UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Appeal No. 09-3325

SAINT FRANCIS MEDICAL CENTER,
on behalf of itself and all others similarly situated,

Plaintiff-Appellant,

v.

C.R. BARD, INC.,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI, SOUTHEASTERN DIVISION
CIVIL DOCKET NO. 1:07-CV-0031-TCM
MAGISTRATE JUDGE THOMAS C. MUMMERT, III

BRIEF FOR CONSUMER FEDERATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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CORPORATE DISCLOSURE

Pursuant to Federal Rule of Appellate Procedure 26.1, Consumer Federation of America states that it is an association of non-profit organization and it does not have a parent corporation and no corporation owns 10% or more of its stock.

INTEREST OF AMICUS CURIAE

Consumer Federation of America (CFA) respectfully submits this amicus curiae brief in support of Plaintiff-Appellant Saint Francis Medical Center (St. Francis).

CFA is the nation's largest consumer advocacy group, comprised of more than 280 state and local affiliates representing consumer, senior citizen, low income, labor, farm, public power and cooperative organizations, with more than 50 million individual members. CFA represents consumer interests before federal and state regulatory and legislative agencies and participates in court proceedings. CFA has been particularly active on antitrust issues affecting health care, medical device, and high technology industries in which exclusive dealing and other practices by dominant firms can be a critical issue.

CFA has an interest in this matter because the panel's decision effectively permits medical device companies such as Defendant-Appellee C.R. Bard, Inc. (Bard) to engage in exclusionary conduct with impunity, so long as they do not

engage in predatory pricing. Amicus has a strong interest in the correct application of the antitrust law here because of its potential impact on consumer healthcare costs.

As a leading representative of the public interest and advocate for millions of consumers of medical devices, pharmaceuticals and other health care products, *amicus curiae* has an interest in ensuring that consumers receive the price and quality benefits that result from a competitive marketplace. The exclusionary practices adopted by dominant firms have the potential to raise prices charged to the consumers, affect doctor's best options, reduce quality or diminish innovation. Specifically, consumers in numerous medical device markets will be faced with less choice and higher prices; doctors will be unable to choose the best products to treat their patients; and innovative rivals will be kept from bringing new products to the market.

The practices at issue in this case— bundling, exclusive dealing, and sole source contracting —are prime examples of the harm to consumers that can arise where a dominant firm uses exclusionary practices, rather than competes on the merits. Bard used a variety of contractual practices to keep a lower cost, safer, and more innovative product off the market. It is apparent that the panel's decision here employed an incorrect standard by which to judge the legality of defendant's conduct.

SUMMARY OF ARGUMENT

The panel's decision in *Saint Francis Medical Center, et al. v. C.R. Bard Inc.*, *sua sponte* breaks new ground in antitrust law, formalistically determines matters that should depend on an actual and in-depth examination of the facts and simply – and mistakenly – chooses sides in a dispute between experts on the proper application of an economic test in this particular market. In so doing, the panel's decision effectively ignores the thrust of modern antitrust law, which is to avoid categorical approval or sanction of acts and to instead focus on the actual economic effects of specific acts in specific markets. Amicus respectfully submits that such departures from existing precedent should be done with specific briefing addressed to the key issues and not upon minimal or no briefing and oral argument regarding the issues.[1]

ARGUMENT

The Sherman Act prohibits monopolization – really the maintenance of monopolies by something other than competition on the merits – and prohibits unreasonably anticompetitive agreements. *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327-28 (1961). In practice, this has meant that the law prohibits monopolists – those with monopoly power – from utilizing contractual provisions that penalize or

[1] Saint Francis appellate brief is referred to herein as "SFOB" and its reply brief as "SFRB."

unnecessarily restrict competition. *See, e.g.*, *United States v. Microsoft*, 253 F.3d 34, 58-78 (D.C. Cir. 2001) (en banc) (per curiam) (holding that various contracting and licensing practices violated Section 2).

The focus of modern antitrust law has been to minimize "categorical" approval or disapproval of arrangements in favor of examination of the actual effects of challenged conduct on competition. *See, e.g.*, *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466-67 (1992) ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.' "). Further, in the context of the antitrust laws and elsewhere, this Court – in accordance with admonitions from the Supreme Court – has consistently emphasized that judges should not be in the business of deciding whose expert is right, rather they should insure that the experts are presenting analysis that would help the jury understand the issues that must be decided – and it is the jury that must decide whose expert is correct. *See e.g.*, *United States v. Vesey*, 338 F.3d 913, 917 (8th Cir. 2003) ("[t]he gatekeeper role should not ... invade the province of the jury, whose job it is to decide issues of credibility and to determine the weight that should be accorded evidence."). The panel's decision contravenes all these principles in only 11 pages.

A. The Panel *Sua Sponte* Created A New Rule Of Antitrust Law Which Removes The Actual Market Effects Of Actions From Consideration.

The test for determining if contractual provisions are anticompetitive or constitute unfair conduct has been whether, in the context of the specific market, the challenged provisions are unnecessarily restrictive. *See LePage's, Inc. v. 3M*, 324 F.3d 141, 154-55 (3rd Cir. 2003) (en banc) (holding that jury could reasonably find that exclusionary conduct, including bundled rebates and exclusive dealing, violated Section 2); *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768, 783-91 (6th Cir. 2002) (holding that evidence that monopolist removed plaintiff's moist-snuff products from stores, trained store employees to destroy plaintiff's in-store display racks, provided misleading information about its products, and entered into exclusivity agreements supported Section 2 jury verdict). In examining this issue, courts look to the *specific market context* to determine whether such contractual provisions are necessary to achieve the legitimate business goal of competing on the merits or whether they primarily just insulate the monopolist from competition. *See, e.g., United States v. Dentsply Int'l Inc.*, 399 F.3d 181, 197-98 (3rd Cir. 2005); *Minn. Mining & Mfg. Co. v. Appleton Papers, Inc.*, 35 F. Supp. 2d 1138, 1146 (D. Minn. 1999). This determination is necessarily fact intensive.

The panel's opinion turns this analysis on its head. It essentially ruled as a matter of law that exclusive sole source arrangements – no matter how they

actually function – are permissible if they do not result in below cost pricing or if they contain a cancellation clause.

Further, the panel's *sua sponte* application of *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), a predatory pricing case, to a case involving exclusive dealing arrangements breaks with established precedent, which has not applied predatory pricing tests to such contractual arrangements. *See Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 901 (9th Cir. 2008); *LePage's*, 324 F.3d at 141, 152; *Ortho Diagnostic Sys., Inc. v. Abbott Labs, Inc.*, 920 F. Supp 455, 466 (S.D.N.Y. 1996). Moreover, the panel's opinion announces this new application of predatory pricing analysis *without a single word* regarding the issue in the parties' briefing or in oral argument. At the very least, the application of predatory pricing analysis to contracts that limit with whom parties can do business (and enforce those limits with financial penalties such as "claw-back" provisions) is an issue that is novel and controversial. Amicus respectfully submits that a decision to apply these rules in the way the panel applies should be made only after careful consideration and full briefing by the parties – not on a *sua sponte* basis that does not discuss whether such an application is appropriate. *See Bethea v. Levi Strauss and Co.*, 916 F.2d 453, 455-56 (8th Cir. 1990) ("[a] federal appellate court's scope of review is limited to issues raised both below and on appeal.")

B. The Panel Abused Summary Judgment Review Standards And Determined Issues That This Court Has Repeatedly Held Should Be Left To The Jury.

The panel also resolved economic issues that were a matter of sharp dispute between the experts. The panel did this by painting economic disputes in legal terms, rather than as matters of market structure and competitive effect that are in fact, matters of fact for the jury. This was improper. *See, e.g., TFWS, Inc. v. Schaefer*, 325 F.3d 234, 242 (4th Cir. 2003) (reversing summary judgment where district court found expert's theory for defendant more persuasive and stating that "[t]hese are not decisions that can be made on summary judgment.").

The issue in this case is whether Bard (a party with an overwhelming market share) unfairly maintained its monopoly power through its contracting practices to foreclose rivals from a vital distribution channel. Based upon Amicus' understanding of the claims and the record, St. Francis presented evidence indicating that Bard used exclusionary contract provisions and market-share commitments to maintain its highly profitable monopoly position in the catheters market. *E.g.*, SFOB 14-22. Some of these mechanisms included insisting on long-term, sole source agreements, which Bard knew would dramatically limit the number of potential competitors. *Id*. at 17-19. In some instances, the evidence suggested that the Bard was involved *in establishing the criteria for who could*

compete for business and limiting the number of competitors or parties on the contract. *Id*. at 15-16.

Amicus understands that St. Francis presented evidence that such provisions not only limited competition but contained "claw-back" and other penalty provisions that, in the context of this market, foreclosed a substantial amount of competition. SFRB 22-29. The panel, however, held that the existence of cancellation clauses meant that such agreements were not restrictive, regardless of the evidence showing that the actual effect of these clauses in the market and the penalties that could be extracted for exiting the agreements. Opinion 9-10. This type of categorical and formalistic analysis runs counter to the entire scope of modern antitrust law, which focuses on the actual economic effects of contractual arrangements. *Eastman Kodak*, 504 U.S. at 466-67.

Moreover, in addressing whether bundled pricing arrangements were anticompetitive, the panel simply took sides and accepted the views of the Bard's experts. As St. Francis's expert testified, economic theory and empirical evidence as to the relevant markets indicates that in this market, bundled pricing operated anticompetitively by raising costs of Bard's rivals and by forcing them to sell one segment of the group of products in the multi-product pricing scheme below cost. SFOB 57-59. The panel, however, chose to ignore the record evidence regarding the anticompetitive effects on the market caused by raising rival's costs and

disparaged the views of St. Francis's expert regarding whether the bundled pricing required Bard's potential rivals to price products bundled with catheters below cost.

Some of the panel's difficulties with the St. Francis's expert's analysis probably arise from a misunderstanding of the concepts and examples used in prior cases trying to explain what is called the "attribution" test. The purpose of an attribution test is two-fold: to determine if a monopolist is trying to leverage its monopoly power to another, unrelated product by selling that product below cost and to determine if the monopolist is seeking to exclude potential competitors in the main market by forcing them to develop a multi-product price that would force them to sell another product – not the product for which monopoly power is alleged (called the "competitive" product) below some measure of cost. *Cascade*, 502 F.3d at 920-21. In order to fulfill these functions and provide insight into the relevant issues, any "bundle" discount or rebate must be applied to the product *over which the monopolist does not have monopoly power* – the "competitive" product (*id*.) – which is exactly what St. Francis's expert did. As St. Francis's expert discovered, the "competitive" products were being sold below cost – meaning that the Bard was both leveraging its monopoly into other markets as well as supporting its monopoly in catheters. SFOB 57-59.

The panel simply misunderstood how the "attribution" test would work in this market. Because past cases have used examples where the monopoly product is truly a "monopoly" – only the monopolist makes the product and the "competitive" product (the product for which monopoly power is not claimed) is made by both the monopolist and all potential competitors – the requirement to apply the discount to the "competitive" product is clear. One applies it to the product both parties make because that product is NOT the product for which monopoly power is claimed. *Cascade* 515 F.3d at 906. Here, the "monopoly" product is produced by Bard and various other parties, but some of the "competitive" (other bundled) products are not made by many of the minor players in the catheters market. Thus, *in the context of this market*, the test was properly applied. The panel, however, probably because of its misunderstanding of the application of the attribution test to this type of market simply resolved the dispute between the experts and rejected the analysis of plaintiffs' economist who is also the former deputy director of the antitrust division at the U.S. Department of Justice, a scholar in residence at the Kaufman Institute and a Brookings Institution scholar.

The panel's actions demonstrate why this Court has repeatedly stated that district and appellate courts should not be in the business of resolving disputes among experts. *See Synergetics, Inc. v. Hurst*, 477 F.3d 949, 956 (8th Cir. 2007) (a

court should not exclude an expert's testimony merely because the court, or another expert, disagrees with the expert's methods or conclusions); *see also Phillips v. Cohen*, 400 F.3d 388, 399 (6th Cir. 2005) ("weighing the credibility of the competing expert reports amounts to improper fact-finding. Indeed, competing expert opinions present the 'classic battle of the experts' and it [is] up to a jury to evaluate what weight and credibility each expert opinion deserves.") (citations omitted). An appellate court is limited in its time, the space that can be devoted to briefing expert issues and the ability to examine the totality of the record and seek additional clarification through direct and cross examination as to the dispute between the experts – constraints that do not exist for the trial court and the finder of fact at trial.

CONCLUSION

For the foregoing reasons, panel rehearing or *en banc* hearing is appropriate and respectfully requested.

Respectfully submitted,

/s/ Edward D. Robertson, Jr. September 23, 2010

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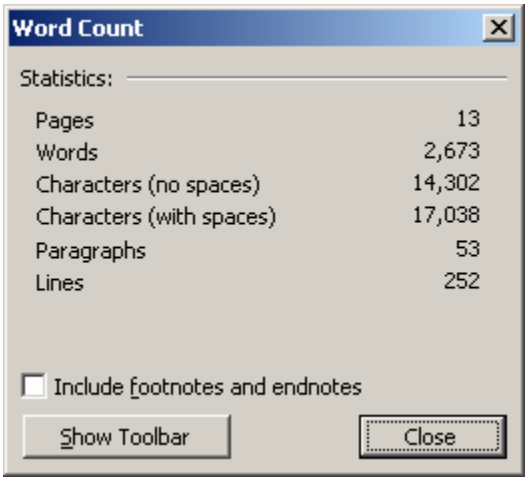
CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

The undersigned certifies that this brief contains 2,673 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), has been prepared in a proportionally spaced typeface using Microsoft Word version 2007, and that the accompanying CD-ROM is virus free.



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CERTIFICATE OF SERVICE
Appeal No. 09-3325

SAINT FRANCIS MEDICAL CENTER V. C.R. BARD, INC.

I hereby certify that on September 23, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I further certify that some of the participants in the case are not CM/ECF users.

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