Nos. 2011-17357, 2011-17373

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

ABBOTT LABORATORIES,
Defendant-Appellant/Cross-Appellee,

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

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

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CORPORATE DISCLOSURE STATEMENT

GlaxoSmithKline LLC, formerly SmithKline Beecham Corporation d/b/a GlaxoSmithKline, is owned, through several layers of wholly-owned subsidiaries, by GlaxoSmithKline plc, a publicly traded public limited company organized under the laws of England. To the knowledge of GlaxoSmithKline LLC and GlaxoSmithKline plc, none of the shareholders of GlaxoSmithKline plc beneficially owns ten percent or more of its outstanding shares. However, the Bank of New York Mellon ("BNYM") acts as Depository in respect of Ordinary Share American Depositary Receipts ("ADRs") representing shares in GlaxoSmithKline plc. In that capacity, BNYM is the holder, but not the beneficial owner, of more than ten percent of the outstanding shares in GlaxoSmithKline plc on behalf of the ADR owners who are the beneficial owners of these shares, none of whom to GlaxoSmithKline plc's knowledge own ten percent or more of its outstanding shares. GlaxoSmithKline's HIV business is owned and operated by ViiV Healthcare, a joint venture created in October 2009. GlaxoSmithKline entities own a majority share (85%) of the ViiV Healthcare joint venture. Pfizer, Inc., a company organized independently of GlaxoSmithKline, owns a minority interest (15%) in ViiV Healthcare.

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INTRODUCTION AND SUMMARY OF ARGUMENT ON CROSS-APPEAL

These cross-appeals stem from a mixed jury verdict in litigation arising from Abbott's 400% price hike on a drug used, as part of a life-saving antiviral regimen, by patients with HIV/AIDS. Evidence showed that Abbott took the unprecedented price hike to suppress competition for a second, blockbuster HIV drug from newer non-Abbott drugs that would be used in combination with the first Abbott drug. The trial addressed GSK's claims that Abbott had violated antitrust laws and a state unfair competition law, and breached the implied covenant of good faith and fair dealing in a license agreement between GSK and Abbott covering the drug Abbott subjected to the massive price hike. By virtue of its cross-appeal, GSK seeks a new trial on all causes of action.

A new trial is warranted because the district court erred by permitting Abbott to strike from the jury the sole male juror known to be a homosexual. Plaintiffs objected to that strike under *Batson v. Kentucky*, 476 U.S. 79 (1986), precisely because of the importance to the gay community of issues related to HIV/AIDS. When offered the chance to justify Abbott's strike by showing a non-discriminatory motive, Abbott's counsel responded only by disingenuously denying that he knew the stricken juror was gay. Nevertheless, the district court rejected plaintiffs' *Batson* challenge, concluding incorrectly that *Batson* did not

apply in civil cases, required more than one discriminatory strike, and, in any event, did not apply to strikes of homosexual men.

Batson and subsequent Supreme Court decisions make clear that all persons, when granted the opportunity to serve on a jury, have the right not to be excluded based on stereotypical presumptions that reflect and reinforce historical patterns of discrimination. *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 140-41 (1994). There can be no doubt that it runs afoul of this direction to strike a gay man because the subject matter of the case deals with drugs used to treat AIDS. It matters not, as the district court held, that this is a civil case or that Abbott struck only one gay juror. While this Court has yet to rule that strikes based on a juror's sexual orientation are covered by *Batson*, recent precedents advancing the rights of homosexuals under the Fifth and Fourteenth Amendments make clear that the time is ripe to do so. The district court's refusal to apply *Batson* to Abbott's strike of a gay man is also inconsistent with established law applying *Batson* to strikes based on gender. Since ample evidence exists from which to infer a discriminatory motive, and since the record contains Abbott's legally inadequate defense of its strike, this Court should complete the *Batson* analysis, find the strike improper and order a new trial.

If this Court does not grant it a new trial, GSK seeks an order directing the district court to find that Abbott violated North Carolina's Unfair and Deceptive

Trade Practices Act ("UDTPA") and to treble the damages awarded to GSK. The jury's findings that Abbott engaged in "intentional misconduct" or was "reckless[ly] indifferen[t] to the rights [of GSK]" in breaching their license agreement and deliberately withheld important information from GSK while negotiating that agreement compel the conclusion that Abbott violated that statute. The district court should have reached that conclusion, and, under North Carolina law, this Court sits in its shoes and reviews its ruling *de novo*. The ruling that Abbott did not violate the UDTPA should be reversed.

For reasons that will be discussed in the section of this brief addressing Abbott's appeal, GSK urges the Court to reject that appeal regardless of how the Court rules on GSK's cross-appeal.

STATEMENT OF ISSUES ON GSK'S CROSS-APPEAL

1. Whether the district court erred by permitting Abbott to use a discriminatory, peremptory strike to remove a homosexual male juror over GSK's objection pursuant to *Batson* and its progeny.

2. Whether the district court erred in holding that Abbott did not violate Section 75-1.1 of North Carolina's UDTPA despite the jury's findings that (a) Abbott's quintupling the price of one of its HIV/AIDS drugs (Norvir) breached the implied covenant of good faith and fair dealing in its license agreement with GSK, (b) Abbott engaged in grossly negligent conduct in committing that breach

and (c) during negotiation of the licensing agreement, Abbott intentionally withheld from GSK its plans for using its control over Norvir to hinder GSK's ability to compete against another of Abbott's HIV/AIDS drugs (Kaletra).

STATEMENT OF ISSUES ON ABBOTT'S APPEAL

1. Whether the jury's finding that Abbott breached the implied covenant of good faith and fair dealing is reasonable in light of all of the evidence, including evidence that Abbott implemented a 400% price hike on Norvir as part of a "supply constraint program" designed to protect its blockbuster drug, Kaletra, from competition with Norvir-boosted protease inhibitors sold by GSK and other Abbott licensees.

2. Whether a finding that Abbott was recklessly indifferent to GSK's rights in taking the 400% price hike on Norvir is sufficient under New York law to prevent Abbott from relying on a limitation of liability clause to avoid liability to GSK, and, if not, whether the jury's answers to special interrogatories require this Court to assume the jury found that Abbott had engaged in no intentional misconduct.

JURISDICTIONAL STATEMENT

The district court properly exercised jurisdiction under 28 U.S.C. §§ 1331, 1332, 1337 and 1367 and entered final judgment. This Court has exclusive appellate jurisdiction under 28 U.S.C. § 1291. Final judgment was entered on

September 6, 2011, ER-1, and interlocutory orders from which appeal is being taken were entered on July 8, 2011, ER-17-22, and on February 28, 2011, SER-228, SER-234:4-6. Notice of appeal was timely filed on October 4, 2011. SER-1-10.

STATEMENT OF THE CASE

The drug on which Abbott imposed the 400% price hike goes by the trade name Norvir and the generic name ritonavir. Norvir is no longer used in HIV/AIDS drug regimens for its antiviral properties, but rather to boost the effectiveness of one of the main classes of drugs used in those regimens. This class is known as protease inhibitors or PIs, and Norvir is the only drug capable of boosting PI efficacy. PIs used with Norvir are known as boosted PIs. For years before it took the price hike, Abbott kept the price of Norvir low and cooperated with sellers of PIs to assist them in developing and marketing drugs that could be boosted by Norvir. Shortly before taking the price hike, Abbott licensed to GSK and others the right to promote Norvir in combination with their own PIs. In taking these steps, Abbott recognized it was creating competition for its own dominant boosted PI, Kaletra, which combined in one pill a PI and the active ingredient in Norvir.

Notwithstanding its long-standing pattern of cooperating with other sellers of PIs, and the licenses it had issued pursuant to that pattern, Abbott spent roughly

a year from late 2002 to late 2003 looking for ways to constrain the supply of Norvir so as to hinder the ability of its licensees to take sales away from Kaletra. The 400% price hike emerged as the preferred method of constraining the supply of Norvir because other options Abbott considered, such as removing Norvir from the market or selling it only as a disgusting tasting liquid, carried with them the risk that Abbott would lose its exclusive right to manufacture Norvir. Abbott announced the 400% price hike a mere three weeks after GSK introduced its new, boostable PI, Lexiva. Abbott did not raise the price of Kaletra, even though it contained the same active chemical ingredient as Norvir. As a result of Abbott's action, overnight, the price of a daily regimen of Norvir and GSK's drug went from rough parity with Kaletra to 75% more expensive. Abbott's price hike was unprecedented; historically, price hikes for HIV/AIDS drugs were under 10%. It caused a furor in the HIV/AIDS community, engulfing Abbott, GSK, physicians, patients and activist groups in a lengthy and vitriolic public dispute. GSK's efforts to launch Lexiva suffered tremendously, and Lexiva's sales never reached expected levels.

In 2007, GSK sued Abbott for violation of federal and state antitrust laws, breach of the covenant of good faith and fair dealing implied by law in the GSK/Abbott license agreement, and violation of the UDTPA. After the district court rejected two motions to dismiss and one summary judgment motion, and

after this Court rejected Abbott's petition for a writ of mandate, the case went to trial.

Trial began on March 1, 2011 and lasted roughly four weeks. During jury selection, Abbott exercised its first peremptory challenge to strike a juror who had identified himself to be gay by discussing the employment history of his male partner. SER-229:8-20, SER-231:23-232:3 (striking male juror who responded that "my partner" studied economics and invests, but that "he doesn't work … he's retired and he just doesn't have to work."). Counsel for plaintiffs moved to block the challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986), asserting that discrimination against homosexual males improperly motivated Abbott's challenge. SER-232:19-233:4.[1] Counsel explained that this case involved HIV/AIDS and that the disease was particularly prevalent in the gay community. *Id.* The district court responded that it was uncertain whether *Batson* applies in civil cases, whether it applies where a pattern has not been established, and whether it applies to challenges based on sexual orientation. SER-233:5-11. The court then gave Abbott's counsel the opportunity to set out a rationale for striking the gay male juror other than his sexual orientation. SER-233:12-16. In response,

[1] At the start of the trial, GSK was only one of many plaintiffs, and tasks were divided among the various counsel. Counsel for the class plaintiffs handled jury selection on behalf of all plaintiffs. Shortly after opening statements, Abbott settled with the other plaintiffs, leaving GSK as the sole remaining plaintiff.

Abbott's counsel defended Abbott's strike by denying that he knew the juror was gay. SER-233:20-22. The court then denied plaintiffs' motion. SER-234:4-6.

Evidence gathered before trial, much of which was introduced at trial, showed that the trial would involve very sensitive issues for the HIV/AIDS community. Abbott's 400% price hike was a "galvanizing event" that "really shook" patients and the HIV community. SER-221:19-24, SER-222:12-223:1. Heather Mason, the self-proclaimed architect of the Abbott price increase, admitted that reaction to the increase was "really strong," people were "upset" and "outrage[d]," and Abbott had "undercalled" the intensity of the firestorm. SER-79:13-80:19, SER-82:12-14. Doctors, patients and patient advocacy groups loudly vocalized their anger often accusing Abbott of an unconscionable attempt to drive them to prescribe Kaletra instead of other boosted PIs like Lexiva. SER-29:15-19, SER-30:9-31:20, SER-61:21-62:24, SER-71:10-72:7, SER-157:23-158:15. Many physicians vowed to boycott unrelated Abbott products, and some patients told their physicians that, if at all possible, they did not want to be prescribed Norvir. SER-64:8-10, SER-224:9-225:8.

The parties disputed the effects of this strong reaction to the unprecedented price increase. GSK claimed it had undermined GSK's ability to sell its newly launched PI and propped up Abbott's sales of Kaletra. SER-116:5-15, SER-156:16-21, ER-668-671. Abbott downplayed any lasting effects the price hike may

have had on Lexiva's sales and argued that it had no effect on Kaletra's sales. SER-26:23-27:7. As both parties knew in advance would be the case, the impact of drug prices on the HIV/AIDS community was a very significant issue with which the jury had to grapple during its deliberations.

At the end of the trial, the jury deliberated for five days before returning its verdict. The jury found for Abbott on GSK's antitrust claims, answering "no" to whether GSK had proven boosted PIs were a relevant market for purposes of the Sherman Act. ER-72. The jury found for GSK on its claim for breach of the implied covenant of good faith and fair dealing and further found that Abbott had engaged in grossly negligent conduct in breaching that covenant. ER-75. Nevertheless, the jury awarded GSK only $3.49 million in damages despite expert testimony that it had suffered hundreds of millions of dollars in losses and percipient testimony from both GSK and Abbott witnesses that, when a drug's launch is disrupted, sales of that drug are highly unlikely ever to recover to expected levels. ER-76. Relying on the jury's verdict, including its answers to three specific questions about Abbott's conduct, one of which the jury answered favorably for GSK, the district court found that Abbott had not violated the UDTPA and hence declined to treble the damages awarded by the jury as provided in that statute. The district court, on GSK's unopposed motion, added pre-

judgment interest and entered judgment against Abbott in the amount of $4.65 million.

STATEMENT OF FACTS

HIV/AIDS was first discovered in the early 1980s in gay communities in San Francisco and Los Angeles. June E. Osborn, *The AIDS Epidemic: Discovery of a New Disease, AIDS and the Law: A Guide for the Public* 18-19 (Harlon L Dalton et al eds. 1987). Until GSK invented the first drug to combat it, an HIV infection meant a certain death sentence. SER-210:6-8, SER-211:9-11. In the years since, strides have been made in its treatment, including most importantly the development of combination therapy in the early 1990s. SER-211:5-212:1. While there is no cure, HIV can now be managed if patients adhere to a daily pharmaceutical regimen. SER-210:9-15.

One frequently used combination of HIV drugs pairs a protease inhibitor (PI) with two nucleoside reverse transcriptase inhibitors. SER-211:5-212:1. In 1996, Abbott released Norvir as a PI. ER-222:19-22. Norvir never succeeded as a PI because of its severe side effects. SER-214:8-215:18. Around the time of Norvir's launch, however, Abbott discovered that Norvir had a second use. SER-215:19-20. When taken in sub-therapeutic doses along with another PI, Norvir interferes with the patient's metabolic clearance of the companion drug, thereby "boosting" its effectiveness. SER-215:19-217:14.

After this discovery, doctors began to prescribe PIs to be boosted with Norvir. ER-335:19-336:4. Norvir's average daily dosage dropped quickly. In fact, Norvir became predominantly used as a low-dose booster by 1999. *Id.*, SER-183:14-185:15, SER-288. In 2000, Abbott introduced a boosted PI, known as Kaletra, which combined a PI (lopinavir) and ritonavir in one pill. SER-218:3-6. Kaletra quickly became the most frequently prescribed PI. SER-528-530. By 2003, doctors prescribed boosted PIs far more often than unboosted ones. SER-197:4-198:19.

Pharmaceutical companies besides Abbott also developed PIs with the expectation that their predominant use would be boosted with Norvir. GSK developed and patented a boostable PI branded Lexiva (generic fosamprenavir), which it launched on November 17, 2003. SER-219:23-220:9. A few months earlier, Bristol-Myers Squibb released a boostable PI branded Reyataz (generic atazanavir). SER-219:4-10. When boosted with Norvir, Lexiva and Reyataz were among the most effective PIs available to patients. SER-199:2-21.

In significant part because of the need for combination therapy, there is a "culture of cooperation" in the HIV/AIDS community. SER-190:23-191:13, SER-206:18-22. Consistent with that culture, Abbott for years took price increases on Norvir only at or near the rate of inflation despite its awareness that Norvir's primary use and dosing had changed. SER-81:17-23, SER-164:11-17, SER-

182:13-16, SER-189:1-18. Abbott also monetized its patents on Norvir boosting by licensing all of its competitors to develop and promote their drugs for boosted use with Norvir. SER-119 (30:18-31:16), SER-121 (39:22-40:14); ER-270:19-24. Abbott made over $300 million in fees paid by its competitors under these license agreements, SER-186:3-10, and additional profits from increased sales of Norvir for use in combination with competitor PIs, SER-187:11-188:15; *see* SER-49 (119:17-22).

GSK and Abbott executed a license effective December 13, 2002 regarding Norvir boosting rights. ER-705-729. GSK not only paid lump sums of $5 million, but also gave tens of millions more in concessions on royalties Abbott would have to pay to use GSK's patented technology to manufacture a blockbuster Abbott drug known as Humira. SER-113:13-17, SER-124 (144:19-145:24), SER-134:5-25, SER-135:2-7. In return for these concessions, Abbott agreed GSK would not have to pay a running royalty on PI sales in the United States as part of the Norvir license. SER-136:3-137:8. When it signed the license, Abbott estimated the total value GSK paid for the Norvir license to be $59 million. SER-571.

The preamble of the Norvir license states its purpose: "GSK is interested in obtaining a license from Abbott to promote and market certain of GSK's HIV products with Ritonavir…." ER-706. James Tyree, Abbott's head of licensing, acknowledged that the purpose of the agreements was to free licensees to exploit

information about boosting to "hopefully" increase sales of their PIs; he went on that "of course" he knew the licenses were enabling other boosted PIs, like boosted Lexiva, to compete with Kaletra. SER-121 (39:22-40:14); *see also* SER-63:19-22.

Key GSK employees identified the purpose of the license as allowing GSK to "operate free and clear from any Norvir interference." SER-162:18-22; *see* SER-172:24-173:2; SER-43 (157:20-158:4). John Poulos, Abbott's head negotiator, testified that he assured GSK's negotiator, John Keller, that Abbott would not withdraw Norvir and was not interested in disrupting its reputation with the HIV community. SER-138:17-139:19. Mr. Keller confirmed this conversation, SER-171:7-21, and testified that he would have considered it a violation of good faith had he been told Abbott was going to take a 400 percent price hike, SER-177:9-17.

Despite understanding that the licenses enabled GSK and others to compete with Kaletra, Abbott's executives worried that the introduction of Lexiva and Reyataz would cause Kaletra's sales to plummet. SER-87:6-13, SER-88:12-15; SER-610-670. Miles White, Abbott's CEO, told Abbott executives he did not believe a plan was in place to "defend and grow [Abbott's] turf." SER-59:8-60:10, SER-83:22-85:17, SER-86:13-17, SER-566-569. In response, Abbott executives turned their attention to finding a way to use Abbott's control over Norvir to protect Kaletra from the coming competition.

Testimony and documents affirmed that Bill Dempsey, Abbott's head of pharmaceuticals, asked his subordinates "to think about ways to constrain the supply of Norvir," SER-46:17-21, because, without Norvir, patients would keep using Kaletra, SER-102:9-103:7, SER-602-605; *see also* SER-607-608. Closing down Abbott's ritonavir manufacturing line was considered a "savvy business idea." SER-599. Abbott's executives also considered leaving only a liquid form of Norvir on the market, which tasted "really bad." SER-104:15-24, SER-464. Finally, Abbott considered a "mega price increase" on Norvir as another way to implement Mr. Dempsey's supply constraint program. SER-471. Extensive evidence showed that Abbott considered the "mega price increase" equivalent to removal, which Abbott did not want to do because outright withdrawal posed regulatory risks, including loss of the exclusive right to manufacture Norvir. SER-98:8-12, SER-104:25-105:3, SER-106:1-6, SER-388, SER-471.

Three weeks after GSK launched Lexiva, Abbott quintupled the price of Norvir. SER-163:22-164:10. Abbott documents cite the timing of the price hike as a "clever, creative way to make [GSK] look bad." SER-485. High level Abbott executives knew the price hike would impact Lexiva sales because it would "fuel th[e] fire" of Abbott's marketing message that Kaletra was the most "cost-effective" PI and cause a public outcry that would harm Lexiva's launch. SER-28:22-23, SER-39:18-24, SER-40:11-41:5, SER-42:12-14, SER-122 (65:10-16),

SER-122 (65:19-22), SER-126 (125:18-24), SER-126-127 (142:5-12), SER-418-428, SER-485, SER-497.

Abbott's Norvir price hike moved the price of a daily dose of boosted Lexiva from $19 to $33. SER-164:18-23. Yet, because Abbott did not raise the price of ritonavir when it was co-formulated as part of Kaletra, the price of Kaletra remained the same. This meant that, overnight, boosted Lexiva went from rough price parity with Kaletra to approximately a 75% premium. SER-166:10-167:6.

The price increase was unprecedented. Indeed, it was "shocking," far exceeding both historical single digit price increases of other HIV/AIDS drugs and the highest one time price increase Abbott had ever taken on any drug – 14.5 percent. SER-48 (81:20-82:16), SER-49 (148:4-7), SER-164:11-17. The Norvir price increase was so unanticipated it would have triggered penalties under Abbott's own contracts with third parties. SER-52 (249:18-21), SER-52-53 (251:21-252:9). Abbott therefore renegotiated those contracts, behind the scenes and before the price hike, to protect its profits. For example, while Abbott sold its public pledge to freeze Norvir's price to AIDS Drug Assistance Programs as a magnanimous act, in fact it was done to avoid contract penalties and save Abbott money. *See* SER-411. Further, Abbott saved $29 million by renegotiating caps on payments due whenever Abbott increased prices to compensate wholesalers for not

making speculative purchases of Abbott drugs in advance. SER-51 (242:24-243:18), SER-55-56 (260:17-262:17), SER-452-453.

The price hike caused a furor in the patient and physician community. Doctors and patients were interested only in discussing the Norvir price hike; they would not discuss adopting Lexiva as a new and effective treatment. SER-69:17-70:11, SER-71:10-72:7, SER-165:3-16, SER-222:2-223:22. GSK lost the most important period in which to educate doctors on the benefits of boosted Lexiva. SER-73:1-13; *see also* SER-125 (121:02-121:13). And, the price differential between boosted Lexiva and Kaletra caused patients to ask their doctors for alternatives to a boosted Lexiva regimen. SER-169:12-170:1, SER-200:25-205:3.

Abbott's massive price hike on Norvir had the impact it sought. Doctors prescribed more Kaletra than they would have absent the Norvir price hike. GSK's medical expert confirmed that many of his patients chose to switch to Kaletra, and GSK's economics experts confirmed through two independent econometric analyses that Kaletra sales benefited from the price hike. SER-116:5-117:16, SER-192:21-194:11, SER-200:25-205:3, SER-225:9-226:21; *see also* SER-66:20-70:11, SER-112:12-18, SER-140:8-141:23, SER-142:1-155:14.

An economics expert testified that GSK lost over $400 million in sales of Lexiva because of the Norvir price hike. SER-116:16-117:7. While GSK has received $927 million in revenues from Lexiva sales since 2004, GSK witnesses

testified that GSK invested $750 to $800 million to develop Lexiva. ER-291:12-14, SER-65:16-22; *see* SER-77:25-78:3. Kaletra sales dwarf Lexiva sales. The evidence shows that Abbott made $3 billion in United States sales from 2003 to 2008, and over $7.2 billion worldwide. SER-21:25-SER-22:15, SER-22:20-23:23, SER-256, SER-273, SER-321, SER-337, SER-369, SER-375. Worse yet, because GSK was unable on launch to introduce Lexiva, doctors never integrated it into their treatment plans. SER-200:25-205:3. Patients therefore received sub-optimal HIV treatments where Lexiva would have been a better choice.

ARGUMENT RELATING TO GSK'S CROSS-APPEAL

I. Standard of Review

The threshold question of whether *Batson* applies to a challenged peremptory strike is reviewed *de novo*. *United States v. Alanis*, 335 F.3d 965, 967 n. 1 (9th Cir. 2003). When it is apparent from the record that the *Batson* challenge is well taken, the appellate court can and should order a new trial. *Id.* at 969 n.5, 970.

In an action for violation of North Carolina's UDTPA, N.C. Gen. Stat. 75-1.1, the "occurrence of the alleged conduct, damages, and proximate cause are fact questions for the jury, but whether the conduct was unfair or deceptive is a legal issue for the Court." *S. Atl. Ltd. P'ship of Tenn., L.P. v. Riese*, 284 F.3d 518, 534 (4th Cir. 2002) (quotation and citations omitted). Whether the conduct found by

the jury is unfair or deceptive is reviewed *de novo* as the appellate court "stands in the shoes of the district court." *Id.* at 535.

II. This Court Should Order a New Trial Because the District Court Erred By Not Rejecting Abbott's Peremptory Challenge of a Gay Man

A. *Batson* applies to the use of peremptory strikes to exclude gay men from the jury.

As they are "subject to the commands of the Equal Protection Clause," peremptory challenges may not to be used as a form of invidious discrimination. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). "All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination." *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 141-42 (1994) (footnote omitted). While *Batson* involved race-based strikes by prosecutors, its reach has expanded to cover peremptory challenges by both civil and criminal litigants based on discriminatory classifications like ethnicity or gender. *See id.* at 128, 146.

GSK here raised a *Batson* challenge when Abbott used a peremptory strike against a male juror who had identified himself to be gay. Although Abbott attempted to justify its strike based only on the demonstrably false contention that its counsel did not know the juror was gay, SER-223:22, the district court dismissed GSK's objection on the erroneous ground that *Batson* did not apply to

the questioned strike.[2] When confronting *Batson* challenges to strikes alleged to be based on sexual orientation, this Court has assumed, without deciding, that *Batson*'s three-part test applies. *See, e.g., United States v. Osazuwa*, 446 Fed. Appx. 919 (9th Cir. 2011) (unpublished), *cert denied*, No. 11-8461, 2012 WL 218131; *Johnson v. Campbell*, 92 F.3d 951, 951, 953 (9th Cir. 1996). Since the record reveals that a proper application of *Batson's* three-part test would have resulted in seating the stricken juror,[3] this case squarely presents the issue of whether that test applies to a strike of a homosexual male. For several independent reasons, it does.

1. *Batson* prohibits peremptory strikes based on a juror's sexual orientation because heightened scrutiny under the Equal Protection Clause applies to any classification that impinges on the liberty rights of homosexuals.

Under the evolving *Batson* doctrine, the Court has set limits on peremptory challenges whenever a challenge classifies jurors in a manner that invokes heightened scrutiny. *J.E.B.*, 511 U.S. at 143 (holding that *Batson* covers gender based strikes because such classifications are quasi-suspect and receive

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[2] The district court reasoned that *Batson* does not apply to: (1) civil cases, (2) a single discriminatory strike, or (3) peremptory strikes based on sexual orientation. *See* SER-233:5-234:6. The first two rationale are directly contradicted by settled law. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991) (holding *Batson* applies in civil cases); *Kesser v. Cambra*, 465 F.3d 351, 369 (9th Cir. 2006) (en banc) (noting that a single racially motivated strike will warrant a retrial).

[3] *See* Section II.B, *infra*.

"heightened scrutiny" rather than traditional rational basis review under equal protection analysis); *see also United States v. Santiago-Martinez*, 58 F.3d 422, 423 (9th Cir. 1995); *United States v. Watson*, 483 F.3d 828, 831 (D.C. Cir. 2007). Such "strict" or "intermediate" scrutiny for the purposes of equal protection – and hence for invoking *Batson* – applies in two circumstances: where the underlying classification concerns a "suspect" or "quasi-suspect" class or where the classification impinges upon fundamental or important constitutional rights recognized under substantive due process analysis. *See Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (holding that the strictest form of heightened scrutiny under equal protection applies "when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class"); *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 946 (9th Cir. 1997) ("The Court has applied an intermediate scrutiny - determining whether the classification is substantially related to an important government interest - to certain disadvantaged classes that were not suspect classes and to important rights that were not fundamental rights."); *Watkins v. U.S. Army*, 875 F.2d 699, 721 n.23 (9th Cir. 1989) (en banc) ("Under equal protection doctrine, heightened scrutiny not only applies to legal classifications that burden suspect or quasi-suspect classes but also applies to classifications that burden the

exercise of fundamental or important substantive rights to engage in certain conduct.").

While few courts have squarely addressed the issue, *Lawrence v. Texas*, 539 U.S. 558 (2003), leaves little doubt that, because of the importance of the rights involved, laws that discriminate on the basis of sexual orientation should be subjected to heightened scrutiny when challenged under the Equal Protection Clause. In *Lawrence,* the Court overruled prior authority sustaining the constitutionality of state laws that banned homosexual sodomy. Central to the Court's reasoning was the importance of the liberty interest at stake for homosexuals:

> The Court began its substantive discussion in *Bowers* [*v. Hardwick*, 478 U. S. 186 (1986)] as follows: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake…. The statutes … seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.
>
> This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is

> more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Id. at 566-67 (citations omitted). In a further sign of the importance of the rights at stake, the Court rested its decision on substantive due process grounds, electing not to rely on what it termed a "tenable" equal protection argument because of the stigma on homosexuals that would remain even if anti-sodomy statutes were redrawn to apply also to heterosexuals. *Id.* at 575.

It matters not whether one describes this right as "fundamental" or simply "an important right" because classifications that impinge on either are subject to heightened scrutiny under the equal protection clause.[4] *See Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) (holding that heightened scrutiny applied to equal protection challenge involving right to education; distinguishing strict scrutiny that would apply to impingement of a "fundamental" right); *Watkins*, 875 F.2d at 721 n.23 (recognizing heightened scrutiny applies to classifications that burden important substantive rights as well as burden suspect or quasi-suspect classes). Abbott's decision to prevent the only juror known to be gay from serving on a case involving a 400% price hike for a drug used to treat persons with HIV/AIDS is

[4] While this Court need not decide the issue, the right recognized in *Lawrence* seems properly characterized as a "fundamental" one. This is because the Court expressed that right in terms of both privacy and freedom of association. 539 U.S. at 567. Both have been recognized to be fundamental rights that garner the strictest level of scrutiny. *Hoffman v. United States*, 767 F.2d 1431, 1435 (9th Cir. 1985).

such a classification. For this reason alone, it must be subjected to the three-part test adopted in *Batson*.[5]

This conclusion is consistent with Ninth Circuit law. Before either Supreme Court decision concerning anti-sodomy laws, this Court recognized that heightened scrutiny applied to classifications based on sexual orientation. *See Hatheway v. Sec'y of Army*, 641 F.2d 1376, 1382 (9th Cir. 1981) (holding that because "[c]lassifications which are based solely on sexual preference implicate the 'right to be free, except in very limited circumstances, from unwarranted government intrusions into one's privacy' … we apply an intermediate level of review") (quotation omitted).[6]

Following the Supreme Court's 1986 decision in *Bowers* finding laws against homosexual sodomy to be constitutional, another panel of this Court

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[5] Where, as here, the conduct involved in the exercise of the liberty interest at stake equates to membership in the minority group, *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010), it is particularly apt to recognize that heightened scrutiny based on the importance of the liberty interest requires the application of the *Batson* line of cases. *Cf. Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring) ("Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class."). To hold otherwise is to allow the very kind of stereotype-based thinking and animus against which *Batson* protects.

[6] Citing the "similarity of the interests at stake," *Hatheway* relied upon the holding in *Beller v. Middendorf*, 632 F.2d 788 (9th Cir.1980) that heightened scrutiny applied to substantive due process challenges to laws that restricted homosexual conduct. *Hatheway*, 641 F.2d at 1382.

declined to follow *Hatheway*, and further declined to find homosexuals to be a suspect class, because it deemed anything beyond rational basis review inconsistent with the criminalization of homosexual sodomy. *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571-73 (9th Cir. 1990). But *Lawrence* overruled *Bowers*, thus stripping away the rationale for the panel's decision in *High Tech Gays* not to follow binding precedent. *Golinski v. U.S. Office of Pers. Mgmt*., No. 10-00257, 2012 WL 569685, at *10 (N.D. Cal. Feb. 22, 2012) (applying heightened scrutiny after concluding that "the reasoning in *High Tech Gays*, that laws discriminating against gay men and lesbians are not entitled to heightened scrutiny because homosexual conduct may be legitimately criminalized, cannot stand post-*Lawrence*"). The standard of review thus reverts to heightened scrutiny,[7] a conclusion that also accords with this Court's ruling that *Lawrence* compels the application of heightened scrutiny to a substantive due process challenge to a policy discriminating against homosexual military personnel. *Witt v. Dep't of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008).

[7] *See Gill v. Stern (In re Stern)*, 345 F.3d 1036, 1043 (9th Cir. 2003) (holding that circuit courts are also bound by the Supreme Court's "mode of analysis" and finding that the precedent at issue was "implicitly overruled" by recent Supreme Court rulings); *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc), *abrogated on other grounds as stated in Fossen v. Blue Cross & Blue Shield of Mont.*, 660 F.3d 1102, 1112 (9th Cir. 2011). Even if *Hatheway* did not govern, at a very minimum, the question about the proper level of scrutiny would be an open one, for which the application of relevant precedent, including *Lawrence* and *Beller*, compels heightened review.

Accordingly, the district court should have subjected Abbott's peremptory challenge to the *Batson* analysis.

2. *Batson* prohibits peremptory strikes based on a juror's sexual orientation because sexual orientation is a suspect or quasi-suspect classification subject to heightened scrutiny under the Equal Protection Clause.

This Court should also find *Batson* applicable to strikes based on sexual orientation because such classifications are suspect ones. While no binding precedent has squarely addressed the "suspect class" question since the Court overruled *Bowers*, the Department of Justice has adopted exactly this legal position and at least one district court has agreed with it. *See* Letter from United States Attorney General Eric H. Holder, Jr. to Speaker of the House of Representatives John Boehner, dated February 23, 2011 ("[C]lassifications based on *sexual orientation should be subject to a heightened standard of scrutiny*.") (emphasis added)[8]; *Golinski*, 2012 WL 569685, at *3, *11.

Under the Equal Protection Clause, a class is deemed "suspect" or "quasi-suspect" where it has "experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Murgia*, 427 U.S. at 313. To decide whether a group fits this description, the courts have emphasized four considerations:

[8] Available at http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

(1) whether the group has suffered a history of discrimination; (2) whether individuals exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; (3) whether the group is a minority or is politically powerless; and (4) whether the characteristics distinguishing the group have little relation to legitimate policy objectives or to an individual's ability to perform or contribute to society. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441-46 (1985). No single consideration is dispositive; instead, courts find that the presence of even one signals that the classification is "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective," thus requiring heightened scrutiny. *Plyler*, 457 U.S. at 216 n.14.

Homosexuals easily qualify. *See, e.g., Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, No. 10-16696, 2012 WL 372713 (9th Cir. Feb. 7, 2012) ("*Perry II*") (finding that "the evidence presented at trial shows that gays and lesbians are the type of minority strict scrutiny was designed to protect").[9] First, homosexuals have suffered a history of

[9] The Ninth Circuit held Proposition 8 unconstitutional under "rational basis" review, finding, among other things, that animus towards homosexuals is insufficient to constitute a legitimate government interest in eliminating same-sex marriage rights. *See Perry II*, 2012 WL 372713 at *27-28; *see also Lawrence*, 539 U.S. at 580 (O'Conner, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."). While

discrimination and still face legal inequalities. Gays and lesbians suffer disparate treatment under laws that ban same-sex marriage, adoption by homosexual parents and, until recently, open service in the military and consensual homosexual sex. Courts consequently recognize that gays and lesbians are subject to invidious discrimination. *E.g.*, *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 954 (9th Cir. 2009) (pointing out the difficulty in denying that gays and lesbians have experienced a history of discrimination); *Watkins v. U.S. Army*, 875 F.2d 699, 724 (9th Cir. 1989) (en banc) (Norris, J., concurring) ("[I]t is indisputable that homosexuals have historically been the object of pernicious and sustained hostility.") (quotation omitted).

Second, as the Ninth Circuit has recognized, "[s]exual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them." *Hernandez–Montiel v. Immigration & Naturalization Serv.*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled in part on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005) (en banc); *see also Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005) (agreeing with

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no court of which we are aware has yet addressed the issue, the logic of *Batson* indicates that it should apply to classifications based on sexual orientation even if those classifications would be tested for equal protection purposes under "a more searching form of rational basis review."

Hernandez–Montiel and acknowledging that homosexuality is "a fundamental aspect of ... human identity....").

Third, homosexuals are a minority with limited relative political power. *See, e.g.*, *Perry*, 704 F.Supp.2d at 943 (expert testimony demonstrated "gays and lesbians do not possess a meaningful degree of political power" and "possess less power than groups [traditionally] granted judicial protection"). Gays and lesbians constitute approximately 3-8% of the population. *See* Gary J. Gates, Williams Institute Study, April 2011.[10] Discriminatory laws like those mentioned above are perhaps the best illustration of homosexuals' relative lack of power. *See In re Balas*, 449 B.R. 567, 577 (Bankr. C.D. Cal. 2011) (citing state statutes aimed at limiting the rights of gays and lesbians as evidence of homosexuals' political struggles).

Finally, sexual orientation "has no relevance to a person's ability to perform or contribute to society." *Watkins*, 875 F.2d at 725 (Norris, J., concurring). Here, sexual orientation does not affect the potential juror's ability to review evidence or deliberate. Rather, striking jurors on the basis of sexual orientation reflects the stereotype-based thinking and animus that *Batson* and its progeny seek to prevent.

[10] Available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf.

City of Cleburne, 473 U.S. at 448 (finding "mere negative attitudes, or fear" insufficient under equal protection clause to justify discriminatory treatment).

Given that homosexuals qualify as a protected class, this Court should hold sexual orientation discrimination subject to heightened scrutiny under the Equal Protection Clause and, hence, that *Batson* applies to Abbott's strike of a gay juror.

3. *Batson* applies because Abbott's strike of a gay man constitutes gender based discrimination.

Batson also applies where, as here, a party uses a peremptory strike on the basis of a juror's gender. *See Alanis*, 335 F.3d 966, 970 (ordering new trial where court failed to conduct proper *Batson* inquiry into peremptory strike against male juror). Where parties use a peremptory strike to target a subset of male or female jurors, impermissible gender discrimination results. *See, e.g., United States v. Omoruyi*, 7 F.3d 880, 881 (9th Cir. 1993) (finding that even though marital status is not a suspect or quasi-suspect classification under equal protection, it is impermissible to strike "single women" because that constitutes gender discrimination). Thus, *Batson* applies when an objection is made that a peremptory strike has been used against a homosexual man on the basis of gender.

In this case, Abbott's only response to the court's invitation to articulate a non-discriminatory basis for its peremptory strike of a homosexual male was to deny that Abbott's counsel knew the juror was gay. However, strong reasons exist to suspect the juror's status as a gay man motivated Abbott. In a case involving the

cost of drugs used to treat HIV/AIDS, stereotypical bias exists against male members of the homosexual community due to the historical roots and prevalence of AIDS in the gay community, an issue GSK raised at trial. *See* SER-232:23-233:3 (objecting that Abbott used its peremptory challenge to strike a gay man and explaining that "the problem here … is the litigation involves AIDS medications. The incidents of AIDS in the homosexual community are well-known, particularly gay men. So with that challenge, Abbott wants to exclude … anybody who is gay").[11] Abbott's strike is gender based, in part, because these particular stereotypes do not apply to female members of the homosexual community who were not blamed for the AIDS epidemic in the 1980s and do not suffer from HIV/AIDS at comparable rates.

Omoruyi controls. There, the Ninth Circuit recognized that using a peremptory challenge against a "single female" implicated *Batson* and violated equal protection because it was based on gender. *Omoruyi*, 7 F.3d at 881 (reversing conviction and remanding for new trial). Just as the strikes of a subset of women (single women) invoked *Batson* in *Omoruyi*, so too does Abbott's peremptory challenge against a subset of men (homosexual men).

[11] *See also* n.16, *infra*.

4. No binding authority forecloses applying *Batson* to Abbott's strike of a gay man.

No binding precedent precludes application of *Batson* to peremptory strikes against gay men, and, consequently, no authority excuses the district court's error. This Court has not squarely addressed the issue. Instead, very recently, it observed that "[w]e need not decide the question whether a challenge based on sexual orientation falls within the rule of *Batson*; we assume for purposes of decision that it does." *Osazuwa*, 446 Fed. Appx. at 919 (quotation omitted) (finding that the district court conducted the required *Batson* inquiry). Such an observation would be erroneous if binding precedent precluded application of *Batson* to strikes of homosexual jurors. It does not.

GSK expects Abbott to make a contrary argument based on precedent concerning the military policy of "Don't Ask, Don't Tell" ("DADT"), in particular *Witt v. Dep't of Air Force*. In *Witt*, this Court evaluated a substantive due process challenge to the constitutionality of DADT as applied to a discharged lesbian major in the military. 527 F.3d at 813-18. The Court held that a form of heightened scrutiny must be applied to assess the legality of the policy. It likened the inquiry to intermediate scrutiny in equal protection cases. *Id*. at 818 n.7. After concluding that the case should be remanded for a substantive due process evaluation of DADT under this form of heightened scrutiny, the Court affirmed the dismissal of Major Witt's equal protection challenge. The Court observed that

Major Witt contended the policy treated homosexuals differently from others "'whose presence may also cause discomfort among other service members,' such as child molesters" but that a previous case, "*Philips* [*v. Perry*, 106 F.3d 1420 (9th Cir. 1997),] clearly held that DADT does not violate equal protection under rational basis review and that holding was not disturbed by *Lawrence*, which declined to address equal protection." *Id.* at 821.

Witt does not foreclose this Court from concluding that *Batson* applies to Abbott's strike of a gay juror. As an initial matter, *Witt* and *Philips* on which it relied are silent as to GSK's argument that heightened scrutiny for equal protection purposes—and hence *Batson*—applies because Abbott's strike amounts to a classification that impinges on important, arguably fundamental, rights of homosexuals recognized in *Lawrence*. *Stare decisis* is thus inapplicable. *Miller ex rel. N.L.R.B. v. Cal. Pac. Med. Ctr.*, 991 F.2d 536, 541 (9th Cir. 1993), *vacated by, reh'g granted*, 19 F.3d 449 (9th Cir. 1994) ("It is a venerable principle that a court isn't bound by a prior decision that failed to consider an argument or issue the later court finds persuasive."). *Witt* is also inapposite to GSK's gender based arguments. As discussed above, *J.E.B.* and *Omoruyi* control that aspect of GSK's *Batson* claim.

Likewise, *Witt* does not foreclose GSK's argument that heightened scrutiny for equal protection purposes—and hence *Batson*—applies to laws that

discriminate between homosexuals and heterosexuals because the former are a suspect class. While *Witt* does mention *Philips*, which in turn relied upon the "no suspect class" holding in *High Tech Gays*, *Witt* addressed neither that holding nor the viability, after *Lawrence*, of the "mode of analysis" behind it, namely the incongruity of deeming a group to be a suspect class while allowing the state to criminalize the behavior that defines the group. *Compare Witt*, 527 F.3d at 821, *with High Tech Gays*, 895 F.2d at 571-72. In light of *Witt's* failure to address the consequences for "suspect class" analysis of the demise of *Bowers*, this Court is free to adopt the ruling that GSK advocates. *See In re Stern*, 345 F.3d at 1043; *see also Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993) (courts free to address issue on the merits when prior cases did not squarely address, but merely assumed, the applicability of a rule); *Sethy v. Alameda County Water Dist.*, 545 F.2d 1157, 1159-60 (9th Cir. 1976) (en banc) (prior decision not binding precedent as to issues neither raised by counsel nor discussed in the opinion of the court).[12]

[12] *Witt's* discussion of equal protection carries even less weight in this circumstance because the precedent cited in that part of the opinion relies in significant part on outdated and unreliable science. Part of the analysis that led to the "no suspect class" ruling in *High Tech Gays*, and hence *Philips*, was based on the then-existing scientific view that homosexuality was not immutable, but rather behavioral. *High Tech Gays*, 895 F.2d at 573-577. Courts considering current scientific evidence now reach the opposite conclusion. *See, e.g., Perry*, 704 F. Supp. 2d at 966 ("No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation."). Under such circumstances, this Court is free to reject *Philips* and *High Tech Gays*. *See Bone Shirt v. Hazeltine*, 461 F.3d 1011,

Finally, both *Witt* and *Philips* are distinguishable because they involved equal protection challenges to a military regulation rather than one applicable to civilians. While the Constitution applies to military life, the degree of judicial scrutiny is much less when military policies are involved. *See Goldman v. Weinberger*, 475 U.S. 503, 507 (1986), *superseded by statute on other grounds as stated in Cutter v. Wilkinson*, 544 U.S. 709 (2005) (the Court's "review of military regulations challenged on [constitutional] grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society"). Courts recognize that "[t]he military's 'considered professional judgment' is 'not lightly to be overruled by the judiciary.'" *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1476-77 (9th Cir. 1994) (citation omitted) (noting that "[o]ur review, therefore, is as deferential as our constitutional responsibilities permit"). Case law explicitly allows application of a lower level of scrutiny under the Equal Protection Clause in the military setting than in a civilian one. *Able v. United States*, 155 F.3d 628, 634 (2d Cir. 1998) (distinguishing equal protection precedent because "[t]hose cases did not arise in the military setting. … [C]onstitutionally-mandated deference to military assessments and judgments gives the judiciary far less scope

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1026 (8th Cir. 2006) ("Science evolves, and scientific methods that were once considered unassailable truths have been discarded over time. Unreliable testimony based upon those outdated theories and methods must be discarded as well, lest scientific *stare decisis* ensure that such theories survive only in court.").

to scrutinize the reasons, legitimate on their face, that the military has advanced to justify its actions"). *Witt's* dismissal of the equal protection challenge to the military's policy of DADT, therefore, says little about whether discrimination against homosexuals in civilian contexts is subject to heightened scrutiny, and, hence, the three-part test set forth in *Batson*.

B. The Court Should Complete a Proper Three-Step *Batson* Analysis and Grant a New Trial as a Remedy for Abbott's Discrimination.

Once this Court determines that alleged discrimination against a gay juror is sufficient to invoke *Batson*, it must determine whether the district court erred by refusing to seat the challenged juror. *Batson* objections are analyzed by applying a three-part burden shifting test:

> At the outset, the defendant must make a prima facie showing that the challenge was based on an impermissible ground, such as race. This is a burden of production, not a burden of persuasion. Second, if the trial court finds the defendant has made a prima facie case of discrimination, the burden then shifts to the prosecution to offer a [classification]-neutral reason for the challenge that relates to the case. Third, if the prosecutor offers a [classification]-neutral explanation, the trial court must decide whether the defendant has proved the prosecutor's motive for the strike was purposeful [classification-based] discrimination ….

United States v. Collins, 551 F.3d 914, 919 (9th Cir. 2009) (quotations omitted). The record before this Court reveals, first, that GSK made a *prima facie* case of discrimination; second, that Abbott failed to offer a classification-neutral reason for the challenge; and, third, that any belated explanation by Abbott would be

entitled to no weight. Hence, this Court should find that the district court erred by refusing to seat the stricken gay juror and remand this case for a new trial.

1. GSK made a *prima facie* showing of discrimination.

"The correct test for a prima facie case of discrimination is whether the defendant has shown that '(1) the prospective juror is a member of a cognizable … group, (2) [counsel] used a peremptory strike to remove the juror, and (3) the totality of the circumstances raises an inference that the strike was motivated by … [membership in the group].'" *Id*. at 551 F.3d at 919 (citation omitted). This standard is a low one, requiring only "that the totality of the relevant facts give rise to an inference of discriminatory purpose.'" *Johnson v. California*, 545 U.S. 162, 168 (2005) (quoting *Batson*, 476 U.S. at 93-94)[13]; *see also Crittenden v. Ayers*, 624 F.3d 943, 957 (9th Cir. 2010) ("We emphasize that Crittenden's burden at this step was not onerous."). Assuming strikes of homosexual men are covered by *Batson*, the first two of these criteria have been met. The totality of the circumstances shows that *GSK* also satisfied the third.

Central to an evaluation of the totality of the circumstances is the nature of the dispute, which clearly gives rise to an inference that Abbott was trying to avoid

[13] In *Johnson*, the Court held that requiring a "more likely than not" standard to make out a *prima facie* case was "at odds with the prima facie inquiry mandated by *Batson*." 545 U.S. at 173. The Court also noted the important policy concerns that favor a low standard for making out a *prima facie* case, which include

being judged by a panel that included a gay juror. All of GSK's claims stemmed from Abbott's unprecedented 400% price hike on a drug used to treat patients suffering with HIV/AIDS. As mentioned above, physicians first discovered the AIDS epidemic in gay communities in San Francisco and other major American cities. Indeed, an earlier name for the disease was gay related immune disorder or "GRID." Michael L. Closen, *HIV-AIDS in the 1990s*, 27 J. Marshall L. Rev. 239, 245 (1994). In the United States today, HIV infects homosexual men at far greater rates than the population in general. CDC Fact Sheet: HIV and AIDS among Gay and Bisexual Men, September 2011[14]. *See also* San Francisco Department of Public Health, HIV/AIDS Epidemiology Annual Report 2010, at 1[15] (noting that in San Francisco, men who have sex with men comprise majority of both new HIV infections and total population living with HIV). And, gay men face discrimination due to stereotypes and presumptions related to AIDS.[16] *See Lederer*

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eradicating discrimination and maintaining public confidence in the fairness of the justice system. *Id*. at 172.

[14] Available at http://www.cdc.gov/nchhstp/newsroom/docs/fastfacts-msm-final508comp.pdf.

[15] Available at http://sfhiv.org/documents/AnnualReport2010Green Surveillance.pdf.

[16] By way of example, the Department of Health and Human Services recently revised blood donation protocols that prohibited homosexual men only from donating blood, and now attempts to protect against "blood borne diseases like HIV/AIDS without perpetuating stereotypes and discrimination against gay men." Press Release, Kerry Marks World Aids Day, Highlights Progress in MA, 2011 WLNR 24986170 (Dec. 12, 2011). In an earlier survey of health care access,

v. BP Prods. N. Am., No. 04 CIV. 9664, 2006 WL 3486787, at *6 (S.D.N.Y. Nov. 20, 2006) (noting "common stereotypes linking homosexuality and HIV/AIDS").

Exhibit lists and deposition testimony submitted during the pre-trial process revealed the extraordinary controversy in the HIV/AIDS community surrounding Abbott's price hike. SER-127 (168:15-168:24) (noting a lot of "bad noise"), SER-127 (169:01-169:05) (doctors locked out Abbott sales reps); SER-207 (163:16-164:01); SER-286-315 (price increase investigated by Senate, FTC, and at least four state attorneys generals); SER-388 ("We understand that the magnitude of the Norvir re-pricing has caused concern and anger in the HIV community."); SER-394 ("Over the past eight weeks, Abbott representatives have met with hundreds of members of the HIV community…."). Predictably, at trial the parties disputed the extent of the controversy, with GSK asserting that doctors refused to consider the benefits of using Lexiva but instead insisted on discussing the expense of the companion Norvir prescription. SER-68:18-69:10, SER-222:7-223:22.

These circumstances alone justify the conclusion that GSK made a *prima facie* case that discrimination motivated Abbott's use of its first strike, SER-231:23-232:3, against the sole juror known to be gay. *See, e.g., United States v.*

2% of HIV-negative men were denied medical treatment because of their sexual orientation, due presumably to suspicions of AIDS. Nancy E. Kass et al., *Homosexual and Bisexual Men's Perceptions of Discrimination in Health Services*, 82:9 Am. J. of Pub. Health 1277, 1278 (1992).

Iron Moccasin, 878 F.2d 226, 228-29 (8th Cir. 1989) (holding evidence sufficient to give rise to inference of discrimination when prosecutor struck sole American Indian in the venire and the trial involved sensitive offenses allegedly committed by an American Indian on an Indian reservation); *Alexis v. Leporati*, No. 93-10003, 1996 U.S. Dist. LEXIS 11705, at *11-12 (D. Mass. July 30, 1996) (finding *prima facie* showing where defendant used first peremptory to strike the lone African-American member of the venire in a case that included claims of racial discrimination).[17] Moreover, there is nothing in the *voir dire* that suggests any other motivation for striking the gay juror. The juror affirmatively stated that he would "be able to be fair and impartial as a juror in this case," SER-230:13-15, and none of his other answers suggested a non-discriminatory reason for striking him.

In short, the evidence shows both arguably discriminatory actions by Abbott and reason to believe it was engaged in stereotyping. GSK thus sustained the burden of producing "evidence sufficient to permit … an inference that discrimination has occurred." *Johnson*, 545 U.S. at 170.

[17] It is irrelevant that Abbott struck only one gay juror. *Crittenden*, 624. F.3d at 955 (holding *prima facie* case established when peremptory challenge was to only African-American juror after observing that "the Constitution forbids striking even a single prospective juror for a discriminatory purpose.") (internal quotations and citations omitted); *United States v. Roan Eagle*, 867 F.2d 436, 440-41 (8th Cir. 1988) (holding that *prima facie* case established when peremptory challenge was to only Indian member of venire).

2. This Court should complete the remainder of the three-step *Batson* analysis and order a new trial as a remedy for Abbott's discrimination.

Once it concludes GSK has raised an inference that Abbott discriminated against a gay juror, this Court should complete the three-step *Batson* inquiry and reverse the ruling of the trial court. The Court should complete this inquiry on appeal, rather than remand to the district court, because the record reveals a new trial is warranted.

In light of GSK's *prima facie* showing, "the burden shifts to [Abbott] to come forward with a neutral explanation for challenging [gay] jurors." *Batson*, 476 U.S. at 97. This is a burden of production. *Purkett v. Elem*, 514 U.S. 765, 767 (1995). Here, although the district court gave several reasons why it was inclined to deny the *Batson* challenge on legal grounds, it still proceeded to step-two of the *Batson* analysis, providing Abbott the opportunity to give a classification-neutral reason for its challenge. SER-233:12-22. Abbott's counsel responded by adopting the trial court's legal rationale and further defending the challenge on the ground that: "I have no idea whether he is gay or not." SER-233:22. Whether Abbott satisfied its burden is to be judged solely by this proffer: counsel "is responsible for articulating his own reasons for the challenges exercised….[C]ourts must be careful not to substitute their own speculation as to reasons why a juror might have

been struck for [counsel's] stated reasons." *Green v. LaMarque*, 532 F.3d 1028, 1030 (9th Cir. 2008).

Abbott did not satisfy its burden under step two of the *Batson* inquiry. Indeed, it provided no "neutral explanation related to the particular case tried." *United States v. Chinchilla*, 874 F.2d 695, 697 (9th Cir. 1989). Three of the four grounds on which it relied are legal positions. The one factual reason it did provide—that it did not know whether the stricken juror was gay—was deficient as a matter of law. A classification-neutral "explanation cannot be a general assertion that denies a discriminatory motive or claims good faith in individual selections[.]" *Id.; see also Paulino v. Harrison*, 542 F.3d 692, 699-702 (9th Cir. 2008) (holding statement of actual reasons for strike is required to satisfy the burden of production). Yet, this is all Abbott did.

Even assuming this Court were to continue to the third step of *Batson*, Abbott could not escape the conclusion that it engaged in purposeful discrimination. The third step tests Abbott's defense of its challenge against the trial record. This approach is not optional. "[C]ourts must review the record to root out such deceptions." *See Kesser*, 465 F.3d at 371 (ruling that court erred by not citing to voir dire record and failing to notice "sham excuse[s]" based on that record). Here, that can easily be done as the record makes clear the juror in question was gay – he referred to his male partner in voir dire. SER-219:8-20.

Abbott's counsel's insinuation that he could not have exercised a challenge based upon the male juror's sexual orientation because he purportedly had no idea whether the stricken juror was gay weighs heavily against Abbott. Indeed, a pretextual explanation such as this gives rise to an inference of discriminatory intent. *See Snyder v. Louisiana*, 552 U.S. 472, 485 (2008) (collecting cases); *Chinchilla*, 874 F.2d at 699 (reversing convictions and remanding for new trial after noting that the fact that some "proffered reasons do not hold up under judicial scrutiny militates against [the] sufficiency" of other seemingly neutral explanations); *see also Kesser*, 465 F.3d at 360.

Finally, remand is unnecessary because Abbott cannot satisfy its burden of production by belatedly offering a non-discriminatory motive. Abbott already had an opportunity to explain its strike, and Abbott's arguments now must "stand or fall on the plausibility of the reasons [it gave]." *See Miller-El v. Dretke*, 545 U.S. 231, 252 (2005). In *Miller-El*, the Court held that the trial and appellate courts had erred by crediting the prosecution's new explanation, after determining its old explanations failed the burden of production. *Id.* at 252; *see also United States v. Taylor*, 636 F.3d 901, 905 (7th Cir. 2011) ("*Miller-El II* instructs that when ruling on a *Batson* challenge, the trial court should consider only the reasons initially given to support the challenged strike, not additional reasons offered after the fact."); *Turner v. Marshall*, 121 F.3d 1248, 1253 (9th Cir. 1997) (giving no weight

to belated explanations because they "do not form part of the prosecutor's explanation" at the *Batson* hearing).

Here, the explanation that Abbott's counsel had "no idea whether [the juror] is gay or not" is clearly implausible. SER-233:22. The juror referred to his male partner during voir dire; Abbott used its first peremptory strike on the only juror known to be gay; the case involved HIV/AIDS – an issue sensitive to the gay community; and, the trial was located in the Bay Area, where there is significant overlap between the HIV and gay communities. Abbott is not entitled to fabricate new reasons for its strike on remand – any such reason would "reek[] of afterthought." *Miller-El*, 545 U.S. at 246.

Since the record establishes the merit of GSK's *Batson* challenge, this Court should order a new trial. *See, e.g.*, *Alanis*, 335 F.3d at 968-70 (finding that district court erred by failing to employ third step of *Batson* analysis, concluding that *Batson* violation occurred, and remanding for a new trial).

III. This Court Should Direct the District Court to Enter Judgment in Favor of GSK on its UDTPA Claim

The District Court erred in finding against GSK on its UDTPA claim. The jury found that Abbott engaged in "grossly negligent conduct" when it breached its agreement with GSK. ER-75:16. The jury instructions properly defined such conduct to include "intentional wrongdoing" or "reckless indifference to the rights of others." ER-120:21-22. The jury also found that "[d]uring the negotiation of

the Norvir license, Abbott was considering how to use its control over Norvir to limit competition with Kaletra and deliberately withheld this from GSK." ER-76:11-14.

Contrary to the district court's ruling, these findings compel the conclusion that Abbott violated the UDTPA. The UDTPA forbids "[u]nfair methods of competition" and "unfair or deceptive acts or practices." N.C. Gen. Stat. § 75-1.1. It "creates a cause of action broader than traditional common law actions" and was intended to overcome "burdensome elements of proof" included in common law tort and contract actions. *Marshall v. Miller*, 276 S.E.2d 397, 400, 402 (N.C. 1981). While Section 75-1.1 sanctions anticompetitive conduct, "[i]t also sanctions, as part of its broad remedial purpose of promoting ethical business dealings, commercial 'unfairness' and 'deception' beyond traditional antitrust concepts." *L.C. Williams Oil Co. v. Exxon Corp.*, 625 F. Supp. 477, 481 (M.D.N.C. 1985) (citation omitted).

An "unfair practice" "is conduct *which a court of equity would consider unfair*." *S. Atl. Ltd. P'ship of Tenn. v. Riese*, 284 F.3d 518, 536 (4th Cir. 2002) (*SALT*) (quotation omitted). "Misrepresentations, even negligent misrepresentations, are sufficient for an act to qualify as an unfair or deceptive

trade practice." *Id.* at 541 (citation omitted).[18] While a simple breach of contract, even if intentional, will not violate the UDTPA, practices that evince "egregious or aggravating circumstances" violate the Act. *Id.* at 535 (quotation omitted).

That Abbott violated the UDTPA is illustrated by several North Carolina cases. For example, in *Mosley & Mosley Builders, Inc. v. Landin Ltd.*, 389 S.E.2d 576, 580-81 (N.C. Ct. App. 1990), the court held a breach of a lease agreement was an "unfair and deceptive trade practice[]" where it was accompanied by intentional or reckless wrongdoing. Landlord defendants "wrongfully entered plaintiff's premises relying on defendants' interpretation of ambiguous provisions of the lease" and physically removed plaintiff's merchandise and other property. *Id.* at 580. In *Huff v. Autos Unlimited, Inc.*, 477 S.E.2d 86 (N.C. Ct. App. 1996), the Court found a violation of the UDTPA where the defendant had sold an unsafe car, representing to the buyer that the car had been in a "fender-bender." The court reasoned that the seller had acted with reckless indifference to the condition of the vehicle: Defendant "took no steps to determine the extent of the damage of the vehicle" and "should have known" it was significantly damaged. *Id.* at 88-89.[19]

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[18] Once a violation is found, damages are automatically trebled. N.C. Gen. Stat. § 75-16; *MRD Motorsports, Inc., v. Trail Motorsports, LLC*, 694 S.E.2d 517, 520 (N.C. Ct. App. 2010). The statute also provides for an award of attorneys' fees. N.C. Gen. Stat. § 75-16.1.

[19] Courts applying the UDTPA have found conduct similar to that present here to be an "unfair and deceptive trade practice" where it does not breach a

Further, in the district court, Abbott acknowledged that "deception in formation of the contract" and "deception in the circumstances of its breach" amount to aggravating circumstances. SER-13:21-22; s*ee also SALT*, 284 F.3d at 538 (deliberately withholding material information "is the essence of unscrupulous behavior"). The jury necessarily found deceptive conduct when it found that Abbott deliberately withheld that it was considering ways to use Norvir to harm GSK and other competitors.

In the face of these findings and case law, the district court erred in holding Abbott did not violate the UDTPA. First, it erred in concluding that the finding of intentional wrongdoing and/or reckless indifference "does not speak to the impact on the marketplace, which is a factor to be considered." ER-21:5-6. The district court supports this conclusion with no legal citation, and the conclusion itself is unclear. While some North Carolina courts have stated that "[w]hat is an unfair or deceptive trade practice usually depends upon the facts of each case and the impact the practice has in the marketplace," these statements have been made in passing

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contract at all. In *SALT*, the Stroud and Riese groups formed a real estate partnership, with Riese providing its construction company for the partnership's development. 284 F.3d at 523. Stroud expelled Riese just eleven days before selling the project for substantial profit, leaving Riese with nothing under the terms of the partnership contract, which provided only for payouts of book value. *Id.* at 527. The Fourth Circuit upheld Riese's section 75-1.1 claim, explaining that the expulsion was an unfair trade practice even though in accord with the contract's terms. *Id.* at 538-40.

without specifying what is meant by "impact in the marketplace." *See, e.g.*, *Johnson v. Phoenix Mutual Life Ins. Co.*, 266 S.E.2d 610, 621 (N.C. 1980), *overruled on other grounds by Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559 (1988); *Marshall*, 276 S.E.2d at 403.[20]

Moreover, as the cases discussed above make clear, a breach of a private, two-party contract, accompanied by reckless or intentional wrongdoing violates the UDTPA. *See, e.g.*, *SALT*, 284 F.3d 518; *Huff*, 477 S.E.2d 86 (involving sale of single car to individual); *Mosley & Mosley Builders*, 389 S.E.2d 576 (involving residents of single mobile home park against park owners). And, as noted, these cases involve small businesses, whose practices have far less impact on the marketplace than a price hike taken by a large pharmaceutical company on a drug used by patients with HIV/AIDS. Whatever "impact on the marketplace" means, if it existed in those cases it exists here.

Second, the court erred in holding that GSK could not prevail because it had "committed to rest its UDTPA claim on the acts reflected on the verdict form." The jury's finding that Abbott acted with intentional wrongdoing or reckless indifference is reflected in the verdict form. The fact that this finding is not listed a

[20] It appears that North Carolina courts have imported these words from interpretations of the Federal Trade Commission Act in antitrust cases. *See, e.g.*, *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963) (cited by *Phoenix Mutual*, 266 S.E.2d at 621). Nonetheless, it is clear that the UDTPA covers unfair and deceptive acts well beyond those defined as anticompetitive. *See, e.g.*, *L.C. Williams Oil*, 625 F. Supp. at 481 (M.D.N.C. 1985).

second time with the "Additional Questions" is irrelevant. By proposing those as separate questions, GSK did not waive its right to rely on other parts of the verdict form; rather, it sought to avoid redundancy. The district court may be suggesting that GSK's claim fails because the jury did not find that Abbott inequitably asserted its power over Norvir to disrupt Lexiva's launch or that Abbott manipulated the timing of the price increase to undermine Lexiva. But, the jury's failure to find those facts does not speak to the legal effect of its actual findings. As discussed above, those findings are sufficient to compel the conclusion that Abbott violated the UDTPA.

Finally, the jury's finding that Abbott considered how to use its control over Norvir to limit competition with Kaletra and deliberately withheld this information from GSK during the negotiation of the license is by itself a significant aggravating circumstance to the contract breach. Regardless of whether the jury found that Abbott's deception proximately caused harm to GSK, the jury did find that Abbott's breach of contract harmed GSK. Abbott's deception in the negotiation of the license is part and parcel of the misconduct at issue in this case. North Carolina courts have repeatedly held that "proof of actual deception is not required" – only the potential for deception is necessary. *SALT*, 284 F.3d at 536; *see Marshall*, 276 S.E.2d at 403. Here, the deception is evident, whether it alone

caused harm or not. The district court erred by declining to consider this finding in ruling on GSK's UDTPA claim.

SUMMARY OF ARGUMENT RELATING TO ABBOTT'S APPEAL

Abbott's appeal distorts the record, misstates the law, and attempts to mislead the Court to overturn a jury verdict on baseless grounds. Abbott argues two main points, neither of which has any merit and both of which rely on straw man arguments.

Abbott's first incorrectly argues that the implied covenant of good faith and fair dealing cannot support the jury's award. Established New York law plainly contradicts this. The jury received proper instructions, and the evidence easily supports its verdict.

Next, Abbott contends that a limitation of liability clause protects it. This is incorrect because under New York law a party cannot shield itself from liability for conduct involving intentional wrongdoing or a reckless indifference to the rights of others. The jury found that Abbott's actions violated that standard. Additionally, the damages should be upheld because the clause does not cover the lost profits here, which are direct damages.

ARGUMENT RELATING TO ABBOTT'S APPEAL

I. Standard of Review

De novo is the nominal standard of review, but the evidence is viewed in the light most favorable to GSK, the non-moving party, and all reasonable inferences

must be drawn in GSK's favor. *El-Hakem v. BJY, Inc.*, 415 F.3d 1068, 1072 (9th Cir. 2005). Abbott's appeal must be rejected unless "no reasonable jury could find in [GSK's] favor." *Id.* Thus, the judgment for GSK must be upheld if "substantial evidence" supported the verdict. *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002).

II. GSK's Implied Covenant Claim is Legally Sufficient

GSK's implied covenant claim is founded upon established New York law and is amply supported by evidence from which a reasonable jury could – and did – find a breach.

A. The implied covenant of good faith and fair dealing applies here.

Abbott attempts to write out of the Norvir licenses any implied covenant of good faith and fair dealing. The implied covenant is no "limited exception," and Abbott's argument contradicts black letter New York law. Under New York law, *every* contract has an implied covenant of good faith and fair dealing in it. *E.g.*, *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 773 N.E.2d 496, 500 (N.Y. 2002). Of course, this includes the Norvir licenses. The implied covenant "embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Id.* (quotation omitted). The covenant is not limited to a contract's express terms, but also "encompass[es] any promises which a reasonable person in

the position of the promisee would be justified in understanding were included." *Id.* at 501 (quotation omitted). The jury instructions use this language, ER-119:14-20, and Abbott concedes it is the proper standard, Br. at 33.

The fact that the parties are "sophisticated" does not alter this black letter law or suggest that New York "routinely rejects" implied covenant claims. *See* Br. at 44-46. Indeed, because the parties here were sophisticated, the jury heard evidence that the negotiators of the Norvir license knew of the contours of the implied covenant and were relying on good faith rather than trying to draft the license to cover every potential scenario. *See* SER-176:3-177:17; SER-178:22-179:13.[21]

[21] The three cases Abbott cites for the proposition that New York courts "routinely reject" implied covenant claims because "sophisticated parties" are held to their bargain are inapposite. Br. 44-45. *M/A-COM Sec. Corp. v. Galesi*, 904 F.2d 134, 136 (2d Cir. 1990) is distinguishable because the plaintiff's complaint alleged harm due to a transaction *unrelated* to the contract. Here, the offending conduct and damages derive from the contract at issue. *Metropolitan Life Insurance Co. v. RJR Nabisco, Inc.*, 716 F. Supp. 1504, 1519 (S.D.N.Y. 1989), held that an indenture contract was not breached because the "very term [at issue] – a limitation on the incurrence of additional debt – has in other past contexts been expressly bargained for …." Abbott introduced no evidence to suggest that is true here. Finally, in *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 660 N.E.2d 415, 416 (N.Y. 1995), the court held that the doctrine of substantial performance did not apply to a lease so oral notice did not satisfy a written notice provision. The court's holding hinged on the finding of an express condition precedent, not the sophistication of the parties. *Id.* at 418.

In sum, Abbott's position that the Norvir licenses leave it free to use Norvir as a weapon to interfere with the ability of its licensees to promote and sell their PIs boosted with Norvir is unsustainable.

B. Substantial evidence supports the jury's finding that the implied covenant prohibited Abbott from using its control over Norvir to interfere with GSK's efforts to sell Lexiva and that Abbott did exactly that.

Abbott constructs a straw man by asserting GSK claims the implied covenant gave GSK an "independent right to control Norvir's price." Br. at 35. As the district court correctly observed: "The theory of GSK's case was that this right 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.'" ER-8:14-17. The evidence introduced at trial amply supports a judgment in GSK's favor on this theory, demonstrating that (i) a reasonable person in GSK's position would be justified in understanding that Abbott promised not to use Norvir to interfere with Lexiva's sales and marketing, (ii) Abbott did exactly this, and (iii) Abbott thereby injured GSK's right to receive the fruits of the agreement.

The evidence shows that GSK entered into the Norvir license to ensure that Abbott would not use its control over Norvir, a product on which Lexiva's success relied, to harm Lexiva. ER-304:11-13, SER-43 (157:20-158:4), SER-161:10-162:22, SER-172:24-173:2. This is no "free-floating duty unattached to the underlying legal document." Br. at 36. Both the preamble and the license grant

itself confirm that the parties understood "GSK is interested in obtaining a license from Abbott to promote and market" Lexiva. ER-706; *see* ER-710.

GSK employees testified that GSK entered the agreement to ensure that Abbott would not use Norvir strategically as a weapon to hurt Lexiva. SER-162:18-22, SER-689-704. And, GSK's key negotiator testified that he would have considered it a violation of good faith had he been told Abbott was going to take a 400 percent price hike on Norvir. SER-177:9-17.

Evidence showed that Abbott executives understood this to be GSK's goal. For example, James Tyree, Abbott's Vice President for Licensing and Business Development, SER-118 (11:24-12:12), testified that "[o]f course" he understood that companies taking licenses on Norvir such as GSK were doing so to enable them to compete with Kaletra, "thereby increasing their sales hopefully." SER-121 (39:22-40:14). Mr. Tyree further affirmed the reasonableness of GSK's expectation when he testified that "[i]t's inconsistent to think about withdrawing a product that we're actually issuing licenses on." SER-123 (134:11-13, 134:17-24).

Abbott's arguments for overturning the jury's verdict on this point are unavailing. Abbott devotes several pages to the lack of any discussion of a price term during the license negotiations. Br. at 38-40. But, this discussion is an attempt improperly to inject concepts from cases addressing a different type of

claim, i.e., one for breach of an implied-in-fact contractual provision.[22] The question for the jury was not whether Abbott and GSK reached, but failed to memorialize, an agreement concerning the pricing of Norvir. Rather, the question was whether GSK could reasonably expect that Abbott would not act to injure GSK's ability to reap the fruits of the license by deliberately and radically raising Norvir's price with the intention of diverting sales to Kaletra from boosted versions of Lexiva and other competitive PIs. As discussed above, GSK presented more than sufficient evidence on that issue to support the jury's verdict.

Abbott's lawyer arguments about "commercial reasonableness" fare no better. *See* Br. at 40-42. Abbott is wrong that the benefit of licensing "pale[s] [in] comparison" to what "the market would bear." Br. 41. The consideration for the GSK license was not only a few million dollars as Abbott claims. The jury was entitled to rely upon Abbott's own estimate that the GSK license was worth $59 million, SER-571, and on testimony that Abbott obtained over $300 million in fees from all its Norvir licenses, SER-186:3-10; *see* SER-173:14-174:15, SER-175:13-16. Setting aside license fees, Abbott also benefitted through tens of millions of dollars in increased sales of Norvir that would not have existed had Abbott chosen

[22] Many of the cases Abbott cites in the section of its brief devoted to GSK's reasonable expectations address this separate legal doctrine and thus cannot help Abbott's cause. *See, e.g.*, Br. at 28, 33-39 (citing, among others, *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 807 N.E.2d 876 (N.Y. 2004); *Rowe v. Great Atl. & Pac. Tea Co.*, 385 N.E.2d 566 (N.Y. 1978)).

to exclude its use as a booster of competitor PIs. *See* SER-239; SER-521; SER-745-752.

Abbott unwittingly supports the view that GSK was justified in believing Abbott would not use Norvir pricing to interfere with Lexiva sales. Abbott admits that "pricing is critical," Br. at 10, and "the business model of a pharmaceutical company … depends on its ability to profit by pricing successful products," Br. 41. Since Abbott knew that the price of boosted Lexiva turned on a combination of the price of Lexiva plus Norvir, it is essentially conceding that GSK would be justified in concluding that, in return for at least $59 million, Abbott would not manipulate the price of Norvir to undermine its licensees' ability to sell boosted PIs.

Yet, that is exactly what documentary evidence and testimony presented to the jury showed Abbott did. While Abbott and GSK were negotiating the license, an Abbott senior executive "asked a group to think about ways to constrain the supply of Norvir in the United States…." SER-46:19-21. In pursuit of a "supply constraint program," Abbott continually and repeatedly analyzed and discussed the option of pulling Norvir from the United States market. SER-74 (65:19-66:04), SER-87:6-92:4, SER-96:9-99:6, SER-100:22-1011:22, SER-102:9-103:7, SER-106:1-108:25, SER-430-440, SER-445-450, SER-455-456, SER-458-468, SER-543-559, SER-561-564, SER-598-600, SER-602-605. Abbott then chose, as an alternative, to use a "mega price increase," rather than pulling pill supplies, as a

weapon against boosted Lexiva and other licensee PIs. SER-19:21-20:11, SER-46:12-21, SER-93:24-95:16, SER-103:8-105:3, SER-388, SER-430-440, SER-458, SER-471. The sole Abbott witness who worked in sales, Jack Rivetti, testified that, when asked in advance about a price increase above the percentage rise in the consumer price index, he had responded that "people would go crazy." SER-126 (125:11-24). He explained that he had been in the market for years and that the HIV community was "very much concerned about patients" and had "explode[d] over silly things, and this had the potential to not be a silly thing." SER-126 (131:15-132:2).

Abbott executive Heather Mason described Abbott's plan as a "clever, creative way to make them [GSK] look bad." SER-485. She also crowed that the price increase would "fuel that fire" of Abbott's marketing message that Kaletra was the "most cost-effective" PI, thereby further harming Lexiva. SER-418. Explaining Abbott's decision shortly before the price increase, Ms. Mason wrote "[a]ll roads do lead to Kaletra, though." SER-418. Shortly after the price increase, Abbott executive Bill Dempsey wrote to a group of Abbott employees congratulating them on Kaletra's sales numbers, stating that "[i]t's too bad you're giving a lump of coal to BMS and GSK for the holidays but such is life." SER-414.

The jury's verdict is not made unique by Abbott's patents on Norvir. As the Federal Circuit observed in *Jacobs v. Nintendo of America, Inc.*, 370 F.3d 1097, 1101 (Fed. Cir. 2004): it is "in accordance with … basic contract law principle[s] 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." The verdict is based on substantial evidence, and it should be allowed to stand.

C. The amount of the damages award does not indicate that Abbott only incidentally lessened the benefit of GSK's bargain.

Primarily citing the size of the damages verdict, Abbott argues GSK's implied covenant claim fails because Abbott only "incidentally lessened" GSK's anticipated fruits. Br. at 43-44. In so arguing, Abbott conflates two separate issues: the propriety of the jury's liability finding with the jury's damages finding. Abbott cites no authority that such an approach is proper.[23]

Abbott's quotation from *Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publ'g Co.*, 281 N.E.2d 142, 145 (N.E. 1972), is from a discussion about a "covenant to promote the author's work" in the contract, not the implied covenant of good faith and fair dealing. And *M/A-COM* affirmed the district court's holding

[23] Abbott attempts to frame a multimillion dollar verdict as small by comparing it to Lexiva *revenues*. *E.g.*, Br. at 43. This comparison of revenues to *profits* is meaningless because it does not indicate Lexiva's costs. The record shows that GSK invested $750 to $800 million just to develop Lexiva, SER-65:18-22, and had relatively high costs to manufacture it, SER-168:17-21.

that there was not a breach of the implied covenant because the covenant did not prevent the other party "from seeking to advance its legitimate business interests in an *unrelated* transaction …." 904 F.2d at 136 (emphasis added). It had nothing to do with the extent of the breach or damages amount. Likewise, in *Bank of New York v. Sasson*, 786 F. Supp. 349, 353 (S.D.N.Y. 1992), the plaintiff "fail[ed] to allege any interference with the benefits promised under the [contract]." The opinion did not pertain to insufficient damages. Moreover, even if Abbott were correct, it would only mean that the jury had reached an inconsistent verdict on liability and damages, the remedy for which is a new trial, not judgment in Abbott's favor. *Norris v. Sysco Corp.*, 191 F.3d 1043, 1047 (9th Cir. 1999).

III. The Limitation of Liability Clause Does Not Bar GSK's Recovery.

Judgment for GSK cannot be overturned because of the limitation of liability clause in the Norvir license. Under New York law, such clauses are unenforceable where, as here, the breaching party engages in conduct involving intentional wrongdoing or reckless indifference to the rights of others. Abbott is also wrong that New York law requires a finding of a separate tort to meet the "reckless indifference" standard, and in any case, the jury's responses to two special interrogatories do not require this Court to assume the jury found no intentional wrongdoing.

A. The jury instructions correctly stated the law.

New York law will not enforce a limitation of liability provision when it is contrary to public policy. The New York Court of Appeals has consistently held that intentional wrongdoing or grossly negligent conduct is contrary to public policy and renders a limitation of liability clause unenforceable. *Gross v. Sweet*, 400 N.E.2d 306, 308 (N.Y. 1979); *Kalisch-Jarcho, Inc. v. City of New York*, 448 N.E.2d 413, 416 (N.Y. 1983); *Sommer v. Fed. Signal Corp.*, 593 N.E.2d 1365, 1370 (N.Y. 1992). Federal cases, including cases Abbott cites, are in accord. *See, e.g.*, *Sveaas v. Christie's Inc.*, No 11-2064, 2011 WL 6415192, at *3 (2d Cir. Dec. 22, 2011); *Soroof Trading Dev. Co. v. GE Fuel Sys., LLC*, No. 10-Civ.-1391, 2012 WL 209110, at *9 (S.D.N.Y. Jan. 24, 2012); *Deutsche Lufthansa AG v. Boeing Co.*, No. 06-CV-7667, 2007 WL 403301, at *3 (S.D.N.Y. Feb. 2, 2007); *Net2Globe Int'l, Inc. v. Time Warner Telecom of N.Y.*, 273 F. Supp. 2d 436, 450-55 (S.D.N.Y. 2003).

For example, in *Kalisch-Jarcho*, the New York Court of Appeals set forth the circumstances under which a limitation of liability clause would be unenforceable. 448 N.E.2d at 416-17. The parties were "sophisticated" and the language in the clause was written "clearly, directly, and absolutely." *Id.* at 416. Nevertheless, the court held that "an exculpatory agreement, no matter how flat and unqualified its terms, will not exonerate a party from liability under all

circumstances. *Under announced public policy, it will not apply to exemption of willful or grossly negligent acts*." *Id.* at 416 (citations omitted and emphasis added). The Court elaborated that intentional wrongdoing was not necessary to render a limitation of liability clause unenforceable. Rather, reckless indifference to the rights of others will also suffice:

> More pointedly, an exculpatory clause is unenforceable when, in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing. This can be explicit, as when it is fraudulent, malicious or prompted by the sinister intention of one acting in bad faith. *Or, when, as in gross negligence, it betokens a reckless indifference to the rights of others, it may be implicit.*

Id. at 416-17 (footnotes and citation omitted and emphasis added). This language could not be clearer. And, it is not mere "dictum" as Abbott claims. *See* Br. 57. The court remanded for retrial and was providing guidance to the lower court. *Kalisch-Jarcho*, 448 N.E.2d at 386.

The Court of Appeals in *Sommer* reiterated that a party cannot limit its liability for grossly negligent conduct: "It is the public policy of this State … that a party may not insulate itself from damages caused by grossly negligent conduct." 593 N.E.2d at 1370 (citing *Kalisch-Jarcho*, 448 N.E.2d at 416-17; *Gross*, 400 N.E.2d at 308). Indeed, in *Sommer*, there was no allegation of intentional misconduct, only gross negligence in failing to report an alarm to the fire department. *Id.* at 1371. There, the court found the exculpatory clause was not

enforceable as a matter of law because the insurance company had acted in a manner "recklessly indifferent to the consequence that might flow" from its actions. *Id.*[24]

Abbott's repeated attempts to invoke *Metropolitan Life Insurance Co. v. Noble Lowndes Int'l, Inc.*, 643 N.E.2d 504 (N.Y. 1994) ("*Metropolitan Life*") overlook the question actually posed in that case. The primary question the *Metropolitan Life* court faced was one of interpreting a specific contract. *Id*. at 506 ("the issue is what the parties intended by 'willful acts' as an exception to their contractual provision limiting defendant's liability…."). Plaintiff advocated a definition that would allow a jury to find "willful" actions that were "intentional rather than inadvertent." *Id.* The court rejected such a low standard, holding instead that the parties intended the term to mean "wrongful conduct in which the

[24] Abbott incorrectly argues that *Sommer* only discusses grossly negligent conduct because some of the claims sounded in tort. Br. at 57. The opinion repeatedly discusses the contractual nature of claims that were allowed to proceed and never states that those claims relied on the tort claims. The court was clear that the "[r]esolution of this threshold [tort claim] issue affects the negligence claims and the availability of contribution." *Sommer*, 593 N.E.2d at 1368. It did not affect the contract claims. In fact, the court rejected the idea that use of the term "gross negligence" was significant to the limitation of liability issue: "Whatever may be the case in other contexts, *public policy precludes enforcement of contract clauses exonerating a party from its reckless indifference to the rights of others*, whether or not termed 'gross negligence.'" *Id.* at 1371 n.3 (citations omitted and emphasis added). This language also reveals for the straw man it is Abbott's repeated attempts to denigrate the district court's instructions as allowing Abbott to be found liable for a "grossly negligent breach." Br. at 5-6, 52-53.

defendant willfully intends to inflict harm on the plaintiff at least in part through breaching the contract…." *Id.* at 508; *see also Banc of Am. Sec. LLC v. Solow Building Co. II*, 847 N.Y.S.2d 49, 54-55 (N.Y. App. Div. 2007). Under this interpretation, "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." *Metropolitan Life*, 643 N.E.2d at 509 (emphasis added).

Although the plaintiff's theory in *Metropolitan Life* focused on willfulness,[25] at no time did the Court of Appeals suggest that New York's public policy would countenance shielding a defendant from liability for its own grossly negligent conduct. To the contrary, in addition to the reference to "gross negligence" quoted above, the court cited with approval the statement in *Sommer* and *Kalisch-Jarcho* that the conduct necessary "to pierce an agreed-upon limitation of liability in a commercial contract must smack[] of intentional wrongdoing." *Id*. at 509

[25] The evidence of wrongdoing on which the plaintiff relied was vastly different in *Metropolitan Life* than in this case. The court there thus concluded that defendant's "intentional nonperformance" directed at withdrawing from a "highly unprofitable business undertaking" did not amount to a "willful act" as the parties had meant it. *Metropolitan Life*, 643 N.E.2d at 509. Here, the evidence shows Abbott breached a profitable business undertaking in order to protect its own Kaletra sales at the expense of sales by GSK and other licensees. SER-49 (119:17-22).

(quotation omitted). As the district court correctly noted, the dictionary definition of "smack" is "to have a trace, vestige or suggestion." ER-14:9-10.[26]

Nor does *Metropolitan Life* support the proposition that one must meet tort standards to evade a limitation of liability. In fact, the Court of Appeals expressly disagreed with the lower court "to the extent that the Appellate Division opinion holds that tort law principles apply in all cases in which the word willful is at issue or thereby limits the legal meaning of the word…." 643 N.E.2d at 506-07. Unsurprisingly, many post-*Metropolitan Life* New York cases demonstrate that GSK need not prove a separate tort. *See, e.g., Banc of Am.*, 847 N.Y.S.2d at 51-53; *Empire One Telecomms., Inc. v. Verizon N.Y., Inc.*, 888 N.Y.S.2d 714, 727 (N.Y. Sup. Ct. 2009).

The New York Pattern Jury Instructions confirm this. The comment to the pattern instruction on the elements for a breach of contract claim has a section on limitations of liability which states that "a party may not contract to avoid liability

[26] Abbott tries to analogize this case to *Metropolitan Life* by citing to Article 3.9 of the license, suggesting that it was a complete allocation of risk if, for any reason, Abbott stopped selling Norvir. Br. at 48-49. Abbott, however, misrepresents the scope of the provision, which the evidence shows addressed only situations where Abbott was unable to supply Norvir, not a situation where it had taken affirmative steps to constrain or eliminate the supply of Norvir. SER-120:19-123:6. Ironically, Abbott fails to notice that this argument undercuts Abbott's earlier position that its sole obligation under the license was not to sue GSK for patent infringement. Br. at 32. If that earlier argument were correct, there would be no need for a provision addressing GSK's "remedies" in the event Abbott lost the ability to supply Norvir.

for grossly negligent conduct" or "to avoid liability for its own bad faith, nor for intentional or willful misconduct." N.Y.P.J.I. Civil 4:1, Comment to Contracts—Elements (3d ed. 2011) (citations omitted). It makes no mention of any requirement to prove a separate tort. The jury instructions used at trial required the jury to find that Abbott's conduct "involve[d] intentional wrongdoing or a reckless indifference to the rights of others," ER-120:21-22, language taken directly from *Kalisch-Jarcho*. *See also Sommer*, 593 N.E.2d at 1371 n.3. There was no error in those instructions.

B. The jury's answers to two special interrogatories do not indicate it concluded that Abbott engaged in no intentional wrongdoing.

Even if Abbott were correct about the standard for avoiding the limitation of liability clause, the jury's verdict for GSK would still stand. Abbott argues that this Court must view the jury as having decided that Abbott engaged in no intentional wrongdoing because, in Abbott's view, such a finding would be inconsistent with other findings. *See* Br. at 49. In making this argument, Abbott asserts an inconsistency that does not exist by improperly skewing the verdict form in its favor, ignoring aspects of it favorable to GSK, and pretending the jury answered questions it was not asked. Abbott, of course, ignores the jury's answer to the only question addressed to Abbott's intent – its finding that Abbott's "conduct involve[d] intentional wrongdoing or a reckless indifference to the rights of others." ER-75:16. Further, while Abbott is correct that the jury did not find it

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-76:19, the jury could have found that Abbott acted intentionally to harm all of its competitors, not simply GSK. Or, the jury could have found that Abbott intended to undermine and disrupt Lexiva, but not through an inequitable assertion of power. None of the special questions posed to the jury asked the stand-alone question of whether the evidence showed Abbott had engaged in intentional wrongdoing.

In attempting to persuade this Court that treating the jury as having found intentional misconduct would create an irreconcilable inconsistency in the verdict, Abbott bears a heavy burden. *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1038 (9th Cir. 2004). When a court "review[s] a case that resulted in a jury verdict, [the court] interpret[s] the evidence, and state[s] [its] account, most favorably to the parties successful at trial." *Bains LLC v. Arco Prods. Co.*, 405 F.3d 764, 770 (9th Cir. 2005) (footnote omitted). Here, the verdict "can be read in light of the evidence to make sense," *id*. at 771 (footnote omitted), without assuming, as Abbott advocates, that the jury must have found only gross negligence and not intentional wrongdoing. Accordingly, the jury's verdict on the limitation of liability aspect of GSK's implied covenant claim should not be overturned. *See White v. Ford Motor Co.*, 312 F.3d 998, 1005 (9th Cir. 2002), *amended by* 335. F3d 833 (9th Cir. 2003) ("After reading the record, we agree with

the district court that, as the case was presented to the jury, there was an alternative possible understanding that makes sense of the verdicts.").

C. This Court should affirm the damages award because, as a matter of law, GSK's lost profits were direct damages.

A judgment can be affirmed on any ground. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 525 (1974) (citations omitted). An alternative basis for rejecting Abbott's appeal is that lost profits were not covered by the limitation of liability clause.

Direct, or general, damages are "those damages that flow naturally from a breach, that is, damages that would follow any breach of similar character in the usual course of events." 24 *Williston on Contracts* § 64:12 (4th ed. 2002). The Norvir license contains a limitation of liability clause that does not apply to direct damages. Rather, the limitation of liability clause, when enforceable, applies to special, incidental, indirect or consequential losses. ER-720. The clause does not mention lost profits.

The damages in this case, GSK's lost profits on Lexiva sales, are direct damages. The lost sales GSK suffered flow naturally from Abbott's breach. Unlike in a standard contract for goods or services, a licensee of unique intellectual property like GSK cannot remedy a breach by "covering." It was uncontroverted at trial that there are no substitutes for Norvir as a booster so third parties could not boost Lexiva with another compound. SER-47:16-20. Thus, unlike in most cases

involving lost profits on sales to third parties, there is no additional layer of causation insulating Abbott's breach from GSK's resulting lost profits.

This construction is supported by the fact that construing the clause to encompass lost profits on Lexiva sales would place GSK at Abbott's mercy because there could be no direct damages due to a breach by Abbott. Such a result is disfavored under New York law. *Hyatt Corp. v. Women's Int'l Bowling Cong., Inc.*, 80 F. Supp. 2d 88, 96 (W.D.N.Y. 1999) ("[I]n construing a contract, courts should not 'suppose that one party was placed at the mercy of the other.'") (quoting *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917)); *see also Mandelblatt v. Devon Stores, Inc.*, 521 N.Y.S.2d 672, 675 (N.Y. App. Div. 1987) (reversing an interpretation that would "produce[] an unreasonable result …, in effect, plac[ing] one party to the contract at the mercy of the other").

Because GSK's lost profits on Lexiva were the only foreseeable harm that could result from an Abbott breach, they are direct damages not covered by the limitation of liability clause.

CONCLUSION

This Court should order a new trial on all causes of action as a result of Abbott's discriminatory use of a peremptory challenge against the sole known homosexual male juror. Failing that, this Court should affirm the judgment in GSK's favor on its cause of action for breach of the implied covenant of good faith

and fair dealing, reverse the judgment in favor of Abbott on GSK's claim under North Carolina's UDTPA and, pursuant to that statute, direct the district court to treble the amount of the judgment in favor of GSK and award GSK its attorneys' fees.

Dated: March 21, 2012

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, GSK states that it does not know of any related cases currently pending in this Court. This case, however, arises from the same Abbott acts as a prior appeal, *Doe v. Abbott Labs.*, No. 08-17699, 571 F.3d 930 (9th Cir. 2009), heard by Judges Schroeder, Reinhardt, and Rymer. Abbott also filed a petition for writ of mandamus in this action. After a request from Abbott, this Court assigned that petition to the panel that heard *Doe*, and that panel rejected it. *In re Abbott Labs.*, No. 10-71786 (9th Cir. Sept. 28, 2010).

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(C), and contains 16,459 words.

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

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March 21, 2012