Nos. 2011-17357, 2011-17373

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SMITHKLINE BEECHAM CORPORATION D/B/A GLAXOSMITHKLINE,
Plaintiff-Appellee/Cross-Appellant,

v.

ABBOTT LABORATORIES,
Defendant-Appellant/Cross-Appellee,

Appeal From The United States District Court For The
Northern District of California
In Case No. 4:07-cv-05702-CW, Judge Claudia Wilken

FOURTH BRIEF ON CROSS-APPEAL OF PLAINTIFF-APPELLEE and CROSS-APPELLANT SMITHKLINE BEECHAM CORPORATION D/B/A GLAXOSMITHKLINE

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an opportunity to enhance public confidence in the justice system by applying to gay and lesbian citizens the Supreme Court's dictate that all persons, when granted the opportunity to serve on a jury, have the right not to be excluded based on stereotypical presumptions that reflect and reinforce historical patterns of discrimination (*J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 140-41 (1994)). In GSK's opening brief ("Second Br."), GSK demonstrated three separate bases for applying this principle to peremptory challenges based on a juror's sexual orientation. In response ("Third Br."), Abbott ignores one of these reasons (that the rationale of recent cases applying a "more searching form" of rational basis review to laws that discriminate based on sexual orientation requires application of *Batson v. Kentucky*, 476 U.S. 79 (1986)—Second Br. at 26 n.9), makes only the erroneous argument that this Court is not free to reach the conclusion for which GSK advocates as to another (that *Batson* applies because homosexuals qualify as a suspect or quasi-suspect class—Second Br. at 25-29), and attacks the third (that *Batson* applies because laws impinging on the exercise of the Constitutional right of adults to form intimate personal relationships of their choosing are subject to heightened scrutiny—Second Br. at 19-25). Abbott's lone merits attack relies on mischaracterizing GSK's argument as requiring that *Batson* be applied to particular groups of people whenever their choices on certain subjects would be protected by

substantive due process. Third Br. at 18. That is not necessary to GSK's argument. Rather, in the case of homosexuals, exercise of the due process right—the right to form intimate personal relationships with members of the same sex—is the very definition of being a homosexual. As the Supreme Court and this Court have recognized, status and conduct in this area are one and the same. Thus, a conclusion that heightened scrutiny applies to impingements of this important constitutional right compels the application of *Batson* just as would a determination that homosexuals are a suspect class.

Next, Abbott argues procedural difficulties prevent application of *Batson* to strikes based on sexual orientation. Yet, California state courts have been doing this for over a decade without trouble. And, were an issue to arise, federal courts have procedures in place to allow them to protect juror privacy while conducting appropriate trial proceedings.

Abbott lastly proposes a series of arguments that it suggests this Court use to avoid addressing the scope of *Batson*. Abbott asserts that GSK did not make a prima facie case of sexual orientation or gender discrimination, but in so doing ignores the law, the subject matter of this case, and much of the *voir dire* that reveals its "obvious reasons" for striking the gay juror to be yet more pretext for a discriminatory strike. GSK met its "quite low" burden when it demonstrated, among other things, that Abbott had a motive to rid the jury of homosexual male

jurors because of the highly controversial nature of the Norvir price hike at issue here.

Abbott's "alternative basis for affirmance" based on its supposed entitlement to judgment as a matter of law fares no better. This contention fails at inception because "harmless error" cannot excuse a *Batson* violation. It also fails on procedural grounds because, on two of GSK's claims, Abbott did not pursue judgment as a matter of law post-verdict. These defects aside, Abbott still must show that all three of GSK's claims should have been taken from the jury. But, ample evidence supports all of GSK's claims. Abbott's arguments to the contrary depend upon misstating the law and drawing inferences from the evidence favorable to Abbott, which is improper in this procedural posture (especially since GSK prevailed on one of its three claims). Moreover, the district court erred when it found that the jury's verdict did not justify finding that Abbott violated North Carolina's Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1, ("UDTPA").

ARGUMENT

I. THIS COURT SHOULD REVERSE AND ORDER A NEW TRIAL

A. *Batson* Applies To Peremptory Challenges Based On A Juror's Sexual Orientation

1. Heightened Scrutiny Applies Where, As Here, A Classification Impinges On The Exercise Of An Important Right That Is The Very Definition Of Being A Homosexual

As shown in GSK's opening brief (Second Br. at 21-22), discrimination based on sexual orientation impinges on the exercise of important constitutional rights. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (recognizing that "the liberty protected by the Constitution allows homosexual persons the right" to choose their intimate partners). Under applicable law, the recognition of this important right in *Lawrence* leads to "heightened scrutiny" for equal protection purposes of laws that impinge it. *E.g.*, *Plyler v. Doe*, 457 U.S. 202, 222-23 (1982) (holding heightened scrutiny applicable to equal protection challenge involving the "important" but not "fundamental" right to education).

Abbott mischaracterizes GSK's argument, interpreting it as arguing "*Batson* applies wherever a potential juror belongs to a class of persons whose choices on these subjects would be protected by substantive due process." Third Br. at 18. But, this is not necessary to rule for GSK. In the circumstances here, a far narrower rationale suffices.

Courts prevent discrimination on the basis of a given classification under *Batson* whenever discrimination against members of the class would be subject to heightened scrutiny for equal protection purposes. *United States v. Santiago-Martinez*, 58 F.3d 422 (9th Cir. 1995). In the case of homosexuals, the Supreme Court and this Court have repeatedly recognized that there is no difference between conduct and status—as the definition of a homosexual is one who forms intimate personal relationships with members of the same sex. *E.g.*, *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010) (noting that Court's "decisions have declined to distinguish between status and conduct in this context"); *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class."); *Perry v. Brown*, 671 F.3d 1052, 1093 (9th Cir. 2012) (quoting *Christian Legal Soc'y*). Thus, when a law impinges on that important right, it necessarily affects homosexuals as a group and a decision to subject that law to heightened scrutiny is the same as a decision to subject laws directed at homosexuals to heightened scrutiny. Under the evolving *Batson* doctrine (*see* Second Br. at 19-

21), this leads inexorably to the conclusion that *Batson* applies to classifications based on sexual orientation.[1]

Abbott never disputes this reasoning, but instead argues that *Batson* has not been applied to situations where jurors might have exercised important constitutional rights, such as the right to marry, obtain an abortion or use contraception. Third Br. at 17-18. Abbott misses the point. There are no classifications of persons who have been the historical object of discrimination based on the exercise of rights to marry, use contraception, or obtain an abortion. Abbott's reference to cases involving "religious *affiliation*" is closer to the instant situation (Third Br. at 20 n.15), in light of the fact that discrimination on this basis has historically been widespread. But, the only federal appellate court decision Abbott cites held that *Batson* applies to strikes based on religious status. *See id.* (citing *United States v. Brown*, 352 F.3d 654, 668-69 (2d Cir. 2003)).[2] Abbott thus inadvertently supports GSK's position.

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[1] Abbott's claim that heightened scrutiny is insufficient for *Batson* to apply finds no support in the law. Indeed, in *Santiago-Martinez*, upon which Abbott relies to make this point (Third Br. at 17 n.14), the Ninth Circuit concluded its opinion with the statement "no court has yet held that discrimination on the basis of obesity is subject to 'heightened scrutiny' under the Equal Protection Clause. We are not surprised, and decline to be the first to so hold." 58 F.3d at 423. The clear implication is that, had this Court so held, it would have found *Batson* applicable.

[2] It is unsurprising that courts have refused to apply *Batson* to peremptory challenges based on political or religious beliefs. Beliefs, unlike religious

2. No Existing Precedent Prevents This Court From Finding Homosexuals To Be A Suspect Or Quasi-Suspect Class Protected Under *Batson*

Abbott concedes that this Court has not decided whether sexual orientation is a classification covered by *Batson*. *See* Third Br. at 21. Rather than address the constitutionality of discriminatory peremptory challenges against jurors who identify themselves as gay or lesbian, Abbott argues that existing case law prevents the Court from making this determination. Contrary to Abbott's argument, *Witt v. Dep't of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008), does not prevent this Court from concluding that heightened scrutiny, and hence *Batson*, applies to classifications based on sexual orientation.[3]

Abbott's position has several flaws. First, Abbott fails to address GSK's argument that *Witt* does not restrict this Court's freedom because the panel there failed to consider the impact on the precedent it cited of the demise of *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. at 567. *Witt* cited *Philips v. Perry*, 106 F.3d 1420, 1424-25 (9th Cir. 1997), but merely assumed without deciding that it supplied the standard of review for sexual orientation-

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affiliation or sexual orientation, are reflective of how people will conduct themselves as jurors.

[3] Abbott actually argues only that *Witt* precludes application of *Batson* using "suspect class" analysis. It does not use *Witt* to attack GSK's other three theories for application of Batson, and hence we address only *Witt*'s effect on "suspect class" analysis here.

based classifications. 527 F.3d at 821. The Supreme Court's statement in *Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993), *superseded by statute on other grounds as stated in Zappulla v. New York*, 391 F.3d 462, 466 (2d Cir. 2004), applies equally here: where courts "never squarely addressed the issue, and have at most assumed the applicability of the [given legal standard], we are free to address the issue on the merits."[4] *See also United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (holding that where an issue was not "raised in briefs or argument nor discussed in the opinion of the Court … the case is not a binding precedent on this point"); *Sethy v. Alameda County Water Dist.*, 545 F.2d 1157, 1159 (9th Cir. 1976) (en banc) (holding court not bound by prior decision where briefing and opinion in prior case failed to consider issue presented in instant case).

Abbott answers only by quoting dicta from a case analyzing the constitutionality of unpublished opinions. Third Br. at 15-16 (quoting *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001)). Even though GSK made the exact same point in its initial brief (Second Br. at 33), Abbott never mentions *Brecht* or

[4] At issue in *Brecht* was the standard for determining "harmless-error" when a habeas petition alleged a constitutional violation in the underlying trial court proceedings. 507 U.S. at 623. The Court spelled out the standard applicable on direct review of a conviction and noted that the Court itself had applied that standard in habeas cases. The Court then confronted the question of whether it was bound by *stare decisis* and concluded it was not. *Id.* at 631.

the other cases on which GSK relied. This Court's observation while discussing unpublished opinions that a panel decision is binding "whether or not the lawyers have done an adequate job of developing and arguing the issue[,]" *Hart*, 266 F.3d at 1175, cannot be read to undermine two Supreme Court cases, and one from this Court, that actually decided the question now presented.

Nor does Abbott have an answer to GSK's argument that, because *Witt* involved a classification by Congress that affects the military, it cannot be binding precedent for the standard of review applicable in a civilian context.[5] Second Br. at 34-35. Citing *Able v. United States*, 155 F.3d 628, 634 (2d Cir. 1998), GSK pointed out that courts have applied different levels of review when a classification by Congress or the Executive Branch involves the military. Second Br. at 34. Abbott responds by suggesting that the military context affects the degree of deference, not the "threshold question of what level of scrutiny applies…."[6] Third Br. at 15.

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[5] *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985 (N.D. Cal. 2012), in which the district court adopted this view of *Witt*, is now on appeal in this Court. Docket Nos. 12-15388, 12-15409.

[6] Abbott cites *United States v. Virginia*, 518 U.S. 515 (1996), a case in which the Court applied heightened scrutiny to a state's policy excluding women from its military academy. As is plain from a review of the opinion, the Court did not treat the issue there as involving a policy adopted in a military setting. *Id*. at 531-34, 556-57. Indeed, the case did not involve either Congressional or Executive Branch action regarding the nation's military.

Abbott, however, ignores *Able*. In *Able*, the court considered the constitutionality of a rule prohibiting homosexuals from serving in the military. It distinguished cases reviewing classifications based on sexual orientation in the civilian context as involving situations where the Court "examine[d] the benign reasons advanced by the government to consider whether they masked an impermissible underlying purpose" (which, at a minimum, is the type of "more searching rational basis" scrutiny that several courts have applied to sexual orientation discrimination in civilian contexts). *Able*, 155 F.3d at 634. It then observed that "[i]n the military setting, however, constitutionally-mandated deference to military assessments and judgments gives the judiciary far less scope to scrutinize the reasons, legitimate on their face, that the military has advanced to justify its actions." *Id.; see also id.* at 635 (court's review of whether purposes are rationally related to law is "circumscribed" by "our recognition of the special status of the military"). *Witt*'s choice of the type of scrutiny to be applied to classifications based on sexual orientation involving the nation's military is no more binding here than the Supreme Court's reasoning from civilian contexts was in *Able*.

Finally, Abbott's attempt to rely on *Witt* fails because the panel there was not presented with an argument based on the classification at issue here—namely, one based on sexual orientation generally—but instead with an argument that the

classification improperly distinguished homosexuals from others "whose presence may also cause discomfort among other service members[.]" *Witt*, 527 F.3d at 821; *see also* Second Br. at 31-32. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925) (citations omitted).

3. Recent Precedent Applying A More Rigorous Form Of Rational Basis Scrutiny To Sexual Orientation-Based Classifications Supports Application Of *Batson* Here

Another reason why this Court should apply *Batson* to Abbott's strike of a gay juror can be found in the rationale of recent precedent applying a more rigorous form of rational basis scrutiny to sexual orientation-based classifications. That rationale is identical to the rationale for invoking *Batson*, namely that the minority group has been subject to pervasive and long-lasting discrimination. As GSK previously noted, the logic of *Batson* indicates that it should apply to classifications involving such a minority even if those classifications would be tested for equal protection purposes not under "heightened scrutiny" but only under "a more searching form of rational basis review." *See* Second Br. at 26 n.9 (citing *Perry*, 671 F.3d at 1089; *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring)).

Two recent circuit court decisions evaluating laws that discriminate on the basis of sexual orientation (the federal Defense of Marriage Act and California's

initiative banning same sex marriage) have "undertaken a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review." *See Mass. v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 11 (1st Cir. 2012) (observing that "the usually deferential 'rational basis' test has been applied with greater rigor in some contexts, particularly those in which courts have had reason to be concerned about possible discrimination" as in the case of gays and lesbians (internal quotation omitted)); *Perry*, 671 F.3d at 1089. Thus, even when courts apply "rational basis" scrutiny to sexual orientation-based classifications, that scrutiny bears little resemblance to traditional rational basis review due to the presence of "historic patterns of disadvantage suffered by the group adversely affected by the statute." *Mass.*, 682 F.3d at 11.

For the same reasons that "historical patterns of disadvantage" have led these courts to apply more searching inquiries under equal protection analysis, those patterns support the application of *Batson* here. *Batson* reflects the Court's recognition that "[d]iscrimination within the judicial system is most pernicious," that litigants have "the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria," *Batson*, 476 U.S. at 85-89, and that potential jurors have the right to jury selection procedures "that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice," *J.E.B.*, 511 U.S. at 128 (citations omitted). As with racial minorities and women,

homosexuals have been subject to severe and enduring historical prejudice and stereotyping. Allowing continued discrimination against homosexuals in jury selection would be inconsistent with each of the three tenets that underlie the *Batson* line of cases, whether one concludes that the "historical disadvantage" to which homosexuals have been subjected compels "heightened scrutiny" of classifications based on sexual orientation or only a "more searching form" of rational basis review.[7]

4. Extending *Batson* To Sexual Orientation Discrimination Would Not Pose Significant Implementation Problems

Instead of focusing on the merits, Abbott manufactures slippery slope arguments about the "formidable practical problems" associated with protecting homosexuals from discrimination during *voir dire*. Third Br. at 18. As an initial matter, this argument is wholly misplaced because the ease or difficulty of

[7] Abbott makes a last ditch argument that homosexuals have not suffered sufficient discrimination in jury selection to warrant *Batson* protection. Third Br. at 16. Abbott is effectively arguing that, when a societal bias is so pervasive that it leads minority jurors to keep secret their minority status, *Batson* does not apply because of the absence of evidence of discrimination in jury selection. This is self-evidently absurd. Moreover, Abbott's argument finds no support in *Batson* or its progeny. While the Court in *J.E.B.* did cite the history of the exclusion of women from jury service, it nowhere intimated that this was a requirement for *Batson* to apply outside of the racial context and, in fact, suggested it was not. *J.E.B.*, 511 U.S. at 136 ("It is necessary only to acknowledge that our Nation has had a long and unfortunate history of sex discrimination."). Unsurprisingly, the Court has not required such evidence in other contexts. *Hernandez v. New York*, 500 U.S. 352 (1991) (applying *Batson* without discussing historical prejudices in jury selection to strike based on ethnicity).

enforcement is irrelevant to a determination of whether equal protection was denied. *See, e.g.*, *Batson*, 476 U.S. at 93 n.17 (acknowledging the practical difficulty of ascertaining a discriminatory motive for a peremptory challenge). Moreover, here, the stricken juror self-identified as gay, so the argument about a purported need to inquire into his sexual orientation is inapposite. *See People v. Garcia*, 77 Cal. App. 4th 1269, 1280 (Cal. Ct. App. 2000) (distinguishing "inquiring of jurors about their sexual orientation" from addressing the issue "[i]f it comes out somehow, as it did here" and holding that litigants could not strike potential jurors on the basis of their sexual orientation when a juror self-identifies as gay).[8]

Furthermore, Abbott ignores both that state courts have been able to work around the supposed "practical problems" and that federal courts already have in place procedures to protect individual juror privacy. California has prohibited using peremptory challenges to strike homosexual jurors since 2000 without significant implementation issues. *See* Cal. Code Civ. Proc. § 231.5 (West 2012); *see also* 2000 Cal. Legis. Serv. 104-05 (West) (adding sexual orientation to list of

[8] Similarly flawed is Abbott's contention about the difficulty of a comparative juror analysis. This can be done by comparing the characteristics of the self-identified homosexual with the rest of the jury pool. If other potential jurors self-identify as homosexual, the analysis would consider that fact. Since the purpose of a *Batson* challenge is to prevent intentional discrimination, the fact there may be some homosexuals on the panel who have not self-identified would not undermine the analysis.

protected classifications during *voir dire*); *Garcia*, 77 Cal. App. 4th at 1280 ("Race and ethnicity are not necessarily patent, either... Yet the propriety of those criteria for cognizable groups is unassailable. Sexual orientation will present no greater difficulty."). If difficulties arise, courts can address them. Federal courts have the power to tailor *voir dire* to protect privacy interests by, for example, holding closed sessions or private conferences to discuss personal issues. Thus, in the rare *voir dire* proceeding in which the issue of a juror's sexual orientation did arise, the court could simultaneously protect the jurors' civil rights and effectively conduct its proceedings.

B. GSK Made A Prima Facie Case That Abbott Discriminated Based On Sexual Orientation

Abbott contends GSK failed to make a sufficient prima facie showing to permit an inference that Abbott struck Juror B because he was gay. Third Br. at 21-28. But, Abbott never confronts the "quite low" threshold that GSK must meet, even though the cases Abbott cites set it out. *E.g.*, *United States v. Collins*, 551 F.3d 914, 919-20 (9th Cir. 2009) (party need only show "totality of the circumstances raises an inference" that membership in a group motivated strike; the threshold is a "less burdensome standard of proof than the preponderance … standard" and "is small."); *Boyd v. Newland*, 467 F.3d 1139, 1145 (9th Cir. 2006). A "single inference of discrimination … is sufficient" to show a prima facie case.

Collins, 551 F.3d at 920.[9] Abbott likewise fails to acknowledge that "a prima facie case of discrimination can be made out by offering a wide variety of evidence." *Johnson v. California*, 545 U.S. 162, 169 (2005).

What Abbott does argue is that GSK has shown little more than that Juror B was the only known homosexual man on the jury. Third Br. at 27. However, Abbott ignores GSK's showing that this case involved a price hike that caused extraordinary controversy in the HIV/AIDS community – a community that overlaps substantially with the gay community (*see* Second Br. at 36-39). This refutes Abbott's claim that it had no reason to discriminate because the case merely "involved HIV drugs" or the "pricing of an HIV drug." *See* Third Br. at 26-27. Rather, the facts make this case closer to *United States v. Iron Moccasin*, 878 F.2d 226, 229 (8th Cir. 1989), which Abbott correctly notes found a prima facie case of discrimination (Third Br. at 27 n.19)—without comparative juror analysis—following the prosecutor's strike of the sole Native American juror in a "sensitive and highly emotional trial" involving a sex offense on an Indian reservation in which the accused and the victim were Native American.

[9] Abbott is wrong when it contends that to meet its burden GSK must show a pattern of striking minority jurors or that Abbott struck more than one minority juror. Third Br. at 25. "[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Collins*, 551 F.3d at 919 (internal citation omitted).

Two other factors, which Abbott also neglects, strengthen the inference of discrimination. That Abbott's counsel used its first strike to remove the only known gay man from the venire panel (*see* ASER-318:19) supports the inference. *See Alexis v. Leporati*, No. 93-10003, 1996 U.S. Dist. LEXIS 11705, at *11-12 (D. Mass. July 30, 1996) (use of first peremptory strike on lone black juror supported inference of discrimination). So does Abbott's refusal to provide a legally cognizable explanation for its strike. *Johnson*, 545 U.S. at 171 n.6 ("[S]uch a refusal … provide[s] additional support for an inference of discrimination…."). Collectively, this evidence is enough to meet GSK's low burden.

Analyzing Abbott's *post-hoc* list of "obvious reasons" for its strike of Juror B (Third Br. at 23-24) reveals nothing that weakens or negates the inference of discrimination. Abbott first suggests that an obvious reason for striking Juror B is that he knew people in the legal field, noting other jurors might "have given extra weight to Juror B's opinions given his employment with this Court." Third Br. at 23. Setting aside that Juror B's job on the Ninth Circuit was in the field of computers rather than law, (ASER-223:4-25), this "obvious reason" cannot survive the most minimal comparative inquiry; one other juror on the panel was a U.S. lawyer (ASER-247:8-16), and another had a French law degree (ASER-299:6-10). Further, another juror also knew several people in the legal field. *See* ASER-211:24-213:25. Abbott left all three on the panel. Abbott also speculates that, due

to his Ninth Circuit employment, Juror B might have talked to court personnel about the case. Third Br. at 23. The record shows that he had not. The district court early on confirmed that no one had heard anything about this case. ASER-204:4-11. Moreover, and especially given this Court's procedures for ensuring its neutrality, Abbott's further speculation that court employees like Juror B might later talk to co-workers about the case is not an "obvious reason" for striking employees of this Court from federal juries.

Second, Abbott suggests another obvious reason to strike Juror B is that he had heard of Kaletra. Third Br. at 23. Yet, in follow-up questioning, Juror B stated that he did not know much about Kaletra and like Juror P – whom Abbott did not strike – did not know what medications his friends were taking. ASER-308:1-14. Moreover, Abbott offers no explanation how knowledge of Kaletra suggests a "predisposition toward [GSK] or a bias against [Abbott]" – without which this cannot be an "obvious neutral reason" to strike him. *See Collins*, 551 F.3d at 922-23.

Third, Abbott suggests Juror B's "friends in the past" diagnosed with HIV constitute an obvious reason for striking him. Third Br. at 24. Abbott advocates that his statement means his friends died of HIV/AIDS and, therefore, he might harbor negative feelings about pharmaceutical companies. Abbott's premise is base supposition. Juror B could have meant that he lost touch with his "friends in

the past." Abbott asked no questions on *voir dire* to clarify. And, the record strongly suggests that, at the time of *voir dire*, Abbott's counsel did not believe Juror B's friends had died. In follow-up questioning, Abbott's counsel asked Juror B whether these friends were taking medications – in the present tense (*see* ASER-308:1-4) – something he would not have done if he believed Juror B's friends to be deceased. As with Abbott's other two reasons, this appears to be simply a *post-hoc* rationale that only serves to enhance the inference that Abbott struck Juror B for a discriminatory reason.

C. GSK Made A Prima Facie Case of Impermissible Gender Discrimination

Abbott asserts that GSK failed to make a prima facie showing of gender discrimination primarily because, according to Abbott, GSK did not specifically identify the factual basis for its *Batson* challenge. Third Br. at 30-32. This is incorrect. GSK objected to Abbott's strike against a homosexual man and explained that "the problem here … is the litigation involves AIDS medications. The incidents of AIDS in the homosexual community are well-known, particularly gay men. So with that challenge, Abbott wants to exclude … anybody who is gay." ASER-320:23.

Abbott's argument ignores GSK's reference to Abbott's strike as impermissibly targeting persons who are "gay" and "gay men," both gendered terms. By contrast, in the out-of-circuit case upon which Abbott relies, the

appellant made no reference to impermissible religious discrimination when objecting to a peremptory challenge on the basis of race. *Brown*, 352 F.3d at 661-63 (finding waiver where defendant's counsel sat through prosecutor's explanation that she struck an African American juror not because of race but because of her religious activities without ever suggesting that this too was an improper ground for a peremptory challenge). Abbott's own case thus does not support its argument. *See id.*

United States v. Omoruyi, 7 F.3d 880 (9th Cir. 1993), cited by both parties, demonstrates that no waiver could be found under Ninth Circuit law even if Abbott had fairly characterized the record. In *Omoruyi*, this Court found two peremptory challenges of single women violated *Batson* on gender grounds even though trial counsel had raised a *Batson* objection on racial grounds to one of them. *Id.* at 881. That defendant objected at trial to the prosecutor's use of a challenge to an African American woman "on the basis that it was racially discriminatory" did not preclude a later finding that this challenge, and another of the prosecutor's peremptory challenges, discriminated on the basis of gender. *Id.*

Abbott's discussion of *Omoruyi* (Third Br. at 31-32) fails to dent its significance to GSK's gender discrimination claim. Abbott correctly, but irrelevantly, points out that, unlike the prosecutor in *Omoruyi*, it did not admit to a discriminatory motive. The question, however, is whether GSK made a prima

facie case of gender discrimination, and *Omoruyi* holds that such a showing exists when the evidence suggests peremptory challenges are being used against a subgroup of one gender. *Omoruyi*, 7 F.3d at 881. Abbott responds that this cannot be so because the pool of eligible jurors included ten men and Abbott struck only one of them. Third Br. at 31. *Omoruyi* rejected a virtually identical argument. There, the government pointed to the presence on the jury of six women and the fact that it did not use four of its peremptory challenges. *Omoruyi*, 7 F.3d at 881. The court observed that, while this might negate a showing of a pattern of discrimination, such a showing was not necessary as a lone strike of a single woman could constitute impermissible gender discrimination. *Id*. at 882. Here too, a lone strike of a homosexual man can constitute an impermissible gender based challenge.

As discussed in GSK's opening brief, the totality of the circumstances are such that GSK has made a prima facie case of gender discrimination. Second Br. at 29-30, 36-39. This is yet another reason why the trial court erred in failing to apply *Batson*.

D. Remand For A New Trial Is The Proper Remedy For Abbott's *Batson* Violation

A party cannot make a statement in court to further one purpose only to erase it from the record later because the statement has become inconvenient. Abbott made a statement that an examination of the *voir dire* reveals

to be pretext. Nowhere in its brief does Abbott maintain that this statement was made in good-faith without knowledge of whether the juror in question was gay. Abbott simply asks this Court to act as if its counsel never said what is in the record.

Abbott seeks to justify this odd result by asserting that it only rested on the three reasons the district court articulated for rejecting GSK's *Batson* challenge. Third Br. at 29. This is not true. Although Abbott correctly notes that, after the court provided it an opportunity to explain its strike, Abbott initially said it would "stand on the court's 'three reasons'" (*Id.* at 29), its counsel then proceeded to provide a fourth reason: "I have no idea whether he is gay or not." ASER-320:22. Abbott maintains that this was not a reason for the strike and "sheds no light on why Abbott exercised this strike." Third Br. at 30. (While saying what it was not, Abbott never proffers an alternative explanation of the clearly false statement.) Yet, the kind of statement Abbott made is one that has been consistently mentioned by courts as a classic rationale to attempt to justify a strike, albeit a legally insufficient one. *See Batson*, 476 U.S. at 98 ("Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive."); *United States v. Chinchilla*, 874 F.2d 695, 697 (9th Cir. 1989) ("This explanation cannot be a general assertion that denies a discriminatory motive or claims good faith in individual selections[.]"). Once Abbott provided an

explanation of its strike, it was bound to it. *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005) ("If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.").

As GSK previously stated (Second Br. at 40-43), this Court should grant a new trial rather than remand for an evidentiary hearing because Abbott's pretextual reason renders any additional reasons it provides highly suspect, thereby eliminating the need for an evidentiary hearing. Abbott undoubtedly wishes for a remand so it can use an after-the-fact review of the record to add to its reasons for striking the gay juror. But, Abbott can give no reason that would overcome the inference of discriminatory intent that its pretextual explanation of its strike establishes.[10] *See Miller-El*, 545 U.S. at 252; *see also United States v. Taylor*, 636 F.3d 901, 905 (7th Cir. 2011) ("*Miller-El II* instructs that when ruling on a *Batson* challenge, the trial court should consider only the reasons initially given to support the challenged strike, not additional reasons offered after the fact."); *Turner v. Marshall*, 121 F.3d 1248, 1253 (9th Cir. 1997) (giving no weight to belated explanations because they "do not form part of the prosecutor's explanation" at the *Batson* hearing).

[10] Counting the three pretextual reasons in its brief (Third Br. at 23-24), Abbott has now offered four pretextual reasons for its strike of Juror B.

Abbott is also incorrect that a "settled" rule requires remand to the district court in a *Batson* case. This Circuit remands for a new trial, not an evidentiary hearing, when the appellate court has a record by which to test a party's proffered explanations for the strike and conduct an adequate *Batson* inquiry. *See, e.g.*, *United States v. Alanis*, 335 F.3d 965, 969-70 (9th Cir. 2003). Failure to do so when the record is adequate would be a waste of resources. In the cases Abbott cites, no adequate record existed from which to conduct a *Batson* analysis, either because the challenging party provided no reasons for its strike or numerous reasons. Here, by contrast, an adequate record exists because Abbott cannot overcome with new "reasons" the inference of discriminatory intent that arises from its having previously offered a pretextual one.

II. THIS COURT CANNOT AVOID THE *BATSON* ISSUE ON THE ALTERNATIVE BASIS PROPOSED BY ABBOTT

A. Courts May Not Use A Purported Lack Of Prejudice To Affirm Despite A *Batson* Violation

Abbott concedes that "*Batson* claims are not subject to ordinary harmless-error analysis." Third Br. at 32. Yet, Abbott claims, "affirmance is warranted if a *Batson* violation caused no prejudice." *Id.* Abbott's only support for this proposition is an unpublished case about an *alternate* juror. *United States v. Gonzalez-Largo*, 436 F. App'x. 819, 821 (9th Cir. 2011) (unpublished). Abbott

cites no case for the proposition that a *Batson* error can be rendered moot by an evaluation of the sufficiency of the evidence.

Gonzalez-Largo does not aid Abbott. First, it does not even discuss "no prejudice" as a basis for affirmance. Rather, it relies upon "harmless error" analysis that Abbott admits should *not* be used here. And, even within its narrow confines—a *Batson* challenge to an alternate juror where the selected alternate did not deliberate—actual precedent holds harmless error analysis improper. *E.g.*, *United States v. Harris*, 192 F.3d 580, 588 (6th Cir. 1999).

In reality, *Batson* errors require reversal. As this Court observed in *Turner*: "[T]here is no harmless error analysis with respect to *Batson* claims." 121 F.3d at 1254 n.3 (citing *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (among those constitutional rights so basic "that their infraction can never be treated as harmless error" is a defendant's "right to an impartial adjudicator") (citation and internal quotation marks omitted); *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986)). In *Vasquez*, the Court rejected a claim, similar to Abbott's, that exclusion of blacks from the grand jury was harmless error because an unbiased jury confirmed the defendant's guilt. *Id.* at 260-66; *see also United States v. Thompson*, 827 F.2d 1254, 1261 (9th Cir. 1987) (rejecting argument that obvious guilt of defendant allowed court to treat *Batson* violation as "harmless error"). And, in *J.E.B.* the Court rejected the reasoning of the dissent that any error was harmless because the

evidence overwhelmingly pointed to the judgment being correct. 511 U.S. at 159 (Scalia, J., dissenting).

This Court need go no further in evaluating Abbott's alternative argument. As discussed below, however, Abbott's alternative argument fails for independent reasons.

B. This Court Should Not Reach Abbott's Alternative Argument Because Abbott Failed To Renew Its JMOL Motion On The Antitrust And UDTPA Counts

Abbott's argument that this Court can affirm without addressing *Batson* also suffers from a procedural flaw. Abbott failed to renew its JMOL motion on the antitrust and UDTPA claims after the jury verdict, SER-47-71, so the district court never ruled on its arguments, SER-2-15.

Abbott ignores this. If Abbott were appealing on the basis of insufficient evidence to support these claims, this failure would be fatal. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 407 (2006). The Court there reasoned:

> A postverdict motion is necessary because [d]etermination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart.

Id. at 401 (internal quotation omitted). *Unitherm's* rationale applies equally here.

Even assuming *Unitherm* does not dispose of Abbott's alternative argument, this Court should exercise its discretion not to reach it. "Whether, as a prudential

matter, [a Court of Appeals] should [affirm on an alternative basis] depends on the adequacy of the record and whether the issues are purely legal, putting [it] in essentially as advantageous a posture to decide the case as would be the district court." *Golden Nugget, Inc. v. Am. Stock Exch., Inc.*, 828 F.2d 586, 590 (9th Cir. 1987). This Court is not in "as advantageous a posture" to decide the sufficiency of the evidence as the district court, and the issues raised are not purely legal, *see Ortiz v. Jordan*, 131 S. Ct. 884, 892 (2011) (record did not raise a purely legal issue because it could not be resolved only with reference to undisputed facts). Addressing Abbott's argument would harm judicial economy and muddle an already complicated appeal.

C. Abbott Cannot Demonstrate, As It Must To Provide An Alternative Ground For Affirmance, That All Of GSK's Claims Fail As A Matter Of Law

Assuming this Court addresses Abbott's alternative argument, that argument is irrelevant unless Abbott demonstrates that, construing the record in the light most favorable to GSK, it cannot support a finding for GSK on *any* of GSK's claims. *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002). This Abbott cannot do.

1. GSK's Antitrust Claims Do Not Fail As A Matter of Law

GSK asserts that Abbott violated Section 2 of the Sherman Act by monopolization and attempted monopolization. Abbott contends, as a matter of

law, that GSK cannot prevail because it cannot show anti-competitive conduct or that Abbott possessed monopoly power or a dangerous probability of achieving or maintaining such power. Abbott is wrong.

(a) Substantial Evidence Supports A Finding That Abbott Engaged In Anti-Competitive Conduct

(i) The jury could have found Abbott violated a duty to deal when it hiked the price of Norvir to make its use with non-Abbott PIs prohibitively expensive

As it did in its unsuccessful Petition for a Writ of Mandate, Abbott argues that the relative prices of Norvir and Kaletra cannot be evidence of anti-competitive conduct because *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438 (2009) and *John Doe 1 v. Abbott Labs.*, 571 F.3d 930 (9th Cir. 2009) forbid such "price squeeze" claims. Third Br. at 33-35. But this is incorrect. *linkLine* repeatedly and emphatically states that it is not addressing price-squeeze claims where a duty to deal exists. 555 U.S. at 449 ("Our grant of certiorari was limited to the question whether price-squeeze claims are cognizable *in the absence of an antitrust duty to deal*.") (emphasis added), 454, 455.

Doe likewise makes clear that a claim premised on a violation of a duty to deal is not encompassed by its holding. The plaintiffs there asserted only a "monopoly leveraging" claim, alleging neither violation of a duty to deal nor below cost pricing. *Doe*, 571 F. 3d at 931. *Doe's* opening sentence explains that it

was not addressing whether "pricing conduct in two markets" might state a claim under Section 2 of the Sherman Act where there is an allegation of an "antitrust refusal to deal." *Id.* And, for good measure, this Court added, "Does have not alleged a refusal to deal in this case." *Id.* at 935 n.5.

Abbott fantasizes a contrary conclusion, focusing on the words "[h]owever labeled" found at 571 F.3d at 935. There, this Court wrote:

> Applying *linkLine* leads us to conclude that *Does' claim falls short as well. They allege no refusal to deal at the booster level*, and no below cost pricing at the boosted level. Does try to distance themselves from *linkLine* on the footing that their claim is for monopoly leveraging, not price squeezing, and that Abbott provides products to consumers in both the booster and boosted markets whereas AT & T provided products in retail and wholesale markets. We understand the difference, but it is insubstantial. *However labeled*, Abbott's conduct is the functional equivalent of the price squeeze the Court found unobjectionable in *linkLine*.

Id. (emphasis added; footnote omitted).

Because *Doe* and *linkLine* specifically exclude from consideration situations where the monopolist has a duty to deal, the words "however labeled" cannot mean what Abbott says. "However labeled," in context, means that simply labeling a claim as "monopoly leveraging" is not sufficient to avoid the holding of *linkLine*. These two words do not swallow up *sub silentio* the limiting language of *Doe* and *linkLine* discussed above.

Here, GSK introduced sufficient evidence for a jury to find a duty to deal on Abbott's part and violation of that duty. GSK's evidence tracks the leading duty to

deal case, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985),[11] where the Court held that a monopolist or putative monopolist will incur liability if it changes a long-standing course of conduct, adopted in a competitive market, in order to handicap its competitors. *Id.* at 596-97, 603-05. After an extensive review of the record, the Court affirmed the jury's finding of liability, holding sufficient evidence supported the conclusion that the defendant's actions "impaired competition in an unnecessarily restrictive way." *Id.* at 604, 605; *see id.* at 603-11.

The relevant facts in *Aspen Skiing* parallel the evidence here in all material respects.

- In *Aspen Skiing*, the plaintiff demonstrated a duty to deal by showing the monopolist had a long-standing, voluntary, and profitable practice of offering multi-day, all-area lift tickets that included plaintiff's resort, with revenues split based upon usage. *Id.* at 589-591. Here, GSK introduced comparable evidence, showing Abbott's long-standing, voluntary, and profitable pattern of encouraging,

[11] *linkLine* reaffirmed *Aspen Skiing*. 555 U.S. at 439 ("There are … limited circumstances in which a firm's unilateral refusal to deal with its rivals can give rise to antitrust liability.") (citing *Aspen Skiing*, 472 U.S. at 608-611).

cooperating with, and licensing competitors to promote Norvir for use with their HIV drugs, with stable price increases limited to inflation.[12]

- In *Aspen Skiing*, the defendant violated its duty to deal by making the plaintiff an unattractive offer to continue the all-area ticket based on a fixed revenue split, then refusing to cooperate with various efforts by the plaintiff to design a substitute package, and, finally, increasing its single-day ticket price and lowering its multi-day ticket price to make it "prohibitively expensive" for the plaintiff to sell a multi-day pass that included traveler's checks for use at the defendant's resorts. *Id.* at 592-595, 607-08. Here, Abbott violated its duty to deal by abandoning its practice of inflation level price increases and abruptly hiking the price of Norvir just after GSK launched Lexiva to compete with Kaletra. GSK introduced evidence that Abbott's actions made it prohibitively expensive to respond to the price hike because of a combination of the magnitude of the price hike in relation to the price

[12] Consistent with the culture of cooperation in the community (Second Br. at 11-12), and despite its awareness that Norvir's use had changed such that it was principally being used as a booster, Abbott had for years taken price increases on Norvir only near the rate of inflation, SER-81:17-23, SER-164:11-17, SER 182:13-16, SER-189:1-18. In addition, Abbott licensed all of its competitors – even though doing so would allow them to compete against Kaletra. SER-119 (30:18-31:16), SER-121 (39:22-40:14); *see also* SER-63:19-22. This course of conduct made Abbott hundreds of millions of dollars. SER-186:3-10; SER-187:11-188:15; *see* SER-49 (119:17-22).

of Kaletra, the timing of the price hike, and government pricing rules. SER-151:10-152:10, GSK's Further Excerpts of Record ("FER") 26:21-27:20, FER-48:12-51:17, FER-75:14-76:13, FER-79:17-82:14. Indeed, it was uncontroverted that the Norvir price hike increased the daily cost of boosted Lexiva to a 75% premium over Kaletra, SER-166:10-167:6, and that government rules made it irrational for GSK to respond by cutting Lexiva's price.[13] FER-50:1-51:10, FER-76:4-13, FER-80:5-82:19.

Like the record in *Aspen Skiing*, abundant evidence demonstrated anticompetitive motivation and resulting action that "impaired competition in an unnecessarily restrictive way" (472 U.S. at 604-05).[14] Consumers paid more for

[13] Under its rules, the government pays at or below what private parties pay, does not accept price increases that exceed inflation, and extracts a penalty when prices to private parties are raised more than inflation. Any price decrease by GSK would necessarily have to be given to public payers, even though Abbott could not inflict the 400% Norvir price hike on public payors. Thus, GSK would be required to take a price cut in the public sector that was unnecessary to maintain price parity there. FER-50:1-51:10, FER-76:4-13, FER-80:5-82:19. The resulting loss in revenue would exceed the benefit from additional sales generated by the lower price in the private sector. *Id.*

[14] For example, Abbott began considering ways to use Norvir to suppress competition for Kaletra after its CEO told executives that he did not believe the company had a plan in place to "defend and grow [Abbott's] turf." SER-59:8-60:10. Abbott's head of pharmaceuticals then asked his subordinates "to think about ways to constrain the supply of Norvir," SER-46:17-21, to help Kaletra. SER-102:9-103:7, SER-602-605; *see also* SER-607-608. Abbott spent over a year plotting, including repeatedly considering closing its ritonavir manufacturing line

boosted PI regimens and were pushed into less-than-ideal therapies. SER-200:25-203:1, SER-204:1-7, SER224:9-226:21, FER-83:12-89:1. Kaletra maintained its market dominance for years while Lexiva suffered a devastating loss of market share from pre-price hike expectations. SER 194:2-11 (econometric analysis showed price hike reduced decline in Kaletra's market share "by between one and two percentage points per month for two years [after the price increase]")[15]; FER-6:17-14:13, FER-52:3-57:19, FER-58:10-60:22, FER-61:20-63:21, FER-65:8-14, FER-68:11-74:5.

Abbott seeks exoneration because it did not refuse outright to sell Norvir. Third Br. at 35-36. But, as this Court and the trial court have stated, an absolute refusal to deal is unnecessary. *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1132 (9th Cir. 2004) ("An offer to deal with a competitor only on unreasonable terms and conditions can amount to a practical refusal to deal."); ASER-414:13-16. Indeed, *Aspen Skiing* itself refutes this argument, as the

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or leaving only a liquid form of Norvir on the market, which tasted "really bad," SER-104:15-24, SER-464, before settling on a "mega price increase" as the solution. SER-471. Extensive evidence showed that Abbott considered the "mega price increase" equivalent to withdrawal, which Abbott avoided because of regulatory risks. SER-98:8-12, SER-104:25-105:3, SER-106:1-6, SER-388, SER-471. Moreover, the self-proclaimed "architect of the price hike" considered its timing shortly after GSK's launch of Lexiva to be a "clever, creative way to make [GSK] look bad." SER-485.

[15] *See also*, SER-116:5-117:16, SER-192:21-194:11, SER-200:25-205:3, SER-225:9-226:2, SER-66:20-70:1, SER-112:12-18, SER-140:8-141:23, SER-142:1-155:14.

monopolist there effectuated its anti-competitive plan through pricing changes. *Aspen Skiing*, 472 U.S. at 592-94 & n.15, 607-08, 610.

(ii) The jury could have found that Abbott engaged in unlawful bundled discounting.

The evidence also supports a second theory of anti-competitive conduct: unlawful bundled discounting under *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2007). Abbott does not dispute that the jury could have properly concluded that Abbott flunked *Cascade*'s "discount attribution test" by its differential pricing of ritonavir when sold as Norvir versus bundled in Kaletra. Abbott argues instead that this theory of liability fails as a matter of law because *Doe* abrogated *Cascade*. But *Doe* did not overrule *Cascade*, which remains good law. *See, e.g., Blue Sky Color of Imagination, LLC v. Mead Westvaco Corp.*, No. 10-02175, 2010 WL 4366849 (C.D. Cal. Sept. 23, 2010) (denying motion to dismiss because complaint alleged bundled pricing scheme violated *Cascade* test); *Retail Imaging Mgmt. Group, LLC v. Fujifilm N. Am. Corp.*, 841 F. Supp. 2d 1189 (D. Or. Jan. 30, 2012) (complaint alleged viable bundled discounting claim under *Cascade*).

Nor does *linkLine* overrule *Cascade.* Bundled discounting was not before the Court. *linkLine*, 555 U.S. at 455 (grant of *certiorari* "limited to" whether certain price squeeze claims were cognizable). Nor did the Court suggest, as Abbott insinuates, that its discussion of a "transfer price test" for price squeeze

claims altered circuit law on a separate theory of anti-competitive conduct. Responding to Abbott's argument, the district court aptly observed: "The Court will not disregard controlling Ninth Circuit precedent based on inapplicable Supreme Court dicta." ASER-409:12-13. This Court should respond likewise.

(b) Substantial Evidence Supports A Finding That Abbott Maintained Monopoly Power, Or Had A Dangerous Probability Of Doing So, Due To Its Anti-Competitive Conduct.

Abbott fares no better when it argues that, as a matter of law, it lacked monopoly power in the relevant market in which Kaletra competes or a dangerous probability of achieving or maintaining such power. Abbott concedes that, for purposes of this argument the relevant market is the market for highly effective boosted PIs. Third Br. at 41. Using this definition, at the time of the price hike,[16] Abbott had 80% of the market, and it did not fall below 50% for almost three years. FER-38:5-12, FER-42:1-12. As economic expert Professor Roger Noll explained, in a product differentiated market such percentages show that Abbott had monopoly power at the time of the price hike in December 2003 and maintained that power through at least the end of 2006. FER-35:22-37:8, FER-

[16] The relevant time for assessing Abbott's monopoly power, or dangerous probability of achieving or maintaining same, is December 2003 when the allegedly anti-competitive conduct occurred. *Oahu Gas Serv., Inc. v. Pac. Res., Inc.*, 838 F.2d 360, 362-63, 366-68 (9th Cir. 1988) (limiting inquiry into defendant's monopoly power to the years in which the alleged anticompetitive conduct took place); *United States v. Am. Airlines, Inc.*, 743 F.2d 1114, 1118 (5th Cir. 1984).

38:5-12, FER-41:17-43:1; *see also* FER-30:3-32:14. Abbott's purported 65% threshold (Third Br. at 41) misstates the law. *Syufy Enters. v. Am. Multicinema, Inc.*, 793 F.2d 990, 995-96 (9th Cir. 1986) (monopoly power can be maintained where market share is as low as 45% when other "factors" are present, including a party's "acknowledged control over the supply market" and barriers of entry) (citation omitted). And, this Court has stated that, for an attempt claim, only a market share below 30% is "presumptively insufficient" to establish a dangerous probability of achieving market power. *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir. 1995).

GSK also proffered evidence of barriers to entry and expansion. As Dr. Noll explained, the requirements of patents, research and development, FDA approval, and Abbott's Norvir price hike itself (by deterring profitable entry) were barriers to entry. FER-39:12-41:7. Focusing on barriers to expansion (Third Br. at 43) likewise does not aid Abbott. Barriers to expansion are relevant because they can serve to prevent an existing competitor from constraining a monopolist. *See Rebel Oil*, 51 F.3d at 1439, 1441. Dr. Noll explained how the market here differs from the gasoline market in *Rebel Oil* due to product differentiation, enabling a monopolist to avoid being constrained by the possibility of rivals' output expansion. FER-30:6-32:14. He further explained that Abbott's control over

Norvir served as a barrier to expansion, something the district court also recognized. FER-32:4-8; ER-375:26-376:1.

Finally, the decline in Abbott's share does not preclude a jury from finding monopoly power. *Oahu Gas Serv.*, 838 F.2d at 367 (answering "yes" to "the question … [of] whether the jury could reasonably have found that a firm with a consistently high, albeit declining, market share in a market with high barriers to entry possessed monopoly power."). Abbott's citation to *United States v. Syufy Enters.*, 903 F.2d 659 (9th Cir. 1990), is misplaced. Assessing a textbook example of an industry with low barriers to entry, *Syufy* affirmed a judgment for the defendant, citing evidence that it had not raised prices and that, within two years of the merger at issue, a competitor had entered and outperformed the defendant by one key measure of market share. *Id.* at 666-67, n.11. Those conditions are not present here. FER-39:12-41:7 (discussing barriers to entry); FER-30:6-32:14 (same); FER-43:2-45:23 (Abbott maintained 50% market share for three years); ER-2:16-3:16, ASER-507-509 (cataloguing Kaletra price increases from 2005-2006).

Abbott seemingly believes it cannot be found liable unless it maintained monopoly power indefinitely. That is incorrect. If Abbott "acquired, enhanced or maintained" its monopoly power through anticompetitive means, it violated Section 2 of the Sherman Act. ABA Section of Antitrust Law, Antitrust Law

Developments (7th Ed. 2012) at 225 (citing *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004)); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 57 (D.C. Cir. 2001) (long term market conditions irrelevant; issue is near term constraints on power of monopolist). Ample evidence exists to allow a jury to find for GSK on this point.

2. GSK's UDTPA Claim Does Not Fail As A Matter Of Law

Abbott makes three faulty arguments to conclude that GSK's UDTPA claim fails as a matter of law. Abbott first asserts, incorrectly, that GSK's claim cannot survive if its breach of contract claim fails. *See* Third Br. at 44. As demonstrated by *South Atlantic Ltd. Partnership of Tennessee v. Riese*, 284 F.3d 518, 540 (4th Cir. 2002) ("*SALT*"), UDTPA liability between contracting parties can attach even absent a breach if one party's "exploitation of its rights under the [contract] is sufficiently egregious …."

Second, Abbott asserts wrongly that GSK's claim "rises or falls with GSK's antitrust claim." Third Br. at 44. Abbott cites no cases for this proposition, and North Carolina law refutes it. As with many state unfair competition statutes, antitrust violations are only one way of violating the UDTPA. *L.C. Williams Oil Co. v. Exxon Corp.*, 625 F. Supp. 477, 481 (M.D.N.C. 1985). Abbott can violate the UDTPA by any "inequitable assertion of power" between the parties, not just power which is market-based, *SALT*, 284 F.3d at 539 (quotation omitted), as well

as by engaging in unscrupulous behavior, *see Marshall v. Miller*, 276 S.E.2d 397, 403 (N.C. 1981). Substantial evidence supports the proposition that Abbott engaged in such behavior.

Abbott's final assertion effectively asks this Court to construe Abbott's behavior in its most favorable light. Third Br. at 44-45. Ample evidence showed that Abbott decided to use the price hike, rather than withdrawal, to constrain Norvir's supply. SER-104:25-105:3; SER-98:8-12, SER-106:1-6, SER-388, SER-471. And, Abbott's year-long discussion of how to use Norvir to harm the ability of its licensees to promote their licensed products is hardly "ordinary" business-related conduct, as Abbott claims. *Cf. Tar Heel Indus., Inc. v. E.I. DuPont de Nemours & Co.*, 370 S.E. 2d 449, 452 (N.C. Ct. App. 1988) (no facts showing unfair or deceptive trade practices in terminating contract).

3. GSK's Implied Covenant Claim Does Not Fail As A Matter Of Law

GSK set out the reasons why substantial evidence supports GSK's implied covenant claim in its previous brief. Second Br. at 49-68.[17] Abbott devotes scant attention to this claim in the "alternative argument" section of its Opposition,

[17] Additional deference must be afforded to GSK with respect to this claim because the jury found for GSK. *See Cross v. N.Y. City Transit Auth.*, 417 F.3d 241, 248 (2d Cir. 2005) ("Under such circumstances, the district court may set aside the verdict only where there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture ….") (quotation and citations omitted).

instead directing the Court to 15 pages of argument from its Opening Brief and the "reply" section of its Opposition Brief. *See* Third Br. at 44. But, Abbott's interpretation of the evidence permeates those arguments. *See, e.g.*, First Br. at 32, 43-44; Third Br. at 54 (addressing Lexiva's sales but ignoring evidence that its market share fell far short of expectations and Lexiva's high marginal costs).[18] This dooms Abbott's argument.

Abbott's principal argument now seems to be that the evidence does not demonstrate it rendered the license "commercially worthless" to GSK by manipulating the price of Norvir . Third Br. at 54-56. But, this is not required. Under New York law, as Abbott concedes, the implied covenant "embraces a pledge that neither party shall do anything which will have the effect of destroying *or injuring* the right of the other party to receive the fruits of the contract." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 773 N.E.2d 496, 500 (N.Y. 2002) (quotation omitted) (emphasis added). There is no question that the evidence was sufficient for the jury to conclude, as it did, that Abbott harmed GSK's efforts to promote Lexiva by manipulating the price of Norvir in order to protect Kaletra from competition. While Abbott correctly notes the Federal Circuit's use of the words "commercially worthless" in *Jacobs v. Nintendo of Am., Inc.*, 370 F.3d

[18] The record shows that GSK invested approximately $750 million just to develop Lexiva, ER-291:12-14, and had relatively high manufacturing costs, SER-168:17-21. Likewise, the record contains evidence that Lexiva's peak market share was roughly 50% of pre-price hike expectations. FER-61:20-62:6, FER-63:22-64:7.

1097, 1101 (Fed. Cir. 2004), to explain that a licensor undertakes certain obligations when it licenses its patents, the Federal Circuit did not purport to be reciting the standard for liability under New York law (or any other state's). Applying the correct standard, as the jury instructions do, there is ample evidence for GSK to prevail.

The remainder of Abbott's argument improperly ignores the evidence supporting GSK's claim and indulges in inferences favorable to Abbott. For example, Abbott's contention that its price increase was not intended to be a weapon against Lexiva (Third Br. at 55) cannot support an argument for judgment as a matter of law. Abbott proffers its own interpretation of damning documents,[19] but, Abbott's innocuous explanations cannot be credited in this procedural posture, and the jury was free to, and this Court must, ignore the marginal, self-serving evidence Abbott cites. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000) (holding that credibility determinations are jury functions and a court ruling on an issue as a matter of law "must disregard all evidence favorable to the moving party that the jury is not required to believe") (citation omitted).

Abbott also continues to set up straw men this Court should disregard. Abbott contends that taking GSK's argument to its logical conclusion demonstrates "its unreasonableness" because it would, according to Abbott, arguably prohibit a

[19] SER-413, SER-485.

marketing campaign promoting Kaletra. Third Br. at 56-60. Of course, that is not GSK's argument. GSK's claim stems from Abbott's use of the licensed drug (Norvir) as a weapon to hinder the very efforts that Abbott was handsomely compensated to license. GSK has never argued that a reasonable party in GSK's position would expect Abbott not to use its best efforts to trumpet Kaletra. And, of course, there is ample evidence to support the reasonableness of GSK's expectation that Abbott would not use its control over Norvir as a weapon to interfere with GSK's efforts to promote Lexiva in competition with Kaletra. *See* Second Br. at 12-13, 52-53. This argument, like Abbott's others, does not support its contention that it is entitled to judgment as a matter of law on GSK's implied covenant claim.[20]

III. THIS COURT SHOULD DIRECT ENTRY OF JUDGMENT IN FAVOR OF GSK ON ITS UDTPA CLAIM

In rebuttal to GSK's argument that this Court should reverse the district court's conclusion that Abbott did not violate the UDTPA, Abbott first contends that GSK waived the theories on which it asks this Court to rule in its favor and,

[20] Abbott's arguments regarding the limitation of liability clause, Third Br. at 60-73, have no bearing on Abbott's effort to supply an alternative basis for affirmance. Abbott concedes that the limitation of liability clause would not protect Abbott if it intended to harm GSK. First Br. at 49-50; Third Br. at 62. Abbott never argues that the evidence was insufficient for a jury to make such a finding and, indeed, there was an abundance of such evidence. *E.g.*, SER-46:17-21, SER-102:9-105:22, SER-106:1-108:25, SER-414-416, SER-418, SER-430-440, SER-445- 450, SER-471; SER-485-86, SER 566-569, SER-602-605.

second, that, given the jury's findings, Abbott's is a "simple breach of contract" to which no UDTPA liability attaches. Third Br. at 46. Both contentions fail.

First, as discussed previously (Second Br. at 47-48), GSK did not waive its argument that the jury's verdict could give rise to a UDTPA claim even if it found for GSK only on questions related to "grossly negligent conduct" and Abbott's non-disclosure of its plans to use Norvir to torpedo its licensees. *See* ER-75-76. Abbott's authority is inapposite. In the only case Abbott cites, the court found waiver where a question was not asked at all and the party did not object to its lack of inclusion in the jury instructions. *Aetna Casualty Surety Co. v. P&B Autobody*, 43 F.3d 1546, 1555 (1st Cir. 1994). Here, the questions upon which GSK relies are in the verdict form. GSK cannot be deemed to have waived its claim because the district court sought not to repeat itself in the "Additional Questions" section.[21]

Abbott's second contention fails because, as Abbott concedes, a violation of the UDTPA will be found where there are "substantial aggravating circumstances," including "deception either in the formation of the contract or in the circumstances of its breach." Third Br. at 48. The jury found each one here. It found that Abbott deceived GSK during the license negotiations by deliberately withholding Abbott's

[21] That there was no waiver here can also be seen from Abbott's acknowledgement that proof of an antitrust violation would suffice to find Abbott violated the UDTPA. Third Br. at 44. Unsurprisingly, the court did not ask a separate question about monopolization in the "Additional Questions" section of the verdict form.

consideration of ways to use its control over Norvir to limit Kaletra's competition. And, contrary to Abbott's assertion, the jury determined the price hike to be a vehicle for suppressing competition when it found Abbott to have engaged in "intentional wrongdoing" or "reckless indifference" to GSK's rights. ER-75-76. The jury further concluded that the latter misconduct harmed GSK. ER-75.

These findings together amount to the "extreme facts" on which Abbott suggests other courts have imposed liability. The district court here erred in not following those cases. Abbott briefly discusses the cases GSK cited for this proposition (Second Br. at 45-46), but fails to address the parallels to its behavior. For example, just as the car dealer in *Huff v. Autos Unlimited, Inc.*, 477 S.E.2d 86 (N.C. Ct. App. 1996), deceived the plaintiff by selling a car as reliable when it knew the car had been wrecked, Abbott deceived GSK by licensing rights to use Norvir to promote boosted Lexiva when Abbott planned to use (and ultimately did use) control of Norvir to undermine that license. Indeed, if the "exercise of a clear contractual *right* … may violate the UDTPA," as Abbott acknowledges (Third Br. at 50), Abbott's *breach* of a contract right, which the jury found amounted to "intentional wrongdoing" or "reckless indifference" with attendant deception, surely also violates the UDTPA.[22]

[22] Abbott spends only one sentence addressing the district court's primary reason for rejecting GSK's claim: that the jury's factual findings do not "speak to the breach's impact on the marketplace." ER-21; *see* Third Br. at 49. As noted, if

CONCLUSION

For the reasons set forth herein and in GSK's Second Brief, this Court should order a new trial on all causes of action. Alternatively, this Court should direct the district court to enter judgment for GSK on its UDTPA claim.

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Respectfully submitted,

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the acts between a car dealership and an individual satisfy an "impact" requirement, a national five-fold price increase by a large pharmaceutical company on a key HIV drug also does. Further, Abbott does not seriously address the issue of proximate causation. That is not surprising given that Abbott's own cases recognize that deception need not have proximately caused the injury, *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 534 (4th Cir. 1989) ("One need not show that he was actually deceived to prevail under the Act….").

CERTIFICATE OF COMPLIANCE

This brief is accompanied by a motion for permission to exceed the type-volume limitation. The current brief contains 11,000 words. I relied on Microsoft Word 2010's word count function to calculate this figure.

I certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point.

July 27, 2012

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