Nos. 11-17357, 11-17373

In the United States Court of Appeals for the Ninth Circuit

SMITHKLINE BEECHAM CORP. 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, NO. 4:07-CV-5702
HON. CLAUDIA WILKEN, PRESIDING

THIRD BRIEF ON CROSS-APPEAL OF DEFENDANT-APPELLANT AND CROSS-APPELLEE ABBOTT LABORATORIES

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APPELLEE'S BRIEF ON GSK'S CROSS-APPEAL

INTRODUCTION

GSK sued Abbott alleging antitrust, unfair competition, and breach of contract claims and seeking billions of dollars in damages. After a 15-day trial, the 10-member jury rejected nearly all of GSK's claims. The jury found Abbott liable only for purported breach of an "implied covenant" and awarded $3.5 million in damages. On appeal, GSK does not identify a single error in the instructions or any lack of evidence to support the jury's rejection of GSK's claims. GSK's sole basis for seeking a new trial is that Abbott exercised a peremptory challenge against an apparently gay prospective juror. This Court should reject GSK's argument.

No court has extended *Batson v. Kentucky*, 476 U.S. 79 (1986), to claims of sexual-orientation discrimination. Neither the Supreme Court nor this Court has recognized sexual orientation as a suspect or quasi-suspect classification under the Equal Protection Clause, which would be a prerequisite for extending *Batson*. And neither court has endorsed GSK's novel and far-reaching substantive due process theory. Moreover, GSK does not address how courts properly could require prospective jurors to disclose their sexual orientations—as courts would need to do to meaningfully evaluate *Batson* challenges.

This Court also need not and should not reach the question of *Batson*'s scope. GSK did not establish a prima facie case of intentional discrimination. Several other reasons for striking the prospective juror are apparent, including that he was unique for having (1) a job at the Ninth Circuit, (2) had friends who died of HIV, and (3) heard of one of the two Abbott drugs at issue.

This Court also need not reach the *Batson* question because Abbott's Rule 50(a) motion for judgment as a matter of law should have been granted before GSK's claims were ever submitted to the jury—rendering any *Batson* challenge irrelevant. First, the antitrust claims fail as a matter of law for the reasons stated in *John Doe 1 v. Abbott Labs.*, 571 F.3d 930 (9th Cir. 2009), where this Court rejected a substantively identical challenge to the very same Abbott pricing conduct brought by retail purchasers of Abbott's HIV drugs. *Doe*'s holding that "Abbott's conduct is the functional equivalent of the price squeeze conduct that the [Supreme] Court found unobjectionable in [*Pac. Bell Tel. Co. v.*] *linkLine* [*Commc'ns, Inc.*, 555 U.S. 438 (2009)]" also disposes of the antitrust claims here. *Id.* at 935. Second, GSK's North Carolina Unfair and Deceptive Trade Practices ("UDTPA") claim fails along with its federal antitrust claims. Third, the implied contract claim fails as a matter of law for the reasons stated in Abbott's initial brief.

STATEMENT OF ISSUES

1. Whether GSK made a prima facie showing of discrimination where voir dire had revealed several neutral reasons for striking an apparently gay juror, and where no federal court has ever held that *Batson* applies to sexual orientation.

2. Whether GSK's *Batson* argument is irrelevant because the case never should have been submitted to the jury.

3. Whether the district court properly entered judgment in Abbott's favor on GSK's UDTPA claim where the jury rejected the theory of liability GSK pursued throughout the trial and where GSK crafted a new theory after the jury verdict based on the jury's finding of a breach of the implied covenant of good faith and fair dealing.

STATEMENT OF ADDITIONAL FACTS

A. Facts Relevant to *Batson* Arguments

Prior to jury selection, prospective jurors filled out questionnaires.[1] Appellant's Supp. Excerpts of Record ("ASER") 354-359; ASER-200. Using these questionnaires, the court conducted the majority of voir dire; each side was permitted approximately 20 minutes for follow-up. ASER-362. After challenges for cause, the court identified 17 eligible jurors. ASER-317. The court allotted

[1] The district court allowed counsel to review the completed questionnaires but did not give them copies. The questionnaires were not docketed.

Abbott three peremptory challenges and plaintiffs four. *Id.*; ASER-369. The remaining 10 jurors were seated.

Abbott used its first peremptory challenge against Juror B. Juror B had stated he worked for the Ninth Circuit on computers and that he knew "a lot of people in the legal field from [his] job." ASER-222-224. Responding to the court's question about knowing someone involved in accounting or economics, Juror B replied "[j]ust my partner," and once referred to his partner as "he." ASER-223. Asked whether he was "close to someone who's been diagnosed with H.I.V.," Juror B answered, "Well, I've had friends in the past." ASER-224. Juror B did not state that he had any friends who were still living with HIV, or give any other information inconsistent with the inference that the "friends in the past" had died of AIDS. Responding to questions from Abbott's counsel, Juror B testified he had heard of Abbott's drug Kaletra, although he did not know whether anyone in his circle was taking it or the other drugs at issue. ASER-307-308.

None of the other 17 eligible jurors worked at this or any other court. None said he or she had lost friends to AIDS or had heard about any drug at issue.[2] Only one, Juror P, had friends with HIV. ASER-256. On further questioning by

[2] Two others questioned during voir dire, who were not ultimately among the 17 eligible jurors, also knew people who had died from AIDS. ASER-219-220; 279-281.

Abbott's counsel, Juror P stated she knew her friends "are on medications," but did not know the specific medications. ASER-312.

Plaintiffs[3] objected to Abbott's challenge to Juror B. Plaintiffs argued that Juror B "is or appears to be, could be homosexual," and that Abbott had used "the peremptory challenge in a discriminatory way" because "the litigation involve[d] AIDS medications" and "it looks like Abbott wants to exclude from the pool anybody who is gay." ASER-319-320. The court denied the challenge, providing three reasons. First, the court questioned "whether *Batson* applies [in] civil [trials]." ASER-320. Second, the court questioned "whether *Batson* ever applies to sexual orientation." *Id.* Third, the court explained: "[T]he evil of *Batson* is not that one person of a given group is excluded, but that everyone is. And there is no way for us to know who is gay and who isn't here, unless somebody happens to say something. There would be no way to analyze it." *Id.*

The court then offered Abbott's counsel a choice: explain the bases for the strike or stand on the court's three reasons for denying the challenge. *Id.* Abbott's counsel elected to stand solely on the court's reasons, stating: "I will stand on the first three, at this point Your Honor. I don't think any of the challenge applies. I have no idea whether he is gay or not." *Id.* The court then ruled that it would permit the peremptory "for now," but told Plaintiffs' counsel "[i]f somehow all

[3] Class plaintiffs settled after opening statements.

three of their challenges are all gay men, then you can raise it again. . . . Although, I don't know how we will know." ASER-321.

Plaintiffs exercised their four peremptory challenges against four men. *Id.* Abbott exercised its remaining two challenges against two women. *Id.* Although nothing in the testimony of these other two jurors suggested anything about their sexual orientation, ASER-214-215, 290, 307, plaintiffs' counsel made a second *Batson* objection to the final Abbott peremptory, claiming the stricken juror was "also homosexual." ASER-322. The court responded, "I don't know how you would draw that conclusion." Counsel replied, "[f]rom the demographics and where she --." *Id.* The court overruled the objection, stating "I have no knowledge of whether she's a lesbian or isn't." *Id.* GSK has not appealed this purported *Batson* claim.[4]

B. Facts Relevant to Antitrust Arguments

Abbott sells two HIV medications, Norvir and Kaletra. Norvir's active ingredient is ritonavir. *E.g.*, SER-166. When absorbed into the bloodstream at a high concentration requiring 12 pills per day, ritonavir acts as a protease inhibitor ("PI"). *E.g.*, ER-180-181, 223-225, 326-327, 415; SER-215-216. But ritonavir is now used almost exclusively at small blood concentrations that most commonly

[4] *See, e.g., AE ex rel. Hernandez v. County of Tulare*, 666 F.3d 631, 638 (9th Cir. 2012) (claim not "specifically and distinctly" argued in opening brief is waived).

require taking just one pill per day to boost the effectiveness of other PIs. ER-180-81; ASER-415. One such PI is the active ingredient in GSK's Lexiva. Another is lopinavir. Abbott sells a formulated drug product called Kaletra, which contains both lopinavir and ritonavir. ASER-80.

When Abbott introduced Kaletra in September 2000, it priced a daily dose at $18.01. *See* ASER-509 (Kaletra priced at $3.0093 per capsule); ASER-64 (six-capsule daily dosage). After modest price increases, by December 2003, Abbott's price for a daily dose of Kaletra was $18.76. ASER-143. When GSK introduced Lexiva in November 2003, GSK priced the most common boosted daily dose (two pills) at $16.00, which would be taken with a then-recommended boosting dose of two Norvir pills, bringing the total daily price of the treatment to $19.42. ASER-171; ASER-29. By July 2010, Abbott had raised its price for a daily dose of Kaletra to $23.40. ER-415. By the same time, GSK had raised its price for a daily dose of the Lexiva portion of a boosted Lexiva regimen (not including the price of the Norvir used for boosting) to $24.16. *Id.*[5]

GSK alleged that, in repricing Norvir for non-Medicare/Medicaid usage from $1.71 to $8.57 per capsule in December 2003 without also increasing the price of Kaletra, Abbott sought to incentivize doctors not to switch their privately

[5] All prices are Wholesale Acquisition Cost (WAC) prices, which refer to the prices charged to wholesale purchasers of the drugs for non-Medicare/Medicaid usage and are the pricing statistics on which both sides relied in the district court.

insured patients from Kaletra to the more expensive Lexiva plus Norvir regimen, and not to prescribe Lexiva plus Norvir to new patients.[6] Abbott did not—indeed, could not—increase the price of Norvir for Medicare/Medicaid usage, and Abbott made the drug available for free under its patient assistance program to every uninsured patient, regardless of financial need. ER-178-179; ASER-98-100.[7]

GSK's antitrust claims were for monopolization or attempted monopolization of a market that GSK defined as a subset of boosted PIs. GSK never argued that Abbott's increased pricing of Norvir constituted illegal monopolization of a market for *boosters* of PIs (Norvir is the only one currently) without regard to the alleged effects of that price increase on *boosted* PIs.[8] ER-392. GSK's own economics expert conceded that such a claim would not have been economically justified. ASER-177-178 ("If there's no implications for other

[6] GSK did not show that any other protease inhibitor boosted by Norvir was significantly impacted by the Norvir repricing. For example, the leading competitor, Reyataz, was introduced about four months before Lexiva, in July 2003. ASER-48, 101-102, 109. By July 2010, Reyataz had more prescriptions than Kaletra. ER-418. Likewise, in 2006, another boosted protease inhibitor called Prezista entered the market. ASER-186. A 1200 mg daily dose of Prezista was initially priced at $25.00 (not counting the Norvir taken with it). *Id*. By July 2010, doctors were prescribing Prezista more than they were prescribing Lexiva, although not as much as they were prescribing Reyataz. ER-418.

[7] GSK also did not show a differential in doctors' prescribing behavior for Lexiva based upon whether the patient was privately insured.

[8] The direct purchaser plaintiffs (who subsequently settled) had made such a claim but the district court entered summary judgment in Abbott's favor on that claim. ER-392-393.

markets, then you can do whatever you want."). Thus, there was no challenge to Abbott's unilateral right to raise the price of Norvir. GSK's sole antitrust contention was that Abbott was improperly favoring its boosted PI, Kaletra, over one of the other available boosted PIs, Lexiva, by not maintaining a sufficient price differential between Norvir and Kaletra for privately insured patients.

C. Procedural History Relevant to Antitrust and UDTPA Claims

Before GSK sued, a class of Norvir users and health insurers brought antitrust claims challenging the same pricing conduct as GSK challenges. This Court considered the viability of those claims in *John Doe I v. Abbott Labs.*, 571 F.3d 930 (9th Cir. 2009), in which GSK appeared as an *amicus*. ASER-448-479. Finding that "Abbott's conduct is the functional equivalent of the price squeeze the [Supreme] Court found unobjectionable" in *Pacific Bell Telephone Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438 (2009), this Court held that the plaintiffs' "claim falls short" because "[t]hey allege no refusal to deal at the booster level [Norvir], and no below cost pricing at the boosted level [Kaletra]." *Doe*, 571 F.3d at 935.

Because GSK's antitrust claims here targeted the very same pricing conduct found lawful in *Doe*, Abbott moved to dismiss. ASER-418-447. When the district court denied the motion, ASER-400-417, Abbott sought mandamus review. Although this Court found that Abbott's petition warranted a response, ASER-398-399, the Court ultimately denied review, explaining that mandamus is unavailable

to correct a district court decision that was contrary to this Court's decision in a *related* case—as opposed to an earlier mandate in the *same* case. ASER-396-397. Thus, this Court did not address whether *Doe* foreclosed GSK's antitrust claim.

In the district court, GSK insisted that its antitrust theories differed from those rejected in *Doe*, because GSK labeled Abbott's pricing of Kaletra in relation to Norvir a "refusal to deal" in Norvir under *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), and bundled discounting of Kaletra under *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008). *See* ER-351. The district court agreed and thus denied Abbott's motions for summary judgment. GSK also proceeded to trial on an unfair competition claim, arguing that Abbott committed three acts that violated North Carolina's UDTPA: (1) deliberately withholding its consideration of plans to use Norvir to limit competition; (2) "inequitably" asserting power over Norvir by increasing its price to disrupt Lexiva's launch; or (3) timing that price increase to do the same. ASER-383-395; 380.

At the close of evidence, Abbott sought judgment as a matter of law under Rule 50(a). ER-133-166. The court deferred ruling on that motion and the jury returned a verdict for Abbott on the antitrust claims on the threshold basis that GSK's market definition was too narrow, and a verdict for GSK on the contract claim. ER-72-75. As to the UDTPA claim, the jury found that Abbott had not

committed the second or third alleged act, and that the first act caused GSK no injury. ER-76-77. Based on the jury's verdict, the district court entered judgment for Abbott on the UDTPA claim. ER-17-22.[9]

SUMMARY OF ARGUMENT

No court has extended *Batson* to claims of sexual orientation discrimination. The Supreme Court has made clear that "[p]arties may . . . exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review" under the Equal Protection Clause, *J.E.B. v. Ala. ex. rel. T.B.*, 511 U.S. 127, 143 (1994), and this Court held in *Witt v. Dep't of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008), that rational basis review applies to equal protection challenges based on sexual orientation classifications.

GSK attempts to avoid this by arguing that there is a substantive due process right to engage in private homosexual sexual activity. But no court has ever endorsed applying *Batson* to particular groups of people based on substantive due process rights, and this Court and others have specifically held that *Batson* does not apply to a variety of groups of people despite the fact that members of those groups have (or are more likely to have) exercised various due process rights.

[9] After denying Abbott's Rule 50(b) motion on the contract claim, the Court entered judgment for GSK on that claim. That judgment is the subject of Abbott's appeal and is not at issue in GSK's cross-appeal.

Further, extending *Batson* to sexual orientation would present significant implementation problems. Sexual orientation is far less likely to be apparent than race or gender, and inquiry into prospective jurors' sexual orientation would be intrusive and offensive to many. Courts would be hard-pressed to evaluate *Batson* challenges, and to conduct meaningful comparative juror analysis, without information about the sexual orientations of all prospective jurors.

In any event, this Court may follow the well-established principle of avoiding unnecessary constitutional questions because GSK has not made a prima facie showing of discrimination. There were independent legitimate reasons for striking Juror B. He was the only eligible juror who: (1) worked for this Court; (2) had friends (or relatives) who apparently had died from HIV/AIDS; or (3) indicated he had heard of a drug at issue. Each of these facts independently warranted striking Juror B. Nothing Abbott's counsel said suggested discrimination or bias. Abbott asked no one about sexual orientation, and its voir dire to Juror B was similar in scope and kind to its questioning of other prospective jurors.

Further, this Court need not reach the *Batson* issue for the additional reason that GSK's claims should never have been submitted to a jury, which makes jury selection irrelevant. Abbott was entitled to judgment as a matter of law at the close of evidence on GSK's antitrust claims because GSK's theories of anticompetitive

conduct were precluded by this Court's rejection of substantively identical challenges to Abbott's pricing conduct in *John Doe 1*, 571 F.3d 930. Abbott's rapidly falling market share also precluded as a matter of law any finding that Abbott possessed the monopoly power that was a prerequisite to all of GSK's antitrust claims. GSK's UDTPA claim fell with its flawed antitrust claims. Finally, GSK's implied covenant claim failed for the reasons shown in Abbott's opening brief and below (at 53-73).

ARGUMENT

I. GSK's *Batson* Claim Is Meritless and Does Not Warrant a New Trial

A. Standard of Review

This Court ordinarily reviews claims that parties have made a prima facie showing under *Batson* for clear error. *Tolbert v. Page*, 182 F.3d 677, 685 (9th Cir. 1999) (en banc). If the district court applied the wrong legal standard, this Court reviews the claim de novo. *Wade v. Terhune*, 202 F.3d 1190, 1199 (9th Cir. 2000).

B. Existing Precedent Provides No Basis To Apply *Batson* to Sexual Orientation.

1. Neither the Supreme Court Nor this Court Has Extended *Batson* Beyond Intentional Discrimination Against a Member of a Suspect or Quasi-Suspect Class Under the Equal Protection Clause.

No court has extended *Batson* to sexual orientation, and the only circuit to consider the question has expressed "serious[] doubt" that Batson applies to sexual orientation. *United States v. Ehrmann*, 421 F.3d 774, 782 (8th Cir. 2005).[10]

The law is clear that "[p]arties may . . . exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review." *J.E.B.*, 511 U.S. at 143. This Court has held that rational basis review applies to equal protection challenges involving classifications based on sexual orientation. *Witt*, 527 F.3d at 821; *accord Philips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997) ("homosexuals do not constitute a suspect or quasi-suspect class" for equal protection purposes); *see also Romer v. Evans*, 517 U.S. 620, 631 (1996) (applying rational basis review to a classification based on sexual orientation).

GSK dismisses *Witt* and *Philips* as having involved a military regulation, which is afforded extra deference. GSK Br. 34; *see also* LAMBDA Br. 3, 10-12.

[10] One California state appellate court has held that "exclusion of lesbians and gay men [from a jury] on the basis of group bias violates the California Constitution," which provides for juries representative of the community; this was not an equal protection decision. *People v. Garcia*, 77 Cal. App. 4th 1269, 1275 (2000).

But the threshold question of what level of scrutiny applies depends on the type classification at issue, not on whether the challenged statute applies to the military. *E.g.*, *United States v. Virginia*, 518 U.S. 515, 531, 555 (1996) (applying heightened scrutiny to gender classifications at a state military academy and rejecting the circuit court's deferential approach).[11]

GSK also criticizes *Witt*'s analysis. GSK Br. 33. But absent an *intervening* Supreme Court (or en banc) decision that is "clearly irreconcilable" with *Witt*, its holding remains binding. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc); *see also United States v. Contreras*, 593 F.3d 1135 (9th Cir. 2010) (en banc) (per curiam) (vacating three-judge panel's overruling of prior cases based on a sentencing guideline amendment enacted *before* the cases the three-judge panel sought to overrule); *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) ("the first panel to consider an issue and publish a precedential opinion occupies the

[11] One district court has concluded that *Witt* left open whether sexual orientation is a suspect or quasi-suspect classification, reasoning that *Witt* held only that "in the context of military policy where judicial deference is 'at its apogee,' the military's policy of "Don't Ask Don't Tell' would fail even rational basis review." *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985 (N.D. Cal. 2012). However, that district court misread *Witt*, which held that Don't Ask Don't Tell *survived* rational basis review under the Equal Protection Clause. That was necessarily a decision that heightened scrutiny did not apply. *Cf. Perry v. Brown*, 671 F.3d 1052, 1076-95 (9th Cir. 2012) (striking down law where it *failed* even rational basis review without deciding level of scrutiny).

field, whether or not the lawyers have done an adequate job of developing and arguing the issue").[12] There has been no such intervening decision here.[13]

Finally, GSK fails to establish the sort of history of exclusion from jury service that the Supreme Court relied upon in restricting peremptory challenges of African-Americans and women. *Batson*, 476 U.S. at 85-88; *J.E.B.*, 511 U.S. at 131-41. *Batson* itself required that a defendant show that the challenged juror was "a member of a racial group capable of being singled out for differential treatment" *and* that "in the particular jurisdiction members of [that] race have not been summoned for jury service over an extended period of time." 476 U.S. at 94. The question is not whether sexual orientation, when apparent, has historically been a basis of discrimination generally, *see* LAMBDA Br. 14-15, but whether GSK has demonstrated an historical practice of excluding homosexuals *from jury service.* It has not.

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[12] Contrary to GSK's suggestion, GSK Br. 33, the plaintiff in *Witt* raised an equal protection challenge to Don't Ask Don't Tell, and the opinion expressly rejected that challenge under rational basis review. *Witt*, 527 F.3d 821 ("We next turn to Major Witt's Equal Protection Clause claim. . . . *Philips* clearly held that DADT does not violate equal protection under rational basis review, and that holding was not disturbed by *Lawrence* . . . . We thus affirm the district court's dismissal of Major Witt's equal protection claims." (citations omitted)).

[13] *Witt* held separately that the Don't Ask Don't Tell policy was subject to heightened scrutiny as a matter of substantive due process under *Lawrence*. *Witt*, 527 F.3d at 815-21. Substantive due process is discussed in the next section, directly below.

2. The Existence of Substantive Due Process Rights Is Not a Basis for Creating New Protected Classes Under *Batson*.

GSK also proposes extending *Batson* beyond suspect or quasi-suspect classes to any strike motivated by a juror's membership in a class that might be particularly likely to exercise "fundamental or important constitutional rights" whose impairment is subject to heightened scrutiny. GSK Br. 19-25. According to GSK, this includes gay jurors because *Lawrence v. Texas*, 539 U.S. 558 (2003), recognized a substantive due process right to engage in private homosexual sexual activity. GSK Br. 21-25. No court, however, has endorsed applying *Batson* to a specific class based on its members' exercise of a substantive due process right.

Heightened scrutiny is *necessary* but *not sufficient* for *Batson* to apply.[14] For example, the Supreme Court has for decades recognized a substantive-due-process right to marry, *e.g.*, *Skinner v. State of Okla. ex rel. Williamson*, 316 U.S.

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[14] *J.E.B.*, 511 U.S. at 129-43 (extending *Batson* to gender based on heightened scrutiny for gender classifications as well as historical discrimination against women on juries); *United States v. Santiago-Martinez*, 58 F.3d 423, 424 (9th Cir. 1995) (*Batson* does not extend to obesity because classifications on the basis of obesity not subject to heightened scrutiny under Equal Protection Clause); *see also* Supp. Br. for United States, *United States v. Osazuwa*, No. 10-50109, 2011 WL 3288062, at *5 (9th Cir. July 20, 2011) (explaining that heightened scrutiny is necessary but not sufficient for *Batson* to apply).

The cases on which amici rely, LAMBDA Br. 7, are consistent with this principle. Both *Bowles v. Sec'y for the Dep't of Corrections*, 608 F.3d 1313, 1316 (11th Cir. 2010), and *United States v. Watson*, 483 F.3d 828, 831-33 (D.C. Cir. 2007), rejected *Batson* claims for lack of heightened scrutiny, but do not establish that *Batson* applies automatically to every classification that impinges on a fundamental right.

535, 541 (1942); *Zablocki v. Redhail*, 434 U.S. 374, 384-85 (1978), but "[p]eremptory challenges based on marital status do not violate *Batson*," *United States v. Omoruyi*, 7 F.3d 880, 881 (9th Cir. 1993). Substantive due process rights also include the right to an abortion, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), to use contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965), and to control one's children's education, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). But no court has ever suggested that *Batson* applies wherever a potential juror belongs to a class of persons whose choices on these subjects would be protected by substantive due process. And for good reason: No one can tell by visual observation whether a juror has made protected choices on these subjects, and questioning jurors on these topics would be highly intrusive.

GSK's proposed approach to *Batson* is inconsistent with existing law.

3. Extending *Batson* to Sexual Orientation Would Present Significant Implementation Problems.

Even if sexual orientation were a suspect classification, applying *Batson* to sexual orientation would present formidable practical problems.

This Court's decision in *Campbell*, 92 F.3d 951, illustrates the difficulty that district courts would face in trying to ascertain jurors' sexual orientations without intrusive questioning or invidious stereotyping. After the plaintiff's counsel there challenged the defendant's peremptory strike, the court inquired at sidebar about the basis for the challenge:

> [COUNSEL]: [The challenged juror] is gay.
>
> THE COURT: How do you know that?
>
> [COUNSEL]: I believe, that based on my observations, just as I would observe a man to be a man, and a woman to be a woman. I listened to his answers. I watched his mannerisms. I believe him to be gay.
>
> * * *
>
> [COUNSEL]: I base this on the following: the way he is—his affect; the way he projects himself, both physically and verbally indicate to me that he is gay. The place where he lives [West Hollywood] is potential evidence of that. His marital status [single] is potential evidence of that. What he has done for a living [freelance screen writer] is potential evidence of that.

Id. at 952. The district court refused counsel's request to ask the juror about his sexual orientation and denied the *Batson* challenge; this Court affirmed. *Id.*

As this Court has explained, "comparative juror analysis is an important tool that courts *should* use" in *Batson* challenges. *Boyd v. Newland*, 467 F.3d 1139, 1149 (9th Cir. 2006); *see Miller-El v. Dretke*, 545 U.S. 231, 240-52 (2005) (applying comparative juror analysis). Indeed, "any notion of discrimination . . . assumes a comparison of substantially similar [parties]." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997). But as *Campbell* illustrates, there is no reliable way to ascertain a juror's sexual orientation, at least short of intrusive questioning or stereotyping.

Justice Ginsburg has recognized this practical constraint in the religion context. *Davis v. Minnesota*, 511 U.S. 1115 (1994) (Ginsburg, J., concurring in denial of certiorari) (noting that religious affiliation "is not as self-evident as race or gender" and "[o]rdinarily, inquiry on voir dire into a juror's religious affiliation and beliefs is irrelevant and prejudicial, and to ask such questions is improper"). Similarly, the First Circuit warned, in rejecting a religion-based *Batson* challenge (while stopping short of deciding whether *Batson* should be extended to religion-based challenges), that courts "simply [do] not have the information to evaluate even the bare numerical assertion that all, or most, Jewish persons in the venire were struck," and "[t]his lack of information is one of the essential problems with applying *Batson* to religious groups." *United States v. Girouard*, 521 F.3d 110, 116 (1st Cir. 2008).[15] The same is true of sexual orientation—as evidenced by the absence of any information concerning other jurors' sexual orientation here.

[15] Courts have consistently rejected extending *Batson* to peremptory strikes based on religious beliefs, *e.g.*, *United States v. DeJesus*, 347 F.3d 500, 510-11 (3d Cir. 2003), despite the fact that free exercise of religious beliefs is a fundamental First Amendment right, *e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972), and that laws targeting religious beliefs "must undergo the most rigorous of scrutiny," *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Courts have split over whether *Batson* extends to religious *affiliation*. *Compare, e.g.*, *United States v. Brown*, 352 F.3d 654, 668-69 (2d Cir. 2003) (extending *Batson* to religious affiliation), *with Casarez v. State*, 913 S.W.2d 468, 496 (Tex. Crim. App. 1994) (en banc) (declining to do so); *and State v. Davis*, 504 N.W.2d 767, 771 (Minn. 1993) (same). *See also Girouard*, 521 F.3d at 113 (noting split). Courts also have not extended *Batson* to peremptory challenges based upon other characteristics about which governmental distinctions would be subject to

C. Even Assuming *Batson* Applies to Sexual Orientation, GSK Did Not Make a Valid Prima Facie Showing of Intentional Discrimination.

1. This Court May Affirm the Denial of GSK's *Batson* Challenge Without Deciding Whether *Batson* Applies to Sexual Orientation.

Consistent with the principle of avoiding unnecessary resolution of constitutional issues, this Court has twice rejected *Batson* claims based on sexual orientation after finding an insufficient showing that the peremptory challenges were discriminatory. *Johnson v. Campbell*, 92 F.3d 951 (9th Cir. 1996); *United States v. Osazuwa*, 446 F. App'x 919 (9th Cir. 2011) (unpublished); *see Superintendent, Mass. Corr. Inst. v. Hill*, 472 U.S. 445, 453 (1985) ("judicial restraint requir[es] us to avoid unnecessary resolution of constitutional issues"). This Court should affirm on that ground here, because GSK likewise failed to make a prima facie showing of intentional discrimination.[16]

2. The Totality of the Circumstances Does Not Raise Any Inference of Discrimination.

Batson involves a three-step procedure. First, the objecting party must make a prima facie showing by "producing evidence sufficient to permit the trial judge to

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heightened scrutiny, such as political beliefs. *E.g.*, *United States v. Prince*, 647 F.3d 1257, 1263 (10th Cir. 2011).

[16] The district court questioned whether *Batson* applies in civil cases. ASER-320. It does, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991), but this Court may affirm on any basis supported by the record. *E.g.*, *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1085 (9th Cir. 2010) (en banc).

draw an inference that discrimination has occurred." *Johnson v. California*, 545 U.S. 162, 170 (2005). Second, the burden shifts to the other party to articulate a nondiscriminatory reason for the strike. *Id.* at 168. Third, the burden shifts back to the objecting party to show that the actual motivation for the strike was discriminatory. *Id.*

Even if *Batson* did extend to sexual orientation, GSK failed to meet its initial burden. A prima facie showing requires that "(1) the prospective juror is a member of a cognizable racial group, (2) [a party] used a peremptory strike to remove the juror, and (3) the totality of the circumstances raises an inference that the strike was motivated by race." *Boyd v. Newland*, 467 F.3d 1139, 1143 (9th Cir. 2006) (internal quotation marks omitted). In analyzing this threshold issue, this Court reviews "the totality of the circumstances, as reflected in the transcript of the voir dire." *Campbell*, 92 F.3d at 953; *see also, e.g.*, *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) ("all of the circumstances . . . must be consulted"); *Wade v. Terhune*, 202 F.3d 1190, 1199 (9th Cir. 2000) (similar). This review includes a "[c]omparative juror analysis"—"comparing the characteristics of a struck juror with the characteristics of other potential jurors, particularly those jurors whom the [party in question] did not strike. An inference of discrimination may arise when two or more potential jurors share the same relevant attributes but the [party] has challenged only the minority juror." *United States v. Collins*, 551 F.3d 914, 921-

22 (9th Cir. 2009) (internal citations omitted); *accord Boyd*, 467 F.3d at 1149-51; *Wade*, 202 F.3d at 1198. When "an obvious neutral reason for the challenge" appears in the record, this Court will not find a prima facie showing. *Campbell*, 92 F.3d at 953.

Assuming, *arguendo*, that Juror B's single reference to his "partner" as "he" established that Juror B was gay—Plaintiffs' counsel could say only that Juror B "could be" gay, ASER-319—the totality of the circumstances does not support an inference of discrimination.

First, Juror B worked at this Court and stated that he "kn[ew] a lot of people in the legal field" from his job—suggesting he interacts with counsel, staff attorneys, law clerks, or even judges on this Panel. ASER-223-224. As of jury selection, this case had already been before this Court, C.A. No. 10-71786, and the case was expected to return, as it now has. Juror B might have had discussions with court personnel that would affect his consideration of the case—or he might later have spoken to someone at this Court who would work on this appeal. Other jurors might have given extra weight to Juror B's opinions given his employment. No other prospective juror had any connection to this Court.

Second, Juror B was the only potential juror who testified that he had heard of any of the three drugs at issue, or of any particular HIV drug. ASER-308

(discussing Kaletra). Juror P, the only other eligible juror who knew people with HIV, did not know what drugs they were taking. ASER-312.

Third, Juror B was the only eligible juror whose testimony suggested he had lost friends to AIDS. Juror B testified he had friends with AIDS "in the past," ASER-224, suggesting they had died. By contrast, Juror P, the only other eligible juror who knew someone with HIV, testified that her friends with HIV "are on medications," ASER-312, suggesting they are living. While a juror whose friends are being kept alive by drugs might have positive feelings towards drug makers, a juror who lost friends to AIDS might harbor negative feelings about a company accused of unreasonably raising the price of an HIV drug—which would make Juror B a more high-risk juror regardless of sexual orientation.[17]

None of the factors this Court has identified as potentially supporting a prima facie showing of discrimination is present here. Those factors are: (1) "a pattern of striking minority panel members," including striking "a large number of panel members from the same racial group, or [using] a disproportionate number of strikes against members of a single racial group"; (2) striking members of more than one racial minority group; or (3) a party's statements to the venire or the

[17] Indeed, one juror ultimately excused for cause testified that she had a friend who died of AIDS and would be angry if the friend died from lack of access to medications. ASER-268-269.

failure "to engage in meaningful questioning of any of the minority jurors." *Collins*, 551 F.3d at 921 (internal quotation marks and citations omitted).

GSK has not alleged (much less proven) any pattern of striking gay jurors, or that Abbott struck members of more than one minority group. Nor can GSK point to statements by Abbott reflecting bias, animus, or the failure to engage in meaningful questioning. To the contrary, counsel asked no questions about sexual orientation. *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994) (no prima facie showing where, *inter alia*, "[t]he prosecutor's questions and statements during the selection of the jury failed to support an inference of purposeful discrimination"). Counsel's questions to Juror B were similar in scope and kind to his questions to other panel members, and no prima facie showing is established where "[t]he challenged prospective juror was not treated differently than other prospective jurors who were similar in relevant aspects except race." *Id*. Counsel asked follow-up questions about Juror B's statements about his friends with HIV and about Juror B's knowledge of Kaletra. ASER-307-308. Counsel asked similar questions of other jurors who knew people with HIV, such as Juror P.

3. GSK Did Not Make a Prima Facie Showing

Despite legitimate factors distinguishing Juror B from the other 16 eligible jurors, GSK says it made a prima facie showing of intentional discrimination

because (a) Juror B was apparently gay and (b) the case involved HIV drugs. GSK Br. 36-38. This is patently insufficient.

Even assuming Juror B was gay, there is no evidence that Juror B was the only eligible gay juror. Sexual orientation is not readily apparent, no juror was asked about sexual orientation, and although some jurors referred to spouses by gender, others did not. Even if Juror B were shown to be the sole gay member of the venire, that would not be enough to support a prima facie case. *Vasquez-Lopez*, 22 F.3d at 902 (no prima facie showing despite government striking sole black juror in venire). This would be true even if the opposing party shared the trait at issue—which was obviously not the situation with the corporate plaintiff here. *Tolbert v. Gomez*, 190 F.3d 985, 988 (9th Cir. 1999) (no prima facie showing where state struck black juror in trial of black defendant).[18] "More is required." *Wade v. Terhune*, 202 F.3d 1190, 1198 (9th Cir. 2000).

GSK relies on *Crittenden v. Ayers*, 624 F.3d 943 (9th Cir. 2010), *see* GSK Br. 39 n.17, which found that an African-American facing the death penalty for allegedly murdering a white couple had made a prima facie showing after the prosecutor struck the sole black juror. But *Crittenden* held that the strike of the

[18] One invoking *Batson* need not be a member of the same cognizable protected group as the juror, but shared characteristics "between the defendant and the excused person" remain relevant in making a prima facie showing. *Powers v. Ohio*, 499 U.S. 400, 402 (1991).

sole black juror "d[id] not by itself raise an inference of discrimination." *Id.* at 955. There was a prima facie showing only because comparative juror analysis showed that (1) the prosecutor had not used peremptory challenges against two similarly situated white jurors, including the white juror who replaced the stricken black juror, and (2) the prosecutor had unsuccessfully attempted to strike the black juror for cause based on the juror's general objection to the death penalty, which does not constitute cause. *Id.* at 956. There is no similar evidence here. Comparative juror analysis here highlights the numerous neutral reasons that distinguished Juror B from other members of the venire; and Abbott did not seek to excuse Juror B for cause, let alone for an improper reason.

GSK is thus left to speculate that there was discrimination because the case involved pricing of an HIV drug. But the issue here was merely the extent to which pricing affected competition. In its only published decision addressing a sexual-orientation-based *Batson* claim, this Court concluded the plaintiff had not made a prima facie showing where "nothing in the record suggested that sexual orientation of any of the parties was in issue." *Campbell*, 92 F.3d at 953. The same is true here.[19]

[19] The cases on which GSK relies, GSK Br. 39, demonstrate the need for a direct link between the subject matter of the case and the alleged discrimination to support an inference of discrimination. In *United States v. Iron Moccasin*, 878 F.2d 226, 227-29 (8th Cir. 1989), the Eighth Circuit, in affirming the denial of a *Batson* challenge, found that the defendant, a Native American, had made a prima

GSK's speculation also does not stand up to the "obvious" neutral facts that distinguished Juror B—his employment with this Court, his awareness of Kaletra, and his loss of friends to AIDS. *Campbell*, 92 F.3d at 953 (finding lack of prima facie showing based on "obvious" neutral reason for strike of allegedly gay juror—that he was one of two jurors with prior jury experience and, unlike the seated juror whose prior jury had reached a defense verdict, the stricken juror's prior trial result was unknown). Even assuming *Batson* extends to sexual orientation, GSK failed to establish a prima facie case.

D. If *Batson* Applied and GSK Had Made a Prima Facie Showing of Discrimination, a Remand Would Be Required.

If GSK had established a prima facie *Batson* claim, the proper course would be for this Court to remand "with instructions that the [district] court require the [the striking party] to provide its reasons" for the strike and "determine, in the first instance, whether the strike was discriminatory." *E.g.*, *Collins*, 551 F.3d at 923; *accord United States v. Esparza-Gonzalez*, 422 F.3d 897, 906 (9th Cir. 2005); *Paulino v. Castro*, 371 F.3d 1083, 1092 (9th Cir. 2004).

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facie showing based on the government striking the sole Native American in the venire in a "sensitive and highly emotional trial" involving a sex offense on an Indian Reservation. And in *Alexis v. Leporati*, No. 93-10003, 1996 WL 463675, at *3-*4 (D. Mass. July 30, 1996), a district court initiated and sustained its own *Batson* challenge against a defendant's strike of the sole African-American juror in a civil suit by an African-American alleging race discrimination. Neither of these cases required the sort of speculative leaps GSK makes here to infer that a party might have struck a protected juror for a discriminatory reason.

GSK seeks to avoid this settled rule by arguing that the district court obtained an explanation for why Abbott struck Juror B—which would have been step two of the *Batson* analysis. That is untrue. When GSK raised *Batson*, the district court articulated three reasons to reject the challenge at the prima facie stage—(1) *Batson* did not apply in civil cases, (2) *Batson* does not extend to sexual orientation, and (3) there is "no way for us to know who is gay and who isn't here." ASER-320. The court then gave Abbott's counsel a choice to stand on the court's "three reasons" or proceed to what the court called "number four" and explain why Abbott made the strike. As the court stated, "Number four, one turns to the other side and asks for the basis for their challenge other than the category that they are in, and if you have one, it might be the better part of valor to tell us what it is. . . . Or . . . you can stand on my first three reasons." *Id.* Abbott's counsel responded: "*I will stand on the first three at this point, your honor*. I don't think any of the challenge applies. I have no idea whether he is gay or not." *Id.* (emphasis added).

In the face of Abbott's clear statement that it would "stand on the first three" reasons why GSK had not made a prima facie showing, GSK argues that counsel nonetheless offered an affirmative reason for the strike under step two of *Batson* by also stating "I have no idea whether he is gay or not." But that was not an affirmative *explanation* for the strike: It was not phrased as such; it directly

followed counsel's choice *not* to offer an explanation; and it sheds no light on why Abbott exercised this strike.

Rather than fairly characterizing the record and seeking remand, GSK says Abbott offered an explanation—but one that was "deficient as a matter of law," GSK Br. 41. GSK then argues that Abbott should not be permitted to explain its strike because Abbott "already had an opportunity" to do so. *Id.* at 42. This is nonsensical. The cases GSK cites, in which this Court made a final step three determination, are all cases in which the trial court reached step two and required the party making the peremptory challenge to explain its reasons, which simply did not occur here. *Id*. at 41-42.

If this Court were to be the first to conclude that *Batson* applies to sexual orientation, that GSK made a prima facie showing of discrimination on the basis of sexual orientation, and that the alternative bases for affirmance do not apply, the proper course would be to remand for completion of the *Batson* process.

E. GSK Did Not Make a Prima Facie Showing of Intentional Gender Discrimination

GSK alternatively appears to challenge Abbott's strike of Juror B as impermissible gender discrimination. GSK Br. 29-30. This argument fails for two reasons.

First, GSK waived any *Batson* gender claim by failing to make it below. *See United States v. Brown*, 352 F.3d 654, 662-63 (2d Cir. 2003) (religion-based *Batson* challenge insufficient to preserve race-based *Batson* challenge).[20]

Second, GSK did not and cannot make a prima facie showing of gender discrimination. All the legitimate reasons for striking Juror B apply regardless of whether the *Batson* claim is based on sexual orientation or gender. Moreover, a comparative juror analysis undermines any claim of discrimination against men.[21] The pool of eligible jurors included ten men and seven women. Abbott used just one of its three peremptory strikes on a man; GSK used all four of its peremptory strikes on men; and the seated jury included five men and five women.

GSK's argument, GSK Br. 29-30, rests on a misreading of *United States v. Omoruyi*, 7 F.3d 880 (9th Cir. 1993). The defendant there made a gender-based *Batson* objection to the exclusion of unmarried women. *Id.* at 881. This Court recognized that *Batson* does not prohibit peremptory challenges based on marital status, but found a *Batson* violation because the prosecutor's explanation

[20] This criminal case, and similar ones, reviewed forfeited *Batson* challenges for plain error under Federal Rule of Criminal Procedure 52(b); but because plain error review does not apply in civil cases, unpreserved claims are waived. *E.g.*, *Haney v. Adams*, 641 F.3d 1168, 1171 n.5 (9th Cir. 2011).

[21] Amici's assertion that "[h]ad the juror been a woman who formed romantic relationships with men rather than a man who does, the juror would not have been disqualified," LAMBDA Br. 24, is both utter speculation and just a rephrasing of the sexual orientation discrimination argument.

"reveal[ed] that the jurors were struck because they were women," not because they were unmarried. *Id.* at 881-82. Nothing like that occurred here. Abbott's strikes do not show a pattern of discrimination against men, and, given that GSK did not even make a gender-based *Batson* objection, Abbott did not provide any step two explanation, let alone one that revealed a discriminatory purpose.

II. The District Court's Denial of GSK's *Batson* Claim Alternatively Should Be Affirmed Because this Case Never Should Have Gone to the Jury.

Quite apart from *Batson*'s inapplicability and the three independent grounds for striking Juror B, there is an additional reason why this Court should not order a new trial: None of GSK's claims should have gone to the jury in the first place because Abbott's Rule 50(a) motion should have been granted at the close of evidence. Although *Batson* claims are not subject to ordinary harmless-error analysis, *Turner v. Marshall*, 121 F.3d 1248, 1254 n.3 (9th Cir. 1997), affirmance is warranted if a *Batson* violation caused no prejudice, *United States v. Gonzalez-Largo*, 436 F. App'x 819, 821 (9th Cir. 2011) (unpublished) (affirming strike of only African-American alternate juror "because the alternate juror was never called upon to serve as a regular juror").

A. Standard of Review

A district court's grant or denial of a motion for judgment as a matter of law is reviewed de novo. *Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, 658 F.3d 936, 941 (9th Cir. 2011).

B. GSK's Antitrust Claims Fail as a Matter of Law.

Not only were GSK's antitrust claims rejected by the jury, but no other result would have been legally supportable. First, the claims fail as a matter of law under this Court's decision in the related case of *John Doe 1 v. Abbott Labs.*, 571 F.3d 930 (2009) ("*Doe*"), which rejected an antitrust challenge to the very same pricing conduct. Second, the evidence showed as a matter of law that Abbott did not have monopoly power in any relevant market.

1. GSK's Claims Fail as a Matter of Law Under *Doe*.

Doe should have ended GSK's antitrust claims. Applying *Pacific Bell Telephone Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438 (2009), *Doe* rejected the claim that Abbott's repricing of Norvir without repricing Kaletra violated the antitrust laws. In *linkLine*, the plaintiffs alleged that AT&T violated the antitrust laws by pricing wholesale DSL transport services too high in relation to its price for retail DSL internet service. AT&T's rivals in the retail DSL market said that the small differential between AT&T's two prices anticompetitively "squeezed" their profit margins.

In rejecting this "price squeeze" theory, the Supreme Court held that "[i]f both the wholesale price and the retail price are independently lawful, there is no basis for imposing antitrust liability simply because [the] wholesale price happens to be greater than or equal to [the] retail price." *linkLine*, 555 U.S. at 455. The Court then analyzed AT&T's conduct in each market—wholesale and retail. Because the plaintiffs had not alleged either a refusal to deal at wholesale or predatory pricing at retail, the Court rejected the plaintiffs' claim as "nothing more than an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level." *Id.* at 452.

Finding that *linkLine* "controls the outcome here," this Court held that the *Doe* plaintiffs failed to state an antitrust claim based on Abbott's repricing of Norvir. 571 F.3d at 933, 935. "However labeled," the court recognized, "Abbott's conduct is the functional equivalent of the price squeeze the Court found unobjectionable in *Linkline*." *Id.* at 935. "[A]nalyz[ing] each market separately," *Doe* found "no independently cognizable harm to competition when the wholesale price and the retail price are independently lawful." *Id.* at 934-35. The Court thus held that the *Doe* plaintiffs' claim "falls short" because "[t]hey allege no refusal to deal at the booster level, and no below cost pricing at the boosted level." *Id.* at 935.

GSK's antitrust claims are based on the very same Norvir price increase, and likewise fail under *linkLine*. GSK showed neither a refusal to deal in Norvir in the booster market, nor predatory pricing of Kaletra in the boosted market.

No Refusal to Deal in the Booster Market. Abbott never refused to sell Norvir to anyone—in fact, Norvir's sales increased dramatically throughout the relevant period. This is undisputed. ASER-193-196, 39-40. As GSK's own expert economist, Roger Noll acknowledged at trial, "Of course [Abbott] didn't make [Norvir] unavailable," and Noll disclaimed any "opinion in this case that Abbott's conduct constitute[d] a refusal to deal" under the applicable law. ASER-175. The absence of any refusal to deal distinguishes this case from *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), upon which GSK had relied.[22]

To overcome its lack of evidence, GSK argued below that by charging a price for Norvir that was too close Kaletra's price, Abbott "effectively" refused to deal in Norvir. That is, the combination of a relatively high price for Norvir and a relatively low price for Kaletra made it harder for competitors to sell their boosted

[22] In *Aspen*, the defendant Ski Co. stopped selling all-Aspen tickets and then "refus[ed] to accept the Adventure Pack coupons" that the plaintiff competitor resort created for its customers as an alternative, even though accepting them "would have entailed no cost to Ski Co. itself." 472 U.S. at 610.

PIs profitably. But as this Court explained in *Doe*, merely relabeling a "price squeeze" as a "refusal to deal" cannot overcome *linkLine*'s holding:

> However labeled, Abbott's conduct is the functional equivalent of the price squeeze the Court found unobjectionable in *Linkline*. Abbott sells Norvir as a standalone inhibitor and as part of a boosted inhibitor instead of selling Norvir to its competitors at a high price for use with their own protease inhibitors while attributing a lower price to the product when used as part of its own boosted inhibitor. . . . [E]ither way, this puts the squeeze on competing producers of protease inhibitors that depend on Norvir for their boosted effectiveness and consumer acceptance.

Doe, 571 F.3d at 935. This is exactly what GSK did with its refusal-to-deal claim.

In any event, *linkLine* explicitly rejected the standard GSK advocates for determining whether Abbott refused to deal. At GSK's request, the district court instructed the jury that, in deciding whether Norvir's price amounted to an "effective" refusal to deal, the jury should consider "whether Abbott offered to deal with its competitors only *on unreasonable terms and conditions*." ER-109-110 (emphasis added). But the only terms and conditions at issue were Abbott's pricing of Norvir and Kaletra. And *linkLine* explicitly rejected a similar inquiry into "adequate" or "fair" prices, explaining that "this test is nearly impossible for courts to apply without conducting complex proceedings like rate-setting agencies." 555 U.S. at 440.

No predatory pricing in the booster market. As this Court held in *Doe*, proving predatory pricing required GSK to show that (1) Kaletra's price was "below an appropriate measure of [Abbott's] costs"; or (2) "there was a 'dangerous probability' that [Abbott] [would] be able to recoup [any] 'investment' in below-cost prices." *Doe*, 571 F.3d at 934 (quoting *linkLine*, 555 U.S. at 451). Yet there was no evidence of either.

As GSK's own expert economist Keith Leffler conceded, the price of a Kaletra pill was not below the cost of producing it. ASER-143. And the undisputed evidence was that several new boosted PIs entered the market, and that others were scheduled to enter, precluding any finding of a dangerous probability of recoupment. ASER-93-94, 188-189; *see Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 119 n.15 (1986) ("It is . . . important to examine the barriers to entry into the market, because without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time.") (quotation omitted).

Lacking any evidence that Abbott predatorily priced Kaletra, GSK focused instead on the relationship between the prices of Norvir and Kaletra. According to GSK, the pricing of Kaletra constituted "bundled discounting" under *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008). But *Doe* expressly held, with respect to the legality of Abbott's pricing, that *Cascade* was "overtaken"

by *linkLine*: "Because . . . the outcome here follows from *linkLine*, we need not discuss *Cascade*." 571 F.3d at 933, 935. And *linkLine* made clear that—"[h]owever labeled," *Doe*, 571 F.3d at 935—"there is no basis for imposing antitrust liability simply because a vertically integrated firm's wholesale price happens to be greater than or equal to its retail price." 555 U.S. at 455. Indeed, it was undisputed that Norvir's price was at all times less than Kaletra's price.

GSK's bundled discounting theory was particularly indefensible given that *linkLine* too involved allegations that the relevant retail product was a "bundled package to end use customers." *See* Joint Appendix, *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, No. 07-512, 2008 WL 4055222, at *33 (¶ 20) (U.S. Aug. 28, 2008).[23] Moreover, *linkLine* explicitly rejected use of a "transfer price test" mathematically equivalent to *Cascade*'s "discount attribution test" for bundled discounting, concluding that the test "lacks any grounding in our antitrust jurisprudence." 555 U.S. at 454. The Supreme Court in *linkLine* explicitly rejected any test that would have required "the defendant [to] leave its rivals a 'fair' or 'adequate' margin between the wholesale price and the retail price." *Id.* The Court held that, rather than imputing certain prices to certain components of a

[23] *Accord linkLine Commc'ns, Inc. v. SBC Cal., Inc.*, 503 F.3d 876, 879 (9th Cir. 2007) (first amended complaint: a "bundled offering"); *linkLine Commc'ns, Inc. v. SBC Cal., Inc.*, No. CV 03-5265 SVW, 2004 WL 5503772, at *2 (C.D. Cal. Oct. 20, 2004) ("a bundled package").

product and then comparing the imputed component prices to the actual product price—as GSK argued that the jury should do here—courts should simply ask whether the product's actual price is below the cost of production. *Id.* at 454-55. Under *Doe* and *linkLine*, therefore, GSK's antitrust claims are foreclosed.

2. GSK's Evidence Was Insufficient To Support a Finding of Monopoly Power.

Even apart from *Doe*, GSK's antitrust claims fail as a matter of law because there was insufficient evidence that Abbott had monopoly power in any relevant market. A monopolization claim requires proof of "the possession of monopoly power in the relevant market." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 480 (1992). An attempted monopolization claim requires proof of a "dangerous probability" of achieving monopoly power. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993). Here there was no evidence that Abbott had monopoly power, or the likelihood of obtaining it, in any relevant market.

Monopoly power is the power to "control prices or exclude competition." *Oahu Gas Serv., Inc. v. Pac. Res., Inc.*, 838 F.2d 360, 366 (9th Cir. 1988). The evidence at trial showed that Abbott had no such power in the market in which Kaletra competed. Far from being able to raise the price of its boosted PI to a supracompetitive level, Abbott always priced Kaletra at or below the prices of other boosted PIs. ASER-29; ER-415 (in June 2010, a daily dose of Kaletra was $23.40, a daily dose of the Lexiva component of boosted Lexiva alone was $24.15

(not including the price of the Norvir used for boosting of Lexiva), and a daily dose of boosted Reyataz was roughly $30 (again, not including the price of the Norvir used for boosting Reyataz)).[24] Indeed, GSK's claims rest on the notion that Abbott priced Kaletra *too low*.

Moreover, far from being able to exclude competition, Abbott saw Kaletra's market share continuously decline as Reyataz, Lexiva, and Prezista entered the market and thrived. ASER-131-135, 186-187. This is the polar opposite of monopoly power.

At trial, GSK admitted that it had not offered direct evidence of monopoly power. ASER-16; 130. Instead, GSK attempted to prove monopoly power through "indirect evidence"—by the ability to maintain a dominant market share coupled with barriers to entry and expansion. *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995); *United States v. Syufy Enters.*, 903 F.2d 659, 665-66 (9th Cir. 1990) ("ability to maintain market share" required to find

[24] The courts have rejected the suggestion that pricing brand name drugs above marginal costs shows monopoly power. *See, e.g., In re Remeron Direct Purchaser Antitrust Litig.*, 367 F. Supp. 2d 675, 684 (D.N.J. 2005); *accord Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1476 (9th Cir. 1997) ("high profits" is insufficient to show monopoly power absent an "accompanying showing of restricted output"). If the law were otherwise, it would lead to the conclusion that it is GSK that has monopoly power, because GSK's pricing for its boosted protease inhibitor Lexiva was higher than Abbott's pricing for Kaletra.

monopoly power). But on these measures too, the undisputed evidence reinforced Abbott's lack of monopoly power.

Insufficient and Declining Market Share. Courts generally require at least 65% market share for monopoly power. *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 924-25 (9th Cir. 1980) ("[M]arket shares on the order of 60 per cent to 70 per cent have supported findings of monopoly power."); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945) (Hand, J.) ("it is doubtful whether sixty or sixty-four per cent would be enough"). Furthermore, ultimately, "it is not market share that counts, but the ability to maintain market share." *Syufy Enters.*, 903 F.2d at 665-66; *accord Oahu Gas*, 838 F.2d at 366 ("market share is just the starting point for assessing market power"). Courts "do better to plot the [market share] points on a graph and observe the pattern they form than to focus narrowly on [defendant's] market share at a particular time." *Syufy*, 903 F.2d at 666.

Even under GSK's too-narrow definition of a market limited to a handful of the "boosted" PIs—which the jury rejected, ER-72—Abbott did not have sufficient market share. In 2004, the very first year after Norvir's repricing, Kaletra's share fell below 65%. ASER-133. By 2005, Kaletra's share had dropped to 50%. ASER-133. By 2009, Reyataz surpassed Kaletra as the most prescribed boosted PI. ASER-135-136. In 2006, when Prezista entered, it rapidly gained market

share, and by the time of trial, was poised to surpass Kaletra. ASER-186-187; ER-418.

Kaletra's market share was thus in decline throughout the entire period for which GSK claimed Abbott had monopoly power. That decline continued for the more than four additional years until trial, ASER-135, a period during which GSK did not even contend that Abbott had monopoly power. As this Court held in *Syufy*, such consistent decline in market share evidences a lack of monopoly power. *Syufy* found a decline from 93% to 75% in about three years evidenced lack of monopoly power. Abbott's decline was even more dramatic. Even assuming GSK's market definition, Kaletra's share dropped 30% from Q2 2003 to Q2 2004, ASER-132, another 20% from Q4 2004 to Q4 2005, ASER-133, and another 11% by Q2 2009, ASER-135. This evidence forecloses not only any finding of monopoly power, but also any finding of a dangerous probability of obtaining it. *E.g.*, *Nifty Foods Corp. v. Great Atl. & Pac. Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980) ("No reasonable jury could conclude from the rapid and continuous decline of [the defendant's] market share . . . that there was a probability that [the defendant] would monopolize the waffle market, let alone a dangerous probability."), *superseded by statute on other grounds*; *accord Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 826 (6th Cir. 1982); *Horst v. Laidlaw Waste Sys.*, 917 F. Supp. 739, 744-45 (D. Colo. 1996) (finding

"as a matter of law, that there is no probability of success in monopolizing the relevant market since [defendant's] market share actually decreased during the relevant time period.").

No Barriers to Expansion. Abbott's competitors also faced no barriers to expansion. "Even if [a defendant] has a high market share, neither monopoly power nor a dangerous probability of achieving monopoly power can exist absent evidence of barriers to new entry or expansion." *Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 108 F.3d 1147, 1154 (9th Cir. 1997); *see also Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1208 (9th Cir. 1997); *Rebel Oil*, 51 F.3d at 1441 ("[I]f rivals have idle plants and can quickly respond to any predator's attempt to raise prices above competitive levels, the predator will suffer an immediate loss of market share to competitors. In that instance, the predator does not have market power."). As GSK's economic expert Dr. Noll conceded at trial, Abbott's rivals are not "constrained in any way in [their] ability to expand the output of [their drug] in response to any price increase by an existing competitor," ASER-92-93, and indeed have expanded output substantially during the relevant period, ASER-93; *see also* ASER-33-34.

C. GSK's State-Law Contract and UDTPA Claims Failed as a Matter of Law.

GSK's state-law contract and UDTPA claims likewise should not have gone to the jury. As explained below and in Abbott's opening brief, GSK's implied covenant claim fails as a matter of law. *Infra* at 53-73; Abbott Br. 31-46. And without a contract claim, there is no merit to GSK's standalone UDTPA claim. The jury rejected each of the three factual predicates for GSK's UDTPA claim. *Infra* at 47. But even if it had not, none of those acts constitutes a UDTPA violation as a matter of law.

GSK's first alleged unlawful act was that Abbott deliberately withheld its plans for Norvir. ER-76. But Abbott had no independent obligation to disclose any such plans. Further, GSK alleged that Abbott withheld not its actual plans, but an idea that Abbott considered and rejected—taking Norvir off the market. Yet the evidence shows that withdrawing Norvir was rejected months before the license was signed. *See, e.g.*, ASER-480-485; 86-89. Merely considering an act that was never taken cannot be illegal.

GSK's second and third theories were that Abbott inequitably asserted market power over Norvir by timing a price increase to disrupt Lexiva's launch. ER-76. But this theory rises or falls with GSK's antitrust claim. It is the declared public policy of North Carolina not to interfere with "the ability of the market [to balance supply and demand or] the function of price in allocating scarce

resources." N.C.G.S.A. § 75-37. Thus, as the district court correctly found, "Abbott would face liability under the UDTPA for monopolization *if and only if* GSK prevailed on its Section 2 claim." ER-401 (emphasis added).

Moreover, Abbott would not have violated the UDTPA even if it timed its product announcements so as to obtain a competitive advantage. That is ordinary "business-related conduct" beyond the UDTPA's reach. *Dalton v. Camp*, 548 S.E.2d 704, 711-12 (N.C. 2001). Nor could Abbott violate the Act simply by "disrupting" or "undermining" GSK's business. *See Tar Heel Indus., Inc. v. E.I. duPont de Nemours & Co*., 370 S.E.2d 449, 451-52 (N.C. Ct. App. 1988) (permitting DuPont to terminate contract with transportation carrier, even though DuPont was the carrier's only client and termination would ruin the carrier's business).

In short, because GSK's UDTPA claim—like its antitrust and implied covenant claims—never should have gone to the jury, this Court can affirm the judgment below without regard to *Batson*.

III. The District Court Properly Entered Judgment for Abbott on GSK's North Carolina UDTPA Claim.

In addition to its *Batson* challenge, GSK also appeals the district court's judgment in Abbott's favor on GSK's North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA") claim. As discussed in the previous section, GSK alleged that Abbott committed three UDTPA violations: (1) withholding from

GSK that Abbott had considered (but ultimately rejected) a plan for using Norvir to limit competition; (2) "inequitably" asserting power over Norvir by repricing it to disrupt Lexiva's launch; and (3) timing that repricing to do the same. The jury found that Abbott had not committed the second or third act, and that GSK suffered no injury from the first.

GSK now urges a fourth act. Citing the jury's finding in connection with the implied covenant claim that Abbott's breach was "grossly negligent," GSK says such conduct violates the UDTPA. But as the district court found, "GSK committed to rest its UDTPA claim on the [three] acts reflected on the verdict form," ER-21—which at GSK's request, the court incorporated verbatim onto the form. GSK thus has waived its new theory.

In any event, GSK admits that "a simple breach of contract, even if intentional, will not violate the UDTPA." GSK Br. 45. It follows that a "grossly negligent" breach cannot violate the UDTPA. And the record does not reveal any "egregious or aggravating circumstances" supporting UDTPA liability. GSK points to the jury's finding that Abbott withheld having *considered* taking Norvir off the market. But the jury (necessarily) concluded that this did *not* proximately cause injury to GSK. ER-77. GSK's argument is but an improper "attempt to multiply the damages for an ordinary breach of an agreement by re-characterizing

the breach as a [UDTPA] violation"—which "North Carolina law forbids." *PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 224 (4th Cir. 2009).

A. GSK Waived Any UDTPA Claim Based on the Breach of the Implied Covenant Found by the Jury.

Throughout trial, GSK based its UDTPA claim on the allegations stated above,[25] proposing a special verdict form asking the jury whether Abbott committed these three acts, and for each act, whether it proximately caused GSK harm. The district court adopted GSK's proposed UDTPA questions verbatim. ER-76; ASER-348. As GSK later confirmed, "[the] jury instructions that your honor passed out are *the right ones*, because *those are the things that we contend violate the North Carolina Unfair Competition Statute*." ASER-367 (emphasis added).

The jury rejected GSK's theory, finding that Abbott did not commit two of the acts and that the third did *not* proximately cause GSK harm. ER-76-77. GSK first asserted its "egregious" breach theory only in a post trial motion, and the district court rightly recognized that it came too late. ER-21. "When a party does not request either a 'special question' or an instruction submitting a particular theory . . . to the jury, that party makes a choice that has the associated

[25] GSK originally proposed a fourth question—whether "Abbott maintained, or attempted to maintain, a monopoly in the market in which Kaletra competes, ASER-383-395—but later agreed that this question was superfluous. ER-350.

consequence of almost certainly precluding the assertion after verdict of the omitted theory." *Aetna Casualty Surety Co. v. P&B Autobody*, 43 F.3d 1546, 1555 (1st Cir. 1994).

B. The Jury's Findings Do Not Establish Unfair or Deceptive Acts.

GSK's theory also fails on the merits. "[A] mere breach of contract, *even if intentional*, is not sufficiently unfair or deceptive to sustain an action under" the UDTPA, violations of which automatically result in treble damages. *Branch Banking & Trust Co. v. Thompson*, 418 S.E.2d 694, 700 (N.C. Ct. App. 1992) (emphasis added). Were the rule otherwise, "awarding . . . treble damages would destroy the parties' bargain," "force the defendant to bear a risk it never took on," and "rewrite[the] contract." *PCS Phosphate*, 559 F.3d at 224 & n.5.

"[C]onduct carried out pursuant to contractual relations rarely violates the UTPA." *S. Atl. Ltd. P'ship of Tennessee, LP v. Riese*, 284 F.3d 518, 536 (4th Cir. 2002). Liability attaches only where the breach is attended by "substantial aggravating circumstances," *Bob Timberlake Collection, Inc. v. Edwards*, 626 S.E.2d 315, 323 (N.C. Ct. App. 2006)—*e.g.*, "deception either in the formation of the contract or in the circumstances of its breach," *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989) (citation omitted). The UDTPA also requires proof of proximate causation. *Gray v. N.C. Ins. Underwriting Ass'n*, 529

S.E.2d 676, 687 (N.C. 2000). As the district court recognized, none of this was present here.

a. A Grossly Negligent Breach of the Implied Covenant Does Not Support a UDTPA Claim as a Matter of Law.

The jury's finding that Abbott's purported breach of the implied covenant was "grossly negligent," ER-75, does not constitute a substantially aggravating circumstance converting the breach into a UDTPA claim. Adopting GSK's proposed instructions, the court instructed that "grossly negligent conduct" involves either "intentional wrongdoing or a reckless indifference to the rights of others." ER-120. As explained below, the jury necessarily found only reckless indifference. *Infra* at 69. Because even an *intentional* breach of contract does not violate the UDTPA, a "grossly negligent" breach necessarily falls short.

Further, as the district court recognized, ER-19-21, neither reckless indifference nor "intentional wrongdoing" says anything about "the impact the practice has in the marketplace." *Johnson v. Phoenix Mut. Life Ins. Co.*, 266 S.E.2d 610, 621 (N.C. 1980). Nor does either show "deception." *Bartolomeo*, 889 F.2d at 535. Indeed, the jury found that Abbott's repricing of Norvir was *not* undertaken "to undermine and disrupt Lexiva's launch and future sales." ER-76.[26]

[26] GSK's other theories for how Abbott might have engaged in intentional wrongdoing, GSK Br. 64-65, both are implausible and were not presented to the jury. *See infra* at 74-77; *Neely v. Club Med Management Servs. Inc.*, 63 F.3d 166,

The jury also found that Abbott's failure to tell GSK that Abbott had *considered* taking Norvir off the market did not proximately cause any injury. ER-20, 77.

GSK's UDTPA cases, GSK Br. 47, involved deception accompanied by extreme facts not found below and inconsistent with the jury's finding that Abbott did not reprice Norvir to harm GSK. For example, *Mosley & Mosley Builders, Inc. v. Landin Ltd.* involved wrongful eviction of a tenant and removal of its property in a manner analogous to trespass and conversion. 389 S.E.2d 576, 580 (N.C. Ct. App. 1990). *Huff v. Autos Unlimited, Inc.* involved deception by a used car salesman who represented that a car known to have been "wrecked" had only been in a "fender-bender" and was "reliable." 477 S.E.2d 86, 88-89 (N.C. Ct. App. 1996). And as GSK concedes, the UDTPA claim in *Riese* was not even premised on a breach, let alone of an *implied* covenant. GSK Br. 45-46 n.19. In fact, *Riese* addressed the opposite issue—when the exercise of a clear contractual *right* (not a breach) may violate the UDTPA.

b. Withholding Its Consideration of a Course of Action Abbott Never Took Is Not a Substantially Aggravating Factor Under the UDTPA.

Nor is UDTPA liability supported by the jury's finding that Abbott "deliberately withheld" from GSK that Abbott *considered* withdrawing Norvir

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200 (3d Cir. 1995) ("Having failed to present this issue to the jury, the defendants failed to meet their burden.").

from the market. ER-76. It is "not unfair or deceptive for [a party] to study and seek alternative[s]" that involve terminating a contract. *Tar Heel Indus.*, 370 S.E.2d at 452.

In any event, the district court rightly recognized that liability is foreclosed by the jury's finding of no proximate cause. ER-20, 77. GSK says proof of actual deception is not required. But proximate cause is "an essential element" of a UDTPA violation, *Old Salem Foreign Car Serv., Inc. v. Webb*, 582 S.E.2d 673, 677 (N.C. Ct. App. 2003), and a plaintiff "must establish *actual injury to himself* or his business, proximately caused *by the unfair or deceptive act or practice*." *Ausley v. Bishop*, 515 S.E.2d 72, 77 (N.C. Ct. App. 1999) (emphasis added) (citing authorities). Thus, GSK was required to prove that any deception caused it actual harm—which it failed to do.[27]

CONCLUSION

GSK's *Batson* claim should be rejected. Even if *Batson* applied to sexual orientation—and no court has so held—GSK did not make a prima facie showing

[27] GSK also says the jury's finding of no proximate cause is irrelevant because of the harm GSK suffered harm by virtue of Abbott's purported breach. GSK Br. 48. GSK is wrong. "In forging [the UDTPA], the legislature intended for the phrase 'treble the amount fixed by the verdict' to mean that damages *proximately caused* by a violation of [the act] shall be trebled, not that damages on every claim that happens to arise in a case involving a violation of [the act] shall be trebled." *Gray*, 529 S.E.2d at 684-5 (discussing private action section of UDTPA, N.C.G.S.A. § 75-16).

of discrimination, and the record reveals obvious, non-discriminatory reasons for excluding the juror in question. Further, the case should never have been submitted to the jury because Abbott was entitled to judgment as a matter of law.

REPLY BRIEF IN SUPPORT OF ABBOTT'S APPEAL

I. GSK Cannot Establish a Breach of the Implied Covenant

GSK's opposition to Abbott's appeal confirms that Abbott was entitled to judgment as a matter of law on GSK's implied covenant claim.

There is a glaring gap between the right that GSK says it was granted by its patent license from Abbott and the right that GSK says Abbott violated. Nobody disputes that "*every* contract has an implied covenant of good faith and fair dealing," GSK Br. 50, or that "a party may not assign a right [to a patent], receive consideration for it, and then take steps that would *render the right commercially worthless*." *Id.* at 57 (quoting *Jacobs v. Nintendo of Am., Inc.*, 370 F.3d 1097, 1101 (Fed. Cir. 2004)) (emphasis added). GSK thus argues that the patent license included an "implied promise that Abbott would not use its control over Norvir to interfere with GSK's ability to promote and market boosted Lexiva." *Id.* at 52 (quoting ER-8). But GSK nowhere shows that *this* purported right was violated.

Instead, GSK says the Norvir price increase "hurt Lexiva," *Id.* at 53—depriving GSK not of the "ability" to promote and market Lexiva, but merely of the opportunity to "*enhance* [Lexiva's] profits." ER-351. GSK's real complaint is thus that it made less profit than it had hoped; and GSK's real claim is that it had an implied right to prevent Abbott from raising the price of Abbott's own patented

product, Norvir, so that GSK could make more on Lexiva. But that goes far beyond what can lawfully be read into a patent license.

A. GSK Does Not Claim That Its License Was Rendered "Commercially Worthless."

Although GSK says the implied covenant prohibited Abbott from rendering GSK's patent license "commercially worthless," GSK Br. 57 (quoting *Jacobs*, 370 F.3d 1097), it is undisputed that Abbott did nothing of the sort.

GSK admits that it was able to sell Lexiva for use with Norvir, that its licensed use of Abbott's patents generated $927 million of Lexiva sales since 2004, and that GSK continues to sell boosted Lexiva to this day—presumably at a substantial profit.[28] *Id.* at 16. Moreover, GSK has conceded that the contract here is a "simple patent license," ER-732—which is "nothing more than a promise by the licensor not to sue" for infringement, *Spindelfabrik Suessen-Schurr, Stahlecker & Grill GmbH v. Schubert & Salzer Maschinenfabrik Aktiengesellschaft*, 829 F.2d 1075, 1081 (Fed. Cir. 1987)—and that Abbott stood by that promise. Thus, GSK cannot plausibly maintain that the patent right it licensed from Abbott has been rendered "commercially worthless," or that it has been deprived of the "*ability* to

[28] Although GSK claims it "invested $750 to $800 million just to develop Lexiva," GSK's admission that it made $927 million in revenue over a six-year period confirms that it more than recouped its investment and is continuing to profit from Lexiva sales. GSK Br. 57 n.23.

promote and market boosted Lexiva." GSK Br. 57, 52 (quoting *Jacobs*, 370 F.3d 1097) (emphasis added).

Although GSK focuses on Abbott's purported efforts to "constrain the supply" of Norvir, *id.* at 6, GSK admits that Abbott never took Norvir off the market. All GSK can say is that Abbott "discussed th[is] option." *Id.* at 55 (emphasis added). But "discussing" this option did not deprive GSK of anything.

Nor can GSK plausibly maintain that Abbott's price increase was somehow intended to be a "weapon" against Lexiva. *Id.* at 56. The jury rejected that theory, *see infra* at 68-70; Abbott Br. 51-52, and the testimony that GSK cites does not support it. For example, GSK cites Heather Mason's reference to a "plan" to make GSK look bad, GSK Br. 56, but this "plan" was Abbott's separate decision to give Norvir away *for free* as part of its "patient assistance program." ASER-103-104; SER-485. GSK similarly cites Bill Dempsey's comment that Kaletra's sales numbers had given GSK a "lump of coal" for the holidays, GSK Br. 56, but this is a reference to Kaletra's sales success *before* the price increase. SER-414-15.

To be sure, GSK thinks it could have made even more money on Lexiva if Abbott had not raised Norvir's price—less than one half of one percent more, according to the jury. Abbott Br. 44. But this is a far cry from what GSK's own cases say is required to demonstrate a breach of the implied covenant—namely, "render[ing] the right commercially worthless." *Jacobs*, 370 F.3d at 1101.

Thus, despite GSK's façade on appeal of embracing a more plausible theory of the implied covenant's scope, the only theory consistent with the undisputed evidence is the one GSK advanced at trial: a theory that an ordinary patent license somehow guaranteed GSK the "right to *enhance* its profits" by controlling the pricing of Abbott's own competing patented product. ER-351. As shown in the following section, that theory cannot support recovery as a matter of law.

B. The Patent License Did Not Give GSK an Implied Right To Enhance Its Profits by Controlling Abbott's Pricing Decisions.

As Abbott's opening brief showed, New York law forecloses GSK's novel theory that the patent license gave it an implied right to control Abbott's pricing. Nothing in GSK's brief undermined that showing. GSK points to the preamble and license grant, which note that "GSK is interested in obtaining a license from Abbott to promote and market" Lexiva. GSK Br. 53 (quoting ER-706). But this generic preamble language hardly means that Abbott relinquished the right to price its own product, or that it guaranteed a particular level of profits to GSK.

It is no answer for GSK to say the implied covenant is "not limited" by the contract's express terms. *Id.* at 50. Under New York law, the implied "covenant does not create duties which are not fairly inferable from the express terms of th[e] contract." *Interallianz Bank AG v. Nycal Corp.*, No. 93 CIV. 5024, 1994 WL 177745, at *8 (S.D.N.Y. May 6, 1994). Although the implied covenant includes promises that a reasonable person "would be justified in understanding were

included," GSK Br. 50-51, that understanding must be based on the express contractual language, lest it create "an independent contractual right that was not bargained for." *Madison Apparel Group Ltd. v. Hachette Filipacchi Presse, S.A.*, 861 N.Y.S.2d 296, 297 (App. Div. 2008). Creating a contractual right, not anchored to the license's text, to maximize Lexiva's profits at Abbott's expense is exactly the kind of abuse of the implied covenant that New York law forbids. Abbott Br. 44-46 (citing decisions vacating similar implied covenant claims).[29] Nor does GSK explain how it would be commercially reasonable to assume that Abbott would surrender control over Norvir's price to a direct competitor. Abbott Br. 40-43. Not only was this right extremely valuable; it was central to the lawful patent monopoly.[30] GSK suggests that, in pointing out the critical importance to a lawful monopolist of setting prices, Abbott has somehow "conced[ed]" that GSK

[29] GSK strains to suggest that these cases are "distinguishable." GSK Br. 51 n.21. One case, GSK asserts, involved an alleged breach of the implied covenant that arose from a separate transaction. But GSK does not explain why this matters. *Id.* GSK says another case involved an allegation that the implied covenant imposed a certain requirement that parties had expressly bargained for in the past. *Id.* But the fact that parties do not routinely bargain for pricing limitations like the one GSK seeks hardly makes it *more* reasonable to imply such a limitation here.

[30] GSK says the license was worth $59 million to Abbott, but the document GSK cites was a "forecasted and very speculative" attempt to estimate the license's value, which was "very, very difficult to pinpoint." ASER-159-160, 162. That estimate also included purported "concessions" made on a *different* license involving a *different* product. And other evidence GSK fails to mention showed that Abbott expected to generate only $19 million in revenue over the Norvir license's lifespan. ASER-159-160, 163.

could expect Abbott "not [to] manipulate the price of Norvir." GSK Br. 55. But it is Abbott—not GSK—that holds patent rights covering Norvir. And setting prices is what patent owners with lawful monopolies are entitled and expected to do.

Indeed, GSK's own argument confirms its unreasonableness. GSK says the patent license gave it an implied "right to enhance its profits," ER-351, while simultaneously maintaining that the jury's award of damages at a *de minimis* one-half of one percent of Lexiva's overall sales is irrelevant to "the propriety of the jury's liability finding." GSK Br. 57. In other words, GSK's position is that it is a breach of the implied covenant for Abbott to take an action that reduces GSK's profits even by a *de minimus* percentage. That is effectively a rule that, in licensing its patents to its competitor, Abbott agreed to stop competing—lest Abbott's competitive conduct do what competition is supposed to do and take sales from GSK, which would then constitute a breach of the implied covenant. If, for example, Abbott engaged in an educational campaign with doctors and convinced doctors to switch patients from Lexiva to Norvir, GSK's theory would deem this a breach of the implied covenant in light of Lexiva's loss of sales.

Once GSK has abandoned the limiting principle of its own cases—that a licensor's conduct violates the implied covenant only if it renders the patent license "commercially worthless"—GSK's theory knows no bounds. *Id.* The notion that GSK had an implied right to maximum profits on Lexiva converts what GSK itself

has called a "simple patent license," ER-732, into an agreement not to compete. Such an interpretation of an ordinary patent license would have a chilling effect on the willingness of companies to license patents to their competitors in the future.

GSK's interpretation is all the more unreasonable in light of the parties' expectations during negotiation. GSK cites conclusory testimony of its own employees, who claim they thought it would have been a breach of the license to raise Norvir's price. GSK Br. 53. But what promises are implied by the covenant requires an objective answer based on the contract's terms, and is not a matter for post-hoc speculation by self-interested witnesses. *Rowe v. Great Atl. & Pac. Tea Co.*, 46 N.Y.2d 62, 67-70 (1978) (implied covenant encompasses "promises which a reasonable person in the position of the promisee would be justified in understanding were included" as "implicit in the agreement viewed as a whole") (internal quotation omitted).

In any event, GSK does not dispute that all negotiators on both sides *intentionally* avoided restricting Norvir's price. *See* Abbott Br. 39 (citing GSK's lead negotiator: "we did not introduce a price control in the agreement on Norvir's price"). GSK instead says it is irrelevant "whether Abbott and GSK reached, but failed to memorialize, an agreement concerning the pricing of Norvir"—characterizing that question as relevant only to a claim for breach of an implied-in-fact contract term. GSK Br. 54. The point, however, is not that the parties simply

"failed to memorialize," *id.*, a price term; it is that the parties "*intentionally* left [a price term] out of the bargaining." Abbott Br. 39-40. And "no reasonable person would be justified in understanding" that the license gave GSK an implied right that the parties intentionally omitted from their negotiations. *Moran v. Erk*, 11 N.Y.3d 452, 457 (2008); *see also Dave Greytak Enters., Inc. v. Mazda Motors of Am., Inc.*, 622 A.2d 14, 23 (Del. Ch. 1992) (where "the contract is intentionally silent as to [a] subject, the implied duty to perform in good faith does not come into play").

In sum, the evidence does not begin to show that Abbott "assign[ed] a right [to a patent], receive[d] consideration for it, and then t[ook] steps that . . . render[ed] the right commercially worthless." GSK Br. 57 (quoting *Jacobs*, 370 F.3d 1097). And the notion that GSK had an implied right to control the timing or amounts of price increases on Abbott's own patented drug—so GSK could "*enhance* its profits"—cannot, as a matter of law, be read into a patent license through the implied covenant of good faith and fair dealing.

II. The Limitation-of-Liability Clause Bars GSK's Contract Claim.

Even if the evidence showed that Abbott breached the implied covenant, the license's limitation-of-liability clause would require reversal of the damages award. As explained in Abbott's opening brief (at 47-49), New York law sets a high bar for escaping from agreements to limit liability, holding that there is "no

harm in express agreements limiting the damages to be recovered for breach of contract." *Metropolitan Life Ins. Co. v. Noble Lowndes Int'l*, 84 N.Y.2d 430, 436 (1994) (quoting 5 Corbin, Contracts § 1068, at 386). Traditionally, the only exceptions have been for "contracts of adhesion" or for "when the breach is also tortious." *Id*. at 436 n.* (citing 5 Corbin, Contracts § 1068, at 386 n.84.5, 389); *see also id*. at 439 (citing Restatement (Second) of Contracts § 195[1]).

GSK does not dispute that this is how standard treatises and the Restatement have always understood the rule. But GSK asks this Court to adopt a different and unprecedented rule that prevents parties from limiting liability for many garden-variety breaches of contract. GSK says a limitation-of-liability clause can be invalidated based on *any kind* of "grossly negligent conduct"—even if that conduct is not tortious, involves no intent to harm, and is no more than a breach of contract committed with "gross negligence." GSK Br. 59. Yet GSK cites no case—New York or otherwise—holding that a mere breach of contract undertaken with reckless indifference to the contract rights of the non-breaching party can overcome a limitation-of-liability clause. In fact, New York law forecloses this novel interpretation and, given the jury verdict, compels judgment for Abbott.

A. New York Law Forecloses GSK's Theory That a Non-Tortious Breach Without Intent To Harm Invalidates a Limitation-of-Liability Clause.

In the only New York case involving a breach of contract without an independent tort, *Metropolitan Life*, the court held a limitation-of-liability clause enforceable for all breaches except those committed with an intent to harm—a finding the jury here rejected. In arguing that neither a separate tort nor intent to harm is required, GSK Br. 58, GSK plucks vague snippets from various New York cases while neglecting their context and actual holdings. Although courts have suggested that "grossly negligent conduct," *id*. at 59, can overcome a limitation-of-liability provision, the "grossly negligent conduct" to which the cases refer is tortious conduct—not a "grossly negligent breach" merely involving indifference to contractual rights.

1. GSK Misreads *Metropolitan Life*.

GSK dismisses *Metropolitan Life* as nothing more than a case of contract interpretation, but that decision squarely held that a mere breach of contract cannot void a limitation-of-liability clause unless the breach is committed with intent to harm. 84 N.Y.2d at 438. The contract in *Metropolitan Life* limited liability for all consequential damages, except for damages due to "intentional misrepresentations, . . . willful acts or gross negligence." *Id*. at 433. But the court narrowly construed that exception as applying only to tortious conduct:

> Under the interpretation tool of *ejusdem generis* applicable to contracts as well as statutes, the phrase "willful acts" should be interpreted here as referring to conduct similar in nature to the "intentional misrepresentation" and "gross negligence" with which it was joined . . . . We, therefore, conclude that the term willful acts as used in this contract was intended by the parties to subsume *conduct which is tortious in nature*, i.e., *wrongful conduct in which defendant willfully intends to inflict harm* on plaintiff at least in part through the means of breaching the contract between the parties.

Id. at 438 (emphasis added).

The court thus construed the exceptions for "intentional misrepresentations," "willful acts," and "gross negligence" as "similar in nature" because they all referred to "conduct which is tortious." And in the context of a breach of contract, the court defined a "willful act" as a breach "willfully intend[ed] to inflict harm." True, the court rejected the lower court's view "that tort law principles apply *in all cases* in which the word willful is at issue." *Id.* at 435 (emphasis added). As shown above, however, the court went on to conclude that the parties "intended" for "willful" to have that meaning in this particular case. *Id*. at 438. And so, by construing the exceptions to the limitation-of-liability clause narrowly, the court necessarily broadened the clause so that it limited liability for all breaches of contract short of those involving intentional misrepresentation, an intent to harm, or tortious gross negligence.

After so construing the limitation-of-liability clause, the court squarely address its enforceability in the very next paragraph: "*As thus defined*, limiting defendant's liability for consequential damages to injuries to plaintiff caused by intentional misrepresentations, willful acts and gross negligence *does not offend public policy*." *Id.* (emphasis added). In other words, a clause that limits liability for all breaches of contract except those involving intentional misrepresentation, intent to harm, or tortious gross negligence does not offend public policy. There is no way to interpret this as anything but a clear holding that limitations of liability are fully enforceable against, at a minimum, breaches of contract that are non-tortious and committed without intent to harm, as the jury found here.

2. Neither *Metropolitan Life*, Nor Any Other Authorities, Allow Invalidation of a Limitation-of-Liability Clause Based on a "Grossly Negligent" Breach that Is Not Tortious.

According to GSK, *Metropolitan Life* did not "suggest that New York's public policy would countenance shielding a defendant from liability for its own grossly negligent conduct." GSK Br. 62. As shown, however, that is only because *Metropolitan Life* understood "grossly negligent *conduct*" to mean "conduct which is tortious in nature." 84 N.Y.2d at 438. *Metropolitan Life* could not have understood "grossly negligent conduct" to mean merely a breach committed with gross negligence, as it held that even an "*intentional*" breach "motivated by financial self-interest" was "a risk which plaintiff assumed under . . . the parties'

[a]greement" to limit liability—an agreement that "does not offend public policy." *Id*. at 438, 439 (emphasis added). And because limiting liability for an *intentional* breach is lawful, it follows *a fortiori* that limiting liability for a breach committed with just gross *negligence* cannot possibly be unlawful. GSK offers no answer to this logical flaw in its argument.

GSK invokes *Sommer* and *Kalisch-Jarcho*, but those decisions simply confirm the traditional rule that "grossly negligent conduct" must be tortious to void a limitation-of-liability clause. GSK does not dispute that *Sommer* involved claims that "sounded in tort," even if it also involved contract claims. GSK Br. 61 n.24. Thus, regardless of the legal basis for each claim there, GSK cannot deny that the *conduct* that formed the basis of the claims in both of those cases was tortious. That is why the court said the case fell "in the borderland between tort and contract." *Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 550 (1992).

Kalisch-Jarcho is no more helpful to GSK. GSK cites dictum from that decision about "grossly negligent acts," GSK Br. 60, but does not dispute that all of the authorities that *Kalisch-Jarcho* cited for that standard involved the traditional tort exception. *Kalisch-Jarcho, Inc. v. City of New York*, 58 N.Y.2d 377, 384-85 (1983) (citing Corbin and the Restatement). GSK says the language it quotes was not dictum because the court "remanded for retrial and was providing guidance" on the appropriate jury instructions. GSK Br. 60. But the portion of the

opinion that canvasses the traditional tort exception is not the portion of the opinion that provided such guidance. After discussing the exception in general terms, the court provided specific guidance for the instructions, explaining that the plaintiff would have to show "bad faith" and "deliberate intent" to harm—not merely a breach committed with "gross negligence." 58 N.Y.2d at 386. *Kalisch-Jarcho*'s holding cannot fairly be read more broadly than that.

In any event, GSK's expansive reading of *Sommer* and *Kalisch-Jarcho* conflicts with *Metropolitan Life*, which post-dates those cases and reads them to hold that tortious conduct is required to void a limitation of liability. GSK cites *Metropolitan Life*'s reference to language from those cases suggesting that a limitation of liability can be voided by conduct that "smack[s] of intentional wrongdoing." GSK Br. 62-63. And by emphasizing the word "smack[s]," GSK strains to suggest that this means something less than tortious conduct. *Id.* But "smack[s]" is not the word that the court emphasized when it cited this language "with approval." *Id.* at 62. It emphasized the word "wrongdoing," which is italicized in the opinion but not in GSK's brief. And it is clear from the full context that *Metropolitan Life* read this language to mean tortious conduct:

> As we said in *Sommer v. Federal Signal Corp*. (79 NY2d 540) the conduct necessary "to pierce an agreed-upon limitation of liability in a commercial contract, must 'smack[ ] of intentional *wrongdoing*'" (*id*. at 554 [quoting *Kalisch-Jarcho, Inc. v. City of New York*, 58 NY2d 377, 385 [emphasis supplied]; *see also*, 5 Corbin,

> Contracts § 1068, at 389 [contractual exemption from liability for *tortious* conduct may be held against the public interest and illegal]; Restatement [Second] of Contracts § 195 [1] ["A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy"]).

84 N.Y.2d at 438-39 (emphasis and brackets in original). As this emphasis by New York's highest court makes clear, *Metropolitan Life* endorsed—and read *Sommer* and *Kalisch-Jarcho* to endorse—the traditional view that, to void a limitation-of-liability clause, conduct must be tortious.

GSK also asserts (without explanation) that two lower-court decisions, post-*Metropolitan Life*, invalidated limitations of liability based on "gross negligence." GSK Br. 62-63. But both involved tortious conduct and intent to harm. In the first, the claim went forward because the complaint alleged "extortion" that could "reasonably be perceived by a trier of fact as *an intention to inflict monetary harm, which is tortious as a matter of law*, and renders the limitation on recovery contained in the lease unenforceable." *Banc. of Am. Sec., LLC v. Solow Bldg. Co.*, 847 N.Y.S.2d 49, *3, *9 (App. Div. 2007) (emphasis added, citation omitted). So too in GSK's second case, where the court found "intentional wrongdoing" sufficient to "state a cause of action, sounding in tort, which would preclude enforcement of [the limitation-of-liability]" clause. *Empire One Telecomms., Inc. v. Verizon New York, Inc.*, 888 N.Y.S.2d 714 (Sup. Ct. 2009). Thus, these decisions reinforce Abbott's position.

GSK's citation of the comments to the New York Pattern Jury Instructions is unconvincing. Those comments merely refer to "grossly negligent conduct," with citation to *Sommer;* and to "bad faith, . . . intentional or willful misconduct," with citation to *Banc of America*. N.Y.P.J.I. Civil 4:1, Comment to Contracts—Elements (3d ed. 2011). As explained above, those cases confirm that grossly negligent conduct must be tortious and that a mere breach must be committed with intent to harm. The jury found neither here.

B. GSK's Novel Suggestion that the Jury Found an Intent To Harm Is Wholly Implausible.

Because New York law requires tortious gross negligence or intent to harm in order to preclude limiting liability, the jury's findings rejecting those theories compel enforcement of the limitation-of-liability clause. Abbott is in no way alleging "error in th[e] [jury] instructions." GSK Br. 64. Nor is Abbott alleging that the verdict is inconsistent. The jury's findings confirm that the jury rejected GSK's theories involving tortious gross negligence and intent to harm, leaving only a theory of a non-tortious, grossly negligent breach.

The district court did not hold otherwise. ER-10-15. Rather, it held that a non-tortious, grossly negligent breach of contract was legally sufficient to void the

limitation-of-liability clause. ER-10-15. Abbott's argument here thus challenges the district court only as to the legal significance of the jury's finding.[31]

In seeking affirmance on an alternative ground, GSK does not dispute that the jury rejected its allegations of tortious conduct (*i.e.*, its antitrust and UDTPA claims, which sound in tort). GSK Br. 64-66. Instead, GSK now attempts to interpret the jury's verdict as having found intent to harm. GSK focuses on the jury's affirmative answer to question B2, which asked whether Abbott engaged in "grossly negligent conduct," defined (at GSK's request, ASER-25) as intentional wrongdoing *or* reckless indifference. ER-75. Because the definition uses the term "or," the jury's response to this question alone is not determinative. As explained in Abbott's opening brief (at 50), however, the jury's answers to other questions confirm that the jury rejected intentional wrongdoing. ER-72, 76.

GSK says the jury's answers to interrogatories "can be read in light of the evidence" without concluding that the jury rejected GSK's theory of intentional wrongdoing. *Bains LLC v. Arco Prods. Co.*, 405 F.3d 764, 771 (9th Cir. 2005). But GSK's two theories for doing so are deeply implausible.

First, although the jury found that Abbott did not raise Norvir's price "to undermine and disrupt Lexiva's launch and future sales," ER-76—language that

[31] The jury rendered no verdict on whether the limitation-of-liability clause is valid. Rather, that was a legal judgment made by the court based on its interpretation of the jury's findings and the applicable law. ER-10-15.

GSK proposed, *see supra* at 50-51)—GSK nevertheless says the jury might have found that "Abbott acted intentionally to harm all of its competitors," GSK Br. 65. But GSK's contention at trial was that Abbott intended to harm *GSK*. It is implausible that the jury would have found that Abbott intended to harm *everyone else in a group that includes GSK*, but not GSK itself. Moreover, this interpretation of the verdict would require holding that Abbott somehow voided its limitation of liability in a contract with one party by intending to harm nonparties to that contract. GSK cites no authority supporting such a rule.

GSK's other theory is even more implausible. The jury answered "no" when asked whether Abbott "inequitably asserted its power over Norvir by increasing Norvir's price by 400 percent to undermine and disrupt Lexiva's launch and future sales." ER-76. GSK claims that "the jury could have found that Abbott intended to undermine and disrupt Lexiva, but not through an inequitable assertion of power." GSK Br. 65. This strains credulity. GSK's contention at trial was that Abbott intended to harm Lexiva *by inequitably raising Norvir's price*. GSK presented no evidence that Abbott harmed Lexiva in some other way.[32]

[32] GSK is wrong to suggest that Abbott's interpretation of the jury verdict, which is the same as the district court's interpretation, "bears a heavy burden," GSK Br. 65, as Abbott is not arguing that the verdict is inconsistent. Nor is GSK entitled to any deference as the "party successful at trial." *Id.* The trial resulted in a mixed verdict, and GSK's success on one element of its contract claim hardly entitles it to a presumption of success on another.

In sum, GSK's attempt to explain away these express findings is no more than grasping at straws, which is especially inappropriate given that it was GSK who proposed the verdict form questions.

C. The District Court Correctly Held that GSK's Lost Profits Are Consequential Damages Barred by the Limitation-of-Liability Clause.

The district court correctly held that "the lost profits GSK seeks are best characterized as consequential, not general, damages." ER-397. In a last-gasp effort to escape from the limitation-of-liability clause, GSK asks this Court to affirm on the alternative ground that the district court was wrong on this point.

The district court relied on a Second Circuit decision distinguishing between consequential and general damages under New York law. ER-396-97. As the Second Circuit held, lost profits are general damages when they seek "to recover money that the breaching party agreed to pay under the contract," but "are consequential damages when, as a result of the breach, the non-breaching party suffers loss of profits *on collateral business arrangements*." *Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*, 487 F.3d 89, 109, 110 (2d Cir. 2007). Thus, having concluded that GSK's lost profits were not monies that Abbott owed under the contract—but rather were collateral "revenue from third parties" that GSK hoped to make on sales of Lexiva—the district court rightly concluded that GSK's lost profits had to be consequential damages. ER-397.

GSK nowhere mentions this precedent. GSK invokes vague language from Williston noting that general damages "flow naturally from a breach," but that is not inconsistent with the Second Circuit's holding. In fact, Williston explains that general damages are limited to those that are a "proximate" and "invariable result of every breach"—*e.g.*, "a failure of the promised performance itself." 24 Williston on Contracts § 64:12 (4th ed. 2002). Consequential damages, by contrast, are those that "do not *always* flow from such a breach," even if they "often" do. *Id*. (emphasis added). Because GSK's purported lost sales to third parties would not be an invariable result of the breach, they are consequential damages under this standard.

Nor is there any merit to GSK's complaint that limiting consequential damages "would place GSK at Abbott's mercy." GSK Br. 67. There is nothing unfair about a commercial provision limiting the parties' damages. New York law instructs that "courts should honor" such provisions. *Metropolitan Life*, 84 N.Y.2d at 436. Moreover, had Abbott failed to supply Norvir, GSK expressly agreed that the appropriate remedy was not lost profits, but rather for GSK to "be relieved of its obligations to pay royalties." *See* Abbott Br. 48; ER-713-714. It would hardly be an "unreasonable result," GSK Br. 67, similarly to limit the remedies available in the event of a price increase that did not rise to the level of a failure to supply Norvir. In sum, even if the evidence supported liability for breach of the implied

covenant, the contract's limitation-of-liability clause would require reversing the damages award.

CONCLUSION

For the foregoing reasons and the reasons stated in Abbott's opening brief, this Court should reverse the district court's denial of judgment as a matter of law and enter judgment for Abbott on GSK's breach of-contract claim.

* * *

July 17, 2012

Respectfully submitted,

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PLAINTIFF/APPELLEE/CROSS-APPELLANT

v.

ABBOTT LABORATORIES,
DEFENDANT/APPELLANT/CROSS-APPELLEE

CERTIFICATE OF COMPLIANCE

This brief complies with the enlargement of brief size granted by court order dated June 19, 2012. The brief is 17,572 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Times New Roman 14 point font.

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