UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

TEVRA BRANDS LLC,

Plaintiff,

v.

BAYER HEALTHCARE LLC, et al.,

Defendants.

Case No. 19-cv-04312-BLF

JURY INSTRUCTIONS

IT IS SO ORDERED.

Dated: July 31, 2024

BETH LABSON FREEMAN
United States District Judge

Instruction 1.A. Duty of Jury

Members of the jury: You are now the jury in this case. It is my duty to instruct you on the law.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

At the end of the trial, I will give you final instructions. It is the final instructions that will govern your duties.

Please do not read into these instructions, or anything I may say or do, that I have an opinion regarding the evidence or what your verdict should be.

Instruction 1.B.: Claims and Defenses

To help you follow the evidence, I will give you a brief summary of the positions of the parties:

Plaintiff Tevra Brands LLC ("Tevra") brings this antitrust action against Defendant Bayer HealthCare LLC ("Bayer"), alleging Bayer violated the Sherman Act and the Clayton Act, which are U.S. antitrust laws whose purpose is to preserve free and unfettered competition in the marketplace. Tevra also claims that Bayer engaged in exclusionary practices that substantially restrained trade in an alleged relevant antitrust market for topical imidacloprid flea and tick treatments for dogs and cats. First, Tevra claims that Bayer maintained a monopoly in imidacloprid flea and tick topicals, in violation of Section 2 of the Sherman Act. Second, Tevra claims that Bayer used exclusive dealing contracts, in violation of Section 3 of the Clayton Act. Tevra has the burden to prove its claims by a preponderance of the evidence.

Bayer asserts that Tevra has not established any of the prerequisites for prevailing under Sherman Act Section 2 and Clayton Act Section 3, including but not limited to the facts that (1) Tevra has not established a valid antitrust market, as the market is broader and likely contains other preventative flea and tick products, such as Frontline or Nexgard; (2) Tevra cannot establish that Bayer had monopoly power in a relevant antitrust market; (3) Tevra cannot establish that Bayer's conduct foreclosed competition in a substantial share of the line of commerce affected, especially because there were other channels of distribution, such as veterinarians or online retailers, available, and the agreements were short-term and easily terminable; (4) Tevra cannot establish that Bayer's conduct caused damages to Tevra; and (5) Tevra cannot establish damages causally connected to the alleged conduct.

Instruction No. 5: Ruling on Objections

There are rules of evidence that control what can be received into evidence. When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered, or the exhibit received. If I sustain the objection, the question cannot be answered, and the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and must not guess what the answer might have been.

Sometimes I may order that evidence be stricken from the record and that you disregard or ignore that evidence. That means when you are deciding the case, you must not consider the stricken evidence for any purpose.

Instruction No. 7: Conduct of the Jury

I will now say a few words about your conduct as jurors.

First, keep an open mind throughout the trial, and do not decide what the verdict should be until you and your fellow jurors have completed your deliberations at the end of the case.

Second, because you must decide this case based only on the evidence received in the case and on my instructions as to the law that applies, you must not be exposed to any other information about the case or to the issues it involves during the course of your jury duty. Thus, until the end of the case or unless I tell you otherwise:

> Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone, tablet, or computer, or any other electronic means, via email, text messaging, or any internet chat room, blog, website or application, including but not limited to Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat, Tiktok, or any other forms of social media. This applies to communicating with your fellow jurors until I give you the case for deliberation, and it applies to communicating with everyone else including your family members, your employer, the media or press, and the people involved in the trial, although you may notify your family and your employer that you have been seated as a juror in the case, and how long you expect the trial to last. But, if you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and report the contact to the court.
>
> Because you will receive all the evidence and legal instruction you properly may consider to return a verdict: do not read, watch or listen to any news or media accounts or commentary about the case or anything to do with it[,although I have no information that there will be news reports about this case]; do not do any

research, such as consulting dictionaries, searching the Internet, or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own. Do not visit or view any place discussed in this case, and do not use the Internet or any other resource to search for or view any place discussed during the trial. Also, do not do any research about this case, the law, or the people involved—including the parties, the witnesses or the lawyers—until you have been excused as jurors. If you happen to read or hear anything touching on this case in the media, turn away and report it to me as soon as possible.

These rules protect each party's right to have this case decided only on evidence that has been presented here in court. Witnesses here in court take an oath to tell the truth, and the accuracy of their testimony is tested through the trial process. If you do any research or investigation outside the courtroom, or gain any information through improper communications, then your verdict may be influenced by inaccurate, incomplete or misleading information that has not been tested by the trial process. Each of the parties is entitled to a fair trial by an impartial jury, and if you decide the case based on information not presented in court, you will have denied the parties a fair trial. Remember, you have taken an oath to follow the rules, and it is very important that you follow these rules.

A juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over. If any juror is exposed to any outside information, please notify the court immediately.

Instruction No. 8: No Transcript Available to Jury

I urge you to pay close attention to the trial testimony as it is given. During deliberations you will not have a transcript of the trial testimony.

Instruction No. 9: Taking Notes

If you wish, you may take notes to help you remember the evidence. If you do take notes, please keep them to yourself until you go to the jury room to decide the case. Do not let notetaking distract you. When you leave, your notes should be left in the courtroom. No one will read your notes.

Whether or not you take notes, you should rely on your own memory of the evidence. Notes are only to assist your memory. You should not be overly influenced by your notes or those of other jurors.

Instruction No. 10: Outline of Trial

Trials proceed in the following way: First, each side may make an opening statement. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. A party is not required to make an opening statement.

Tevra will then present evidence, and counsel for Bayer may cross-examine. Then Bayer may present evidence, and counsel for Tevra may cross-examine.

After the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments.

After that, you will go to the jury room to deliberate on your verdict.

Instruction No. 10.A: Bench Conferences and Recesses

From time to time during the trial, it may become necessary for me to talk with the attorneys out of the hearing of the jury, either by having a conference at the bench when the jury is present in the courtroom, or by calling a recess. Please understand that while you are waiting, we are working. The purpose of these conferences is not to keep relevant information from you, but to decide how certain evidence is to be treated under the rules of evidence and to avoid confusion and error.

Of course, we will do what we can to keep the number and length of these conferences to a minimum. I may not always grant an attorney's request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of what your verdict should be.

Instruction No. 11: Stipulations of Fact

The parties have agreed to certain facts to be placed in evidence as Exhibit 5000. Exhibit 5000 will be read to you.

Instruction No. 12: Deposition in Lieu of Live Testimony

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. The questions and answers are recorded. When a person is unavailable to testify at trial, the deposition of that person may be used at the trial. Insofar as possible, you should consider deposition testimony, presented to you in court in lieu of live testimony, in the same way as if the witness had been present to testify.

Instruction No. 14: Expert Opinion

You will hear testimony from experts who will testify to opinions and the reasons for his or her opinions. The opinion testimony is allowed, because of the education or experience of this witness.

Such opinion testimony should be judged like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

Instruction No. 15: Charts and Summaries Not Received in Evidence

Certain charts and summaries not admitted into evidence may be shown to you in order to help explain the contents of books, records, documents, or other evidence in the case. Charts and summaries are only as good as the underlying evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

Instruction No. 15.A: Charts and Summaries Received in Evidence

Certain charts and summaries may be admitted into evidence to illustrate information brought out in the trial. Charts and summaries are only as good as the testimony or other admitted evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

Instruction No. 16: Courtroom

You should draw no conclusions and pay no attention to individuals coming and going from the courtroom. The court has tried to accommodate the schedules of numerous witnesses who are travelling from far away, so we are going to do them the courtesy of being here only once for those who cannot travel twice; and therefore, each witness is not required to remain in the courtroom for the duration of the trial.

Instruction No. 17: Duty of the Jury

Members of the Jury: Now that you have heard all of the evidence, it is my duty to instruct you as to the law of the case. A copy of these instructions will be sent with you to the jury room during your deliberation.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

Please do not read into these instructions or anything that I may say or do or have said or done that I have an opinion regarding the evidence or what your verdict should be.

Instruction No. 1: Burden of Proof – Preponderance of the Evidence

When a party has the burden of proving any claim or affirmative defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim or affirmative defense is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

Instruction No. 2: What is Evidence

The evidence you are to consider in deciding what the facts are consists of:

1. the sworn testimony of any witness;
2. the exhibits that are admitted into evidence;
3. any facts to which the lawyers have agreed; and
4. any facts that I may instruct you to accept as proved.

Instruction No. 3: What is Not Evidence

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

(1) Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they may say in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

(2) Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

(3) Testimony that is excluded or stricken, or that you are instructed to disregard, is not evidence and must not be considered. In addition, some evidence may be received only for a limited purpose; when I instruct you to consider certain evidence only for a limited purpose, you must do so, and you may not consider that evidence for any other purpose.

(4) Anything you may see or hear when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

Instruction No. 4: Direct and Circumstantial Evidence

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

Instruction No. 6: Credibility of Witnesses

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

(1) the opportunity and ability of the witness to see or hear or know the things testified to;

(2) the witness's memory;

(3) the witness's manner while testifying;

(4) the witness's interest in the outcome of the case, if any;

(5) the witness's bias or prejudice, if any;

(6) whether other evidence contradicted the witness's testimony;

(7) the reasonableness of the witness's testimony in light of all the evidence; and

(8) any other factors that bear on believability.

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.

Instruction No. 18: Purpose of Sherman and Clayton Acts.

This is an antitrust case brought under federal law. These laws are known as the Sherman Act and the Clayton Act. The purpose of the Sherman Act is to preserve free and unfettered competition in the marketplace. The Sherman Act rests on the central premise that competition produces the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress. The Clayton Act is an amendment to the Sherman Act which makes some types of "exclusive dealing" agreements illegal.

Instruction No. 19: Relevant Antitrust Market

To prove its claims, Tevra must prove by a preponderance of the evidence that Bayer had monopoly power under the Sherman Act or market power under the Clayton Act in a relevant antitrust market. In this case, Tevra alleges that the relevant antitrust market is topical imidacloprid flea and tick treatments for dogs and cats. Defining the relevant antitrust market is essential because you are required to make a judgment about whether Bayer has monopoly power or market power in a properly defined economic market. To make this judgment, you must be able to determine what, if any, economic forces restrain Bayer's freedom to set prices for or to restrict the production level of imidacloprid topicals.

The most likely and most important restraining force will be actual and potential competition from other firms and their products. This includes all firms and products that act or likely could act as restraints on Bayer's power to set prices as it pleases because customers could switch to them if Bayer sets its own prices too high. All the firms and products that exert such restraining force are within what is called the relevant antitrust market.

There are two aspects of a relevant antitrust market: (1) the relevant product market and (2) the relevant geographic market. Here, the parties agree that the relevant geographic market is the United States. Therefore, the aspect for you to consider is whether there is a relevant product market defined as topical imidacloprid flea and tick treatments for dogs and cats. Tevra has the burden of proving this relevant product market by a preponderance of the evidence.

The basic idea of a relevant product market is that the products within it are reasonable substitutes for each other from the buyer's point of view; that is, the products compete with each other. In other words, the relevant product market includes the products that a consumer believes are reasonably interchangeable or reasonable substitutes for each other. This is a practical test with reference to the actual behavior of buyers and marketing efforts of sellers. Products need not be identical or precisely interchangeable as long as they are reasonable substitutes. Thus, for example, if consumers seeking to cover leftover food for storage considered certain types of flexible

wrapping material–such as aluminum foil, cellophane, or even plastic containers–to be reasonable alternatives, then all those products may be in the same relevant product market.

To determine whether products are reasonable substitutes for each other, you must consider whether a small but significant and non-transitory increase in the price of one product would result in enough customers switching from that product to another product such that the price increase would not be profitable. In other words, will customers accept the price increase or will so many switch to alternative products that the price increase will be withdrawn? Generally speaking, a small but significant and non-transitory increase in price is approximately a 5 percent increase in price not due to cost factors but you may conclude in this case that some other percentage is more applicable to the product at issue. If you find that customers would switch and that the price increase would not be profitable, then you must conclude that the products are in the product market. If, on the other hand, you find that customers would not switch, then you must conclude that the products are not in the product market.

In evaluating whether various products are reasonably interchangeable or reasonable substitutes for each other under the price increase test I have just given you, you may also consider:

- customers' views on whether the products are interchangeable;
- the relationship between the price of one product and sales of another;
- the presence or absence of specialized vendors;
- the perceptions of either industry or the public as to whether the products are in separate markets;
- the views of Tevra and Bayer regarding who their respective competitors are; and
- the existence or absence of different customer groups or distribution channels.

In this case, Tevra contends that the relevant product market is topical imidacloprid flea and tick treatments for dogs and cats. By contrast, Bayer contends that Tevra has failed to establish the proper relevant product market. Bayer contends that the relevant antitrust market also includes other flea and tick topicals, such as those containing fipronil, as well as other types of flea and tick

treatments, such as oral medications and flea collars. If you find that Tevra has proven a relevant product market, then you should continue to evaluate Tevra's claims. However, if you find that Tevra has failed to prove such a market, then you must find in Bayer's favor.

Instruction No. 33: Clayton Act, Section 3 - Elements

Tevra challenges Bayer's conduct under Section 3 of the Clayton Act. Tevra alleges Bayer used competition restraining contracts or agreements to restrain competition in a substantial portion of the relevant antitrust market, and that it was injured as a result of these competition-restraining contracts or agreements. Bayer contends that its contracts or agreements with its customers were not exclusive, did not prevent customers from buying products from Bayer's competitors, and promoted competition for lower prices in the market. In these instructions, "contracts" and "agreements" are the same.

To prevail on this claim, Tevra must prove each of the following elements by a preponderance of the evidence:

(1) That the alleged market for topical imidacloprid flea and tick products is a relevant antitrust market (as defined in Instruction No. 19);

(2) That Bayer possessed market power (as defined in Instruction No. 33.A) in the relevant antitrust market;

(3) That there were competition-restricting exclusive dealing agreements between Bayer and its customers, for goods in the relevant antitrust market;

(4) That the exclusive dealing agreements were likely to substantially foreclose (i.e., decrease or restrict) or foreclosed competition in a substantial share of the relevant antitrust market; and

(5) That the exclusive dealing agreements and the resulting foreclosure of competition caused Tevra to suffer injury to its business or property.

If you find that Tevra has failed to prove any of these elements, then you must find for Bayer and against Tevra on this claim. If you find that Tevra has proved each of these elements by a preponderance of the evidence, then you must find for Tevra and against Bayer on this claim.

Instruction No. 33.A: Clayton Act Section 3 – Market Power

Market power is defined as an ability to profitably raise prices, for a sustained period of time, above those that would be charged in a competitive market. A firm that possesses market power generally can charge higher prices for the same goods or services than a firm in the same market that does not possess market power. The ability to charge higher prices for better products or services, however, is not market power. An important factor in determining whether Bayer possesses market power is Bayer's market share, that is, its percentage of the products or services sold in the relevant antitrust market by all competitors. Other factors that you may consider in determining whether Bayer has market power include barriers to entry by competitors into the relevant antitrust market. If Bayer does not possess a market share, it is less likely that Bayer possesses market power.

Instruction No. 34: Clayton Act, Section 3 - Exclusive Dealing – Additional Considerations

In determining whether Bayer's exclusive dealing contracts had a substantially harmful effect on competition in the relevant antitrust market, you should consider the nature and history of the use of exclusive dealing contracts in the flea and tick industry, whether buyers of topical imidacloprid flea and tick products have independent reasons for entering into exclusive dealing contracts or were coerced into entering into them, whether other competing suppliers also offer exclusive dealing contracts, the extent of competition among competing suppliers for exclusive dealing contracts with buyers, Bayer's position in the marketplace, the competitive alternatives to Bayer's products or services, the reasons Bayer and buyers entered into the exclusive dealing contracts at issue, and the effect of the use of exclusive dealing contracts on the ability of new firms to enter the market and on price and other competition in the market.

You also should consider whether the buyer is the final end user of the product. If the buyer is the final end user, the exclusive dealing contract forecloses competitors from that portion of the market represented by the buyer's purchases and makes it more likely that competition may be harmed if the buyer represents a substantial portion of the market. On the other hand, if the buyer is a distributor or reseller, and there are other alternatives for competing sellers to market their products to end users, then an exclusive dealing agreement may not foreclose competitors' access to the market and, thus, not substantially harm competition.

In determining the extent to which Bayer's exclusive dealing contracts foreclose competition on the merits, it is relevant to consider the percentage of the market foreclosed and the length of the foreclosure. Where the exclusive dealing contracts foreclose less than 20 percent of the market, this indicates that the harm from the foreclosure of competition is not substantial because there are alternatives available. However, the amount of market foreclosure that may be "substantial" is for you to determine based on the underlying facts of the exclusive dealing agreements at issue. For example, even where exclusive dealing contracts foreclose more than 20 percent of the market, this may not amount to substantial foreclosure if the alleged exclusive

dealing agreements were of short duration and easy terminability. The ultimate issue in any case is whether an exclusive dealing contract suppresses competition. The shorter the duration of the contract, the less likely it is to harm competition. The longer the contract's duration, the more likely that the harm to competition will be greater, unless it is clear that there was vigorous competition on the merits to win the longer contract or the buyer as a practical matter can terminate the agreement on short notice without cause and without significant penalty. In such a case, the stated length of the exclusive contract is not the period in which it has a competitive effect.

In determining if Bayer's exclusive dealing contracts substantially harmed competition, you also should consider Bayer's market power. If Bayer does not possess market power, then there cannot be substantial harm to competition from an exclusive dealing contract, and you must find for Bayer on this claim. If you decide that the buyers are sophisticated businesses themselves which have countervailing power in negotiating contracts, this may offset any market power Bayer might otherwise have. If Tevra cannot show that Bayer had the power to force buyers to enter into exclusive contracts they did not want, this would be an indication that Bayer lacks market power.

Finally, you should consider whether the process in which Bayer secured exclusive contracts itself involved competition. If you determine that the buyers formally or informally put their exclusive contracts out for bid, and other competitors had an equal opportunity to compete for the exclusive contracts against Bayer, this is also evidence that Bayer does not have market power.

By considering all of these factors, you should determine whether the exclusive dealing contracts adversely affected the price paid by buyers, output, or the quality of products offered in the relevant antitrust market. Where a restraint does not adversely affect price, output, or product quality, it is unlikely to substantially harm competition.

Instruction No. 35: Clayton Act, Section 3 – Duration of Exclusive Dealing Agreements

In evaluating whether Bayer's agreements substantially foreclose competition, you should consider the duration of the agreements and whether they are easily terminable. In general, discounts conditioned on exclusivity in relatively short-term contracts or contracts that are easily terminable will rarely have an adverse effect on competition. Indeed, even a high foreclosure percentage will not exclude competition if the period covered by the exclusive-dealing arrangement is short and there are no other impediments to switching. A short term generally means a term of three years or less.

In determining whether Bayer's agreements were of short duration and/or easily terminable, you should also consider whether the agreements were *de facto* long term, which means that despite the stated terms of the agreements Bayer in fact had an understanding with the retailers or distributors that the agreements would apply for a long term or that the exclusivity provision could not be terminated. You should also consider whether the practical effect of the agreements was to prevent retailers or distributors from purchasing products from Bayer's competitor, Tevra.

Instruction No. 36: Sherman Act, Section 2 - Elements

Tevra also alleges that it was injured by Bayer's unlawful monopolization of the alleged relevant antitrust market of topical imidacloprid flea and tick treatments for dogs and cats.

To prevail on this claim, Tevra must prove each of the following elements by a preponderance of the evidence:

(1) the alleged market for topical imidacloprid products is a valid relevant antitrust market (as defined in Instruction No. 19);

(2) Bayer possessed monopoly power (as defined in Instruction No. 37) in that relevant antitrust market;

(3) Bayer willfully maintained monopoly power in that relevant antitrust market by engaging in anticompetitive conduct;

(4) Bayer's conduct occurred in or affected interstate commerce; and

(5) Tevra was injured in its business or property because of Bayer's anticompetitive conduct.

If you find that Tevra has failed to prove any of these elements, then you must find for Bayer and against Tevra on this claim. If you find that Tevra has proved each of these elements by a preponderance of the evidence, then you must find for Tevra and against Bayer on this claim.

Instruction No. 37: Sherman Act, Section 2 - Monopoly Power Defined

To prove its monopolization claim, Tevra must prove that Bayer has monopoly power in a relevant antitrust market. Monopoly power requires something greater than market power. Monopoly power is the power to control prices, restrict output, and exclude competition in a relevant antitrust market. More precisely, a firm is a monopolist if it can profitably raise prices substantially above the competitive level for a significant period of time. However, possession of monopoly power, in and of itself, is not unlawful.

I will provide further instructions about how you may determine whether Tevra has met its burden of proving monopoly power in a relevant antitrust market.

Instruction No. 38: Sherman Act, Section 2 – Existence of Monopoly Power - Indirect Proof

One way to prove the existence of monopoly power is through indirect proof. If you find that Tevra has proven a relevant antitrust market, then you should determine whether Bayer has monopoly power in that market. As I instructed you earlier, monopoly power is the power to control prices and exclude competition in a relevant antitrust market. Tevra has introduced evidence of the structure of the market to show that Bayer has monopoly power. The evidence presented by the parties includes evidence of Bayer's market share and barriers to entry, if any, into the relevant antitrust market. If this evidence establishes that Bayer has the power to control prices and exclude competition in the relevant antitrust market, then you may conclude that Bayer has monopoly power in the market.

Market Share

The first factor that you should consider is Bayer's share of the relevant antitrust market. Based on the evidence that you have heard about Bayer's market share, you should determine Bayer's market share as a percentage of total sales in the relevant antitrust market. Bayer must have a significant share of the market in order to possess monopoly power.

In evaluating whether the percentage of market share supports a finding of monopoly power, you also should consider other aspects of the relevant antitrust market, including market share trends, the existence of barriers to entry (that is, how difficult is it for other producers to enter the market and begin competing with Bayer for sales), the entry and exit by other companies, and the number and size of competitors. Along with Bayer's market share, these factors should inform you as to whether Bayer has monopoly power. The higher the company's share, the higher the likelihood that a company has monopoly power.

A market share below 50 percent is ordinarily not sufficient to support a conclusion that Bayer has monopoly power. However, if you find that the other evidence demonstrates that Bayer

does, in fact, have monopoly power despite having a market share below 50 percent, you may conclude that Bayer has monopoly power.

Market Share Trends

The trend in Bayer's market share is something you may consider. An increasing market share may strengthen an inference that a company has monopoly power, particularly where that company has a high market share, while a decreasing share might show that a company does not have monopoly power.

Barriers to Entry

You may also consider whether there are barriers to entry into the relevant antitrust market. Barriers to entry make it difficult for new competitors to enter the relevant antitrust market in a meaningful and timely way. Barriers to entry might include intellectual property rights (such as patents or trade secrets), the large financial investment required to build a plant or satisfy governmental regulations, specialized marketing practices, and the reputation of the companies already participating in the market (or the brand name recognition of their products).

Evidence of low or no entry barriers may be evidence that Bayer does not have monopoly power, regardless of Bayer's market share, because new competitors could enter easily if Bayer attempted to raise prices for a substantial period of time. By contrast, evidence of high barriers to entry along with high market share may support an inference that Bayer has monopoly power.

Entry and Exit by Other Companies

The history of entry and exit in the relevant antitrust market may be helpful to consider. Entry of new competitors or expansion of existing competitors may be evidence that Bayer lacks monopoly power. On the other hand, departures from the market, or the failure of firms to enter

the market, particularly if prices and profit margins are relatively high, may support an inference that Bayer has monopoly power.

Number and Size of Competitors

You may consider whether Bayer's competitors are capable of effectively competing. In other words, you should consider whether the financial strength, market shares, and number of competitors act as a check on Bayer's ability to price its products. If Bayer's competitors are vigorous or have large or increasing market shares, this may be evidence that Bayer lacks monopoly power. On the other hand, if you determine that Bayer's competitors are weak or have small or declining market shares, this may support an inference that Bayer has monopoly power.

Conclusion

If you find that Bayer has monopoly power in the relevant antitrust market, then you must consider the remaining elements of this claim. If you find that Bayer does not have monopoly power, then you must find for Bayer and against Tevra on this claim.

Instruction No. 39: Sherman Act, Section 2 – Existence of Monopoly Power - Direct Proof

Another way to prove the existence of monopoly power is through direct proof. If you find that Tevra has proven a relevant antitrust market, then you should determine whether Bayer has monopoly power in that market. As I instructed you earlier, monopoly power is the power to control prices and exclude competition in a relevant antitrust market. More precisely, a firm is a monopolist if it can profitably raise or maintain prices substantially above the competitive level for a significant period of time.

Tevra has the burden of proving that Bayer has the ability to raise or maintain the prices that it charges for goods or services in the relevant antitrust market above competitive levels. Tevra must prove that Bayer has the power to do so by itself – that is, without the assistance of, and despite competition from, any existing or potential competitors.

Tevra must also prove that Bayer has the power to maintain prices above a competitive level for a significant period of time. If Bayer attempted to maintain prices above competitive levels, but would lose so much business to other competitors that the price increase would become unprofitable and would have to be withdrawn, then Bayer does not have monopoly power.

Similarly, Tevra must prove that Bayer has the ability to exclude competition. For example, if Bayer attempted to maintain prices above competitive levels, but new competitors could enter the relevant antitrust market or existing competitors could expand their sales and take so much business that the price increase would become unprofitable and would have to be withdrawn, then Bayer does not have monopoly power.

The ability to earn high profit margins or a high rate of return does not necessarily mean that Bayer has monopoly power. Other factors may enable a company without monopoly power to sell at higher prices or earn higher profit margins than its competitors, such as superior products or services, low costs, superior advertising or marketing, or other benefits offered. However, an ability to sell at higher prices or earn higher profit margins than other companies for similar goods or services over a long period of time may be evidence of monopoly power. By contrast, evidence

that Bayer would lose a substantial amount of sales if it raised prices substantially, or that Bayer's profit margins were low compared to its competitors, or that Bayer's margins go up and down or are steadily decreasing, might be evidence that Bayer does not have monopoly power.

If you find that Bayer has monopoly power in the relevant antitrust market, then you must consider the remaining elements of this claim. If you find that Bayer does not have monopoly power, then you must find for Bayer and against Tevra on this claim.

Instruction No. 40: Sherman Act, Section 2 – Willful Maintenance of Monopoly Power

The next element Tevra must prove is that Bayer willfully maintained monopoly power through anticompetitive acts or practices. Anticompetitive acts are acts, other than competition on the merits, that have the effect of preventing or excluding competition or frustrating the efforts of other companies to compete for customers within the relevant antitrust market. Harm to competition is to be distinguished from harm to a single competitor or group of competitors, which does not necessarily constitute harm to competition. Some examples of harm to competition include increased prices, decreased production levels, and reduced quality. Mere possession of monopoly power, if lawfully acquired, does not violate the antitrust laws. The acquisition or maintenance of monopoly power by supplying better products or services, possessing superior business skills, or because of luck, is not unlawful.

A monopolist may compete aggressively without violating the antitrust laws, and a monopolist may charge monopoly prices without violating the antitrust laws. A monopolist's conduct only becomes unlawful where it involves anticompetitive acts.

The difference between anticompetitive conduct and conduct that has a legitimate business purpose can be difficult to determine. This is because all companies have a desire to increase their profits and increase their market share. These goals are an essential part of a competitive marketplace, and the antitrust laws do not make these goals–or the achievement of these goals–unlawful, as long as a company does not use anticompetitive means to achieve these goals.

In determining whether Bayer's conduct was anticompetitive or whether it was legitimate business conduct, you should determine whether the conduct is consistent with competition on the merits, whether the conduct provides benefits to consumers, and whether the conduct would make business sense apart from any effect it has on excluding competition or harming competitors.

For example, suppose there are five firms that make printers for home computers and that these printers comprised a relevant product market. Suppose also that Firm A developed a more efficient manufacturing process that allowed it to sell profitably at a lower price than its

competitors. If Firm A grew its market share and achieved monopoly power by selling profitably at a lower price, it would not be unlawful for Firm A to achieve monopoly power in this way. Developing more efficient processes and developing the ability to sell profitably at lower prices is competition on the merits and benefits consumers, and it therefore is not anticompetitive conduct even if it has a negative effect on competitors.

Similarly, in the same example, suppose Firm B developed and patented a revolutionary new printer and consumers so preferred Firm B's printer that Firm B achieved monopoly power. It would not be unlawful for Firm B to achieve monopoly power in this way. Firm B "built a better mousetrap," which is competition on the merits and benefits consumers, and it therefore is not anticompetitive conduct.

By contrast, in the same example, suppose not only that Firm C makes printers, but also that Firm C is the world's only manufacturer of computers and that there are barriers to entry in the computer market such that no other firm will be able to enter that market. Suppose also that Firm C altered its computers in such a way that only Firm C's printers would work with its computers, and that the alteration does not improve the design of Firm C's computers or provide any benefits to competition or consumers. The only effect of the alteration is to exclude competing printer makers from the marketplace. It would be unlawful for Firm C to achieve monopoly power in the printer market in this way.

As these examples show, the acts or practices that result in the acquisition or maintenance of monopoly power must represent something more than the conduct of business that is part of the normal competitive process or commercial success. They must represent conduct that has made it very difficult or impossible for competitors to compete and that was taken for no legitimate business reason. You may not find that a company willfully maintained monopoly power through anticompetitive means if it has maintained that power solely through the exercise of superior foresight and skill; or because of natural advantages such as unique geographic access to raw materials or markets; or because of economic or technological efficiency, including efficiency

resulting from scientific research; or by obtaining a lawful patent; or because changes in cost or consumer preference have driven out all but one supplier.

If you find that Tevra has proven by a preponderance of the evidence that Bayer willfully maintained monopoly power through anticompetitive acts, then you must consider whether Tevra has proved the remaining elements of this claim. If, however, you find that Tevra did not prove this element by a preponderance of the evidence, then you must find for Bayer and against Tevra on this claim.

Instruction No. 41: Causation & Damages – Injury and Causation

If you find that Bayer has violated the Sherman Act or the Clayton Act, then you must decide if Tevra is entitled to recover damages from Bayer.

Tevra is entitled to recover damages for an injury to its business or property if it can establish three elements of injury and causation:

(1) Tevra was in fact injured as a result of Bayer's alleged violation of the antitrust laws;

(2) Bayer's alleged illegal conduct was a material cause of Tevra's injury; and

(3) Tevra's injury is an injury of the type that the antitrust laws were intended to prevent.

The first element is sometimes referred to as "injury in fact" or "fact of damage." For Tevra to establish that it is entitled to recover damages, it must prove that it was injured as a result of Bayer's alleged violation of the antitrust laws. Proving the fact of damage does not require Tevra to prove the dollar value of its injury. It requires only that Tevra prove that it was in fact injured by Bayer's alleged antitrust violation. If you find that Tevra has established that it was in fact injured, you may then consider the amount of Tevra's damages. It is important to understand, however, that injury and amount of damage are different concepts and that you cannot consider the amount of damage unless and until you have concluded that Tevra has established that it was in fact injured.

Tevra must also prove by a preponderance of the evidence that Bayer's alleged illegal conduct was a material cause of Tevra's injury. This means that Tevra must prove that some damage occurred to it as a result of Bayer's alleged antitrust violation, and not some other cause. Tevra is not required to prove that Bayer's alleged antitrust violation was the sole cause of its injury; nor need Tevra eliminate all other possible causes of injury. It is enough that Tevra proves that the alleged antitrust violation was a material cause of its injury.

Finally, Tevra must prove by a preponderance of the evidence that its injury is the type of injury that the antitrust laws were intended to prevent. This is sometimes referred to as "antitrust injury." If Tevra's injuries were caused by a reduction in competition, acts that would lead to a reduction in competition, or acts that would otherwise harm consumers, then Tevra's injuries are antitrust injuries. On the other hand, if Tevra's injuries were caused by heightened competition, the competitive process itself, or by acts that would benefit consumers, then Tevra's injuries are not antitrust injuries and Tevra may not recover damages for those injuries under the antitrust laws.

You should bear in mind that businesses may incur losses for many reasons that the antitrust laws are not designed to prohibit or protect against – such as where a competitor offers better products or services, or where a competitor is more efficient and can charge lower prices and still earn a profit. The antitrust laws do not permit a plaintiff to recover damages for losses that were caused by the competitive process or conduct that benefits consumers.

In summary, if Tevra can prove by a preponderance of the evidence that it was in fact injured by Bayer's conduct, that Bayer's conduct was a material cause of Tevra's injury, and that Tevra's injury was the type that the antitrust laws were intended to prevent, then Tevra is entitled to recover damages for the injury to its business or property.

Instruction No. 42: Causation & Damages – Business or Property

Tevra must prove by a preponderance of the evidence that the injury it claims to have suffered was an injury to its business or property. The term "business" includes any commercial interest or venture. Tevra has been injured in its business if you find that it has suffered injury to any of its commercial interests or enterprises as a result of Bayer's alleged antitrust violation. The term property includes anything of value Tevra owns, possesses, or in which Tevra has a protectable legal interest. Tevra has been injured in its property if you find that anything of value that it owns, possesses, or has a legal interest in has been damaged as a result of Bayer's alleged antitrust violation. Tevra has been injured in its property if you find that it has paid an inflated price for goods, services, any legal interest of value, or has lost money as a result of Bayer's alleged antitrust violation.

Instruction No. 43: Causation & Damages – Antitrust Damage

If you find that Bayer violated the antitrust laws and that this violation caused injury to Tevra, then you must determine the amount of damages, if any, Tevra is entitled to recover. The fact that I am giving you instructions concerning the issue of Tevra's damages does not mean that I believe Tevra should, or should not, prevail in this case. If you reach a verdict for Bayer on the issue of liability, you should not consider the issue of damages, and you may disregard the damages instruction that I am about to give.

The law provides that Tevra should be fairly compensated for all damages to its business or property that were a direct result or likely consequence of the conduct that you have found to be unlawful.

Antitrust damages are only compensatory, meaning their purpose is to put an injured plaintiff as near as possible in the position in which it would have been had the alleged antitrust violation not occurred. The law does not permit you to award damages to punish a wrongdoer – what we sometimes refer to as punitive damages – or to deter particular conduct in the future. Furthermore, you are not permitted to award to Tevra an amount for attorneys' fees or the costs of maintaining this lawsuit.

Instruction No. 44: Causation & Damages – Basis for Calculating Damage

You are permitted to make just and reasonable estimates in calculating Tevra's damages. You are not required to calculate damages with mathematical certainty or precision. However, the amount of damages must have a reasonable basis in the evidence and must be based on reasonable, non-speculative assumptions and estimates. Damages may not be based on guesswork or speculation. Tevra must prove the reasonableness of each of the assumptions upon which the damages calculation is based.

If you find that Tevra has provided a reasonable basis for determining damages, then you may award damages based on a just and reasonable estimate supported by the evidence.

If you find that Tevra has failed to carry its burden of providing a reasonable basis for determining damages, then you may not award damages or you may award nominal damages, not to exceed one dollar.

Instruction No. 45: Causation & Damages

If you find that Bayer violated the antitrust laws and that Tevra was injured by that violation, Tevra is entitled to recover for such injury that was the direct result or likely consequence of the unlawful acts of Bayer. Tevra bears the burden of showing that its injuries were caused by Bayer's antitrust violation, as opposed to any other factors. If you find that Tevra's alleged injuries were caused in part by Bayer's alleged antitrust violation and in part by other factors, then you may award damages only for that portion of Tevra's alleged injuries that was caused by Bayer's alleged antitrust violation.

Tevra claims that it suffered injury because it lost sales and profits as a result of Bayer's alleged agreement to exclude generic imidacloprid topicals from the relevant antitrust market, and its maintenance of monopoly power in that market. Bayer claims that any profits or sales lost by Tevra occurred as a result of other factors that have nothing to do with the alleged antitrust violation. These include Tevra's alleged failures to effectively manufacture, market, and sell its products, including not being the first generic imidacloprid topical product to be on the market, perceived quality issues with its products, and not being able to use "compare-to" language on its products. Tevra is not entitled to recover for lost profits that resulted solely from these or other causes arising from the normal course of business activity. The presence of these factors does not mean Tevra did not suffer antitrust injury, but Tevra is not entitled to recovery for damages caused by them. Tevra only may recover for damages caused by the alleged antitrust violation.

Tevra bears the burden of proving damages by a preponderance of the evidence, including apportioning damages between lawful and unlawful causes. If you find that Tevra was injured by Bayer's alleged antitrust violation, and there is a reasonable basis to apportion Tevra's alleged injury between lawful and unlawful causes, then you may award damages.

If you find that Tevra's alleged injuries were caused by factors other than Bayer's alleged antitrust violation, then you must return a verdict for Bayer. If you find that there is no reasonable basis to apportion Tevra's alleged injury between lawful and unlawful causes, or that

apportionment can only be accomplished through speculation or guesswork, then you may not award any damages at all.

Instruction No. 46: Causation & Damages – Damages for Competitors - Lost Profits

Tevra claims that it was harmed because it lost profits as a result of Bayer's alleged antitrust violation. If you find that Bayer committed an antitrust violation and that this violation caused injury to Tevra, you now must calculate the profits, if any, that Tevra lost as a result of Bayer's antitrust violation. To calculate lost profits, you must calculate net profit: the amount by which Tevra's gross revenues would have exceeded all of the costs and expenses that would have been necessary to produce those revenues.

Instruction No. 48: Causation & Damages – Mitigation

Tevra may not recover damages for any portion of its injuries that it could have avoided through the exercise of reasonable care and prudence. Tevra is not entitled to increase any damages through inaction. The law requires an injured party to take all reasonable steps it can to avoid further injury and thereby reduce its loss. If Tevra failed to take reasonable steps available to it, and the failure to take those steps resulted in greater harm to Tevra than it would have suffered had it taken those steps, then Tevra may not recover any damages for that part of the injury it could have avoided.

Bayer has the burden of proof on this issue. Bayer must prove by a preponderance of the evidence that Tevra:

(1) acted unreasonably in failing to take specific steps to minimize or limit its losses;

(2) that the failure to take those specific steps resulted in its losses being greater than they would have been had it taken such steps; and

(3) the amount by which Tevra's loss would have been reduced had Tevra taken those steps.

In determining whether Tevra failed to take reasonable measures to limit its damages, you must remember that the law does not require Tevra to take every conceivable step that might reduce its damages. The evidence must show that Tevra failed to take commercially reasonable measures that were open to it. Commercially reasonable measures mean those measures that a prudent businessperson in Tevra's position would likely have adopted, given the circumstances as they appeared at that time. Tevra should be given wide latitude in deciding how to handle the situation, so long as what Tevra did was not unreasonable in light of the existing circumstances.

Instruction No. 48.A: Evidence for Limited Purposes – Consumer Complaints

Evidence was introduced that a retailer who sold Tevra's fipronil topical product under its store brand notified Tevra that it was discontinuing use of Tevra's product due to poor reviews. You may consider this evidence for the limited purpose of deciding whether Bayer's alleged anticompetitive conduct was a material cause of Tevra's alleged injury. You may not consider this as evidence that poor reviews were accurate or that Tevra's fipronil product was ineffective. Both Bayer and Tevra received positive and negative consumer reviews for their flea and tick products.

Instruction No. 48.B: Evidence for Limited Purpose – Sales After August 2020

The time period at issue extends through August 1, 2020. Evidence of sales of generic imidacloprid flea and tick topicals after August 2020 is irrelevant and you may not consider it for any purpose.

Instruction No. 49: Duty to Deliberate

Before you begin your deliberations, elect one member of the jury as your presiding juror. The presiding juror will preside over the deliberations and serve as the spokesperson for the jury in court.

You shall diligently strive to reach agreement with all of the other jurors if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to their views.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not be unwilling to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right or change an honest belief about the weight and effect of the evidence simply to reach a verdict.

Instruction No. 50: Consideration of Evidence

Because you must base your verdict only on the evidence received in the case and on these instructions, I remind you that you must not be exposed to any other information about the case or to the issues it involves. Except for discussing the case with your fellow jurors during your deliberations:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone, tablet, computer, or any other means, via email, via text messaging, or any internet chat room, blog, website or application, including but not limited to Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat, TikTok, or any other forms of social media. This applies to communicating with your family members, your employer, the media or press, and the people involved in the trial. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the Internet, or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own. Do not visit or view any place discussed in this case, and do not use Internet programs or other devices to search for or view any place discussed during the trial. Also, do not do any research about this case, the law, or the people involved—including the parties, the witnesses, or the lawyers—until you have been excused as jurors. If you happen to read or hear anything touching on this case in the media, turn away and report it to me as soon as possible.

These rules protect each party's right to have this case decided only on evidence that has been presented here in court. Witnesses here in court take an oath to tell the truth, and the accuracy of their testimony is tested through the trial process. If you do any research or investigation outside

the courtroom, or gain any information through improper communications, then your verdict may be influenced by inaccurate, incomplete, or misleading information that has not been tested by the trial process. Each of the parties is entitled to a fair trial by an impartial jury, and if you decide the case based on information not presented in court, you will have denied the parties a fair trial. Remember, you have taken an oath to follow the rules, and it is very important that you follow these rules.

A juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over. If any juror is exposed to any outside information, please notify the court immediately.

Instruction No. 51: Communication with the Court

If it becomes necessary during your deliberations to communicate with me, you may send a note through the clerk, signed by any one or more of you. No member of the jury should ever attempt to communicate with me except by a signed writing. I will not communicate with any member of the jury on anything concerning the case except in writing or here in open court. If you send out a question, I will consult with the lawyers before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including the court—how the jury stands, whether in terms of vote count or otherwise, until after you have reached a unanimous verdict or have been discharged.

Instruction No. 52: Return of Verdict

A verdict form has been prepared for you. After you have reached unanimous agreement on a verdict, your presiding juror should complete the verdict form according to your deliberations, sign and date it, and advise the clerk that you are ready to return to the courtroom.