No. 06-

IN THE
Supreme Court of the United States

GARY SCHOR, a Florida resident, on behalf of himself and all others similarly situated,

Petitioner,

v.

ABBOTT LABORATORIES, an Illinois corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented for consideration is whether a cognizable cause of action exists under § 2 of the Sherman Antitrust Act under a monopoly leveraging theory. Stated otherwise, does a claim for relief exist under § 2 of the Act where a party with monopoly power in one market has improperly exploited its dominant position to establish or enhance a monopoly in a secondary market?

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CITATION TO OPINION RENDERED BY COURT OF APPEALS

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STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

The Seventh Circuit's decision was rendered July 26, 2006. *See* Rule 13, Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

Petitioner originally brought this case on behalf of himself and a putative class of similarly situated consumers, each of whom were prescribed and consumed Norvir, Abbott Laboratories' ("Abbott") antiretroviral drug prescribed to AIDS patients. This case is about Abbott's efforts to abuse its monopoly power in the boosted protease inhibitor ("PI") market via its patented Norvir product. Petitioner alleged below that Abbott had engaged in a course of conduct wherein it used its monopoly power over its drug Norvir to unreasonably inflate the price of drugs integral to the treatment of the AIDS virus in violation of the Sherman Antitrust Act, 15 U.S.C. § 2, and the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq*.

Substantially similar class action lawsuits were also filed in the United States District Court for the Northern District of California, alleging the very same anticompetitive and unfair and deceptive trade practices, and seeking recovery under § 2 of the Sherman Act and California state consumer protection statutes. *See generally Doe v. Abbott Labs.*, No. 04-CV-1511, 2004 WL 3639688 (N.D. Cal. Oct. 21, 2004); *Serv. Employees Int'l Health and Welfare Fund v. Abbott Labs.*, No. 04-CV-4203, 2005 WL 528323 (N.D. Cal. Mar. 2, 2005).

The salient facts regarding the business practices under challenge here are set forth in the reported opinions denying Abbott's motions to dismiss in *Doe* and *Service Employees*. As summarized by the *Doe* court, the facts relevant to the question of the legal viability of Petitioner's antitrust claim are as follows:

> Defendant is one of several companies currently manufacturing protease inhibitors (PIs), considered the most potent class of drugs to combat the HIV virus. . . . Defendant originally developed Norvir for use as a stand-alone PI, but quickly discovered that the drug had serious side effects when used in large dosages. However, when Norvir is prescribed in smaller dosages along with other PIs, it both "boosts" the antiviral effect of those PIs and reduces their harmful side effects. There is no other drug that "boosts" PIs the way Norvir does; and all but one PI currently prescribed for HIV treatment benefit from the use of Norvir as a booster. Norvir thus affects two distinct markets: the "booster market," which Norvir alone constitutes, and the "boosted market," which consists of those PIs that are prescribed for use with Norvir as a booster.

> In September, 2000, Defendant introduced its own boosted PI regimen: Kaletra. Kaletra, which comes in the form of a pill that contains both Defendant's PI lopinaver and Norvir, causes significant and harmful side effects. Nevertheless, by June, 2003, Kaletra had secured a seventy-five percent share of the boosted market. In June, 2003, Bristol-Meyers Squibb introduced Reyataz, a competing PI that is boosted by Norvir. In October, 2003, GlaxoSmithKline introduced Lexiva, another PI capable of being boosted by Norvir. Kaletra prescriptions began to decrease as HIV patients switched to boosted regimens that result in less harmful side effects than does Kaletra.
>
> On December 3, 2003, just five weeks after Lexiva entered the boosted market, Defendant increased the wholesale price of Norvir by 478 percent. In doing so, Defendant significantly raised the cost of using all PIs in the boosted market—the increase in annual cost for using Lexiva was over $6,200—but did not pass along the same Norvir price increase to its own Kaletra. As a result, the cost of Kaletra overnight became substantially cheaper than the cost of using all other PIs in conjunction with Norvir. Plaintiffs allege that the December 3, 2003 Norvir price increase constitutes an illegal attempt to achieve an anticompetitive purpose in the boosted market.

Doe, 2004 WL 3639688, *1.

The Northern District of California denied Abbott's motions to dismiss in the *Doe* and *Service Employees* cases,

relying on the Ninth Circuit's earlier decision in *Image Technical Services, Inc. v. Eastman Kodak Co. (Kodak II)*, 125 F.3d 1195 (9th Cir. 1997).[1]

Faced with a nearly identical motion to dismiss filed by Abbott in this case, the United States District Court for the Northern District of Illinois refused to follow the fully apposite and persuasive opinions in *Kodak II*, *Doe*, and *Service Employees*, instead ruling that Petitioner's Sherman Act claim was barred as a matter of law. *See* Appendix C. The District Court justified its diversion from these legal authorities on the Federal Circuit's decision in *Independent Service Orgs. v. Xerox*, 203 F. 3d 1322 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 1143 (2001) ("*Xerox*"), stating that it "agrees with the Federal Circuit that subject to narrow limitations, not at issue in the instant case, a patentee's exercise of its statutorily-granted market power does not constitute a Sherman Act violation, even if such conduct affects a second market." (Appendix C, 31a).

On appeal, the Seventh Circuit affirmed the dismissal, finding that there is no cognizable cause of action under § 2 of the Sherman Act based on a "monopoly leveraging" theory, *i.e.*, allegations that a party with monopoly power in one market has improperly exploited its dominant position to establish or enhance a monopoly in a secondary market. *See Schor v. Abbott Labs.*, 457 F.3d 608 (7th Cir., July 26, 2006) (Appendix A).

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1. The *Kodak II* decision is discussed at greater length in the Argument section, *infra*.

REASONS FOR GRANTING THE PETITION

As expressed in the Seventh Circuit's opinion in this case, there is a direct conflict among several federal Circuit Courts of Appeal on the threshold question of whether a cognizable cause of action exists under § 2 of the Sherman Act, either for consumers or competitors, for alleged monopoly leveraging. *See Schor v. Abbott Labs.*, 457 F.3d at 613-14; Appendix A, 9a-11a. Specifically, in rendering its decision in this case, the Seventh Circuit joined the Federal Circuit in prohibiting such causes of action as a matter of law, while the Ninth Circuit permits such causes of action to proceed on their merits. *Id.* at 613; Appendix A, 10a. *Compare Indep. Serv. Orgs. v. Xerox*, 203 F.3d 1322 (Fed. Cir. 2000), *with Image Technical Servs., Inc. v. Eastman Kodak Co. (Kodak II)*, 125 F.3d 1195 (9th Cir. 1997). Furthermore, the Second Circuit also recognizes the monopoly leveraging doctrine. *See Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979) ("[T]he use of monopoly power attained in one market to gain a competitive advantage in another is a violation of § 2."); *cert. denied*, 444 U.S. 1093, 1096 (1980) ("I would grant the petitions for certiorari and limit the question[] as follows: . . . Did Kodak violate § 2 of the Sherman Act by impermissibly using its film monopoly as 'leverage' to enhance its position in the photofinishing and photofinishing equipment markets?") (Blackmun, J., dissenting).

Petitioner respectfully submits that a decision by this Court is needed to ensure consistency between the federal courts on this important question of antitrust law, and to provide guidance to commercial entities and consumers. What distinguishes this case, and its importance to the welfare of all possible consumers, is that Abbott's conduct

has a direct impact on AIDS patients worldwide. Because the decisions of the Seventh Circuit and the Federal Circuit effectively deny consumers access to courts to challenge commercial practices having tremendous adverse affects on them, the present legal question invokes important public policy considerations. This is especially true under the particular facts of this case, where the alleged monopoly leveraging—increasing the costs of a lifesaving AIDS drug over 400%—raises undeniable public health considerations.

ARGUMENT

I. Review is Necessary to Resolve the Conflict Among the Circuit Courts of Appeal.

The conflicting views of the Second, Ninth, Seventh and Federal Circuit courts on the fundamental question of whether a claim can be maintained under § 2 of the Sherman Act applying a monopoly leveraging theory creates a great deal of uncertainty in the trial and appellate courts of this Nation, and necessarily opens the door to, and has in fact created, inconsistent and conflicting rulings on the same legal question. Under the current state of the law, the very viability of a lawsuit alleging anticompetitive behavior resulting from the use of monopoly leveraging power to affect a secondary market depends upon the geographic location of the lawsuit. Persons filing in district courts governed by decisions of the Ninth and Second Circuits will be permitted to pursue their antitrust claims on the merits, while the courthouse doors will be closed to those filing in trial courts governed by the Seventh Circuit or Federal Circuit. *Compare Image Technical Servs., Inc. v. Eastman Kodak Co. (Kodak II)*, 125 F.3d 1195 (9th Cir. 1997), and *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *with Schor v. Abbott Labs.*, 457 F.3d 608 (7th Cir., July 26, 2006), and *Indep. Serv. Orgs. v. Xerox*, 203 F.3d 1322 (Fed. Cir. 2000).

Even greater uncertainty exists for litigants filing in courts outside the four Circuits that have directly addressed this legal issue, as there is no guidance from the Court as to which of the two conflicting views might be adopted in the forum in which they are filed (both by the district courts and Circuit Courts of Appeal).

In the interests of legal consistency and increased certainty for litigants and for the federal courts, as well as, more importantly, the interests of public health, Petitioner submits that the Court should accept jurisdiction over this matter.

II. The View of the Ninth and Second Circuit Courts of Appeal Should be Adopted.

Petitioner respectfully submits that the particular facts of this case demonstrate the correctness of the approach of the Ninth Circuit, as well as the Second Circuit, to the monopoly leveraging question, and that this approach should be adopted by the Court.

Consistent with the Federal Circuit's *Xerox* opinion, the District Court here refused to recognize a monopoly leveraging theory of recovery, instead finding that the existence of patents for Norvir immunizes Abbott from antitrust liability, and that the legal inquiry essentially ends with the patents.

> We have held that "if a [patent infringement] suit is not objectively baseless, an antitrust defendant's subjective motivation is immaterial." We see no more reason to inquire into the subjective motivation of Xerox in refusing to sell or license

> its patented works than we found in evaluating the subjective motivation of a patentee in bringing suit to enforce that same right.

Xerox, 203 F.3d at 1327-28 (citation omitted). *See also* Appendix C, 31a (the court "agrees with the Federal Circuit that subject to narrow limitations, not at issue in the instant case, a patentee's exercise of its statutorily-granted market power does not constitute a Sherman Act violation, even if such conduct affects a second market.").[2] Because patent law and antitrust law are not coextensive, the *Xerox* court and the Northern District of Illinois erred in ruling that the existence of patents can preclude, as a matter of law, a Sherman Act claim based on a monopoly leverage theory. The contrary decision by the Ninth Circuit in *Kodak II* to look beyond the patents to determine whether such patents were being used to further anticompetitive goals in a secondary market represents the correct treatment of the issue, especially under the facts of the present case.

As the *Xerox* court recognized, a patent holder can be held liable for anticompetitive behavior, *i.e.*, antitrust law extends beyond patent grants. *See Xerox*, 203 F.3d at 1325 ("Intellectual property rights do not confer a privilege to violate the antitrust laws.") (*citing Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346 (Fed. Cir. 1999)); *Id.* ("'Determination of whether the patentee meets the Sherman Act elements of monopolization or attempt to monopolize is governed by the rules of application of the antitrust laws to market

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2. The Seventh Circuit likewise refused to recognize the monopoly leveraging theory, but only secondarily considered the effect of Abbott's patents on the monopolization question. *See Schor*, 457 F.3d at 614; Appendix A, 11a-12a.

participants, with due consideration to the exclusivity that inheres in the patent grant.'") (*quoting Abbott Labs. v. Brennan*, 952 F.2d 1346, 1354-55 (Fed. Cir. 1991)); *see also Kodak II*, 125 F.3d at 1215 (one of the principles that has emerged regarding "the interplay" between intellectual property and antitrust laws is that "neither patent nor copyright holders are immune from antitrust liability") (*quoting Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1185 n.63 (1st Cir. 1994)); *Id.* ("[We have] held many times that power gained through some natural advantage such as a patent, copyright, or business acumen can give rise to liability if 'a seller exploits his dominant position in one market to expand his empire into the next.'") (*quoting Kodak I*, 504 U.S. 451, 479 n.2). The case law is clear, therefore, that Abbott's patent rights do not immunize it from antitrust liability, and, thus, an antitrust claim can properly lie notwithstanding the patents.

Regardless of the Abbott patents, this case is about Abbott's efforts to establish or enhance monopoly power in the boosted PI market via its patented Norvir product. Such a claim should be actionable. *See supra*; *see also United States v. Singer Mfg. Co.*, 374 U.S. 174, 196-97 (1963) (It is "'well settled that the possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly.'") (*quoting United States v. Line Mat. Co.*, 333 U.S. 287, 308 (1948)). In this regard, the *Doe* court's analysis is directly on point:

> Plaintiffs concede that Defendant owns a monopoly in the booster market. Plaintiffs define the booster market as the market for Norvir and its use as a boosting agent. Plaintiffs' contention

is that the Defendant's actions constitute illegal anticompetitive activity in the boosted market, which Plaintiffs define as the market for PIs that are prescribed together with Norvir as a booster. Defendant does not argue that its Norvir patents cover the market for PIs that are prescribed along with Norvir. In fact, Defendant acknowledges in its moving papers that there are at least seven competing PIs in the boosted market.

Plaintiffs' complaint alleges that Defendant has used its monopoly in one market (the booster market) in order to achieve an anticompetitive purpose in a separate market (the boosted market). In *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1216 (9th Cir. 1997), the court noted that "a monopolist who acquires a dominant position in one market through patents and copyrights may violate § 2 if the monopolist exploits that dominant position to enhance a monopoly in another market." In *Image Technical*, the court ruled that Kodak violated the Sherman Act when it used its monopoly over Kodak parts, many of which Kodak had patented, in order to gain a monopoly over the service of Kodak equipment. *Id.* at 1215-16. The court demanded that Kodak sell its parts to independent service organizations that serviced Kodak equipment, holding, "Neither the aims of intellectual property law, nor the antitrust laws justify allowing a monopolist to rely upon a pretextual business justification to mask anticompetitive conduct." *Id.* at 1219. The successful "monopoly leveraging theory" relied upon by the plaintiffs in *Image*

> *Technical*, *Id.*, at 1208, is the theory Plaintiffs assert in their amended complaint to trigger Sherman Act liability.

Doe, 2004 WL 3639688, at *5-6 (allowing antitrust claim to go forward on the merits); *see also Serv. Employees*, 2005 WL 528323, at *3 ("Plaintiff has adequately alleged, under the monopoly leveraging theory, which the plaintiffs in *Doe* relied upon and that was recognized by the Ninth Circuit in [*Kodak II*], that Defendant's actions trigger Sherman Act liability. Once again, Defendant's assertion that its patents preclude liability under federal anti-trust law is not persuasive.").[3]

The recognition that antitrust laws extend beyond patent grants underscores the correctness of the *Kodak II* ruling, as the court there refused to decide the case solely based on the patents and the business rationale offered for the

3. As the *Doe* court recognized, Abbott's anticompetitive actions presented AIDS patients with a "Hobson's choice", whereby consumers are forced to either pay dramatically more for other boosted PIs or use Kaletra, with its substantially greater side effects:

> Plaintiffs allege a similar and analogous injury here. They argue that the Hobson's choice into which they have been forced—paying more for competing boosted regimens versus paying less for Defendant's Kaletra while accepting the drug's harmful side effects—is intertwined with the injury that Defendant sought to inflict on its competitors and on the boosted PI market. . . . Plaintiffs have standing to seek injunctive relief under the Sherman Act.

Doe, 2004 WL 3639688, at *4 (*citing Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982)).

anticompetitive behavior at issue in that case, allowing the plaintiff to counter the presumption of patent rights and business justification with evidence of pretext. *Kodak II,* 125 F.3d at 1219-20 ("The presumption [of a legitimate profit motive] may also be rebutted by evidence of pretext. Neither the aims of intellectual property law, nor the antitrust laws justify allowing a monopolist to rely upon a pretextual business justification to mask anticompetitive conduct.") (*citing Kodak I*, 504 U.S. at 484 ("Because 'Kodak's willingness to allow self-service casts doubt on its quality claim . . . a reasonable trier of fact could conclude that this justification is pretextual.'")).

Moreover, the fact that this litigation is being brought on behalf of consumers rather than business competitors (including patent infringers) raises a dynamic different from the considerations driving the decisions in both *Kodak II* and *Xerox*. The present action was brought by consumers who have been severely harmed—financially and ultimately health-wise—by Abbott's anticompetitive behavior in the boosted PI market. The *Xerox* and *Kodak II* cases did not involve allegations of consumer harm. Rather, those cases involved antitrust allegations by direct competitors, and *Xerox* involved counterclaims for patent infringement and copyright infringement.[4]

Here, AIDS patients who need their PI regimens boosted by Norvir suffered direct adverse effects as a result of Abbott's anticompetitive behavior. Patients on all but one boosted PI could no longer get their drugs at the original

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4. While *Kodak II* was a competitors' suit, there were no patent infringement claims at issue, in contrast with *Xerox*. *Kodak II*, 125 F.3d at 1200-01.

price or anywhere close to it; they were forced to pay over 400% percent more for the Norvir booster. The only way to avoid these adverse financial effects would be, for most, to instead increase adverse health effects (side effects) by switching to Abbott's PI, Kaletra.[5] This important dynamic was completely overlooked by the Seventh Circuit in its decision in *Schor v. Abbott*, which treated this case like one involving a fungible good. *See Schor*, 457 F.3d at 612-13; Appendix A, 7a-9a (analogizing to the computer software market, and discussing general predatory pricing scenarios). Absent recognition of a monopoly leveraging theory to support recovery under the Sherman Act, actions such as those perpetrated by Abbott on AIDS patients can continue unabated and without legal consequence.

In addition to the fact that this is a consumer action and not a competitor's suit, Abbott's clear motivation for raising the price of Norvir for the boosting of all PIs but its own Kaletra product gets to the heart of why *Kodak II* should control the result here, rather than *Xerox* or *Schor*. In *Kodak II*, the court applied a *rebuttable presumption* that the exercise of statutory patent rights to exclude provides a valid business justification for any ultimate consumer harm (in a secondary market), and permitted a jury to determine whether the business justification offered in defense of the antitrust claim was pretextual. *Kodak II*, 125 F.3d at 1218-1220. In contrast, the *Xerox* court—guided by patent infringement case

5. Obviously, patients on any drug regimen other than Kaletra could not get their Norvir-boosted PIs directly from Abbott — at any price. This further distinguishes the *Xerox* case, as the failure to deal and/or price hikes in that case hurt only competitors (ISOs), whereas here consumers are greatly harmed in addition to any adverse effects on competitors.

authority—refused to allow consideration of a patent holder's subjective motivation. *Xerox*, 203 F.3d at 1327-28.

In short, the *Xerox* court believes the inquiry begins and ends with the extent of the patent grant, while the *Kodak II* court believes that real world considerations like the monopolist's motivation and adverse effects in the second market (*e.g.* consumer harm) should be part of the equation. Petitioner submits that the *Kodak II* ruling is the appropriate model, especially in a consumer action as with this case, and that the view followed in *Xerox* should not have been adopted by the Seventh Circuit.

CONCLUSION

For the reasons stated, Petitioner Gary Schor respectfully requests that the Court accept review over this legal controversy, and further requests an Order 1) reversing the judgment of the Seventh Circuit affirming dismissal of his complaint for failure to state a cause of action under § 2 of the Sherman Antitrust Act, and 2) remanding this case to the district court for further proceedings on Schor's federal and state law claims.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED JULY 26, 2006

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 05-3344

GARY SCHOR,

Plaintiff-Appellant,

v.

ABBOTT LABORATORIES,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 05 C 1592—Robert W. Gettleman, *Judge.*

ARGUED MAY 1, 2006—DECIDED July 26, 2006*

Before EASTERBROOK, MANION, and SYKES, *Circuit Judges.*

EASTERBROOK, *Circuit Judge*. People infected by the human immunodeficiency virus (HIV), a retrovirus that causes the acquired immune deficiency syndrome (AIDS), can slow the progress of the disease by taking protease

* This is amended to correct the formatting of the trademarks.

inhibitors, which hamper HIV's ability to copy itself into additional cells. Abbott Laboratories holds a patent on NORVIR® (ritonavir), one such drug. When used in doses high enough to work as a stand-alone protease inhibitor, however, Norvir causes serious side effects. It serves better as a booster for other protease inhibitors, causing them to last longer in the bloodstream. Norvir has this effect because it inhibits Cytochrome P450-3A4, an enzyme in the liver that normally metabolizes away protease inhibitors. For example, a standard dose of FORTOVASE® (saquinavir) is 1,200 mg three times a day; when combined with NORVIR, however, Fortovase is effective in doses of 800 mg twice a day. Abbott offers its own combination under the brand name KALETRA®, which includes ritonavir plus the protease inhibitor lopinavir. Abbott's patents (Nos. 5,886,036 and 6,037,157) cover ritonavir taken alone and in combination with any other protease inhibitor.

Gary Schor, who proposes to represent a class of everyone who uses protease inhibitors, contends that Abbott charges too much for NORVIR alone and too little for the NORVIR component of KALETRA. (Stated otherwise, Schor's contention is that KALETRA sells for less than a cocktail made by combining Abbott's NORVIR with a protease inhibitor from some other supplier.) According to Schor's complaint, the disparity between the unduly high price of NORVIR and the unduly low price of KALETRA is designed to monopolize the market in protease inhibitors, in violation of § 2 of the Sherman Act, 15 U.S.C. § 2. Schor calls the strategy "monopoly leveraging": Abbott is trying to use its patent to obtain a monopoly of all protease inhibitors by inducing HIV patients to buy KALETRA, which will lead other vendors to

drop out of the market. Once rivals' products have been vanquished, Abbott will be able to jack up the price of Kaletra as well as Norvir. The district court dismissed the complaint under Fed. R. Civ. P. 12(b)(6), however, after concluding that it does not state a claim on which relief may be granted. 378 F.Supp.2d 850 (N.D.Ill.2005). The court concluded that "monopoly leveraging" does not violate the antitrust laws unless it takes a particular form, such as a tie-in sale or refusal to deal.

Schor's complaint does not allege any of the normal exclusionary practices-tie-in sales (or another form of bundling), group boycotts, exclusive dealing and selective refusal to deal, or predatory pricing. Abbott sells ritonavir as part of KALETRA, but this is not a tie-in because ritonavir is available separately as NORVIR. Abbott will sell to anyone willing to pay its price: there is no refusal to deal. The price of NORVIR cannot violate the Sherman Act: a patent holder is entitled to charge whatever the traffic will bear. This is true of both NORVIR's price, see *Brunswick Corp. v. Riegel Textile Corp.,* 752 F.2d 261, 265 (7th Cir.1984), and of a claim that the patent holder has engaged in price discrimination by cutting ritonavir's price to people who buy it (through KALETRA) in combination with lopinavir. See *In re Brand Name Prescription Drugs Antitrust Litigation,* 186 F.3d 781 (7th Cir.1999); *Zenith Laboratories, Inc. v. Carter-Wallace, Inc.,* 530 F.2d 508, 513 n. 9 (3d Cir.1976). And antitrust law does not require monopolists to cooperate with rivals by selling them products that would help the rivals to compete. See *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP,* 540 U.S. 398, 124 S.Ct. 872, 157 L.Ed.2d 823 (2004). Cooperation is a *problem* in antitrust, not one of its obligations.

Appendix A

The (relatively) lower price of ritonavir in KALETRA summons up thoughts of the price-squeeze claim in *United States v. Aluminum Co. of America,* 148 F.2d 416, 436-38 (2d Cir.1945) (L.Hand, J.), which held that Alcoa violated the Sherman Act by selling processed aluminum sheets for less than the price it charged for the raw aluminum required to make them. That necessarily excluded all rivalry in the sheet-metal market. Schor's claim is no more than a faint echo of *Alcoa,* however, because Kaletra sells for more than its ritonavir component purchased as Norvir, and Kaletra therefore does not meet the legal standard articulated by Judge Hand. See also *Mishawaka v. American Electric Power Co.,* 616 F.2d 976 (7th Cir.1980); *Concord v. Boston Edison Co.,* 915 F.2d 17 (1st Cir.1990) (Breyer, J.) (describing the very limited scope of a price-squeeze doctrine). We therefore need not decide whether *Alcoa*'s holding about price squeezes is sound.

Schor does not contend that KALETRA is an instance of predatory pricing. Even if the ritonavir component of KALETRA were deemed to cost the same (per milligram) as ritonavir sold as NORVIR, the imputed price of KALETRA's lopinavir component would be above the average variable cost of its manufacture. None of Abbott's rivals contends that, at KALETRA's going price, it is unable to sell its own protease inhibitor profitably. If Abbott's rivals continue to make money from their protease inhibitors, they cannot be knocked out of the market and Abbott will be unable to raise the price of KALETRA. And without any prospect of rivals' exit, there is also no prospect of higher prices later ("recoupment," in antitrust argot) and no antitrust worry. See *Brooke Group Ltd. v. Brown & Williamson Tobacco*

Corp., 509 U.S. 209, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). A (relatively) low price for ritonavir in KALETRA then is an unalloyed benefit for consumers. The antitrust laws condemn high prices, not low ones, and it would be wholly inappropriate to use the Sherman Act to oblige Abbott to raise its price for KALETRA. And if, as Schor seems to contend, KALETRA is not as beneficial for consumers as the combination of NORVIR and a protease inhibitor other than lopinavir, then it is easy to understand why KALETRA is sold at a discount: there's no antitrust rule against reducing the price of products that consumers desire less than competitive goods.

That leaves the question whether there is a free-standing theory of "monopoly leveraging." The first subject would have to be whether Abbott enjoys a monopoly, which seems unlikely. A patent does not (necessarily) create market power. See *Illinois Tool Works, Inc. v. Independent Ink, Inc.,* __ U.S. __, 126 S.Ct. 1281, 164 L.Ed.2d 26 (2006). Although the complaint alleges (and we therefore must assume) that ritonavir is unique in its ability to inhibit Cytochrome P450-3A4, the only benefit of that effect is to reduce the quantity of protease inhibitor required for treatment. Many drugs act as protease inhibitors and are substitutes for Abbott's products. In addition to lopinavir and saquinavir, which we have already mentioned, amprenavir (AGENERASE®), atazanavir (REYATAZ®), fosamprenavir (LEXIVA®), indinavir (CRIXIVAN®), and nelfinavir (VIRACEPT®) are widely used. See http://www.aidsmeds.com/PIs.htm. Nonetheless, because the complaint was dismissed under Rule 12(b)(6), we must

assume that Abbott has market power. Likewise we must assume that some clever combination of prices for Norvir and Kaletra could induce one or more of Abbott's rivals to withdraw their protease inhibitors from the market, or reduce the rate of new entry. Still, there is no antitrust concern unless Abbott could make a monopoly profit for itself by keeping other drugs off the market-and there is no good economic reason to think that it could do so.

The problem with "monopoly leveraging" as an antitrust theory is that the practice cannot increase a monopolist's profits. Abbott has (we must assume) a monopoly, but a monopolist can take its monopoly profit just once. It can collect a monopoly profit for ritonavir and allow a competitive market to continue in other products. Or, by reducing the price of ritonavir, it can induce customers to buy more from it. But it can't do both. Suppose the competitive price of ritonavir would be $2 per 100 mg, and that the monopoly price is $7; suppose further that the competitive price of some other protease inhibitor such as saquinavir is $3 per 400 mg. Without ritonavir, the patient must take 3,600 mg of saquinavir daily, at a price of $27; take 100 mg of ritonavir with each 800 mg of saquinavir, however, and the cost falls to $26 (1,600 mg of saquinavir plus 200 mg of ritonavir) even with ritonavir at the monopoly price. If Abbott offered KALETRA at $24 for a daily dose, that would knock saquinavir out of the market-but Abbott would make less money than if it had charged the monopoly price for ritonavir alone. If it then raised the price of KALETRA to $28 (say), the producer of saquinavir would bring that drug back to market-and Abbott would lose money from reduced sales even if it did not, for it would now be charging an

(implicit) price of $8 per dose of ritonavir, or *more* than the profit-maximizing, monopoly price.

The basic point is that a firm that monopolizes some essential component of a treatment (or product or service) can extract the whole monopoly profit by charging a suitable price for the component alone. If the monopolist gets control of another component as well and tries to jack up the price of that item, the effect is the same as setting an excessive price for the monopolized component. The monopolist can take its profit just once; an effort to do more makes it worse off and is self-deterring. See Philip Areeda & Herbert Hovenkamp, 9 *Antitrust Law* ¶¶ 1706a, 1706b (2d ed.2000).

The monopolist's profit-maximizing strategy is not to take over the market in related products (ritonavir and other protease inhibitors are complements, not substitutes, given the bad side effects when ritonavir is used alone) but to promote competition among the other producers. The less the complements cost, the more the monopolist can charge for its own product. Thus Microsoft does not make computers but encourages vigorous competition among Dell, Hewlett-Packard, Sony, Lenovo, and other participants in that market; the less it costs to buy the hardware, the more sales of operating system software there will be and the more Microsoft can charge. Similarly Abbott hopes that competition among other drug manufacturers will drive down the price of protease inhibitors; the less they cost, the more Abbott can charge for NORVIR (or the ritonavir component in KALETRA). There's no reason to think that Abbott would be better off if it took over the market in protease inhibitors and tried to charge a monopoly price for substances that

complement ritonavir. And if a manufacturer cannot make itself better off by injuring consumers through lower output and higher prices, there is no role for antitrust law to play. See *Menasha Corp. v. News America Marketing In-Store, Inc.,* 354 F.3d 661, 663 (7th Cir.2004); *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.,* 784 F.2d 1325, 1333-34 (7th Cir.1986).

We appreciate the potential reply that it is impossible to say that a given practice "never" could injure consumers. A creative economist could imagine unusual combinations of costs, elasticities, and barriers to entry that would cause injury in the rare situation. See Einer Elhauge, *Defining Better Monopolization Standards,* 56 Stan. L.Rev. 253, 282-93 (2003); Robin Cooper Feldman, *Defensive Leveraging in Antitrust,* 87 Geo. L.J.2079 (1999); Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers,* 63 Antitrust L.J. 513, 516-19 (1995); Michael D. Whinston, *Tying, Foreclosure & Exclusion,* 80 Am. Econ. Rev. 837 (1990); Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power over Price,* 96 Yale L.J. 209, 230-49 (1986). But just as rules of *per se* illegality condemn practices that almost always injure consumers, so antitrust law applies rules of *per se* legality to practices that almost never injure consumers.

Rules for predatory pricing are good examples. Lower prices almost always benefit consumers. Subjecting all low prices to litigation, and the inevitable risk of error in a search for the rare instances in which consumers could be made worse off in the long run by low prices today, would make it more risky for firms to reduce prices, and they would be less

inclined to do so-to consumers' considerable detriment. That's why in *Matsushita* and *Brooke Group* the Supreme Court held that low prices are lawful, even if the seller has considerable market power, unless rivals have been driven out of the market and recoupment is either ongoing or imminent. It is why any firm's unilateral conduct is almost always deemed lawful unless it creates a dangerous probability of success in monopolizing. *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 113 S.Ct. 884, 122 L.Ed.2d 247 (1993). Cf. Areeda & Hovenkamp, 9 *Antitrust Law* ¶ 1730 (recommending the greatest restraint in condemning any unilateral practice as "monopolization," given the risk of forbidding a practice that benefits consumers in ways that judges do not appreciate); David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices,* 72 U. Chi. L.Rev. 73, 80-83 (2005).

Just so with arguments that low prices are designed to "leverage" a firm from one monopoly to another. As long as rivals continue to sell, and no second monopoly is in prospect, the search for the rare situation in which that second monopoly just might allow the firm to gain a profit by injuring consumers is not worth the candle. The search itself (and the risk of error in the judicial process) has much more chance of condemning a beneficial practice than of catching a detrimental one. A price high enough to avoid condemnation under predatory-pricing rules cannot be condemned under a "monopoly leveraging" theory that is just a predatory-pricing variant without the intellectual discipline of that doctrine. Schor does not contend that Kaletra's pricing could be condemned under *Matsushita* or *Brooke Group,* so there is nothing to this case.

Having said this, we must acknowledge that one court of appeals has adopted just such an undisciplined monopoly-leveraging principle. See *Image Technical Services, Inc. v. Eastman Kodak Co.,* 125 F.3d 1195, 1208-13 (9th Cir.1997). Perhaps some portions of *Berkey Photo v. Eastman Kodak Co.,* 603 F.2d 263 (2d Cir.1980), should be included in the same category. At least one court of appeals has gone the other way, rejecting *Image Technical* by name. See *In re Independent Service Organizations Antitrust Litigation,* 203 F.3d 1322, 1327 (Fed.Cir.2000). It would be possible to cabin *Image Technical* by observing that, despite the opinion's language, the case arose from a refusal to deal, so it occupies one of the traditional antitrust categories rather than a claim of "naked" monopoly leveraging of the sort that Schor attempts to pursue. But we think it better to join the Federal Circuit in saying that *Image Technical* just got it wrong.

The ninth circuit did not give any reason for thinking that a monopolist's acquisition of market power in a complementary product injures consumers. Instead the court attributed the principle to *Eastman Kodak Co. v. Image Technical Services, Inc.,* 504 U.S. 451, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992). That's a misunderstanding of the Supreme Court's opinion. See *Digital Equipment Corp. v. Uniq Digital Technologies, Inc.,* 73 F.3d 756, 762-63 (7th Cir.1996). What the Supreme Court held in *Image Technical* is not that firms with market power are forbidden to deal in complementary products, but that they can't do this in ways that take advantage of customers' sunk costs. Kodak sold copiers that customers could service themselves (or through independent service organizations). Having achieved substantial sales, Kodak then moved to claim all of the repair

work for itself. That change had the potential to raise the total cost of copier-plus-service above the competitive level—and, we observed in *Digital Equipment,* above the price that Kodak could have charged had it followed a closed-service model from the outset. Schor does not accuse Abbott of any similar switch that would exploit customers' sunk costs; none is possible in this market. Unless we generalize the Supreme Court's decision in *Image Technical* to a rule against selling products that complement those in which the defendant has market power—which *Digital Equipment* already has held would be inappropriate—Schor is left without a leg to stand on.

Schor pretty much concedes most of this analysis but maintains that patented products are different. That's what the ninth circuit said in *Image Technical.* But *why* would a patent matter? A given patent may (or may not, see *Illinois Tool Works*) create market power, but if a monopolist cannot gain by "leveraging" its way to dominance of a related product, the fact that the patent rather than something else supplies the market power can't create an antitrust problem.

Abbott's patents do more to support its position than to assist Schor. Recall that the patents cover not only ritonavir administered by itself but also ritonavir administered in combination with another protease inhibitor. Abbott therefore could take control of the market in combination treatments until the patents expire. A patent does not permit its owner to condition use of the patented product on the surrender of a monopoly in some other unpatented product. See *Ethyl Gasoline Corp. v. United States,* 309 U.S. 436, 457-58, 60 S.Ct. 618, 84 L.Ed. 852 (1940); *Motion Picture Patents Co.*

v. Universal Film Manufacturing Co., 243 U.S. 502, 512, 37 S.Ct. 416, 61 L.Ed. 871 (1917). But the product "ritonavir in combination with another protease inhibitor" *is* patented to Abbott, which therefore is entitled to monopolize the combination. Yet it has not done so-doubtless because, as we have explained, Abbott's profits are highest when the price of other protease inhibitors is lowest, and Abbott therefore has a powerful incentive to encourage competition among other producers rather than monopolize the market for all protease inhibitors. It would make little sense to use the antitrust laws to condemn Abbott for a strategy (a) that it has not in fact pursued; (b) that would disserve its own interests; and (c) that the patents entitle Abbott to pursue if it chooses.

One final topic and we are done. Schor maintains that he is entitled to prevail without regard to the merits-that issue preclusion (collateral estoppel) blocks Abbott from offering any legal defense. Three users of protease inhibitors have brought essentially identical suits against Abbott. Two were filed in the Northern District of California and the third, Schor's, in the Northern District of Illinois. District Judge Wilkin denied Abbott's motion to dismiss one of the California suits under Rule 12(b)(6). See *Doe v. Abbott Laboratories,* 2004 U.S. Dist. LEXIS 29129 (N.D.Cal. Oct. 21, 2004). Then she consolidated them and denied (as premature) Abbott's motion for summary judgment, concluding that plaintiffs are entitled to conduct additional discovery. See *In re Abbott Laboratories NORVIR Anti-Trust Litigation,* 2005 WL 2206700, 2005 U.S. Dist. LEXIS 24238 (N.D.Cal. Sept. 12, 2005). According to Schor, these decisions conclusively establish that his complaint *does* state

a claim on which relief may be granted; all that remains for decision, he insists, is whether the complaint's allegations can be proved at trial.

There are two problems with Schor's use of issue preclusion. The first is that the California decisions are not final. They do not resolve any issue in plaintiffs' favor; they conclude only that more litigation is required. No judgment has been entered; Abbott has not had an opportunity to appeal. Federal law determines the preclusive effect of a federal court's decision, and as a matter of federal law the denial of a motion (whether under Rule 12(b)(6) or Rule 56), so that a suit continues and the issue remains alive, has no preclusive effect. See *Financial Acquisition Partners L.P. v. Blackwell,* 440 F.3d 278, 284-85 (5th Cir.2006). Although it is possible to imagine circumstances under which the denial of a motion to dismiss may conclusively resolve some concrete issue, see *Gilldorn Savings Association v. Commerce Savings Association,* 804 F.2d 390, 393-96 (7th Cir.1986), that's not what happened in the Northern District of California. Nothing has been resolved there with finality.

Even if a point of law *had* been resolved against Abbott in the California suits, that would not be preclusive in Illinois. Schor is invoking a doctrine known as offensive non-mutual issue preclusion. (The preclusion is offensive because Schor is the plaintiff and non-mutual because he is not a party to the California cases. A decision favorable to Abbott in California would not have been conclusive against Schor in Illinois, unless the California court first certified a class and Schor failed to opt out.) Although federal law recognizes the possibility of offensive non-mutual issue preclusion,

see *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), the Supreme Court added in *Parklane* that circumstances may make its application inappropriate. One of those circumstances is a difference in the governing law. A district court in California must apply the ninth circuit's decision in *Image Technical.* We need not. Having concluded that *Image Technical* misunderstood the Sherman Act, we are unwilling to allow its effect to extend beyond the boundaries of that circuit. The district court in Illinois did not err in making an independent decision about the merit of Schor's complaint.

AFFIRMED

A true Copy:

Teste:

s/ [illegible]
Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT FILED AUGUST 17, 2006

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Date: July 26, 2006

BEFORE: Honorable FRANK H. EASTERBROOK,
Circuit Judge

Honorable DANIEL A. MANION,
Circuit Judge

Honorable DIANE S. SYKES,
Circuit Judge

No. 05-3344

GARY SCHOR, a Florida Resident, on behalf of himself and all others similarly situated,

Plaintiff - Appellant

v.

ABBOTT LABORATORIES, an Illinois Corporation,

Defendant - Appellee

Appendix B

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 05 C 1592, Robert W. Gettleman, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED JULY 12, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 05 C 1592

Judge Robert W. Gettleman

GARY SCHOR, a Florida resident, on behalf and all others similarly situated,

Plaintiff,

v.

ABBOTT LABORATORIES, an Illinois corporation,

Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff Gary Schor filed a three-count class action complaint against defendant Abbott Laboratories ("Abbott"), alleging violations of the Sherman Antitrust Act ("Sherman Act"), 15 U.S.C. § 2, and the Illinois Consumer Fraud Act, 815 ILCS 505/1, *et seq*. Plaintiff also asserts a state law claim for unjust enrichment. Plaintiff alleges that defendant used its monopoly over its patented AIDS drug Norvir to unreasonably inflate the price of competitors' drug combinations that contain Norvir.

Appendix C

Subject matter jurisdiction of the Sherman Act claim is based on 28 U.S.C. §§ 1331 and 1337, and 15 U.S.C. § 15. Jurisdiction over the state law claims is based on supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

Defendant has moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. For the reasons discussed below, the court grants defendant's motion to dismiss Count I, and declines to exercise supplemental jurisdiction over the state law claims.

FACTS[1]

Defendant Abbott, an Illinois corporation, is a pharmaceutical company engaged in the business of manufacturing, developing, and distributing anti-retroviral drugs worldwide, including throughout the United States. Plaintiff, a citizen of Florida, purchased one of defendant's AIDS drugs, Norvir, for his personal use.

Norvir was originally marketed as a stand-alone protease inhibitor ("PI"). PIs are anti-retroviral drugs that inhibit the AIDS virus from copying itself into new cells. Plaintiff alleges that Norvir cannot be interchanged with any other drug, and therefore constitutes a product market subject to antitrust laws. Through various patents, defendant controls 100% of the Norvir market, and there are no generic versions of Norvir. Norvir causes severe side effects when used alone,

1. For the purposes of a motion to dismiss, the court accepts all well-pleaded allegations as true and draws all reasonable inferences in favor of the plaintiff. *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia,* 73 F.3d 1423, 1428 (7th Cir. 1996).

but when taken in conjunction with other PIs, it boosts the effectiveness of the other drugs. These "boosted PIs" also remain effective for longer periods of time. It is important for AIDS patients to have a variety of PIs available to them because patients may build a tolerance to certain drug combinations.

Defendant produces its own boosted PI, called Kaletra, which is boosted by Norvir. At least seven other boosted PIs, not manufactured by defendant, are boosted by Norvir: Agenerase, Crixivan, Fortovase, Invirase, Lexiva, Reyataz, and Viracept. Plaintiff alleges that PIs boosted by Norvir are not interchangeable with any other drugs and are a market subject to antitrust laws. Plaintiff asserts that defendant effectively controls this market for "all of the anti-retroviral drugs dependent on a boost from Norvir in the United States," and that the United States is a proper geographical market for antitrust purposes.

Kaletra, defendant's boosted PT, began to lose its market share in 2003. In December 2003, defendant raised the price of Norvir by more than 400%. Defendant did not, however, pass this price increase on to Kaletra. As a result, Kaletra costs substantially less than other boosted PIs. Plaintiff asserts that defendant's "anticompetitive pricing scheme is designed to exclude competition for Kaletra, even though Kaletra might not be the most effective PI for a particular patient." Prior to the increase, it was projected that defendant would receive over $2 billion in revenues for Norvir. According to plaintiff, defendant "had no legitimate justification for the exorbitant price increase of Norvir other than to strangle the market to the detriment of AIDS victims."

Appendix C

DISCUSSION

In ruling on a motion to dismiss for failure to state a claim, the court accepts the allegations of the complaint as true and views the facts in the light most favorable to the plaintiff. *Travel All Over the World,* 73 F.3d at 1428. A complaint should not be dismissed for failure to state a claim unless there is no doubt that the plaintiff cannot prove a set of facts that would entitled her to relief based on her claim. *Pressalite Corp. v. Matsushita Electric Corp. of America,* 2003 WL 1811530, at *2 (N.D. Ill. Apr. 4, 2003).

I. Collateral estoppel

Plaintiff argues in his response to the motion to dismiss that defendant is collaterally estopped from raising its arguments in favor of its motion to dismiss by two earlier decisions issued by Judge Wilken of the Northern District of California, *Doe v. Abbott Laboratories,* C 04-1511 CW, unpub. order (N.D. Cal. Oct. 21, 2004), and *Service Employees International Union Health and Welfare Fund v. Abbott Laboratories,* 2005 WL 528323 (N.D. Cal. Mar. 2, 2005). Like the instant case, *Doe* and *Service Employees* are class actions against defendant brought by indirect consumers of Norvir. The *Doe* and *Service Employees* plaintiffs allege violations of the Sherman Act, as well as violations of the California Business and Professions Code and state law unjust enrichment claims. Judge Wilken denied the defendant's motions to dismiss in both cases, which remain pending.

Appendix C

In the instant case, defendant argues that collateral estoppel does not apply because a ruling on a motion to dismiss is not a "final judgment," and thus does not trigger collateral estoppel.[2] Collateral estoppel, or issue preclusion, bars the litigation in a subsequent action of an issue that has been decided in a prior action. *Meyer v. Rigdon,* 36 F.3d 1375, 1378 n. 1 (7th Cir. 1994). The Seventh Circuit has held that the party invoking collateral estoppel has the burden of proving four elements: (1) that the issue sought to be precluded is identical to the issue raised in the prior action; (2) that the issue was actually litigated; (3) that determination of the issue was essential to the final judgment; and (4) that the party against whom estoppel is invoked was fully represented in the prior action. *Id*. The party asserting estoppel has the burden of establishing which issues were actually determined in his favor in a prior action. *Gilldorn Savings Ass'n. v. Commerce Savings Ass'n.,* 804 F.2d 390, 393 (7th Cir. 1986).

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2. Defendant also argues that collateral estoppel does not apply because the California court "did not address 'identical' issues" to those presented in the instant case. In its joinder motion filed with the Judicial Panel on Multi-District Litigation ("MDL"), however, defendant asserts that the instant case and *Doe* and *Service Employees* "are based on identical facts and allege identical legal theories." Judicial estoppel prevents a party that has taken one position in litigating a particular set of facts from later reversing its position when it is to its advantage to do so, if the party to be estopped has convinced the court to adopt its position. *Levinson v. United States,* 969 F.2d 260, 264 (7th Cir. 1992). Although at this point judicial estoppel does not strictly apply because the MDL has not ruled on the joinder and transfer motion, the court notes that defendant's positions regarding identical facts appear clearly inconsistent. *Id.*

Appendix C

Although defendant is correct that a ruling denying a motion to dismiss is typically not a final judgment for the purposes of collateral estoppel, the Seventh Circuit has held that there are instances in which a motion to dismiss ruling may have preclusive effect. For example, the *Gilldorn* court held that a district court's denial of a motion to dismiss was sufficiently final for purposes of collateral estoppel. *Id*. In *Gilldorn,* an Illinois district court judge granted the plaintiff's motion to enjoin a pending action brought by the defendant in Texas, based on the plaintiff's argument that the Texas action should have been brought as a compulsory counterclaim in the Illinois action. The plaintiff, however, had already moved for dismissal in the Texas action, and had made the compulsory counterclaim argument, along with others, unsuccessfully. *Id.* at 391. The Seventh Circuit held that the Illinois district court should have given collateral estoppel effect to the Texas district court's denial of the plaintiff's dismissal motion. *Id.* at 395.

In support of its holding that a denial of a motion to dismiss may, in some cases, operate as collateral estoppel, the *Gilldorn* court cited the Seventh Circuit's earlier holding in *Miller Brewing Co. v. Joseph Schlitz Brewing Co.,* 605 F.2d 990 (7th Cir. 1979), *cert. denied,* 444 U.S. 1102 (1980). To determine whether a decision is "final" for collateral estoppel purposes, the *Miller* court instructed courts to consider whether: (1) the decision was not "avowedly tentative"; (2) the hearing was adequate and the parties were fully heard; (3) the court supported its decision with a reasoned opinion; and (4) the decision was appealable or had been appealed. 605 F.2d at 996. The ultimate question, then, is whether the "'prior adjudication . . . is determined to be

sufficiently firm to be accorded conclusive effect.'" *Id.* (quoting Restatement (Second) of Judgments § 41 comment G (Tent. Draft No. 1 1973)); *see also In re Bridgestone/ Firestone Inc.,* 333 F.3d 763, 767 (7th Cir. 2003) ("[F]or the purposes of issue preclusion (as distinguished from merger and bar), 'final judgement' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.").

Judge Wilken's findings regarding the California plaintiffs' Sherman Act claims do not have collateral estoppel effect in the instant case.[3] First, most of the "holdings" listed by plaintiff in its brief are not in fact holdings. The plaintiffs in *Doe* and *Service Employees,* like plaintiff in the instant case, rely on a "monopoly leveraging theory" of antitrust liability. Although the Ninth Circuit applied this theory to a patentee in *Image Technical Services, Inc. v. Eastman Kodak, Co.*, 125 F.3d 1195 (9th Cir. 1997), *cert. denied,* 523 U.S. 1094 (1998), there is a circuit split on this question, as discussed below, and Ninth Circuit case law is not binding on this court. More damaging to plaintiff's collateral estoppel argument, Judge Wilken did not hold that defendant was liable under this theory, but only that the plaintiffs in those cases had alleged sufficient facts to survive the motions to dismiss. *Doe* at 6; *Service Employees,* 2005 WL 528323, at *3. Similarly, the California court did not issue a final judgment or appealable ruling on the question of defendant's monopoly power in the boosted PI market, but held only that

3. Although the court does not reach plaintiff's state law claims, it is clear that Judge Wilken's rulings on the California plaintiffs' state law claims, brought under California law, do not have a collateral estoppel effect on a court applying Illinois law.

under Ninth Circuit law the plaintiffs had sufficiently pled all of the essential elements of their Sherman Act claims. *Id.* Such non-final holdings cannot collaterally estop defendant from advancing similar arguments here.

Second, although Judge Wilken held that the plaintiffs in *Doe* and *Service Employees* had standing as indirect consumers of Norvir to pursue their Sherman Act claims, the Seventh Circuit has held that the "denial of a motion to dismiss for lack of standing does not qualify as a final judgment." *Triad Assocs., Inc. v. Robinson,* 10 F.3d 492, 496 n. 2 (7th Cir. 1993)(citing *Cymes v. DeKalb County, Ga.,* 923 F.2d 1482, 1484-1485 (11th Cir. 1991); *see also Carter v. Signode Industries, Inc.,* 1988 WL 130619, at *1 (N.D. Ill. Dec. 1, 1988) (noting that denial of motion to dismiss for lack of standing, absent certification of interlocutory appeal under 28 U.S.C. § 1292(b), is "otherwise unappealable"). Because the denial of the motions to dismiss *Doe* and *Service Employees* for lack of standing were not final orders and thus not appealable, they do not have collateral estoppel effect on defendant's arguments in support of its motion to dismiss in the instant case.

II. Sherman Act

Count I of plaintiff's complaint alleges that defendant violated § 2 of the Sherman Act by abusing its monopoly power in the U.S. market for Norvir, its patented product, to unfairly injure competition in the market for PIs boosted by Norvir.[4] Defendant's own boosted PI, Kaletra, competes in

4. Section 2 of the Sherman Act, 15 U.S.C. § 2, prohibits monopolization or attempts to monopolize: "Every person who shall (Cont'd)

this second market with approximately seven other PIs boosted by Norvir. Defendant argues that Count I should be dismissed because its patents for Norvir, which cover its use as a stand-alone drug and as a booster when combined with other PIs, preclude antitrust liability. Defendant also argues that plaintiff fails to sufficiently allege defendant's market power in the boosted PI market, and that plaintiff lacks standing to obtain relief under the Sherman Act because he is an indirect consumer and has failed to allege that he suffered any antitrust injuries.[5]

The instant case reveals the tension between antitrust laws, which discourage monopolies, and patent laws, which protect monopolies. *See Image Technical Servs., Inc. v. Eastman Kodak Co*., 125 F.3d 1195, 1217 (9th Cir. 1997) ("At the border of intellectual property monopolies and antritrust markets lies a field of dissonance yet to be harmonized by statute or the Supreme Court."); *Sheet Metal Duct, Inc. v. Lindab, Inc.,* 2000 WL 987865, at *2 (E.D. Pa. July 18, 2000) ("patent and antitrust laws exist in tension, as the patent laws protect monopoly power, while antitrust laws seek to restrain it"); *see also* Patrick H. Moran, Comment, *The Federal and Ninth Circuits Square Off: Refusals to Deal*

(Cont'd)

monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . ."

5. In plaintiff's response to the motion to dismiss, he withdraws his claims for damages under Count I of his complaint, and now seeks only injunctive relief.

– the Precarious Intersection Between Antitrust and Patent Law, 87 MARQ. L. REV. 387, 387 (2003) ("Although both the patent and antitrust laws were designed to stimulate the economy and benefit consumers, a fundamental tension between the two has always existed."). One consequence of the overlap between the patent and antitrust statutes and case law is that there is no easy delineation between a patent holder's permissible exercise of its rights under patent law, which grants a government-sanctioned monopoly and expressly allows the patentee to engage in exclusionary conduct, and anticompetitive behavior that violates antitrust law, which proscribes exclusionary conduct when coupled with monopoly power.

Although not a model of clarity in antitrust pleading, plaintiff's complaint alleges two separate markets: the Norvir market and the market of PIs boosted by Norvir. Plaintiff clarifies in his response to the motion to dismiss that he does not dispute the validity of the Norvir patents or defendant's lawful monopoly in the Norvir market. Instead, he is challenging defendant's use of its monopoly of the Norvir market to attain a monopoly in the boosted PI market. Plaintiff's Sherman Act claim is premised on an extension of the monopoly leveraging theory to patent holders, under which antitrust liability may be based on the improper use of a monopoly in one market to strengthen or create a monopoly in another market. *Virgin Atlantic Airways Ltd. v. British Airways PLC,* 257 F.3d 256, 272 (2nd Cir. 2001); *Alaska Airlines, Inc. v. United Airlines, Inc,* 948 F.2d 536, 547 (9th Cir. 1991). To establish a § 2 Sherman Act violation based on monopoly leveraging, a plaintiff must prove that the monopolist: (1) possesses monopoly power in the primary

relevant market; (2) gained or attempted to gain a monopoly power in a second relevant market; and (3) willfully acquired the monopoly power by some exclusionary conduct and not through efficiency and innovation." *Alaska Airlines,* 948 F.2d at 547.

The Supreme Court emphasized in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP,* 540 U.S. 398, 415 n. 4 (2004), that a monopoly leveraging claim "presupposes anticompetitive conduct." It is well established that not all conduct that hurts competitors is anticompetitive or a violation of the antitrust laws. *See, e.g., Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 458 (1993) ("The [Sherman Act] directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."); *Endsley v. City of Chicago,* 230 F.3d 276, 283 (7th Cir. 2000) ("Under § 2, intent to obtain a monopoly is unlawful only where an entity seeks to maintain or achieve monopoly power by anticompetitive means."); *Intergraph Corp. v. Intel Corp,* 195 F.3d 1346, 1363 (Fed. Cir. 1999) ("Precedent makes clear that a customer who is dependent on a manufacturer's supply of a component cannot on that ground force the producer to provide it; there must also be an anticompetitive aspect invoking the Sherman Act [to warrant imposition of antitrust liability.]"). To state a claim for a Sherman Act violation, a plaintiff must allege conduct that hurts competition in the relevant market. *Endsley,* 230 F.3d at 284 (affirming dismissal of plaintiff's antitrust claim because plaintiff failed to identify "any facts which point to the [defendant's] alleged anti-competitive use of its power to control the price").

Appendix C

There is sparse case law regarding if or how the monopoly leveraging theory applies to conduct by a patentee, and what little case law there is does not concern a price increase by a patent holder. In the instant case, both parties cite to opinions addressing whether a patentee's refusal to deal — to license or sell its patented product — is a violation of antitrust law. The court agrees with the parties' implicit assumption that it is appropriate to analogize refusal to deal cases with the price increase at issue here because if a patentee has the right to refuse to sell its product altogether, it has the right to raise the price. See *Zenith Laboratories, Inc. v. Carter-Wallace, Inc.,* 530 F.2d 508, 513 n. 9 (3rd Cir. 1976) ("a patentee is privileged to withhold [its invention] from sale at any price, or to offer it for sale at any price he wishes, low or high") (citing 6A CORBIN, CONTRACTS § 1410 at 246 (1962)). Applying the refusal to deal case law to the instant case, however, is no easy task. There is no Supreme Court precedent, and a split exists between the Ninth and Federal Circuits regarding whether the monopoly leveraging theory may be applied to patent holders. Thus, this is a case of first impression in the Seventh Circuit whether a patent holder may be liable under the monopoly leveraging theory, and whether the Sherman Act limits a patentee's right to exclude others from more than one relevant market.

The Ninth Circuit was the first court to examine the antitrust liability of a patent holder under the monopoly leveraging theory. Sharon Brawner McCullen, Comment, *The Federal Circuit and Ninth Circuit Face-Off: Does A Patent Holder Violate the Sherman Act By Unilaterally Excluding Others From A Patented Invention In More Than One Relevant Market?,* 74 TEMP. L. REV. 469, 500 (2001).

Appendix C

In *Image Technical Services, Inc. v. Eastman Kodak, Co.,* 125 F.3d 1195 (9th 1997), *cert. denied,* 523 U.S. 1094 (1998) ("*Kodak II*"), the court held that patent rights do not immunize a patent holder to antitrust violations based on monopoly leveraging, and that a patent holder may be liable under the monopoly leveraging theory for using its monopoly over a patented product to affect a secondary market. The plaintiffs in *Kodak II* were a group of independent service organizations (ISOs) who alleged Sherman Act violations after Kodak refused to sell replacement parts, many of which were patented, to the ISOs, who serviced and repaired Kodak photocopier equipment.

In *Kodak II* the Ninth Circuit extended earlier monopoly leveraging precedent to antitrust cases involving patented products, and limited a patent holder's right to exclude others to a single market. *Id*. at 1217-18. *Kodak II* held that Kodak violated § 2 of the Sherman Act when it refused to sell its patented parts for use by independent service organization in the secondary service market. In support of its finding, the *Kodak II* court relied in part on a footnote in the Supreme Court's opinion affirming the Ninth Circuit's earlier denial of summary judgment. *Id*. at 1215-16. Addressing the plaintiffs' § 2 monopolization claim, the Court rejected the argument that a manufacturer competing in the secondary service market enjoys *per se* immunity to antitrust laws. *Eastman Kodak Co. v. Image Technical Services, Inc.,* 504 U.S. 451, 479 n. 29 (1992) ("*Kodak I*"). The Court noted that it "has held many times that power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if 'a seller exploits his dominant position in one market to expand his empire into the next.'" *Id.*

Appendix C

Three years later, and faced with a very similar factual situation to *Kodak II,* the Federal Circuit expressly rejected the Ninth Circuit's reasoning, and held that a patent holder does not violate the Sherman Act by refusing to license or sell a patented item in a second market, even when the patented product is necessary to the second market. *In re Independent Service Organizations Antitrust Litigation CSU, L.L.C., v. Xerox,* 203 F.3d 1322 (Fed. Cir. 2000), *cert. denied,* 531 U.S. 1143 (2001) ("Xerox"). The *Xerox* plaintiffs, ISO competitors in the photocopier service market, sued Xerox over its refusal to sell its patented replacement parts and other copyrighted materials to ISOs unless they were also end-users of Xerox copiers. *Id.* at 1324. Affirming the district court's grant of summary judgment to the defendant, the Federal Circuit held that absent "illegal tying, fraud in the Patent and Trademark Office, or sham litigation," a patentee may enforce its statutory rights "free from liability under the antitrust law." *Id.* at 1327-28. Contrary to the Ninth Circuit, the Federal Circuit also held that a patent holder's right to exclude extends to any relevant market that involves the use, manufacture or sale of the invention. *Id*. at 1325-26.

Defendant in the instant case incorrectly argues that *Xerox* is binding precedent because the instant case involves patents, and therefore the law of the Federal Circuit, rather than Seventh or Ninth Circuit law, controls. See *In re Spalding Sports Worldwide, Inc.,* 203 F.3d 800, 803 (Fed. Cir. 2000) (Federal Circuit law applies to issues of substantive patent law). The Supreme Court, however, has significantly curtailed the Federal Circuit's jurisdiction over antitrust claims, which had expanded during the 1990s. In *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.,*

535 U.S. 826, 829-830 (2002), the Court held that 28 U.S.C. § 1338, the congressional grant of jurisdiction to the Federal Circuit, requires that the plaintiff's complaint "creates the cause of action." In the instant case, defendant cites *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.,* 375 F.3d 1341, 1355 (Fed. Cir. 2004), in support of its argument that Federal Circuit precedent controls, but *Unitherm* is inapposite. The plaintiffs in *Unitherm* sought a declaration of patent invalidity, in addition to asserting monopolization and tortuous interference claims. *Id*. In contrast, plaintiff in the instant case has disavowed any patent claims, and patent law does not create the cause of action. Federal Circuit law may nevertheless control the instant case, however, because, as discussed below, the scope of the patent is an issue.

Regardless of which circuit's law must control, for the reasons discussed below the court finds the *Xerox* court's reasoning persuasive, and that the holding represents a sounder approach to a patentee's antitrust liability in a second market than the Ninth Circuit's opinion in *Kodak II*. The court agrees with the Federal Circuit that subject to narrow limitations, not at issue in the instant case, a patentee's exercise of its statutorily-granted market power does not constitute a Sherman Act violation, even if such conduct affects a second market. The Federal Circuit's decision is in keeping with the case law and the statutory language suggesting that a court must consider the scope of the patent grant when determining whether an antitrust violation has occurred, and properly holds that a patentee is not liable for conduct within the scope of its valid patent grant.

Appendix C

A patent holder may, of course, violate the Sherman Act by excluding others from inventions beyond the scope of the patent. *Ethyl Gasoline Corp. v. United States,* 309 U.S. 436, 457-58 (1940). For example, the Supreme Court has held that a patent holder exceeded the scope of its patent by conditioning a license agreement on the licensee's use of the protected invention with products not included in the patent grant, *Motion Picture Patents Co. v. Universal Film Mfg. Co.,* 243 U.S. 502, 512 (1917), on royalty payments for products not within the scope of the patented invention, *Zenith Radio Corp. v. Hazeltine Research, Inc,* 395 U.S. 100, 135-36 (1969), or on the purchase, use or sale of other products, *Ethyl Gasoline,* 309 U.S. at 447-48. As these cases indicate, the Supreme Court carefully distinguishes between the unlawful enlargement of a patent and a patentee's lawful exercise of the right to sell others the invention within the scope of the patent. *See, e.g., Ethyl Gasoline,* 309 U.S. at 457-58 ("The picture here revealed is not that of a patentee exercising its right to refuse to sell or to permit his licensee to sell the patented product."). The Supreme Court case law suggests that the Sherman Act does not limit the patent holder's right to exclude others from the protected invention to a single market, but rather that the right is coextensive with the scope of the patent grant. Thus, patent law extends to protect a patent holder from antitrust liability in a second market that is encompassed by the patent claims.

The court agrees with the *Xerox* court that footnote 29 in the Supreme Court's decision in *Kodak I,* which suggests that a patentee's expansion into a second market may be an antitrust violation, is largely inapposite to the facts of *Kodak II* and *Xerox,* and was incorrectly applied by the Ninth

Circuit in *Kodak II*. As the Federal Circuit noted, *Kodak I* was a tying case when it came before the Supreme Court, and no patents had been asserted in defense of the antitrust claims against Kodak. *Xerox,* 203 F.3d at 1327. "Properly viewed within the framework of a tying case, the footnote can be interpreted as restating the undisputed premise that the patent holder cannot use his statutory right to refuse to sell patented parts to gain a monopoly in a market *beyond the scope of the patent*. *Id.* (emphasis in original). The Federal Circuit recognized that a patent grant may encompass multiple markets, and held that Xerox's actions fell within the statutory patent grant. *Id*. at 1327.

The Federal Circuit cited section 271(d) of the Patent Act, which immunizes a patent holder against certain liabilities, in support of its expansion of a patentee's rights into a second market. *Xerox,* 203 F.3d at 1326. Section 271(d) states that, "No patent owner otherwise entitled to relief . . . shall be denied relief or deemed guilty of misuse or *illegal extension of the patent right* by reason of his having . . . (4) refused to license or use any rights to the patent . . ." 35 U.S.C. § 271(d) (emphasis added). Although § 271(d) does not explicitly refer to an antitrust violation, the Supreme Court has frequently used the language of whether a patent holder's actions have "expanded" or "enlarge[d]" the patent grant to analyze allegations of antitrust violation, implying that the phrase in § 271(d) includes antitrust violations. See McCullen, 74 TEMP. L. REV. 469, 494 (collecting cases). The court agrees with the Federal Circuit's suggestion that the statutory language of the Patent Act indicates that a patent holder is not liable for an antitrust violation for refusing sell or license a patented product within the scope of the patent

grant, and that this immunity is not limited to a single market. Thus, if the product is encompassed within the patent claims, the Sherman Act does not limit the patent holder's refusal to license or sell that item, or limit the patent holder's right to charge a higher price, in any market.

Lastly, the instant case is factually distinguishable from *Kodak II* and *Xerox* in aspects that support defendant's argument that it should not be subject to antitrust liability for raising the price of Norvir. First, defendant's patents cover Norvir's use in the stand-alone market as well as the boosted PI market. Plaintiff does not challenge defendant's assertion that its patents "explicitly cover the use of Norvir as a 'booster' in combination with another PIs." In *Xerox* and *Kodak II,* in contrast, the second market at issue was a service and repair market, which was apparently not covered by the defendants' patent grants. Here, the alleged second market is for compound products containing the first market's product, and plaintiff does not argue that defendant's use of Norvir in Kaletra or its sale of Norvir as a booster for competitors' boosted PIs exceeds the patent grant. Unlike *Xerox* and *Kodak II,* defendant's Norvir patents apply in both markets to cover Norvir's use in conjunction with drugs manufactured and sold by third parties.

Second, in *Xerox* the Federal Circuit determined that the defendant's refusal to deal was within the scope of its patent claims and thus permissible. 203 F.3d at 1327-28. In the instant case, defendant has taken a less drastic measure than the defendants in *Kodak II* and *Xerox,* because it has not instituted a unilateral refusal to deal, which would prevent customers or a group of customers from obtaining its product.

Plaintiff does not allege that Norvir or any of the boosted PIs that depend on Norvir are unavailable, but only that they are significantly more expensive. The court is not unsympathetic to plaintiff's seemingly legitimate concerns that the drastic price increase will prevent him and other AIDS patients from receiving the best drug treatments for their disease, but antitrust laws do not impose liability for a business entity's failure to act morally or in the public interest.

To accept plaintiff's argument would seem to impose antitrust liability on any manufacturer who holds patents for a product when used alone as well as for its use as a component in products manufactured by the patentee and competitors, and raises the price it charges competitors for its patented component. Such a result runs contrary to the aims of the antitrust and patent laws to encourage innovation and competition, and is not supported by the case law. The Supreme Court has held that the Sherman Act was enacted to prevent restraint of commerce, but has explicitly recognized the patent grant as an exception. *United States v. Line Material Co.,* 333 U.S. 287, 309 (1948). The court is not persuaded by plaintiff's arguments in the instant case, or by the Ninth Circuit's reasoning in *Kodak II,* that a patentee's right to exclude others, including by raising prices, is limited to the primary market only, particularly when, as here, it is not disputed that the use of the patented invention in second market is within the scope of the patent claims.

For the reasons stated above, defendant may not be held liable for a violation of § 2 of the Sherman Act for increasing the price of its patented product, even though that price

increase may affect competition in a second market. Accordingly, the court grants defendant's motion to dismiss Count I with prejudice.

Because the court grants defendant's motion to dismiss Count I, it need not reach defendant's alternative arguments that plaintiff failed to allege market power or that plaintiff lacks standing as an indirect consumer to pursue injunctive relief. In addition, the court declines to exercise supplemental jurisdiction over the remaining state law claims. Accordingly, the court grants defendant's motion to dismiss Counts II and III without prejudice.

CONCLUSION

For the reasons stated above, the court grants defendant's motion to dismiss the complaint. Count I is dismissed with prejudice. Counts II and III are dismissed without prejudice.

ENTER: July 12, 2005

s/ Robert W. Gettleman
Robert W. Gettleman
United States District Judge

APPENDIX D — RELEVANT STATUTE

Sherman Antitrust Act, 15 U.S.C. § 2:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, in any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.