

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

MYLAN PHARMACEUTICALS INC.,  
MYLAN SPECIALTY L.P., and MYLAN  
INC.,

*Plaintiffs,*

v.

SANOFI-AVENTIS U.S. LLC, SANOFI S.A.,  
AVENTIS PHARMA S.A., and SANOFI-  
AVENTIS PUERTO RICO INC.

*Defendants.*

No. 2:23-cv-00836-MRH

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

Mylan's newest supplemental authority (ECF 74) is an out-of-circuit case involving electric power companies that is factually and legally inapposite. *Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 2024 WL 3642432 (4th Cir. Aug. 5, 2024). Mylan's complaint should be dismissed promptly for the reasons given in Sanofi's motion to dismiss. ECF 50.

According to Mylan, *Duke Energy* supports its "bundled rebates" claim by rejecting an argument that "*Brook[e] Group's* predatory pricing analysis" is "the only applicable analysis" for a "package discount." ECF 74 at 2. That is irrelevant. Mylan's bundling claim fails, not because of *Brooke Group*, but because among other things (1) "Mylan does not allege bundling of products across separate product markets," (2) Mylan "sells multiple product lines and can therefore 'make a comparable offer' by bundling its discounts," and (3) "Mylan does not plausibly allege that Sanofi conditioned discounts on exclusively purchasing from Sanofi." Sanofi Reply (ECF 66) at 3-5. *Duke Energy* says nothing about those defects.

Nor does *Duke Energy* support Mylan's "scheme" argument. Unlike in *Duke Energy*, Mylan fails to allege any viable anticompetitive conduct, and the scheme theory fails because there is nothing to aggregate. Considered independently, each of Mylan's theories—bundling, product hopping, sham litigation, Orange Book listing—alleges a well-defined category of conduct subject to well-defined standards. Sanofi Reply at 2-13; *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 457 (2009) ("Two wrong claims do not make one that is right."); *Duke Energy*, 2024 WL 3642432, at \*11 (Courts must apply established tests when "alleged conduct falls within ... well-defined categories."). And each of Mylan's theories fails to state a claim, unlike in *Duke Energy*. 2024 WL 3642432, at \*13-16 (holding that plaintiff's package discount theory independently survived summary judgment because it was akin to a bundled discount under *LePage's* and also satisfied the price-cost test under *Brooke Group*).

Considered as a whole, the scheme claim fails because Mylan still has pointed to no synergy among its theories that could create a viable whole that is greater than its series of defective parts. Sanofi Reply at 2-3; *see also* Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 310c2 (May 2024) (“Claims are not subject to aggregation when there is no cardinal unit in one that can be added to any unit in another to produce a meaningful sum,” such as “when the plaintiff’s proof fails on an element that is essential to each individual claim.”).

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