

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

MYLAN PHARMACEUTICALS INC. ET AL,

Plaintiffs,

v.

SANOFI-AVENTIS U.S. LLC ET AL,

Defendants.

2:23-cv-00836-MRH

Chief Judge Mark R. Hornak

Oral Argument Requested

**PLAINTIFFS' RESPONSE TO**  
**DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY**

Mylan respectfully submits this brief response to Defendants' Notice of Supplemental Authority (ECF No. 70) regarding *In re Revlimid & Thalomid Purchaser Antitrust Litigation*, No. 19-7532, 2024 WL 2861865 (D.N.J. June 6, 2024).

Defendants' supplemental authority adds no new law. It is uncontroversial that courts often find it useful to consider individual components of an overall monopolization scheme, so long as "the larger scope of the scheme is kept in context." Ex. A to Defendants' Notice of Supplemental Authority (ECF No. 70) at 41. In other words, while courts may evaluate individual components of a monopolization scheme separately, that evaluation must be in service of considering the monopolist's conduct as a whole, for that is the "relevant inquiry." *LePage's Inc. v. 3M*, 324 F.3d 141, 162 (3d Cir. 2003) (en banc).<sup>1</sup> The *Revlimid* court did just that.

*Revlimid's* further observations on monopolization schemes are irrelevant. Mylan agrees that a plaintiff cannot cobble together into a monopolization scheme acts that, in isolation, would be lawful.<sup>2</sup> But *Revlimid's* acknowledgement of the proposition that a scheme cannot be composed *entirely* of lawful actions does not challenge Supreme Court and Third Circuit precedent making clear that a monopolization scheme can include *some* otherwise lawful acts. See ECF No. 59, at 8-9 (discussing precedents). Under the proper analytical framework, once the court identifies one component of the defendant's scheme that is independently unlawful, the inquiry into the standalone legality of the remaining component parts ends and thereafter each

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<sup>1</sup> Mylan has consistently argued as much, across multiple litigations with Sanofi. See *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.*, 44 F.4th 959, 982 (10th Cir. 2022) ("For the sake of accuracy, precision, and analytical clarity, we must evaluate Mylan's alleged exclusionary conduct separately . . . . Only then can we *evaluate the evidence in totality to see if any 'synergistic effect' saves Sanofi's case.*") (emphasis added, internal citations omitted, adopting Mylan's argument).

<sup>2</sup> See Mylan's Br. at 28-29, ECF No. 43-1, Sept. 14, 2017, *In re EpiPen.*, No. 2:17-md-02785 (D. Kan.); Mylan's Reply Br. at 3, ECF No. 57, Oct. 6, 2017, *In re EpiPen.*, No. 2:17-md-02785 (D. Kan.).

component is evaluated for its synergistic effect with the rest of the scheme. In any event, the component parts of Sanofi's scheme are all independently unlawful. *See id.*, at 8 ("Sanofi might prefer to disaggregate individual components of that whole and attack each as alone insufficient (*which they are not*), but the law expressly prohibits this wholesale restructuring of Mylan's monopolization claim on a motion to dismiss.") (emphasis added).

For the foregoing reasons, *Revlimid* does nothing to undermine the Mylan's case. And Mylan therefore respectfully requests that Sanofi's motion to dismiss be denied.

Dated: June 18, 2024

Respectfully submitted,

/s/ John A. Schwab

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