IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

10-3458 and 10-3459 (Consolidated)

FEDERAL TRADE COMMISSION AND STATE OF MINNESOTA,
Plaintiffs-Appellants,

v.

LUNDBECK, INC.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA (Nos. 08-cv-6379 and 08-cv-6381)

PETITION FOR REHEARING *EN BANC* OF PLAINTIFFS-APPELLANTS FEDERAL TRADE COMMISSION AND STATE OF MINNESOTA

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STATEMENT PURSUANT TO FED. R. APP. P. 35(b)(1)

A panel of this Court affirmed a district court decision that Indocin IV ("Indocin") and NeoProfen were not in the same relevant product market, despite the district court's findings, *inter alia*, that:

(1) At the time of trial, these two drugs were the only Food & Drug Administration ("FDA")-approved drugs for treating a life-threatening heart condition known as patent ductus arteriosus ("PDA") that afflicts seriously premature infants, FF.15, 16, 21, Op.2;[1]

(2) These two drugs were equally effective at treating PDA, and no consensus existed among hospitals (which purchased the drugs) or neonatologists (who prescribed the drugs) that one drug was better or safer than the other for treating PDA, FF.21, 94, 101-08;

(3) Following its purchase of Indocin, Lundbeck Inc. acquired NeoProfen and two days later raised the price of Indocin by 1300%, subsequently introducing NeoProfen at nearly the same price, FF.15, 16, 33, 57, 82; and

(4) Lundbeck priced them near parity in order to eliminate price as a competitive variable, FF.36, 58, 63, 78, 82-84.

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[1] "FF." refers to the district court's findings of fact, and "CL." refers to its conclusions of law. "Op." refers to the panel's August 19, 2011, decision.

The Federal Trade Commission ("FTC") and the State of Minnesota ("Minnesota") petition this Court to rehear this case *en banc*, pursuant to Fed. R. App. P. 35. We respectfully submit that the panel opinion is contrary to the following decisions of the Supreme Court and this Court and that full Court review is needed to maintain decisional uniformity: *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209 (1993); *United States v. Cont'l Can Co.*, 378 U.S. 441 (1964); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000); *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045 (8th Cir. 1999); *FTC v. Freeman Hosp.*, 69 F.3d 260 (8th Cir. 1995); *Morgenstern v. Wilson*, 29 F.3d 1291 (8th Cir. 1994); *H.J., Inc. v. Int'l Tel. & Tel. Corp.*, 867 F.2d 1531 (8th Cir. 1989); *United States v. Empire Gas Corp*., 537 F.2d 296 (8th Cir. 1976).

We also submit that this case raises questions of exceptional importance concerning basic principles of antitrust market definition, namely, (1) whether an economist's opinion may trump the undisputed and indisputable facts regarding Lundbeck's acquisitions and monopolistic conduct; (2) whether consideration of a hypothetical "but-for" market may be dispensed with; (3) whether, in this case, cross-price elasticity of demand could be the only means to define a relevant product

market; and (4) whether the product market definition here could fail to reflect the merger party's business documents about what products constitute the relevant product market.

STATEMENT OF THE CASE

The FTC and Minnesota brought this case in December 2008, alleging that Lundbeck, shortly after it had purchased Indocin, acquired NeoProfen and monopolized the market for FDA-approved drugs for treating PDA, in violation of federal and state antitrust laws. At the time of the acquisition, NeoProfen was awaiting FDA approval, which occurred a short time later. The district court concluded that the FTC and Minnesota had not shown that Indocin and NeoProfen were in the same product market and dismissed their complaints. FF.116; CL.5.

The district court's own findings, however, established, *inter alia*, that hospitals, which are the purchasers of Indocin and NeoProfen, would likely have sought to encourage price competition between these functionally interchangeable drugs, by working with doctors to shift use toward the lower-priced drug. FF.15-16, 21, 36, 89, 91-93. The district court's findings further showed that Lundbeck itself viewed the drugs as competing products, including on price. FF.36, 58, 63, 78. But, given hospitals' price sensitivity and the role of hospitals in promoting price competition, Lundbeck sought to eliminate price as a competitive variable. FF.82-84.

The FTC and Minnesota appealed. On August 19, 2011, a panel of this Court

affirmed the district court's conclusion, on the ground that it was required to defer to a district court's findings unless they constituted "clear error." Op.3-4. Specifically, the panel approved the district court's conclusion that the two drugs were not in the same product market based on the testimony of an economist, who opined that cross-price elasticity of demand between Indocin and NeoProfen was "very low," and on the testimony of neonatologists, who did not pay for the drugs. FF.88, 115-16; Op.6 (first full paragraph).

At the same time, however, the panel also agreed with the district court's findings that, after having eliminated the threat posed by independent entry of NeoProfen, Lundbeck raised the price of Indocin"thirteen-fold" and priced NeoProfen at a similarly high level. FF.33, 57, 59, 62; Op.3. District Judge Richard G. Kopf (sitting by designation) concurred, but questioned why the district court "relied upon the doctors' [*i.e.*, neonatlogists] testimony so heavily" because "it seems odd to define a product market based upon the actions of actors who eschew rational economic consideration." Op.10 (citing *Tenet*, 186 F.3d at 1054 & n.14). He added that the district court's reliance "seems especially strange where, as here, there is no real dispute that (1) both drugs are effective when used to treat the illness about which the doctors testified and (2) internal records from the defendant raise an odor of predation." Op.11.

ARGUMENT

Contrary to the panel's view (Op.4, 10), the errors identified by the FTC and Minnesota were legal in nature – not factual challenges to the weight given evidence or testimony – because the district court misapplied governing legal principles to its findings of fact. *See* Op.4 ("despite Rule 52(a), a court can correct 'a finding of fact that is predicated on a misunderstanding of the governing law'") (quoting *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 501 (1984)); *see also Du Pont*, 351 U.S. at 381 (appellate review considers whether "erroneous legal tests were applied to essential findings of fact"); *Empire Gas*, 537 F.2d at 303 (holding that the trial judge had applied an incorrect legal standard in determining the relevant product market). If allowed to stand, the panel opinion would conflict with decisions of the Supreme Court and this Court.

I. ECONOMIC OPINION DOES NOT TRUMP FINDINGS OF FACT ESTABLISHING THE DRUGS WERE IN THE SAME MARKET

The district court based its product market conclusion in the first instance on the opinion of Lundbeck's economist that cross-price elasticity between Indocin and NeoProfen was "very low" and that the drugs, therefore, are not in the same product market. FF.115; Op.6-7. The district court erred because that opinion contradicted the undisputed findings of fact that Lundbeck's acquisition of NeoProfen, when it already owned Indocin, solidified and expanded its monopoly, which Lundbeck

proceeded to exploit only after it acquired NeoProfen. FF.14, 56-57, 62-63, 94, 116; Op.3 (first two paragraphs). As a matter of law, Lundbeck's economist's opinion could not support the district court's conclusion that the drugs were not in the same product market. *Brooke Group*, 509 U.S. at 242; *accord Concord Boat*, 207 F.3d at 1057; *Morgenstern*, 29 F.3d at 1297.

Because it was already a monopolist with respect to Indocin, Lundbeck's acquisition of NeoProfen was anticompetitive under established principles. When a monopolist acquires an actual or likely potential competitor, it "is properly classified as anticompetitive, for it tends to augment or reinforce the monopoly by means other than competition on the merits." III Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 701a, at 194 (3d ed. 2008). "Whatever the market may be, … control of price or competition establishes the existence of monopoly power under § 2." *Du Pont*, 351 U.S. at 393; *see also id.* at 394 (control of product without substitutes is monopoly power); *United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 246 (8th Cir. 1988) ("The lawfulness of an acquisition turns on the purchaser's potential for creating, enhancing, or facilitating the exercise of market power … .").

Moreover, the Supreme Court and this Court have both declared that "[w]hen indisputable record facts contradict or otherwise render [an expert] opinion unreasonable, it cannot support a jury's verdict." *Brooke Group*, 509 U.S. at 242; *accord Concord Boat*, 207 F.3d at 1057; *Morgenstern*, 29 F.3d at 1297. The district

court thus committed legal error by allowing the economist's opinion on cross-price elasticity and the relevant market to stand in the way of a judgment compelled by its findings of fact about the effect of Lundbeck's acquisition of NeoProfen. *Brooke Group*, 509 U.S. at 229 ("However unlikely that possibility may be as a general matter, when the realities of the market and the record facts indicate that it has occurred and was likely to have succeeded, theory will not stand in the way of liability"). The panel's acquiescence in this error requires rehearing by this Court.

II. THE PANEL DECISION CONFLICTS WITH THE REQUIREMENT THAT MARKETS BE DEFINED BASED ON THE ALTERNATIVES TO WHICH CONSUMERS WOULD LIKELY TURN

The panel decision also warrants rehearing because it departs from this Court's repeated admonition that, when defining the market in a merger case the "critical question" is the alternatives to which consumers could turn if "the merger [should] be consummated and prices become anticompetitive." *Tenet*, 186 F.3d at 1052; *see also Freeman*, 69 F.3d at 269-70.[2] One of the FTC and Minnesota's principal arguments on appeal was that the district court failed to apply that rule. The panel responded

[2] The law in other circuits is to the same effect. *See also Coastal Fuels of P.R., Inc. v. Caribbean Petrol. Corp.*, 79 F.3d 182, 198 (1st Cir. 1996) ("The touchstone of market definition is whether a hypothetical monopolist could raise prices."); *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) (same); *Olin Corp. v. FTC*, 986 F.2d 1295, 1299 (9th Cir. 1993) (citing the hypothetical monopolist test under the FTC and Department of Justice Horizontal Merger Guidelines); *United States v. Rockford Mem. Corp.*, 898 F.2d 1278, 1283-84 (7th Cir. 1990) (approving a hypothetical monopolist analysis).

that, "[i]n determining the relevant market, the district court need not consider a hypothetical market, especially here where the FTC offered no evidence about such a hypothetical market." Op.6 n.3. The panel, however, departed from governing law regarding the hypothetical market.

Using a hypothetical market in market definition is well-established. This Court explained in *H.J., Inc. v. IT&T Corp.* that "a market can be described as 'any grouping of sales whose sellers, if unified by a hypothetical cartel or merger, could raise prices significantly above the competitive level.'" 867 F.2d at 1537 (quoting Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 518.1 at 311 (1987 Supp.)). Similarly, the FTC and Department of Justice's Horizontal Merger Guidelines have long provided for the use of a "hypothetical monopolist test" to identify a set of reasonably interchangeable products. Christine A. Varney, *The 2010 Horizontal Merger Guidelines: Evolution, Not Revolution*, 77 ANTITRUST L.J. 651, 653 (2011). The hypothetical market is considered because market definition must provide "insight into the future effects of the allegedly anticompetitive merger." *Freeman*, 69 F.3d at 269.

Although in the typical merger case, the hypothetical market is considered to assess likely consumer responses if the transaction were consummated, where the transaction has already been consummated or the challenged conduct has already occurred, which was the case here, the hypothetical market is the one that likely would

have existed but-for the transaction. Thus, the district court needed to examine the counterfactual scenario – the PDA drug market where Indocin and NeoProfen were separately owned – to determine whether the drugs would have competed against one another had Lundbeck not owned both.

The panel also erred in holding that "the FTC offered no evidence about such a hypothetical market." Op.6 n.3. On the contrary, at the time NeoProfen was acquired, Lundbeck itself believed that Indocin and NeoProfen likely would have competed along a number of dimensions, including price. FF.78, 82-85, 90. Thus, the panel was mistaken to suggest that the district court's failure to consider the hypothetical market was harmless; in fact, it was a significant, legal error.

III. THE PANEL DEPARTED FROM LONGSTANDING GOVERNING LAW THAT PRODUCT MARKETS BE DETERMINED BASED ON AN APPROPRIATE MEASURE OF LIKELY CUSTOMER SUBSTITUTION

Stating that "cross-price elasticity is essential to market definition," Op.6 (citing *H.J., Inc.*, 867 F.2d at 1538, 1540), the panel affirmed the district court's conclusion that Indocin and NeoProfen were not in the same product market based on the testimony of a handful of neonatologists that price did not factor into their choice of drug and Lundbeck's economist's opinion that, therefore, there was little cross-price elasticity between the two drugs. Op.6; *see also id.* at 5, 7 & 8 (referring to consumer decisions based on "cost" or "price"). In the circumstances of this case, that reasoning cannot support rejection of the FTC and Minnesota's proposed product

market. The cross-price elasticity findings here were not probative of substitutability where, as the district court found, "neonatologists do not pay for Indocin IV and NeoProfen." FF.88. And the economist's opinion on cross-price elasticity was equally suspect, because Lundbeck had purposely destroyed the competitive marketplace.

Fundamentally, the district court's and the panel's conclusions misunderstood the nature of cross-price elasticity and contradicted findings of fact regarding the reasonable interchangeability of the products. FF.78, 85-86, 88, 94. It is well accepted that the boundaries of a market are determined by the degree to which customers would switch between products in response to changes in prices or non-price terms,[3] which is measured by a broad interpretation of the economic notion of "cross-elasticity." Multiple factors go into this measure, including customer testimony, business documents, and "objective information about product characteristics." U.S. Dep't of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 4.1.3 (Aug. 19, 2010). Especially where, as here, systematic quantitative studies of demand responsiveness were not feasible (because of Lundbeck's own actions), the court was required to be more open to the "objective information about product characteristics." *Id.* Or, as described in *Brown Shoe:*

[3] *See, e.g., Gen. Indus. Corp. v. The Hartz Mountain Corp.*, 810 F.2d 795, 805 (8th Cir. 1987).

"[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use *or* the cross-elasticity of demand between the product itself and substitutes for it." 370 U.S. at 325 (emphasis added). *Accord Archer-Daniels-Midland Co.*, 866 F.2d at 246 (same).

The district court and the panel, however, both overlooked the "or" in the *Brown Shoe* standard, despite citing it. FF.112; Op.5. Here, the district court's numerous findings of fact established that Indocin and NeoProfen were reasonably interchangeable and would likely have constrained pricing if owned by competing firms. FF.21, 63, 78-80, 82, 85, 94. Consequently, by focusing on the alleged insufficiency of cross-price elasticity, both the district court and the panel "obscure[d] competition" rather than "'recognize[d] competition where, in fact, competition exists.'" *Cont'l Can*, 378 U.S. at 453 (quoting *Brown Shoe*, 370 U.S. at 326). *Accord Archer-Daniels-Midland*, 866 F.2d at 246.[4]

Moreover, the district court's factual findings established reasonable

[4] In fact, in *H.J., Inc.*, this Court pointed to an absence of cross-price elasticity data in concluding that the product market included non-identical manure pumps that had the "same basic function," were sold to the "same customers," and were handled by "similar, even the same dealers and distributors." 867 F.2d at 1538-40. The Court also noted that where, as here, new products enter the market, they still face "at least the possibility of competition from the products they are meant to supercede." *Id.* at 1538. In such cases, "[it] makes no sense to say that [the new entrant] has monopoly power by defining the market as those customers whom the entrant has so far managed to persuade." *Id.* Yet, that is exactly what the district court and the panel concluded here. Op.9.

interchangeability as defined by the Supreme Court. *Du Pont*, 351 U.S. at 395-96. Reasonable interchangeability must take into account whether variations in price or quality may cause purchasers to prefer one product over another, notwithstanding their similar uses. *Id.* at 396. Here, however, demand did not reflect market consensus in favor of either drug. A majority of hospitals treating PDA used only one or the other of the two drugs to treat *all* PDA cases,[5] and overall Indocin is used 60% and NeoProfen is used 40% of the time. FF.94; *see also* FF.101-08 (neonatologist testimony corroborating lack of consensus). Given these findings establishing reasonable interchangeability,[6] the district court's product market conclusion to the contrary cannot stand, because it "cannot be squared with its own specific findings of fact." *United States v. Gen. Motors Corp.*, 384 U.S. 127, 140 (1966).

Thus, the fact that any neonatologist might choose one or the other drug without regard to price (especially since, as Judge Kopf observed, it was undisputed that they

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[5] In other words, hospitals could not rely on just a single drug to treat all PDA cases if the products were not interchangeable.

[6] Indeed, if the drugs were not interchangeable, it would not have made economic sense for Lundbeck to invest in a marketing plan aimed at converting neonatologists from Indocin to NeoProfen as the first-line pharmaceutical treatment for PDA. *See* FF.81-87. The district court's reasoning—"Were NeoProfen and Indocin IV in the same product market, Lundbeck's attempt to persuade neonatologists to switch from Indocin to NeoProfen would not make sense." FF.116—is fundamentally flawed; it is precisely because NeoProfen and Indocin are in the same product market that Lundbeck had to take steps to discourage NeoProfen consumers *from switching back to Indocin*. *See* FF.85.

did not pay for the drugs, Op.10) did not mean that, over time and at other critical points in the determination of market demand (such as hospitals' purchases of the drugs), competition was lacking. *See* FF.78-80, 83-85.

> That there are price differentials between the two products or *that the demand for one is not particularly or immediately responsive to changes in the price of the other are relevant matters but not determinative of the product market issue*. Whether a packager will use glass or cans may depend not only on the price of the package but also upon other equally important considerations. The consumer, for example, may begin to prefer one type of container over the other and the manufacturer of baby food cans may therefore find that his problem is the housewife rather than the packer or the price of his cans. *This may not be price competition but it is nevertheless meaningful competition between interchangeable containers.*

Cont'l Can, 378 U.S. at 455-56 (emphases added). In asserting that cross-price elasticity here was "essential," the panel failed to follow *Continental Can*'s holding that "meaningful competition" can exist even where demand does not change in immediate response to changes in price. 378 U.S. at 455-56.

IV. LUNDBECK'S BUSINESS DOCUMENTS ESTABLISHED THAT THE DRUGS WERE IN THE SAME MARKET

Finally, the district court's product market conclusion contradicted not only its own findings of fact concerning reasonable interchangeability, but also Lundbeck's business documents showing that Lundbeck made business decisions based on the prospect of customers responding to potential competition between Indocin and NeoProfen, including on price. FF.78-80, 114. On appeal, the panel allowed this

ruling to stand, speculating that Lundbeck's documents could be interpreted as reflecting only competition between Indocin and its generic equivalent, not between Indocin and NeoProfen. Op. 9.[7] Both the district court and the panel erred as a matter of law.

The district court made numerous findings based on Lundbeck's business documents, *e.g.*, FF.78-87, which Lundbeck admitted in its appeal brief. Lundbeck Br.64, 67. As Judge Kopf observed, those documents "raise an odor of predation," Op.11, which would not have made sense if the drugs were in separate markets. Given these documents, the district court's and the panel's conclusions cannot stand. *Gen. Motors*, 384 U.S. at 140.

In *Brown Shoe*, the Supreme Court held that "evidence indicating the purpose of the merging parties, where available, is an aid in predicting the probable future conduct of the parties and thus the probable effects of the merger." 370 U.S. at 329 n.48 (citing *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905)). *Accord FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1047 (D.C. Cir. 2008) (Tatel, J., concurring). And in the words of Judge Robert Bork in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), a merger party's own views regarding the marketplace should be given weight "because we assume that economic actors usually

[7] During the relevant time period, there were no generic equivalents to treat PDA in the market.

have accurate perceptions of economic realities." *Id.* at 218 n.4. *Accord Whole Foods*, 548 F.3d at 1045 (Tatel, J., concurring). In this regard, the district court's product market conclusion is especially suspect because, as Judge Kopf questioned in his concurrence, the trial judge chose to rely "so heavily" on the testimony of doctors "who eschew rational economic considerations," Op.10, and not on the documents from Lundbeck, whose stated economic objective was to "retain sales for both products and continue to grow total company sales in the PDA market with an exclusivity protected product," FF.79 (emphasis added); *see also* FF.80.

CONCLUSION

For the foregoing reasons, this Court should rehear this appeal *en banc*, reverse the district court, and remand for further proceedings.

Respectfully submitted,

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October 3, 2011

CERTIFICATE OF FILING, SERVICE, AND VIRUS SCANNING

U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT
NOS. 10-3458 and 10-3459

We hereby certify that on October 3, 2011, we electronically filed the PETITION FOR REHEARING *EN BANC* OF PLAINTIFFS-APPELLANTS FEDERAL TRADE COMMISSION AND STATE OF MINNESOTA with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

We further certify that the electronic version of the PETITION has been scanned for viruses and is virus free

/s/ Benjamin Velzen
Benjamin Velzen

/s/ Mark S. Hegedus
Mark S. Hegedus