RECORD NOS. 18-2183, 18-2232

In The
United States Court of Appeals
For The Fourth Circuit

BELMORA LLC,

Plaintiff – Appellee/Cross-Appellant,

v.

BAYER CONSUMER CARE AG, a Swiss Corporation;
BAYER HEALTHCARE LLC,
a Delaware Limited Liability Company,

Defendants - Consolidated Plaintiffs-Appellants/Cross-Appellees,

v.

BELMORA LLC, a Virginia Limited Liability Company;
JAMIE BELCASTRO, an individual,

Consolidated Defendants – Appellees/Cross-Appellants,

and

DOES, 1-10, inclusive,

Consolidated Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

REPLY BRIEF FOR APPELLEES/CROSS-APPELLANTS

Ronald D. Coleman
Joel G. MacMull
MANDELBAUM SALSBURG P.C.
1270 Avenue of the Americas, Suite 1808
New York, New York, 10020
(212) 776-1834

Counsel for Appellees/Cross-Appellants

Craig C. Reilly
LAW OFFICES OF CRAIG C. REILLY
111 Oronoco Street
Alexandria, Virginia 22314
(703) 549-5354

Counsel for Appellees/Cross-Appellants

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

ARGUMENT

I. THE DISTRICT COURT ERRED BY DISMISSING BELMORA'S TORTIOUIS INTERFERENCE COUNTERCLAIMS.

As Belmora argued in its opening brief, it is well established that courts "may consider materials that would themselves be admissible at trial, and the content or substance of otherwise inadmissible materials" where it is possible that the evidence can be put "into an admissible form." *Humphreys & Partners Architects, L.P. v. Lessard Design, Inc.*, 790 F.3d 532, 538 (4th Cir. 2015). The district court nonetheless dismissed Belmora's tortious interference counterclaims arising from Bayer's blocking any sale of liquidgel capsules to Belmora by the only manufacturer in the U.S. authorized to make them. The ruling was premised on the district court's finding that "there is no admissible evidence that Belmora has 'orders' for FLANAX branded naproxen sodium liquidgels or a reasonable expectation of receiving any." J.A. 895-96.

Belmora's opening brief noted that the district court failed to explain why the extensive evidence of Belmora's economic expectancy would not have been admissible, as well as this Court's general rule against basing a summary judgment dismissal solely on a preliminary (much less barely explained) evidentiary determination. (Belmora Br.[1] at 59-60.) Bayer, agreeing with what it assumes was

[1] All references to the Opening/Response Brief for Appellees/Cross-Appellants dated February 13, 2019 (Doc. 32) appears herein as "Belmora Br. at ___."

the reasoning of the district court, insists that the hearsay issue adverted to by the district court was, indeed, adequate grounds to dismiss Belmora's claims. (Bayer Resp. Br.[2] at 55-56.) Bayer's argument relies on inapposite case law, misapprehends why the documents claimed as hearsay are admissible as exceptions and disregards all the non-hearsay evidence Bayer placed before the district court on this issue. To support the district court's ruling, Bayer cites this Court's 1991 decision in *Md. Highways Contractors Ass'n v. Maryland,* 933 F.2d 1246 (4th Cir. 1991). (Bayer Resp. Br. at 55-56.) That case, which involved the issue of standing to challenge the constitutionality of a statute, included a ruling that a letter from a member of an association of contractors to the association concerning problems the contractor perceived with the statute was inadmissible hearsay. *Id*. at 1251.

Bayer omits any discussion of this Court's holding, cited by Belmora in its opening brief, in *U.S. Dep't of Hous. & Urban Dev. v. Cost Control Mktg. & Sales of Va., Inc.,* 64 F.3d 920, 926 n.8 (4th Cir. 1995), which, like the holding in *Humphreys*, makes clear that the strict rule Bayer asserts is not the law. Rather, the holding in *Cost Control* merely reflects the basic rule that hearsay determinations are to be made in the factual context of the record in a given litigation. *See*, e.g., *In re Thomas*, 146 B.R. 683, 685 (Bankr. E.D. Va. 1992) ("Given the importance of the

[2] All references to the Response/Reply Brief of Appellants Bayer Consumer Care AG and Bayer HealthCare LLC dated April 17, 2019 (Doc. 36) appears herein as "Bayer Resp. Br. at ___."

factual context surrounding the making of a hearsay statement and its relationship to the litigation, this omnibus exception [of Fed. R. Evid. 803(24)] to the hearsay rule is necessarily employed on a case-by-case basis"), *citing*, *United States v. Mandel*, 591 F.2d 1347, 1368 (4th Cir. 1979); *United States v. Bryce,* 208 F.3d 346, 350 (2d Cir. 1999) (district court may admit hearsay documents pursuant to Fed. R. Evid. 807 where (i) the hearsay is particularly trustworthy, (ii) the hearsay bears on a material fact, (iii) the hearsay is the most probative evidence addressing the fact, (iv) the proffer follows adequate notice to the adverse party, and (v) the admission is consistent with the rules of evidence and advances the interests of justice.)

And that is exactly what the decision in *Md. Highway Contractors Ass'n* explains, noting that the trial court did not, as the Association states, merely hold that the letter was inadmissible hearsay. Instead, the court further discussed the letter in light of the contrary testimony of the Association's president. In that context, the letter was insufficient to rebut that testimony. *Id*. at 1251. This is not that case. On the contrary, it is the opposite: Rather than constituting the sole proof contradicting otherwise unrebutted and reliable testimony, conversations and emails between Belmora and George Fiscus and Belmora and PL Developments corroborate the testimony of Belmora's Jamie Belcastro, who was entirely competent to testify that he attempted to place a purchase order with PL Developments based on an opportunity to produce and sell Belmora Flanax liquidgel product which, after being

initially entertained, was refused. Absent any other explanation for this refusal based on evidence in the record, this testimony alone would have been sufficient to establish a *bona fide* fact issue as to expectancy.

Finally, the emails between Belmora and PL Developments were in any event also admissible under a host of other grounds, including as business records. As summarized recently in *In re Council of Unit Owners of 100 Harborview Drive Condo.*, 580 B.R. 135, 149 n.20 (Bankr. D. Md. 2018):

> [T]he Court notes that other courts have found email messages to be admissible under a variety of Evidence Rules. *See U.S. v. Siddiqui*, 235 F.3d 1318, 1323 (11th Cir. 2000) (admitting email evidence over hearsay objection on the basis that the emails constituted admissions of a party pursuant to Federal Rule of Evidence 801(d)(2)(A)); *U.S. v. Levy*, 2008 WL 373646 *5 (E.D. Va. Feb. 8, 2008) (discussing circumstances in which emails do not constitute hearsay, and quoting *U.S. v. Safari*, 849 F.2d 891, 894 (4th Cir. 1988) to support admission of emails as non-hearsay because "they were not offered to prove the truth of the matter asserted"); *Avondale Mills, Inc. v. Norfolk Southern Corp.*, 2008 WL 6953956 (D.S.C. Feb. 21, 2008) (denying plaintiff's motion *in limine* to exclude emails and noting that emails would be admitted or excluded at trial "consonant with the Federal Rules of Evidence."); *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007) (discussing, in depth, the admissibility of email evidence in the context of all manner of possible evidentiary issues); and *New York v. Microsoft Corp.*, 2002 WL 649951 (D. D.C. Apr. 12, 2002) (analyzing admissibility of email evidence under the "present sense impression," "existing state of mind or condition," and "business records" exceptions to the hearsay rule).

Belmora's argument here is not that the emails in question should have been admitted. Rather, it is that the district court's cursory and premature ruling regarding admissibility was an improper basis for dismissing Belmora's expectancy evidence

at the summary judgment level. As this Court has taught, if, on summary judgment, "the nonmovant objects to the court's consideration of 'material cited to support or dispute a fact,' Fed. R. Civ. P. 56(c)(2), the movant has the burden 'to show that the material is admissible as presented or to explain the admissible form that is anticipated' . . ." *Humphreys & Partners*, 790 F.3d at 538–39. Bayer admits that Belmora satisfied this requirement by adverting to the possibility of presenting Fiscus as a trial witness, but insists that because Fiscus was not named as a trial witness, Rule 37(c)(1) bars his testimony. The district court made no such finding, however, limiting its holding to the issue of admissibility.

Moreover, Rule 37 does not bar consideration on summary judgment of whether evidence may be presented at trial where, as here, the failure to disclose the witness's name is harmless because of a lack of surprise or where the witness would only be authenticating documents already in the record. *See*, *Christian v. Vought Aircraft Indus., Inc.*, No. 5:09-cv-186-FL, 2010 WL 4065482, at *4–5 (E.D.N.C. Oct. 15, 2010), *aff'd*, 439 F. App'x 272 (4th Cir. 2011) (failure to disclose witness does not, without more, foreclose consideration of his statements where adversary knew he was likely to have discoverable information and had the opportunity to depose him); *citing*, *Salami v. N.C. Agric. & Tech. State Univ.,* 394 F.Supp.2d 696, 704–05 (M.D.N.C. 2005); *Lam v. City & Cty. of San Francisco*, 565 F. App'x 641, 643 (9th Cir. 2014) (district court did not abuse its discretion when it considered, on

summary judgment, declarations of undisclosed witnesses who "merely authenticated documents already in the record").

For these reasons, and the reasons set out in Belmora's opening brief, the district court's ruling dismissing Belmora's tortious interference claims should be reversed.

II. THE DISTRICT COURT ERRED BY DISMISSING BELMORA'S TRADEMARK COUNTERCLAIMS.

In opposing Belmora's appeal of the dismissal of its claim for contributory trademark infringement arising from its willful blindness concerning the illegal importation of Bayer Flanax-brand product into the U.S, Bayer relies on the district court's conclusory statement that Belmora fell short of demonstrating there was enough evidence in support of its claims to proceed to trial. J.A. 892. The evidence overlooked by the district court, Bayer insists, amounts to mere speculation. Why should a jury, Bayer asks, be allowed to consider that Bayer is contributorily liable for infringement "merely" because (a) Bayer sells its non-U.S. strength of Flanax pain reliever in Mexico and (b) consumers can buy Bayer's illegal Flanax in the U.S.? (Bayer Resp. Br. at 32.) The answer to this question is that the alphabet does not end at "(b)." As the record shows, and as Belmora observed in its opening brief, in addition to (a) and (b), the evidence shows (c) that Bayer knew Mexican Flanax was being sold in the U.S., admitting as much in its pleadings (J.A. 107, ¶ 29); and (d) that Bayer did nothing about it.

Bayer relies on the testimony of its 30(b)(6) witness, Michelle Cunningham, to assert – in a footnote – the self-serving, but legally irrelevant, proposition that, officially, "Bayer is opposed to gray market sales of its products because 'the regulatory situations are specific to countries.' J.A. 848." (Bayer Resp. Br. at 36.) In fact, however, while Bayer may be "against" doing things that might lead to legal liability, it does not do anything to stop them from being done – at least when it comes to illegal importation of an unapproved drug. Thus, as Belmora notes in its initial brief, Cunningham admitted that Bayer does not actually have a policy to prevent or even monitor for the possibility of importation of gray goods into the U.S. J.A. 682. Similarly, Bayer relies on the testimony of Gustavo Pisani, another Bayer 30(b)(6) witness, who, like Cunningham, also testified regarding Bayer's aspirations, saying "Bayer would be against any gray market [sales]" J.A. 839. (Bayer Resp. Br. 35-36.).

These statements of good will do not suffice, because, the record shows notwithstanding its stated aspirations, Bayer knew that gray market sales of its illegal Flanax formulation were being sold, to its financial benefit, in the U.S. And, as Belmora's opening brief sets out (Belmora Br. at 54), the proof shows not only that Bayer did not have a program or a plan to prevent such violations of U.S. drug regulations, criminal law and Belmora's trademark rights. It also shows that Bayer did not even follow up with an investigation or other action after being placed on

affirmative notice of it through a media report. Instead, Bayer treated the issue as an image problem and took no action to prevent it from happening again. J.A. 716-18; 1272-74.

Bayer's admissions that it knew it had a problem and just looked the other way – to the extent that even after admitting to illegal importation of Mexican Flanax in the U.S. in its pleadings, it still presented corporate representatives for deposition who testified under oath, like TV's Sergeant Schultz, "I know nothing" – is the very definition of willful blindness, i.e., a "failure to investigate because one was afraid of what the inquiry would yield." *Lorillard Tobacco Co. v. A & E Oil, Inc.,* 503 F.3d 588, 591-92 (7th Cir. 2007). *See*, *Tiffany (NJ) Inc. v. eBay, Inc.,* 576 F. Supp. 2d 463, 513, 515 (S.D.N.Y. 2008) (where "the defendant knew of a high probability of illegal conduct and purposefully contrived to avoid learning of it, for example, by failing to inquire further out of fear of the result of the inquiry," that is actionable willful blindness).

In the face of such evidence, corporate aspirations and posturing are of no consequence. Bayer's only response is to quote its Head of Global Communications as saying that the company "requested that [the reporter] provide the name of the retail outlet at which he purchased the product, as well as that he return the package, including the blister containing the medication, so that we can conduct our own investigation" and insists that sending an email claiming to have requested

something (which in and of itself is hearsay) is "the antithesis of willful blindness." (Bayer Resp. Br. at 36-37.)

It is not. The "antithesis of willful blindness" would have been actually conducting an investigation, using its conclusions to promulgate standards and procedures to prevent the practice, and making some actual effort to stop it. There is no evidence that Bayer did any of these things. Bayer did not even produce admissible evidence to support its assertion that it "requested" the information from the reporter. In fact, based on the testimony of Bayer's 30(b)(6) witnesses, a factfinder could readily infer that Bayer still refuses to even admit the existence of a problem it saw fit to allege existed in court pleadings. And **that** is the antithesis of willful blindness.

Because the facts here make out a classic example of willful blindness, Belmora has demonstrated the existence of sufficient evidence for its fourth and fifth counts to go to the jury.

III. THE DISTRICT COURT ERRED IN DISMISSING BELMORA'S ANTITRUST COUNTERCLAIMS.

Bayer's rationalizations for why the district court dismissed Belmora's antitrust claim exceed the court's own explanation by orders of magnitude. They fail to make up in volume, however, for what the district court omitted in analysis – especially concerning the factual record.

Bayer begins by reinventing that record, arguing that the basis for Belmora's exclusion from the market for branded naproxen liquidgel was based solely on the exclusionary contract provisions between Bayer and Banner Pharmacaps Inc. ("Banner") and later Bayer and Bionpharma Inc. ("Bionpharma"). Bayer then argues that the rights that contract gave it to exclude competition from all other national brands was justified and innocuous. The fundamental flaw in Bayer's argument, however, as discussed in detail below, is that the Bayer-Bionpharma contract and the particular instance of Bayer's instruction, pursuant to that compact, prohibiting sales of liquidgels is merely **evidence** in support of Belmora's claim regarding the whole of the branded naproxen sodium market, not the sum of it. Bayer's revisionist narrative is problematic for at least three reasons.

A. There was Ample Record Evidence that Bayer Intended to Exclude all National-Brand Competitors from the Naproxen Sodium Market.

Bayer has no explanation for why Bionpharma, as a commercial enterprise, would refuse to sell Belmora potentially large quantities of its main product: Naproxen sodium liquidgels unless Bayer stopped it from doing so. Bayer takes that bull by the horns, however, by arguing that the powerful evidence of its anticompetitive conduct actually proves that there was no anticompetitive conduct: Belmora's planned private-branded product, Bayer explains helpfully, was just an excluded product under the Bayer-Bionpharma agreement. (Bayer Resp. Br. at 40-

41.) This argument is worse than tautological. What Bayer is saying is that an illegal contract – whose terms Bayer itself describes as prohibiting Bionpharma from providing third parties with liquidgels to be marketed as "national brand" products, i.e., to compete with Bayer's Aleve brand (*id*. at 39) – is legal, because it is a contract. (Bayer Resp. Br. at 43 n. 14.)

Bayer disregards the fact that the contract, likely as a matter of antitrust prophylaxis, actually provides that sales to "national brands" are permitted – when and if Bayer authorized them. J.A. 913, 919-20. What Bayer cannot explain is why Bionpharma, which unlike Banner was never beholden to Bayer's early investment in the project, would agree to such a provision unless its largest customer – Bayer – gave it no choice. And there is ample evidence to corroborate the inference that Bayer insisted on this anticompetitive provision in the contract when it renegotiated the deal with Banner's successor, Bionpharma.

What the evidence shows, and what Belmora presented to the district court in opposition to Bayer's motion for summary judgment on this claim, was that Bayer knew by 2014 that Belmora's Flanax product was gaining on the higher-priced Aleve among Hispanics. This was shown in internal documents produced by Bayer and authenticated at the deposition of Bayer's Rule 30(b)(6) designee as to antitrust issues, Gustavo Pisani, consisting of a series of 2014 PowerPoint slides by Brice Loving, a Bayer sales executive, focusing entirely on "immediate concerns" posed

by "Flanax Risk to Aleve at Walmart." J.A. 1242-62. These documents were distributed by email through the Bayer sales hierarchy and eventually to Bayer's lawyers. J.A. 1252-55.

This analysis, described in an email by John Stertz, Bayer's Customer Business Manager with responsibility for Walmart, focused on the surging sales of Belmora Flanax in Walmart, which Bayer anticipated expanding from 800 stores to 2,300. J.A. 1254. Belmora's interposition of a non-store-label, "national brand" competing with Aleve but costing less was seen as posing a "risk of $ 1 – 3 million impact to Aleve at Walmart." J.A. 1254. Bayer's Loving asked how to use the "pending litigation" against Belmora to "build a defense story" and depress Flanax's inroads against Aleve at Walmart. J.A. 1254.

Once Bayer determined that a distinct naproxen sodium market or submarket within the analgesic category was itself being divided into sectors that were anticipated in the near future to consist solely of Aleve and Flanax on the one hand and private labels on the other, it acted to ensure that one of the fastest-growing forms of the product – naproxen sodium liquidgels – would be closed off to **all** potential national competitors. J.A. 916. Flanax was merely the first national-brand competitor to be victimized by Bayer's no-national-competition clause with the only manufacturer of liquidgels. Bayer's right to veto the sale of naproxen sodium liquidgels to any comer trying to build a national brand in that market was, as Bayer

acknowledges, a contractual one. But Bayer is wrong in asserting that this restriction on sales was legal.

B. The Definition of the Relevant Market by Professionals is Admissible Evidence Sufficient to Raise a Fact Issue for Trial.

Bayer argues that even if Belmora was kept out of a market due to an exclusive-dealing agreement between Bayer and the supplier that at once was the only source of naproxen liquidgels and also depended primarily on Bayer as its predominant purchaser, there was no antitrust injury because what Belmora was shut out of did not constitute "a market." To make this argument, Bayer slaloms its way through deposition testimony from Belmora's principal, Jamie Belcastro, who is not trained in economics, and Belmora's antitrust expert, Dr. Gordon Rausser, who is an economist but not a ventriloquist's puppet. The district court adopted Bayer's presentation of selective and misleading excerpts from their testimony instead of viewing them in the context of who was speaking and what, in truth, each was saying. This, as demonstrated below, was error.

Bayer's argument on this point relies on facile comparisons of what it asserts are inconsistencies between how economists define markets (the subject of Dr. Rausser's testimony) and how a pharmacist trying to "break into a market" with a new brand (Mr. Belcastro) uses the word "market." (Bayer Br. at 41-42.) Dr. Rausser's analysis supported Belmora's assertion that Bayer was acting in an anticompetitive fashion in order to monopolize the "branded naproxen sodium

products." Bayer, however, says no expert testimony can overcome Mr. Belcastro's "admission" that his Flanax brand, which he unsurprisingly considers the best product on the market to solve the aches and pains of America, "competes with" all analgesics, not just Bayer's Aleve. (Bayer Resp. Br. at 42.)

Bayer's responsive brief actually observes, correctly, the level of sophistication and expertise needed to identify a relevant product market for antitrust purposes. Bayer writes as follows:

> It is beyond the ken of a layperson to know whether a given set of products compete with each other such that they exist in a single market. That determination requires economic expertise. …
>
> "'[R]elevant product market' is a term of art in antitrust analysis." *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 50 (D.D.C. 2011); *accord Nobel Sci. Indus., Inc. v. Beckman Instruments, Inc.*, 670 F. Supp. 1313, 1318 (D. Md. 1986) ("Use of the term 'product market' has specific connotations for antitrust purposes."), *aff'd*, 831 F.2d 537 (4th Cir. 1987). In antitrust law, "market" means something very specific—the entire set of reasonably interchangeable products. That is not the way that people, including business people, often use the term.
>
> Thus, courts recognize that casual, unelaborated references to a "market" in internal corporate documents are not germane to the definition of the relevant market for antitrust purposes. "[T]he relevant market cannot be defined by a defendant's marketing materials or from opinions of investment analysts ... [T]he relevant market is determined by reasonable interchangeability ... not by laymen's comments made in a competitive business environment."

(Bayer Resp. Br. at 45-46, 51.) Bayer, in other words, acknowledges that an entrepreneur with no training in economics or business might well describe the "market" for the new product he has sunk his entire life and all his resources into as

"the whole world" he is setting out to beat. Thus, Mr. Belcastro's testimony that Bayer's Aleve is "competing with the Tylenols of the world and Advils of the world and the Motrins of the world and the store private labels of the world" is properly understood as an expression of his admiration for the size of those brands' marketing budgets and his own recognition that, just as Aleve has made it onto store shelves, Belmora's competitive offering can too. J.A. 771-72. No one, however, can seriously argue that the aspirations of an entrepreneurial pharmacist constitute an admission regarding market definition for antitrust purposes – much less a conclusive one justifying summary judgment. *See*, *SmithKline Corp. v. Eli Lilly & Co*., 427 F. Supp. 1089, 1119 n. 24 (E.D. Pa.), *aff'd*, 575 F.2d 1056 (3d Cir. 1978) ("Surely Lilly does not contend that reference to either the broad or the narrow product market in an internal marketing analysis is an admission of the relevant product market for antitrust purposes.").

While Bayer argues that Jamie Belcastro's musings about his product's "market" is an admission regarding the relevant market for antitrust purposes, it maintains that quantitative analyses prepared by marketing professionals for one of the world's largest companies – people such as Brice Loving and John Stertz, marketing executives for Bayer – are not relevant evidence at all. (Bayer Resp. Br. at 50-52.) This is unsurprising, because Loving and Stertz certainly thought there was a specific market, or sub-market, for branded naproxen sodium. They are not

expert economists, of course; neither, on the other hand, is a trial court a finder of fact – but the acknowledgment by these Bayer marketing executives of the economic reality behind Belmora's claims, while not an admission regarding antitrust law, certainly raises a genuine fact issue on the question of market definition. As the court explained in *Bristol-Myers Squibb Co. v. Ben Venue Labs*., 90 F. Supp. 2d 540 (D.N.J. 2000):

> The counterclaimants have submitted evidence that Bristol is well aware of the extent of competition between its own Taxol® product and docetaxel. Under the circumstances, and consistent with the court's statements at oral argument, the IVAX defendants should not be confined to their preliminary suggestion that "*one* relevant product market is the market for paclitaxel-based drugs" (emphasis added). Whether the counterclaimants can prove the relevant product market and Bristol's exclusionary power in that market, as necessary to prevail on their antitrust claims, remains to be determined at trial.

Id. at 547 (citations to record omitted). For this reason, the Third Circuit in *SmithKline Corp.*, *supra*, observed that while internal marketing studies are not actual admissions of market definitions for antitrust purposes, "upon careful examination of Lilly's internal marketing documents, the Court is singularly impressed with the untold references made to the cephalosporin and/or cefazolin market, without any mention of a broader anti-infective market." 427 F. Supp. at 1119. The court concluded that, given such a record, determination of the relevant market should only be made "in light of all the evidence produced at

trial." *Id*. The district court's decision below to take on that determination on summary judgment instead was error.

C. Belmora Presented Competent Evidence Supporting its Definition of the Relevant Market.

As Belmora argues in its opening brief, a relevant market need not include all therapeutic alternatives. *See*, e.g., *Barr Labs., Inc. v. Abbott Labs*, 978 F.2d 98, 102 (3rd Cir. 1992) (relevant product market consisted of erythromycins, not all antibiotics); *SmithKline Corp.*, *supra*, 575 F.2d at 1064-65 (relevant market consisted of cephalosporins, not all antibiotics, despite existence of "overlap in [certain) therapeutic capabilit[ies]"). This principle is not confined to the pharmaceutical industry. *See*, e.g., *FTC v. Staples, Inc*., 970 F. Supp. 1066, 1074, 1079-80 (D.D.C. 1997) (relevant product market limited to consumable office products sold by office supply superstores despite "perfect 'functional interchangeability'" with office supplies sold by other retailer types); *In the Matter of Coca-Cola Bottling Co. of the Southwest*, 118 F.T.C. 452, 574 (1994) (relevant product market limited to branded carbonated soft drinks) (*vacated on other grounds*); *In the Matter of the Coca-Cola Co.*, 117 F.T.C. 795, 931-40 (1994) (relevant market limited to branded soft drink concentrate).

Bayer nonetheless focuses on the fact that Belmora's economist, Dr. Rausser, would not fit his analysis validating Belmora's antitrust claims to precise "magic words." (Bayer Resp. Br. at 47-49.) Instead, Dr. Rausser's analysis proceeded on the

accepted principle that, nomenclature notwithstanding, the key to identifying antitrust injury is not the abstract or formal definition of "a market" but rather conclusions drawn from observations and data about linkages between what one firm does and how it affects the behavior and competitive position of other firms (horizontally) in the context of suppliers and customers (vertically). This approach rejects facile "market" definitions based on functional or therapeutic interchangeability in favor of what Bayer ultimately acknowledges – using the "magic word" of cross-elasticity – is the only relevant inquiry: whether and to what extent products are sufficiently substitutable that they could constrain each other's prices. *See*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) (an antitrust product market is premised on proof of "reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it").

This is the basis on which Dr. Rausser's analysis proceeded, and which the district court erred in disregarding. As he testified in his deposition:

> Q. How can you offer an opinion that Bayer has exercised or abused market power without defining the market in which it's operating?
>
> A. By looking at the actual relationships that exist in terms of the linkages among markets. I have another publication that appears in the book *Antitrust Revolutions*, and the focus there is on market linkages. If you can manipulate one market, [it can] have consequences downstream and the focus is on the linkages, not the definition of the market itself. . . .
>
> It's not that the scope of the relevant market is not important or can be swept under the rug. Instead it's a question of whether there is a market

> linkage that allows the market position of one supplier to the market to actually abuse their position. And if they can, there's got to be some market where they can exercise that power. And as in my Exhibit 1, the market where they can exercise that power is upstream with regard to the manufacturing of the Aleve product, the liquid gel product, in particular.

J.A. 365-66. The district court disregarded this testimony in dismissing Belmora's antitrust claim and simply adopted Bayer's assertion that Dr. Rausser admitted that he never actually defined a relevant market. J.A. 894-95. Dr. Rausser's testimony, in other words, was that Bayer's undisputed veto over the market for inputs – the sale of raw naproxen liquidgels to any branded competitor – had to give it market power over the retail market for branded naproxen products, including (but not necessarily confined to) liquidgels.

In *U.S. Information Systems, Inc. v. International Brotherhood of Elec Workers Local Union Number 3*, 313 F. Supp. 2d 213 (S.D.N.Y. 2004), the defendants in an antitrust case argued, as Bayer does here, that the plaintiff's proffered testimony on market power and the existence of anticompetitive conduct was insufficiently "scientific" because it did not include the traditional regression analysis, a typical deficiency where, as here, there is a dearth of sufficient data. *Id.* at 228. The court rejected this argument, observing that the expert's opinion was based on quantitative analysis of the available data from which the expert made inferences "an economist would draw" based on "textbook economic theory." *Id.* at 229. So, too, regarding Dr. Rausser's testimony, but instead of addressing his

analysis with the minimal level of rigor appropriate to the task, the district court simply deferred to the out-of-context excerpt provided by Bayer. This was reversable error.

IV. THE DISTRICT COURT IMPROPERLY DISREGARDED NEW EVIDENCE AND APPLIED AN ERRONEOUS STANDARD OF REVIEW IN AFFIRMING THE TTAB'S RULING.

The TTAB's decision to cancel Belmora's trademark registration of FLANAX was explicitly predicated on the TTAB's unequivocal determination that Belmora's application to register the mark was done in bad faith, and in derogation of the rights of Bayer in particular. J.A. 139-47. Evidence negating that bad faith as a matter of law, developed in the subsequent litigation in the district court, would therefore be of central significance in the litigation of this matter. And in its opening brief, Belmora observed that the section of the district court's opinion affirming the Trademark Trial and Appeal Board's decision cancelling Belmora's FLANAX registration simply ignored exactly such evidence and that the district court employed an erroneous standard of review of that decision. (Belmora Br. at 64-67.)

Faced with these facts of record, in its response Bayer has adopted the common tack of declining to engage on the facts and law of an appellant, while in the posture of an appellee, and, instead, merely parrots the decision being appealed. Thus, Bayer says – frankly misrepresenting the record – "Belmora did not present a single piece of new evidence to the District Court pertaining to the Board decision."

(Bayer Resp. Br. at 61.) The federal government joins Bayer in this mischaracterization through its amicus brief. (Doc. 37-1 at 8, 17-19.)

What Bayer and the government hope this Court will disregard, as the district court did, is the 2009 memorialization by Belmora's trademark counsel, Lessa Weiss, of her conclusion that Belmora had priority rights in the use of FLANAX in the United States as early as 2003. J.A. 746-47. Bayer's hope is understandable, because as a matter of law, reliance of counsel on such advice negates a finding of bad faith in a trademark use context. *See Dorr-Oliver, Inc. v. Fluid-Quip, Inc.*, 834 F. Supp. 1008, 1112 (N.D. Ill. 1993) ("Whether or not defendants acted in good faith depends on what legal advice they received and whether they followed that advice."); *see also Breuer Electric Mfg. Co. v. Hoover Co.*, Case No. 97-cv-7443, 1998 WL 427595, at *13 (N.D. Ill. July 23, 1998) (where defendant's counsel conducted trademark review, knew of plaintiff's mark and concluded that confusion was unlikely, plaintiff failed to prove "bad faith" for the purpose of proving a likelihood of confusion).

What the record developed after the TTAB's ruling shows is that Belmora relied on objectively reasonable legal advice. Bayer does not dispute that it was objectively reasonable and, as Belmora argued in its opening brief, it cannot. This Court's ruling reversing the original 12(b)(6) dismissal by the district court was unprecedented and novel. Because the law on this issue is so straightforward,

however, neither Bayer nor the government acknowledge that Belmora relied on the advice of counsel and acted in good faith. (Bayer Resp. Br. at 60; Doc. 37-1 at 17-19.) They argue, instead, that the district court had no reason to address it because intent was not relevant to the TTAB's conclusions. (Bayer Resp. Br. at 60; Doc. 37-1 at 18.) But this is an incoherent assertion where, as here, the TTAB's conclusions involve bad faith. J.A. 137-48.

Bayer nonetheless argues that the "letter is not a clearance opinion, does not show that a clearance opinion was ever provided regarding Belmora's right to use the FLANAX mark in the United States, and was written years after Belmora began using and applied to register the mark." (Bayer Resp. Br. at 62.) But besides the fact that this formulation is essentially an admission of the existence of a fact question appropriate for the jury, not summary judgment, Bayer fails to address the fact that this letter was not the only form of evidence Belmora produced following remand. That additional evidence includes the following deposition testimony by Mr. Belcastro – the only person "in the room" with first-hand knowledge of the facts:

> Q. Thank you. You mentioned [the law firm of] Jacobson Holman. So if you turn to Page 16 . . . In Paragraphs 49 and 50, it mentions that you consulted with an attorney in Paragraph 49, right?
>
> A. Correct.
>
> Q. That – those attorneys were Jacobson – Jacobson Holman, right?
>
> A. Jacobson Holman PLC of Washington D.C.

Q. You consulted them before deciding to apply to register for Flanax, apply to register as a trademark in the United States Patent and Trademark Office; is that right?

A. I don't know that –

…

THE WITNESS: I don't know the exact sequence of timing. But it was around the same time I applied for registration for Flanax in the U.S.

Q. Did you receive a written opinion from Jacobson Holman?

A. I met with three of their attorneys. I told them the dilemma, that there was this illegal Mexican Flanax being floated around, that my distributors were scared to touch it because they were fearful of criminal prosecution, and they suggested that I should lawfully make it in the United States. And I wanted an opinion from a law firm.

…

Q. Please tell me what you recall about the opinion that you were given.

…

THE WITNESS: So we talked about a similar case that Jacobson Holman had worked for another client of theirs that I'm aware of, because he is in my market in terms of marketing products to the U.S. Hispanic community. And he registered a mark that was used abroad for use in the United States. And Jacobson Holman concluded at the end of the meeting that registration of Flanax by Belmora within the United States was legally permissible.

Q. This other case they handled, what was the mark?

…

THE WITNESS: The mark is Neurobion, N-E-U-R-O-B-I-O-N.

BY MR. BARENGOLTS:

Q. What else did they tell you about the Neurobion matter?

…

BY MR. BARENGOLTS:

Q. Let's answer the – let's start with, what else did they tell you about the Neurobion matter they handled?

A. That they were successful in establishing intellectual property rights for the registration and that the company that had the mark in Mexico was unsuccessful in bringing any action against Bernard Industries. And as long as you follow the U.S. laws, that you're equally permissible to undertake this action. And they likened it to the Budweiser case with August Busch registering the Budweiser mark in the United States when it was already present in the Czech Republic.

…

Q. So based on their – on Jacobson Holman's prior handling of the Neurobion matter, they advised you that you were free to seek registration of the Flanax mark; is that right?

…

THE WITNESS: I did.

BY MR. BARENGOLTS:

Q. And have you had a – do you recall roughly when this meeting happened?

A. It may have been my first or second visit to their law firm. And I don't recall the date. I don't.

Q. 2003 or 2004? At least the year?

A. Somewhere in that range.

Q. But you can't be sure at this point?

A. I can't be sure. It was either my first or second meeting with that law firm.

J.A. 992-1001 (objections and colloquy between counsel omitted; emphasis added).

Bayer and the government both concede the district court failed to apply a *de novo* standard of review to the entire factual record placed before it, including the newly produced evidence described above which, as Belmora demonstrated in its opening brief, is the appropriate standard. (Belmora Br. at 65-67.) Their argument amounts to a "no harm, no foul" defense of the district court. But the foul here was more than technical: Had this testimony been properly considered below it would have served as a sufficient counterweight to the TTAB's determination of Belmora's intent to at least raise an issue for trial regarding the bad faith on which the TTAB's cancellation decision was premised.

The district court's failure even to consider this evidence, as it was required to do when engaging in judicial review of a TTAB decision under *Kappos v. Hyatt*, 566 U.S. 431 (2012) and its progeny, was reversible error.

CONCLUSION

For all the foregoing reasons as well as those set forth in Belmora's initial brief, this Court should (1) affirm the district court's dismissal of Bayer's claims; (2) reverse the district court's Order (i) dismissing each of Belmora's affirmative

counterclaims in Bayer's favor; and (ii) affirming the TTAB's 2014 decision and remand this case to the district court for trial on these issues.

Respectfully submitted,

By: /s/ Ronald D. Coleman
MANDELBAUM SALSBURG P.C.
Ronald D. Coleman
Joel G. MacMull
1270 Avenue of the Americas, Suite 1808
New York, New York 10020
Tel.: 212-776-1834
Fax: 917-383-1228
rcoleman@lawfirm.ms
jmacmull@lawfirm.ms

/s/ Craig C. Reilly
Craig C. Reilly (VSB # 20942)
111 Oronoco Street
Alexandria, Virginia 22314
Tel.: 703-549-5354
Fax: 703-549-5355
craig.reilly@ccreillylaw.com

Attorneys for Consolidated Defendants, Appellees.

Dated: May 17, 2019

CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

   [X] this brief contains [*6,270*] words.

   [ ] this brief uses a monospaced type and contains [*state the number of*] lines of text.

2. This brief document complies with the typeface and type style requirements because:

   [X] this brief has been prepared in a proportionally spaced typeface using [*Microsoft Word 2016*] in [*14pt Times New Roman*]; *or*

   [ ] this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

Dated: May 17, 2019

/s/ Joel G. MacMull
Counsel for Appellees/
Cross-Appellants

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 17th day of May, 2019, I caused this Reply Brief of Appellees/Cross-Appellants to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Phillip Barengolts
Bradley L. Cohn
Jessica A. Ekhoff
PATTISHALL, MCAULIFFE, NEWBURY, HILLIARD & GERALDSON LLP
200 South Wacker Drive, Suite 2900
Chicago, Illinois 60606
(312) 554-8000
pb@pattishall.com
blc@pattishall.com
jae@pattishall.com

Robert J. Shaughnessy
WILLIAMS & CONNOLLY, LLP
725 12th Street, NW
Washington, DC 20005
(202) 434-5564
bshaughnessy@wc.com

Counsel for Appellants/Cross-Appellees

I further certify that on this 20th day of May, 2019, I caused the required copy of the Reply Brief of Appellees/Cross-Appellants to be hand filed with the Clerk of the Court.

/s/ Joel G. MacMull
Counsel for Appellees/
Cross-Appellants