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Attorneys for Defendant BAYER HEALTHCARE LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

TEVRA BRANDS, LLC,

Plaintiff,

vs.

BAYER HEALTHCARE LLC,

Defendant.

Case No.: 5:19-cv-04312-BLF

Action Filed: July 26, 2019

STIPULATION AND ~~[PROPOSED]~~ ORDER RE PROPOSED REDACTIONS TO THE COURT'S ORDER DENYING DEFENDANTS' 12(B)(6) MOTION TO DISMISS SECOND AMENDED COMPLAINT; GRANTING DEFENDANTS' 12(B)(2) MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION (ECF 231)

The Honorable Beth Labson Freeman

Plaintiff Tevra Brands, LLC and Defendant Bayer HealthCare LLC, by and through their respective attorneys of record herein, enter into this Stipulation with reference to the following circumstances:

WHEREAS, on January 6, 2022, the Court issued and conditionally sealed its Order Denying Defendants' 12(b)(6) Motion to Dismiss the Second Amended Complaint and Granting Defendants' 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction ("Order") (ECF 231);

WHEREAS, the Court directed the parties to submit a stipulated request for redactions on or before January 12, 2022 (ECF 232);

WHEREAS, the Order referenced documents designated by Bayer HealthCare LLC as confidential and materials that were filed under seal in this case, including information from Bayer HealthCare LLC's internal documents;

NOW THEREFORE, THE PARTIES BY COUNSEL HEREBY STIPULATE to redaction of the following portions of the Court's Order, as reflected in Exhibit 1:

ECF No.	Document	Portion(s) to Seal	Reasons(s) for Sealing
231	Order Denying Defendants' 12(b)(6) Motion to Dismiss the Second Amended Complaint and Granting Defendants' 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction	Redacted portions at: p. 9, line 23; p. 10, lines 3, 6, 8, 17, 22; p. 11, line 11; p. 12, line 14; p. 14, line 23; p. 22, lines 11-13, 17-18, 21-23, 26-28; p. 23, lines 2-4, 8-10, 15, 18-19, 21-22; p. 26, lines 23-25; p. 27, lines 4-5, 16-18, 24-25; p. 30, lines 5-9.	Contains information designated confidential by Bayer HealthCare LLC, including information that the Court has previously ordered sealed.

IT IS SO STIPULATED.

Dated: January 12, 2022.

ARNOLD & PORTER KAYE SCHOLER LLP

By /s/ *Daniel B. Asimow*
DANIEL B. ASIMOW

Attorneys for Defendant BAYER HEALTHCARE LLC

Dated: January 12, 2022.

POLSINELLI PC

By /s/ *Daniel D. Owen*
DANIEL D. OWEN

Attorneys for Plaintiff
TEVRA BRANDS, LLC

SIGNATURE ATTESTATION

I, Daniel B. Asimow, am the ECF user whose user ID and password are being utilized to electronically file this **STIPULATION AND [PROPOSED] ORDER RE PROPOSED REDACTIONS TO THE COURT'S ORDER DENYING DEFENDANTS' 12(B)(6) MOTION TO DISMISS SECOND AMENDED COMPLAINT; GRANTING DEFENDANTS' 12(B)(2) MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION (ECF 231)**. Pursuant to Local Rule 5-1(i)(3), I hereby attest that the other signatories have concurred in this filing.

Dated: January 12, 2022.

/s/ *Daniel B. Asimow*
DANIEL B. ASIMOW

ORDER

Based on the stipulation of the parties, and good cause appearing therefore, IT IS HEREBY ORDERED that the Stipulation is approved.

PURSUANT TO STIPULATION, IT IS SO ORDERED.

DATED: January 13, 2022

THE HONORABLE BETH LABSON FREEMAN
United States District Judge

EXHIBIT 1

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

ORDER DENYING DEFENDANTS' 12(B)(6) MOTION TO DISMISS SECOND AMENDED COMPLAINT; GRANTING DEFENDANTS' 12(B)(2) MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

[Re: ECF No. 200]

Plaintiff Tevra Brands LLC ("Tevra") brings this antitrust action against Bayer HealthCare LLC ("BHC LLC") and Bayer Animal Health GmbH ("BAH GmbH") (collectively, "Bayer") alleging they engaged in exclusionary practices that substantially restrained trade in the market for "squeeze-on" imidacloprid topical flea and tick treatments for dogs and cats.

Before the Court is (1) Bayer's Motion to Dismiss Tevra's Second Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and (2) Bayer's Motion to Dismiss Tevra's claims against BAH GmbH for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). *See* Motion, ECF No. 200. The Court held a hearing on the Motions on November 3, 2021. For the reasons stated below, Bayer's 12(b)(6) Motion is DENIED and its 12(b)(2) Motion is GRANTED WITHOUT LEAVE TO AMEND.

I. BACKGROUND

The parties are familiar with the facts giving rise to this lawsuit, which need not be repeated in full here. *See generally* Order Dismissing First Amended Complaint, ECF No. 155 at 1–3.

On September 14, 2020, the Court issued an order dismissing Tevra's First Amended Complaint with leave to amend for failure to state a claim under Federal Rule of Civil Procedure

12(b)(6). *See* ECF No. 155. The Court dismissed Tevra's claims for (1) exclusive dealing under Section 3 of the Clayton Act and Section 1 of the Sherman Act; (2) unlawful tying under Section 3 of the Clayton Act and Section 1 of the Sherman Act; (3) unlawful maintenance of a monopoly under Section 2 of the Sherman Act; and (4) a hub-and-spoke conspiracy in violation of Section 1 of the Sherman Act. *See id.* One of the primary bases for the Court's dismissal of Tevra's First Amended Complaint was its failure to plead sufficient facts to justify its narrowly defined relevant market—above all, by limiting it to (a) particular distribution channels and (b) topical products that used imidacloprid, rather than other active ingredients. *See id.* at 5–15.

On September 15, 2020, the Court issued an order dismissing all claims against Bayer AG and BAH GmbH with leave to amend for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2). *See* ECF No. 157. The Court found that Tevra had failed to meet its burden for showing Bayer AG or BAH GmbH—both German entities—were subject to personal jurisdiction in the US due to Tevra's failure to (1) particularize its allegations against the various Bayer entities or (2) plead a nexus between its allegations against Bayer AG and BAH GmbH and the exclusionary agreements with retailers at the heart of its suit. *Id.* at 3–4.

On March 29, 2021, Tevra filed its Second Amended Complaint. *See* Second Amended Complaint ("SAC"), ECF No. 196. Tevra's amendments in the Second Amended Complaint included the following: (1) it dropped its claims for unlawful tying and a hub-and-spoke conspiracy, leaving only its claims for (a) exclusive dealing under Section 3 of the Clayton Act and Section 1 of the Sherman Act and (b) unlawful maintenance of a monopoly under Section 2 of the Sherman Act; (2) it dropped Bayer AG as a Defendant; (3) it broadened its relevant market to include imidacloprid topicals regardless of distribution channels; (4) it added allegations regarding BAH GmbH's contacts with the US regarding Bayer's "second brand" strategy, which involved Bayer introducing a generic version of its imidacloprid topicals; and (5) it added allegations throughout the complaint supported by Bayer internal documents it obtained through discovery. *See generally id.*

The primary questions before the Court are (1) whether Tevra's newly alleged relevant market is adequately pled in light of the revised definition and Tevra's added factual allegations;

(2) whether Tevra's exclusive dealing and maintenance of a monopoly claims are adequately pled; and (3) whether Tevra's new allegations related to BAH GmbH's US contacts are sufficient to show that it is subject to personal jurisdiction in this forum.

II. LEGAL STANDARD

A. Failure to State a Claim – Rule 12(b)(6)

"A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted 'tests the legal sufficiency of a claim.'" *Conservation Force v. Salazar*, 646 F.3d 1240, 1241–42 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)). When determining whether a plaintiff has stated a claim, the Court accepts as true all well-pled factual allegations and construes them in the light most favorable to the plaintiff. *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011). However, the Court need not "accept as true allegations that contradict matters properly subject to judicial notice" or "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (internal quotation marks and citations omitted). While a complaint need not contain detailed factual allegations, it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* On a motion to dismiss, the Court's review is limited to the face of the complaint and matters judicially noticeable. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986); *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983).

B. Personal Jurisdiction – Rule 12(b)(2)

"Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons." *Walden v. Fiore*, 571 U.S. 277, 283 (2014) (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014)). California's long-arm statute is coextensive with federal due process requirements. *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800–801 (9th Cir. 2004). "Although a nonresident's physical presence within the territorial jurisdiction of the court is

not required, the nonresident generally must have 'certain minimum contacts . . . such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Walden*, 571 U.S. at 283 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

When a defendant raises a challenge to personal jurisdiction, the plaintiff bears the burden of establishing that jurisdiction is proper. *See Ranza v. Nike, Inc.*, 793 F.3d 1059, 1068 (9th Cir. 2015) (citing *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1073 (9th Cir. 2011)). "Where, as here, the defendant's motion is based on written materials rather than an evidentiary hearing, the plaintiff need only make a prima facie showing of jurisdictional facts to withstand the motion to dismiss." *Id.* (quotation marks and citation omitted). "[T]he plaintiff cannot simply rest on the bare allegations of its complaint," but the uncontroverted allegations in the complaint must be accepted as true. *Schwarzenegger*, 374 F.3d at 800 (quotation marks and citation omitted). The court may consider evidence presented in affidavits in considering a 12(b)(2) motion. *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001) (citation omitted). Where not directly controverted, plaintiff's version of the facts is taken as true. *Id.* (citation omitted). Conflicts between the facts contained in the parties' affidavits must be resolved in plaintiffs' favor for purposes of deciding whether a prima facie case for personal jurisdiction exists. *Id.* (citation omitted).

Personal jurisdiction may be either general or specific. General personal jurisdiction exists when the defendant's contacts "are so continuous and systematic as to render [it] essentially at home in the forum State." *Daimler*, 571 U.S. at 127 (quotation marks and citation omitted). Specific personal jurisdiction exists when the defendant's contacts with the forum state are more limited but the plaintiff's claims arise out of or relate to those contacts. *Id.* at 127–28.

C. Leave to Amend

In deciding whether to grant leave to amend, the Court must consider the factors set forth by the Supreme Court in *Foman v. Davis*, 371 U.S. 178 (1962), and discussed at length by the Ninth Circuit in *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048 (9th Cir. 2003). A district court ordinarily must grant leave to amend unless one or more of the *Foman* factors is present: (1) undue delay, (2) bad faith or dilatory motive, (3) repeated failure to cure deficiencies by amendment, (4) undue prejudice to the opposing party, or (5) futility of amendment. *Eminence Capital*,

316 F.3d at 1052. "[I]t is the consideration of prejudice to the opposing party that carries the greatest weight." *Id.* However, a strong showing with respect to one of the other factors may warrant denial of leave to amend. *Id.*

III. REQUEST FOR JUDICIAL NOTICE

In the Motion, Bayer requests that the Court take judicial notice of documents and public records quoted from and incorporated in the Second Amended Complaint. *See* Motion, ECF No. 200 at 5; Decl. of Daniel B. Asimow, ECF No. 200-1, Exs. 1–4, 7–12. Tevra does not oppose Bayer's request. Opposition, ECF No. 211 at 1. The Court GRANTS Bayer's request for judicial notice. *See Arista Networks, Inc. v. Cisco Sys., Inc.*, No. 16–CV–00923–BLF, 2017 WL 6102804, at *4 (N.D. Cal. Oct. 10, 2017) ("The Court may generally consider exhibits attached to or incorporated by reference into the complaint and matters properly subject to judicial notice."); *Stem, Inc. v. Scottsdale Ins. Co.*, No. 20–CV–02950–CRB, 2020 WL 4051706, at *4 n.8 (N.D. Cal. July 20, 2020) (citing *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018)).

Bayer also includes a request for judicial notice in the Reply. Reply, ECF No. 216 at 7 n.5. Bayer seeks judicial notice for another Bayer document cited in Tevra's Second Amended Complaint. *See* Reply Decl. of Daniel B. Asimow, ECF No. 216-1, Ex. 1. "[W]here new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without giving the non-movant an opportunity to respond." *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (alterations and citation omitted). However, since this document was incorporated into Tevra's Second Amended Complaint, the Court finds that taking judicial notice of it is proper. *See Arista*, 2017 WL 6102804, at *4. Accordingly, the Court GRANTS Bayer's request for judicial notice as to this document.

IV. TEVRA'S OBJECTION TO BAYER'S NEW REPLY EVIDENCE

On July 16, 2021, Tevra filed objections to evidence that Bayer cited for the first time in its Reply. *See* Objection, ECF No. 217.

First, Tevra objects to Bayer's citation of a webpage entitled "CPI Inflation Calculator" for the first time in the Reply. *See* Objection, ECF No. 217 at 1. While Bayer argued in its Motion that

an alleged increase in the price of Bayer's products may be attributable to inflation, it did not provide a particular rate of inflation or cite this website as evidence. *See* Motion, ECF No. 200 at 8–9. Accordingly, the Court STRIKES this evidence from Bayer's Reply. *Provenz*, 102 F.3d at 1483.

Second, Tevra objects to Bayer's citation to a document Bayer produced in discovery, which the Court already addressed above in discussing Bayer's request for judicial notice in the Reply.

Third, Tevra objects to Bayer's citation to one of Tevra's interrogatory answers for the first time on Reply. Objection, ECF No. 217 at 1. Since the Court does not consider this document in its reasoning, the Court finds that Tevra's objection to this evidence is MOOT.

V. DISCUSSION

A. Rule 12(b)(6) Motion

1. Relevant Market

Bayer's Rule 12(b)(6) motion primarily hinges on whether Tevra adequately pleads a properly defined relevant market. "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008) (quoting *Brown Shoe v. United States*, 370 U.S. 294, 325 (1962)). "Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted." *In re eBay Seller Antitrust Litig.*, 545 F.Supp.2d 1027, 1031 (N.D. Cal. 2008) (citation omitted). Cross-elasticity of demand—*i.e.*, "whether consumers view the products as substitutes for each other," *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1435 (9th Cir. 1995)—is a guiding principle of product market definition. *See Newcal*, 513 F.3d at 1045.[1]

[1] Tevra suggests the parties disagree whether "functionally interchangeable" products—*i.e.*, products that can be used for the same purpose—must be included in a relevant market. Opposition, ECF No. 211 at 4. To the extent there is a dispute, the Court finds that the "reasonably

In the First Amended Complaint, Tevra alleged the following relevant market:

> Topical flea and tick products containing Imidacloprid sold at wholesale by manufacturers to Over-The-Counter ("OTC") retailers in the U.S., including the sub-markets of sales to Pet Specialty Retailers, Online Retailers, and General Retailers, and to distributors who re-sell these products to OTC retailers.

First Amended Complaint ("FAC"), ECF No. 96 ¶ 16. In its order granting Bayer's 12(b)(6) Motion to Dismiss the First Amended Complaint, the Court found that Tevra did not plead sufficient facts to support that a relevant market as narrow as Tevra had alleged was facially sustainable. *See* Order Dismissing FAC, ECF No. 155 at 4–15. The Court found that (1) the exclusion of sales to veterinarians and (2) the exclusion of direct sales to consumers, (3) the alleged submarkets, and (4) the exclusion of topical flea and tick products using active ingredients other than imidacloprid—above all, fipronil topicals—was not facially sustainable based on the allegations in the First Amended Complaint. *See id.* at 7–15. The Court declined to rule on whether the exclusion of non-topical flea and tick products from Tevra's alleged relevant market was facially sustainable. *Id.* at 14–15.

In the Second Amended Complaint, Tevra alleges a broader relevant market: "[T]opical flea and tick products for dogs and cats containing Imidacloprid sold in the U.S." SAC ¶ 15. Tevra also added factual allegations from Bayer internal documents obtained through discovery in support of its newly alleged relevant market, as well as facts related to the Federal Trade Commission's ("FTC") investigation of Elanco's acquisition of Bayer's animal health business. *See, e.g.*, SAC ¶¶ 40–62. The questions at issue in Bayer's Motion to Dismiss the Second Amended Complaint regarding Tevra's newly alleged relevant market are (1) whether Tevra has added sufficient factual allegations to overcome the deficiencies the Court identified in its First Amend Complaint regarding its exclusion of non-imidacloprid—above all, fipronil-based—topical flea and tick products from the relevant market and (2) whether Tevra has adequately alleged that non-topical

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interchangeable" standard applies even where products are "functionally interchangeable." *See Newcal*, 513 F.3d at 1045; *United States v. Aetna Inc.*, 240 F.Supp.3d 1, 20 (D.D.C. 2017).

flea and tick products should be excluded from the relevant market.

As a threshold matter, the parties disagree whether the prescription drug cases Tevra cites are relevant to the present case. Tevra cites several cases to support the proposition that "[c]ourts commonly define antitrust markets to include only a patented drug and its generic equivalents." Opposition, ECF No. 211 at 4–6 (citing *Lidoderm*, 296 F.Supp.3d at 1171; *In re Intuniv Antitrust Litig.*, 496 F.Supp.3d 639, 658 (D. Mass. 2020); *In re Asacol Antitrust Litig.*, No. 15–CV–12730–DJC, 2016 WL 4083333, at *11 (D. Mass. July 20, 2016); *In re Suboxone Antitrust Litigation*, 64 F.Supp.3d 665, 713 (E.D. Pa. 2014); *In re Nexium (Esomeprazole) Antitrust Litigation*, 968 F.Supp.2d 367, 388 (D. Mass. 2013)). Bayer argues that nearly all of Tevra's cases are reverse payment cases involving prescription pharmaceuticals regulated by the FDA, so their narrow relevant markets are defined by a "physician's prescribing practices and the FDA approval barriers." Reply, ECF No. 216 at 2–3 (citing *In re Cardizem CD Antitrust Litig.*, 105 F.Supp.2d 618, 680–81 (E.D. Mich. 2000)). Accordingly, Bayer argues that these cases are not applicable to over-the-counter products for dogs and cats. *Id*. The Court agrees with Bayer that the prescription drug cases have limited applicability. The Court's inquiry is to determine whether Tevra has adequately pled a relevant market that includes all reasonably interchangeable substitutes, *i.e.* those with sufficiently high cross-elasticity of demand. *See, e.g.*, *Newcal*, 513 F.3d at 1045; *Nexium*, 968 F.Supp.2d at 388 (declining to dismiss complaint that "expressly alleges that 'Nexium does not exhibit significant, positive cross-elasticity of demand with respect to price with any product other than AB-rated generic versions of Nexium'"). Further, the parties agree that under the *Times-Picayune* case the Court's inquiry involves determining "the smallest product market that will satisfy the hypothetical monopolist test." Opposition, ECF No. 211 at 4; Reply, ECF No. 216 at 2; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953). Under this standard, the Court evaluates the adequacy of the alleged relevant market.

Tevra's market definition is supported by extensive allegations covering economic substitutes and cross-elasticity of demand. *See* SAC ¶¶ 19–25. Tevra also alleges application of the Hypothetical Monopolist Test ("HMT"), including use of the SSNIP test. *See id.* ¶¶ 26–54. Tevra further alleges product differences between imidacloprid topicals and fipronil topicals, *see*

id. ¶¶ 63–72, and differences regarding flea collars, oral medications, sprays, wipes, and shampoos, *see id.* ¶¶ 73–79.

Unsurprisingly, Bayer takes issue with the adequacy of this pleading, arguing that Tevra's relevant market is implausibly narrow and excludes the most direct and obvious competitor—Frontline, a fipronil topical. Motion, ECF No. 200 at 7. Bayer claims insufficiency in Tevra's alleged HMT/SSNIP test, product differences, and monopoly pricing. *Id.* at 8–14. Each issue is addressed below.

a. SSNIP Test

In support of its alleged relevant market, Tevra argues that it pleads sufficient facts to show that the relevant market meets the SSNIP test. Opposition, ECF No. 211 at 7–10. A common method for establishing (or disproving) the substitutability of two or more products is the "SSNIP" test, which "asks whether a [hypothetical] monopolist in the proposed market could profitably impose a small but significant and nontransitory price increase" (or "SSNIP") on a product in the proposed market. *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1002 (9th Cir. 2008). As the Ninth Circuit explained:

> If a significant number of customers would respond to a SSNIP by purchasing substitute products, the SSNIP would not be profitable for the hypothetical monopolist. If a monopolist could not profitably impose a SSNIP, the market definition could be expanded to include those substitute products that constrain the monopolist's pricing.

A price differential alone is insufficient to establish an economically distinct submarket. *Apple, Inc. v. Psystar Corp.*, 586 F.Supp.2d 1190, 1198 (N.D. Cal. 2008).

Tevra points to allegations of three "real-world examples" to support its claim that its proposed relevant market meets the SSNIP test: (1) [redacted] sales data that shows an [redacted]% price increase for Bayer's imidacloprid topicals between 2011 and 2016; (2) a Bayer document that allegedly shows little to no loss in imidacloprid topical sales between 2011 and 2016 and a 50% decrease in sales of Frontline, a brand fipronil topical; and (3) Bayer documents that show "[a]lmost all of the [generic imidacloprid] sales were pulled from Advantage II[.]" SAC ¶¶ 40–54; Opposition,

ECF No. 211 at 7–10.[2]

i. First Real-World Example

For its first real-world example, Tevra points to [redacted] sales data showing an [redacted]% price increase between 2011 and 2016. The parties disagree whether this is sufficient evidence to plausibly allege a SSNIP. Bayer argues that the Merger Guidelines require a 5% per annum increase, and an increase of [redacted]% over five years is much less than 5% per annum. Motion, ECF No. 200 at 8–9. In response, Tevra argues that the only requirement of the SSNIP test is a "significant but non-transitory" price increase, and an [redacted]% price increase that is not defeated by competition for five years is non-transitory. Opposition, ECF No. 211 at 7–8. On reply, Bayer argues that Tevra's approach of averaging price increases over several years is not a proper SSNIP test. Reply, ECF No. 216 at 5.

The Court finds that Tevra's allegations are sufficient for the pleading stage. The SSNIP test considers whether a price increase is "significant but non-transitory"—a 5% per annum price increase is not an absolute requirement. *See, e.g.*, Merger Guidelines § 4.1.2 ("[W]hat constitutes a 'small but significant' increase in price . . . depends upon the nature of the industry and the merging firms' positions in it, and the Agencies may accordingly use a price increase that is larger or smaller than five percent[.]"). Tevra's allegations of a price increase of up to [redacted]% over five years are sufficient to plausibly plead a "significant but non-transitory" price increase. Bayer's cited case, where a court found unreliable an expert's approach of averaging price increases over eight years, is both factually and procedurally distinguishable. Reply, ECF No. 216 at 5 (citing *Kentucky Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc.*, 588 F.3d 908, 918–19 (6th Cir. 2009)). While Tevra's allegations of an [redacted]% price increase over five years may not survive a *Daubert* motion if relied on as SSNIP test in an expert report, the Court finds these allegations are sufficient to survive Bayer's Motion to Dismiss.

Bayer further argues that Tevra's allegations are deficient since they fail to (1) account for

[2] "Advantage" and "Advantix" refers to Bayer's brand imidacloprid topical products. *See, e.g.*, SAC ¶ 1.

inflation or (2) plead a price increase relative to products outside the alleged relative market. Motion, ECF No. 200 at 8–9. In response, Tevra argues that its allegations support that fipronil topicals underwent a 10-20% price decrease during the 2011 to 2016 timeframe. Opposition, ECF No. 211 at 8 (citing SAC ¶¶ 43, 47, 48.) The Court finds that Tevra's allegations are sufficient to plausibly plead that Bayer's imidacloprid topical prices increased relative to products outside of the alleged relevant market. Bayer argues that Tevra's allegations regarding fipronil topicals are deficient, since Tevra fails to allege specifics regarding the price of the brand fipronil product Frontline. Reply, ECF No. 216 at 6. Tevra certainly exaggerates its allegations regarding fipronil prices in its Opposition. *See* Opposition, ECF No. 211 at 7 ("Thus, the SAC alleges a substantial change in the relative prices of imidacloprid and fipronil topicals, with fipronil prices dropping 10% to 20% while imidacloprid topical prices increased [redacted]% to [redacted]%."). The Second Amended Complaint only alleges that fipronil generics entered the market in 2011 at a price 10-20% lower than brand fipronil topicals. SAC ¶¶ 47, 82. This does not show that fipronil generics generally, or Frontline specifically, decreased in price by 10-20% between 2011 and 2016. However, given Tevra's allegations of market entry by multiple generic manufacturers throughout the 2011 to 2016 range, and Bayer documents showing a precipitous drop in Frontline market share during those years, the Court finds it to be a plausible inference that fipronil prices decreased or remained relatively static during that time period compared to Bayer's imidacloprid topicals. *See, e.g.*, SAC ¶¶ 43, 82–83; Decl. of Daniel B. Asimow ("Asimow Decl."), ECF No. 200-1, Ex. 1 at 7.

Accordingly, the Court finds that Tevra's allegations regarding its first real-world example are sufficient to plausibly plead that Bayer's imidacloprid topicals underwent a "significant but non-transitory" price increase. The remaining question is whether Tevra has plausibly alleged Bayer was able to "profitably impose" this SSNIP. *Theme Promotions*, 546 F.3d at 1002.

ii. Second Real-World Example

For its second "real-world example," Tevra points to a Bayer document that indicates Bayer experienced little to no loss in sales between 2011 and 2016 while Frontline's sales decreased by 50%. Opposition, ECF No. 211 at 8–9 (citing SAC ¶ 41). Bayer argues that the document in question shows that Frontline lost market share between 2010 and 2016—not sales. Motion,

ECF No. 200 at 9. Further, Bayer argues that other information in this document shows that non-topical flea and tick medicines competed with Bayer's imidacloprid topicals and flattened sales. Reply, ECF No. 216 at 6.

While Bayer attempts to distract from the imidacloprid sales numbers in its document, it cannot dispute that Tevra has pointed to facts indicating that Bayer's imidacloprid topical sales increased between 2011 and 2016. *See* Asimow Decl., ECF No. 200-1, Ex. 1 at 5. Bayer argues that its document "actually shows" that imidacloprid topical sales greatly increased from 2006-2012 and then decreased from 2012-2016. Reply, ECF No. 216 at 6. But it is indisputable that Bayer's document *also* shows an increase in imidacloprid topical sales between 2011 and 2016—the period during which Tevra has plausibly alleged a SSNIP. *See* Asimow Decl., ECF No. 200-1, Ex. 1 at 5; SAC ¶ 40.

On Bayer's other points, the Court generally agrees. The document Tevra points to does not show that Frontline's sales decreased by 50%—it shows that Frontline's *market share* decreased from [redacted]% in 2011 to [redacted]% in 2016. *See* Asimow Decl., ECF No. 200-1, Ex. 1 at 7. Further, the Court finds that Bayer has raised evidence in its documents suggesting that Bayer may have considered (1) fipronil topicals and (2) non-topical flea medicines to be substitutes for Bayer's imidacloprid topicals. Motion, ECF No. 200 at 9; Reply, ECF No. 216 at 6. However, the question here is whether Tevra has alleged sufficient facts to state a claim that the relevant market is limited to imidacloprid topicals. And none of the evidence Bayer points to contradicts the primary facts Tevra relies on in Bayer's document—Bayer's imidacloprid topical sales increased between 2011 and 2016, during the same period Tevra has plausibly alleged a SSNIP.

Accordingly, the Court finds that in combination with Tevra's price increase allegations for its first "real-world example," Tevra's allegations that Bayer lost little to no sales between 2011 and 2016 are sufficient to plausibly allege that it was able to "profitably impose" a SSNIP. *Theme Promotions*, 546 F.3d at 1002.

iii. Third Real-World Example

Tevra also alleges that Bayer's documents show that "[a]lmost all of the [generic imidacloprid] sales were pulled from Advantage II." SAC ¶ 52. Tevra argues that this indicates

that consumers did not view fipronil and imidacloprid topicals as substitutes, because almost no one switched to generic imidacloprid topicals from fipronil topicals. Opposition, ECF No. 211 at 9. Bayer argues that at most, this shows that Advantage II and the generic product compete—it has no bearing on other products in the market. Reply, ECF No. 216 at 7. The Court agrees with Bayer. Given Tevra's allegations that imidacloprid topicals were priced higher than fipronil topicals, this could explain why consumers did not switch from fipronil topicals to generic imidacloprid topicals, although it would have no bearing on whether consumers would switch in the opposite direction. *See, e.g.*, SAC ¶¶ 3, 45–46. Further, "a mere price differential alone does not necessarily signal a distinct market." *Psystar*, 586 F.Supp.2d at 1198. Accordingly, Tevra's allegations regarding the third "real-world example" are insufficient to support its proposed relevant market.

b. Product Differences

Tevra alleges differences between (1) imidacloprid and fipronil topicals, SAC ¶¶ 63–66, and (2) imidacloprid topicals and non-topical flea and tick products, *id.* ¶¶ 73–78. Bayer argues that bare allegations regarding product differences or consumer loyalty are insufficient to define a relevant market. Motion, ECF No. 200 at 10, 14. Tevra argues its alleged product differences are sufficient to show that consumers view imidacloprid topicals as different from the other products. Opposition, ECF No. 211 at 10. In response, Bayer argues that Tevra's alleged product differences are minor in light of the Court's order dismissing the First Amended Complaint and Bayer documents indicating that non-topical flea and tick products are key competitors to topical imidacloprid. Reply, ECF No. 216 at 8–9.

The Court previously found Tevra's alleged differences between imidacloprid and fipronil topicals were insufficient to plead a relevant market that excluded fipronil topicals. Order Dismissing FAC, ECF No. 155 at 13–14. Tevra has not raised any reason for the Court to reconsider its prior decision. Accordingly, differences between imidacloprid and fipronil provide no support for Tevra's alleged relevant market.

The differences Tevra alleges between imidacloprid topicals and non-topical flea and tick products are more significant. Tevra alleges oral products are inconvenient and difficult to administer compared to topicals, because "many pets will not consume the oral treatments, or will

expel them." SAC ¶ 76. Further, Tevra alleges that some consumers have concerns about the cost, smell, appearance, and safety of flea collars. *Id.* ¶ 78. While some of these considerations (cost, smell, appearance) seem like the kinds of "minor differences" the Court has previously rejected, the Court finds that Tevra's alleged product differences—particularly pet reluctance and safety concerns—constitute a plausible basis for why at least some consumers would not consider non-topical flea and tick products to be a substitute for imidacloprid topicals. *See Greyhound Computer Corp. v. IBM*, 559 F.2d 488, 495 (9th Cir. 1977) (finding distinct submarkets where "there was substantial customer resistance to shifting from one to the other"); *Rebel Oil*, 51 F.3d at 1435 (describing cross-elasticity of demand inquiry as "whether consumers view the products as substitutes for each other").

In response to Tevra's allegations regarding product differences, Bayer points to internal documents suggesting that its imidacloprid topicals compete with non-topical products. As outlined further below, the Court finds this evidence does not render Tevra's relevant market "facially unsustainable." *Newcal*, 513 F.3d at 1045; s*ee, e.g.*, Asimow Decl., ECF No. 200-1, Ex. 2 at 7 (stating "Advantix holds position" against oral products); *id.* at 4 (marketing campaign focused on product differences significant to consumers that they may not be aware of).

Accordingly, the Court finds that Tevra's allegations regarding differences between imidacloprid topicals and non-topical flea and tick products, including collars and oral medicines, support its alleged relevant market. Tevra's allegations regarding differences between imidacloprid and fipronil topicals, however, provide no support for the proposed relevant market.

c. Monopoly Pricing

As additional support for its relevant market, Tevra alleges that Bayer charged monopoly prices, pointing to gross profits of [redacted]% and net profits of [redacted]%. *See* SAC ¶ 42. Bayer argues that (1) high profits are not determinative of a lack of competition and (2) Tevra has failed to present evidence that Bayer's profit margins were out of line with competitors' or Tevra's own profit margins. *See* Motion, ECF No. 200 at 11. Tevra argues that monopoly and supracompetitive pricing is direct evidence of Bayer's market power over Tevra's alleged relevant market. *See* Opposition, ECF No. 211 at 11–12.

The Court agrees with Bayer. Tevra fails to allege sufficient facts to support that Bayer's profits indicate it was able to charge monopoly prices. "[T]he inference that a defendant that enjoys healthy profits only does so because of an unhealthy market structure is not a strong one." *In re IBM Peripheral EDP Devices Antitrust Litig.*, 481 F.Supp. 965, 981 (N.D. Cal. 1979). It is unclear how Tevra's caselaw about "supracompetitive prices" and "supra-normal profits" is applicable here when Tevra has failed to allege facts as to what constitutes "competitive prices" and "normal profits." *In re Asacol Antitrust Litig.*, No. 15–CV–12730–DJC, 2016 WL 4083333, at *11 (D. Mass. July 20, 2016); *IBM Peripheral*, 481 F.Supp. at 981. Absent such facts, the Court finds that Tevra's allegations of monopoly pricing and profits fail to support its proposed relevant market.

d. Bayer's Documents and Tevra's First Amended Complaint

Tevra relies on Bayer internal documents obtained through discovery for many of its factual allegations in support of its alleged relevant market. Bayer argues that when these documents are read in their entirety, they show that fipronil topicals and oral flea and tick products are key competitors with Bayer's imidacloprid topicals. Motion, ECF No. 200 at 12–13. Tevra argues that these documents are consistent with the fact that Bayer charged monopoly prices, so it could not raise prices further without causing customers to switch to inferior products. Opposition, ECF No. 211 at 12–14. Further, Tevra argues that the relevant question for market definition is whether other products constrained Bayer from increasing prices to monopoly levels, and Tevra's allegations show they did not. *Id.* at 13. In response, Bayer calls this a circular argument, since it relies on the assumption that Bayer charged monopoly prices. Reply, ECF No. 216 at 7–8.

The Court agrees with Tevra that Bayer's internal documents do not render Tevra's relevant market facially unsustainable. Tevra has pointed to facts sufficient to plausibly allege (1) the SSNIP test is met and (2) potentially significant differences exist between Bayer's imidacloprid topicals and other products outside the proposed relevant market. In response, Bayer has pointed to representations in its internal documents suggesting that it considered fipronil topicals and non-topical products competitive with imidacloprid topicals. This evidence will potentially give Tevra an uphill battle as it proceeds forward with its case. But the Court is not convinced that Bayer's evidence sufficiently undermines Tevra's allegations for the Court to dismiss its claims at the

pleading stage. *See, e.g.,* Asimow Decl., ECF No. 200-1, Ex. 3 at 2 (citing "key points of difference" between Advantix and Frontline); ECF No. 200-1, Ex. 2 at 7 (stating "Advantix holds position" against oral products); *id.* at 4 (marketing campaign focused on product differences); *see also Newcal*, 513 F.3d at 1045. Products can compete with each other to some extent without being in the same relevant market. *See, e.g.*, SAC ¶ 36 (alleging fipronil topicals are "weaker substitutes [that] do not constrain Bayer's ability to raise the price of its imidacloprid topicals above the competitive level"). The key question is whether there is high cross-elasticity of demand—Tevra has plausibly alleged low cross elasticity of demand between imidacloprid topicals and other products via its SSNIP test allegations, and Bayer's evidence fails to undermine those allegations. *See Times-Picayune*, 345 U.S. at 612 n.31 (a relevant market "must be drawn narrowly to exclude . . . products whose 'cross-elasticities of demand' are small'"); *see also In re Cardizem CD Antitrust Litig.*, 105 F.Supp.2d 618, 681 (E.D. Mich. 2000) ("The determination whether there are additional products that are 'reasonably' interchangeable . . . involves questions of fact not properly addressed in a Rule 12(b)(6) motion to dismiss.").

Bayer also points to an allegation in the First Amended Complaint that Tevra dropped from its Second Amended Complaint alleging that Bayer has "extensively advertised the greater effectiveness of its name brand Imidacloprid topicals, as compared to Fipronil topicals[.]" Motion, ECF No. 200 at 13. Bayer argues that the Court previously found that this allegation undermined Tevra's proposed relevant market. *Id.* Bayer is correct that the Court considered Tevra's allegation regarding advertising in rejecting the relevant market Tevra proposed in its First Amended Complaint. Order Dismissing FAC, ECF No. 155 at 14. However, the Court found Tevra's allegations in the First Amended Complaint to be significantly less plausible than those it advances in its Second Amended Complaint. For example, the Court found that Tevra failed to plead sufficient facts to plausibly allege that Bayer's pricing practices for its imidacloprid topicals met the SSNIP test. Order Dismissing FAC, ECF No. 155 at 11–13. The Court now finds that Tevra plausibly pleads in the Second Amended Complaint that the SSNIP test is met. Accordingly, the Court finds the evidence regarding Bayer's advertising is not sufficient at this stage to show that Tevra's claims are "facially unsustainable." *Newcal*, 513 F.3d at 1045; *see also In re Suboxone*

Antitrust Litigation, 64 F.Supp.3d 665, 713 (E.D. Pa. 2014) ("Dismissal at the motion to dismiss stage for failure to define a relevant market is disfavored.").

Accordingly, the Court finds that the evidence Bayer raises in its internal documents and Tevra's First Amended Complaint is insufficient to show that Tevra has failed to state a claim with its proposed relevant market.

e. Bayer/Elanco Transaction

Tevra alleges facts regarding an FTC investigation related to Elanco's acquisition of Bayer's animal health business in support of its proposed relevant market. SAC ¶¶ 55–62. Bayer argues that these allegations are "equally consistent with there being significant competition in a market that includes both imidacloprid and fipronil topical products as there being a lack of competition between them." Motion, ECF No. 200 at 11. Since Tevra fails to oppose Bayer's contention, the Court finds that the allegations pertaining to the Bayer/Elanco transaction do not support Tevra's proposed relevant market. *See Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996–97 (9th Cir. 2014) ("plaintiffs cannot offer allegations that are merely consistent with their favored explanation but are also consistent with the alternative explanation").

* * *

While the Court continues to have doubts about Tevra's ability to prevail at later stages of the case with its proposed relevant market limited to imidacloprid topicals, the Court finds that Tevra has pled sufficient facts regarding the SSNIP test and product differences for its proposed relevant market to survive Bayer's Motion to Dismiss.

2. **Exclusive Dealing**

Tevra asserts two claims for unlawful exclusive dealing arising from Bayer's Purchase Agreements with retailers: (1) under Section 1 of the Sherman Act (SAC ¶¶ 223–227) and (2) under Section 3 of the Clayton Act (SAC ¶¶ 228–233). "Exclusive dealing involves an agreement between a vendor and a buyer that prevents the buyer from purchasing a given good from any other vendor." *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 996 (9th Cir. 2010). While antitrust laws object to exclusive dealing for its tendency to "foreclose" competitors or new entrants from competition in the covered portion of the relevant market during the term of the

agreement, there are "well-recognized economic benefits to exclusive dealing arrangements, including the enhancement of interbrand competition." *Omega Environmental, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997) (citation omitted). Thus, in the Ninth Circuit, "an exclusive dealing arrangement is not per se illegal." *Fed. Trade Comm'n v. Qualcomm Inc.*, 969 F.3d 974, 1003 (9th Cir. 2020). Instead, "[o]nly those arrangements whose 'probable' effect is to 'foreclose competition in a substantial share of the line of commerce affected'" run afoul of antitrust laws. *Omega Envtl.*, 127 F.3d at 1162 (citing *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)).

Previously, the Court found that "[a]lthough the exclusive dealing allegations are sufficient, the claim fails because Tevra has failed to sufficiently plead facts showing a properly defined market." *Id.* at 19. Now that the Court has found that Tevra has sufficiently pled a relevant market, the only question at issue regarding the adequacy of Tevra's exclusive dealing claim is whether Tevra has pled sufficient foreclosure of its alleged relevant market.

As outlined in the Court's prior order, market foreclosure must be "substantial" to be actionable under the antitrust laws. *Id.* at 15 (citing *Omega Environmental*, 127 F.3d at 1162). Bayer argues that Tevra has alleged foreclosure from only around 27% of the relevant market, which is inadequate to support an exclusive dealing claim. Motion, ECF No. 200 at 14–15. Tevra alleges that it was foreclosed from at least 56% of the alleged relevant market in 2018, which it argues is substantial. Opposition, ECF No. 211 at 14 (citing SAC ¶¶ 178–179).

The amount of market foreclosure the Ninth Circuit considers to be "substantial" has varied widely based on the underlying facts of the exclusive dealing agreements at issue in particular cases. In *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, the Ninth Circuit held that 24% market foreclosure was substantial. 676 F.2d 1291, 1298, 1304–1305 (9th Cir. 1982). In *Omega Environmental* the Ninth Circuit held that market foreclosure as high as 38% did not constitute "substantial foreclosure" where the alleged exclusive dealing agreements were of short duration and easy terminability. 127 F.3d at 1162–65. The Court finds the *Masimo* case to be a helpful guide in determining which of the *Twin City* or *Omega* precedents applies to a particular case—and accordingly, how much market foreclosure is "substantial." *Masimo Corp. v. Tyco Health Care*

Grp., L.P., 2006 WL 1236666 (C.D. Cal. Mar. 22, 2006), *aff'd* 350 Fed.Appx. 95 (9th Cir. 2009). In *Masimo*, the court found that where the alleged exclusive dealing agreements were not in practice terminable on short notice, *Omega* did not apply and *Twin City* did, so it found that a jury could reasonably infer that 24% market foreclosure was substantial. *Id.* at *6.

In this case, Bayer argues that the contractual provisions at issue are short-term and easily terminable. Motion, ECF No. 200 at 15. However, the Court previously found that Tevra has plausibly pled that the contractual provisions at issue were "*de facto* long term and not easily terminable." *See* Order Dismissing FAC, ECF No. 155 at 19. Accordingly, the Court finds that *Twin City* is more pertinent than *Omega*, so it is plausible that a rate of market foreclosure as low as 24% would be sufficient to plead substantial foreclosure. *Twin City*, 676 F.2d at 1298. Since even the market foreclosure percentage Bayer asserts—27%—is higher than the 24% market foreclosure found substantial in *Twin City*, the Court finds that there is no dispute that under the applicable *Twin City* precedent, Tevra has alleged sufficient market foreclosure to plausibly meet the "substantial foreclosure" threshold. *Id.* While Bayer also argues that the "adjusted 27% figure still greatly overstates foreclosure because Tevra understates the importance of direct-to-consumer distribution through online marketplaces," this is a factual issue that the Court cannot resolve at the pleading stage. Motion, ECF No. 200 at 15; *see Reese*, 643 F.3d at 690.

Accordingly, the Court finds that Tevra has plausibly pled exclusive dealing under Section 3 of the Clayton Act and Section 1 of the Sherman Act.[3]

3. **Monopolization**

Tevra asserts an unlawful monopolization claim under Section 2 of the Sherman Act. SAC ¶¶ 217–22. As outlined in the Court's previous order, such a claim requires (1) the possession of monopoly power in the relevant market; (2) the willful acquisition or maintenance of that power;

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[3] Bayer also challenges Tevra's new allegations regarding Bayer's alleged "direct payments to remove generic competition." Motion, ECF No. 200 at 16 (citing SAC ¶¶ 155–58). Since the Court has already found that Tevra has alleged sufficient facts to support its exclusive dealing claims, the Court does not need to consider the adequacy of these additional allegations.

and (3) causal antitrust injury. Order Dismissing FAC, ECF No. 155 at 23 (citing *Allied Orthopedic*, 592 F.3d at 998). The Court previously found Tevra had adequately pled the second element (willful acquisition or maintenance of monopoly power), but due to the deficiencies in its alleged relevant market, Tevra failed to state a monopolization claim. *Id.* at 24–26.

In its Motion, Bayer raises two objections to Tevra's monopolization claim: (1) Tevra has not adequately pled monopoly power because its alleged relevant market is still deficient and (2) in a recent case, the Ninth Circuit stated that "[i]f, in reviewing an alleged Sherman Act violation a court finds that the conduct in question is *not* anticompetitive under § 1, the court need not separately analyze the conduct under § 2." Motion, ECF No. 200 at 17–18 (citing *Qualcomm*, 969 F.3d at 991). Now that the Court has found that Tevra has (1) sufficiently pled a relevant market and (2) stated a claim under Section 1 of the Sherman Act, both of Bayer's arguments are moot.

Accordingly, the Court finds that Tevra has properly pled a monopolization claim under Section 2 of the Sherman Act.

* * *

Since the Court finds that Tevra has plausibly pled (1) exclusive dealing claims under Section 1 of the Sherman Act and Section 3 of the Clayton Act and (2) an unlawful maintenance of a monopoly claim under Section 2 of the Sherman Act, the Court DENIES Bayer's Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6).

B. Rule 12(b)(2) Motion

The Court previously dismissed the two German entities in this case—BAH GmbH and Bayer AG—under Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction. *See* ECF No. 157. The Court found that the First Amended Complaint (1) "largely fails to particularize which Defendant engaged in the anticompetitive acts it describes, repeatedly referring to Defendants collectively as 'BAH' and piggybacking the conduct of the German Defendants onto the conduct of U.S.-based Defendant Bayer Healthcare" and (2) "[w]hen Tevra does plead specific facts concerning Bayer AG or Bayer Animal Health GmbH's conduct, it fails to relate those facts to the anticompetitive scheme alleged in this suit." *Id.* at 3–4. Accordingly, the Court dismissed Bayer AG and BAH GmbH with leave to amend. *Id.* at 5. In the Second Amended Complaint, Tevra

dropped its claims against Bayer AG and added new allegations against BAH GmbH regarding its alleged direction of Bayer's "second brand strategy" in the United States, which involved introducing Bayer's own generic imidacloprid topical. *See* SAC ¶¶ 118–19, 180–90. These allegations pertain to communications between BAH GmbH and BHC LLC, which is a US company and corporate affiliate of BAH GmbH under the common control of Bayer AG. *Id.* ¶¶ 7, 9. The question before the Court is whether these amendments are sufficient to overcome the Court's prior dismissal of Tevra's claims against BAH GmbH.

As a threshold matter, Tevra seeks to incorporate by reference evidence and arguments raised in its Opposition to Bayer's Motion to Dismiss the First Amended Complaint. Opposition, ECF No. 211 at 20–21 (citing ECF No. 131-2 at 6–7). This is improper under the Court's standing order. Standing Order IV.D ("All factual and legal bases for a party's position with respect to a motion must be presented in the briefing on that motion. Arguments presented in earlier-filed briefs or documents may not be incorporated by reference."). The Court hereby STRIKES Tevra's incorporation of its prior briefing by reference.[4]

As another threshold matter, Bayer argues that Tevra "blurs the line among Defendants" with "shotgun pleading tactics" similar to what the Court previously found deficient in its order dismissing Tevra's claims against BAH GmbH and Bayer AG. *See* Motion, ECF No. 200 at 19 (citing ECF No. 157 at 3:17–21). Tevra argues that Bayer can only point to a single paragraph from the Second Amended Complaint to support its point—a paragraph that Bayer misconstrues. Opposition, ECF No. 211 at 21–22 (citing SAC ¶ 9). The Court agrees with Tevra. At least as to the allegations Tevra seeks to use as the basis for its claim that BAH GmbH is subject to personal jurisdiction in this Court, Tevra has adequately particularized its allegations such that they are

[4] Tevra stated at the November 3, 2021 hearing that its claim that BAH GmbH is subject to personal jurisdiction in this Court rises and falls with Tevra's allegations regarding BAH GmbH's involvement with Bayer's "second brand" strategy for imidacloprid topicals in the US. Accordingly, whether the Court considers the additional evidence and arguments Tevra raised in its Opposition to Bayer's Motion to Dismiss the First Amended Complaint is moot.

directed to BAH GmbH's conduct—rather than "Bayer's." *See* SAC ¶¶ 118–19, 180–90.

Tevra relies on the following contacts in support of its claim that this Court has personal jurisdiction over BAH GmbH, Opposition, ECF No. 211 at 19–20:

- A 2013 email from BAH GmbH Global Brand Manager Oliver Aue to David VanBrunt, a BHC LLC manager for imidacloprid topicals, and unspecified communications from BAH GmbH's head of Global Marketing Martio Andreoli, to request monthly reports from BHC LLC regarding competitive conditions in the US. SAC ¶¶ 181–82.
- A February 2014 "U.S. Straco [i.e. Strategic Consensus] Alignment Call" between BAH GmbH executives and BHC LLC managers in charge of marketing and selling imidacloprid topicals. SAC ¶ 183. This call involved a "Straco template" provided by BAH GmbH to BHC LLC [redacted] *Id.* The Straco templates were allegedly created in Germany and served as the basis for "joint modeling by the GmbH team that they do with their key countries." *Id.* ¶ 184.
- An October 24, 2014 email from Sebastian Holl to David Zapatero, Global Brand Manager at BAH GmbH, [redacted] *Id.* ¶ 118.
- A November 20, 2015 email from Kristina Pollok, Strategic Controlling at BAH GmbH, partially written by Ian Spinks, President and General Manager of Animal Health North America at BHC LLC, [redacted] *Id.* ¶ 119.
- A November 3, 2016 email from BHC LLC's Mr. VanBrunt to BAH GmbH's Mr. Zapatero [redacted] *Id.* ¶ 186.

- A 2017 email from BAH GmbH Global Pricing Excellence Manager Frank Rautenberg, who was leading an effort at BAH GmbH [redacted] to Bayer executives indicating that "patent protection of Advantix will expire" [redacted] which is a "huge threat to our sales and profitability." *Id.* ¶ 185.
- A February 2017 meeting between BAH GmbH employee Jeriel Chua, who had formerly been a US brand manager for imidacloprid topicals at BHC LLC, and the Advantix "Global Brand Team" [redacted] *Id.* ¶ 187. This meeting set the agenda for the following Global Brand Team meeting, [redacted] *Id.*
- An April 10, 2017 email from Imke Rottman, a Global Pricing Excellence Manager for BAH GmbH, to BHC LLC employees responsible for marketing and sales of Bayer's imidacloprid topicals in the US, indicating they previously had an in-person meeting "discussing the endo+endecto price strategy" and that she will share "the market research report for the U.S." [redacted] *Id.* ¶ 188.
- A "later email" from Imke Pickardt (formely Imke Rottman) to unspecified recipients indicating "we will lose market share to generics when they enter" [redacted] *Id.* ¶ 189.
- A September 2019 BAH GmbH presentation entitled "Attractiveness of 2nd Brand Strategies in CAP Parasiticides Market" [redacted] *Id.* ¶ 190.

1. **General Jurisdiction**

Tevra does not appear to argue that BAH GmbH is subject to general personal jurisdiction in this forum. *See, e.g.,* Opposition, ECF No. 211 at 19 ("The question posed by BAH GmbH's challenge to personal jurisdiction is whether Tevra's SAC pleads sufficient facts showing BAH GmbH's involvement in the alleged antitrust violations[.]")

To the extent Tevra claims that BAH GmbH is subject to general personal jurisdiction, the

Court disagrees. "[O]nly a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there." *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014). "With respect to a corporation, the place of incorporation and principal place of business are paradigm . . . bases for general jurisdiction." *Id.* (internal quotation marks, citation, and brackets omitted). "Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable." *Id.* To show a corporation is subject to general jurisdiction in another forum, a plaintiff must demonstrate that (1) the corporation "engages in a substantial, continuous, and systematic course of business" and (2) the "corporation's affiliations with the state are so continuous and systematic as to render it essentially at home in the forum State." *Id.* Tevra does not appear to have even attempted to meet its burden here. BAH GmbH is incorporated and has its principal place of business in Germany. SAC ¶ 8. Further, Tevra only points to a limited set of contacts between BAH GmbH and the US—a handful of communications with BHC LLC regarding a single aspect of this suit (the "second brand" strategy) over the course of 7 years. *See* SAC ¶¶ 118–19, 180–90. As the court outlines below, these contacts are insufficient for Tevra to meet its burden for showing specific jurisdiction—let alone "continuous and systematic" enough to render BAH GmbH "essentially at home" in the US. *Daimler*, 571 U.S. at 137.

Accordingly, the Court finds that Tevra has failed to meet its burden for showing that BAH GmbH is subject to general jurisdiction in this forum.

2. **Specific Jurisdiction**

Tevra argues that BAH GmbH is subject to specific personal jurisdiction in this forum. Courts use a three-prong test for analyzing personal jurisdiction:

> (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
>
> (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004) (citations omitted).

The plaintiff bears the burden of satisfying the first two prongs of the test. *Id.* (citations omitted). If the plaintiff fails to satisfy either of these prongs, the claim of personal jurisdiction fails. *Id.* If the plaintiff succeeds in satisfying both of the first two prongs, the burden then shifts to the defendant to 'present a compelling case' that the exercise of jurisdiction would not be reasonable. *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–78 (1985)). In a case under Section 12 of the Clayton Act, the personal jurisdiction inquiry is focused on a defendant's contacts with the United States as a whole. *See Go-Video, Inc. v. Akai Elec. Co., Ltd.*, 885 F.2d 1406, 1416 (9th Cir. 1989).

a. Purposeful Direction

The first prong of the personal jurisdiction analysis requires either purposeful direction or purposeful availment. While a purposeful availment analysis is generally used in suits sounding in contract, a purposeful direction analysis is used in suits like this one sounding in tort. *See Schwarzenegger*, 374 F.3d at 802. The test for purposeful direction is the *Calder* effects test, which requires that the defendant "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Id.* at 803 (citing *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002)).

i. Intentional Act

The first requirement of the *Calder* effects test is that the defendant "committed an intentional act." *Schwarzenegger*, 374 F.3d at 803. The intentional act requirement refers to "an intent to perform an actual, physical act in the real world, rather than an intent to accomplish a result or consequence of that act." *Id.* at 806.

The Court finds that the contacts Tevra has identified are "intentional acts." "The intentional act threshold is not a high bar." *In re Packaged Seafood Pros. Antitrust Litig.*, 338 F.Supp.3d 1118, 1157 (S.D. Cal. 2018). Tevra points to meetings, emails, and other communications between BAH GmbH and BHC LLC. Courts have found similar contacts to be sufficient to meet the "intentional act" requirement. *See In re Packaged Seafood Prods. Antitrust Litig.*, 338 F.Supp.3d 1118, 1157 (S.D. Cal. 2018) ("Plaintiffs detail a variety of intentional acts undertaken by Defendants including receiving information, monitoring [U.S. entity] projects, corresponding with [U.S. entity] executives, . . . and exchanging confidential information."); *EcoDisc Tech. AG v. DVD Format/Logo*

Licensing Corp., 711 F.Supp.2d 1074, 1092 (C.D. Cal. Apr. 22, 2010) (holding "Steering Committee meetings" was an intentional act). Accordingly, the Court finds that BAH GmbH's contacts satisfy the intentional act requirement.

ii. Expressly Aimed at U.S.

For the second element of the *Calder* effects test, courts consider whether a defendant's intentional acts were "expressly aimed at the forum state." *Schwarzenegger*, 374 F.3d at 803. The analysis for this factor focuses on the "defendant's contacts with the forum state itself, not the defendant's contacts with the persons who reside there." *Walden v. Fiore*, 571 U.S. 277, 285 (2014). "[A] defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction." *Id.* at 286. The "expressly aimed" requirement is satisfied for an antitrust defendant where the defendant knew and intended that the consequences of their anticompetitive conduct would be felt in the forum. *See In re W. States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 743–44 (9th Cir. 2013).

Contrary to Tevra's allegations that BAH GmbH "directed and coordinated" Bayer's "second brand" strategy for imidacloprid topicals in the US, the parties' submitted evidence indicates far less. Opposition, ECF No. 211 at 19. Tevra points to communications between BAH GmbH and BHC LLC in which BAH GmbH requests information from BHC LLC for modeling purposes. SAC ¶¶ 181–84. Tevra further points to emails and meetings generally discussing generic entry and a second brand strategy throughout the world. *See* SAC ¶¶ 185, 187–90, 118–19; Asimow Decl., ECF No. 200-1, Exs. 7–11. None of Tevra's cited documents supports the inference that BAH GmbH "directed and coordinated" Bayer's US "second brand" strategy. In fact, one of the documents directly undermines this inference—Tevra points to an email from a BHC LLC manager to a BAH GmbH executive [redacted] SAC ¶ 186. This suggests that the decision on whether to pursue a "second brand" strategy ultimately fell to BHC LLC—it was not "directed and coordinated" by BAH GmbH.

Additionally, the documents cited by Tevra show that if BAH GmbH had any role in the

"second brand" strategy in the U.S., it was limited to analyzing the U.S. experience as a case study or providing general advice throughout the world, rather than the kind of leadership role over U.S. strategy that Tevra alleges. *See* ¶¶ 181–84 (general references to using US data for analysis); SAC ¶ 188 ([redacted]); *id.* ¶ 189 (citing document at Asimow Decl., ECF No. 200-1, Ex. 9 at 1 ("each country is a case on its own/a country-by-country decision is required")); *id.* ¶ 187 (citing document at Asimow Decl., ECF No. 200-1, Ex. 8 at 4 (generally referencing "[g]eneric defense strategy incl 2nd brands" on an agenda for future meeting)); *id.* ¶¶ 118–19. For example, Bayer provides an email thread containing the 2017 email from Frank Rautenberg to Jeriel Chua, which Tevra cites in the complaint as stating that "[s]ooner or later the patent protection of Advantix will expire. . . . This is a huge threat to our sales and profitability." SAC ¶ 185; *see* Asimow Decl., ECF No. 200-1, Ex. 10. The email from Mr. Chua in response discusses "us[ing] the US experience" and says that he "value[s] the perspective" from Mr. Rautenberg—far from suggesting any kind of direction or coordination of US strategy. Asimow Decl., ECF No. 200-1, Ex. 10 at 1. Further, various documents Tevra cites pertain to Europe or have no apparent relevance to the U.S. market. *See, e.g.*, SAC ¶ 181 (citing document at Asimow Decl., ECF No. 200-1, Ex. 7 at 12–14 ([redacted])).

Moreover, the deposition testimony submitted by Bayer further undermines the inference that BAH GmbH "directed and coordinated" Bayer's US "second brand" strategy. Bayer points to the testimony of Jeriel Chua indicating that he was not "aware of any strategy relating to generic flea and tick products in the U.S. that was directed by [BAH GmbH]." Motion, ECF No. 200 at 20 (citing Asimow Decl., ECF No. 200-1, Ex. 5 at 114:21–25). Further, Bayer points to testimony from David Zapatero [redacted]. *Id.* (citing Asimow Decl., ECF No. 200-1, Ex. 6 at 58:19–59:7). While Tevra indicates in its Opposition that Mr. Chua's deposition testimony "confirm[s]" that BAH GmbH managers "coordinated the second brand strategy in the United States," Tevra fails to cite to the transcript or

address Mr. Zapatero's testimony. Opposition, ECF No. 211 at 20. Accordingly, the Court does not consider the deposition testimony cited by Bayer to be disputed facts that must be resolved in Tevra's favor. *Unocal*, 248 F.3d at 922. Rather, Bayer's cited deposition testimony further undermines the inference that BAH GmbH "directed and coordinated" the imidacloprid topical "second brand" strategy in the US.

Accordingly, Tevra's allegations that BAH GmbH "directed," "led," "implemented," "controlled," "created," "developed," "used," or "applied" the "second brand" strategy in the US are directly controverted by the evidence.. *See, e.g.,* SAC ¶¶ 180, 184, 191 Indeed, based on the parties' submitted evidence, the true nature of BAH GmbH's contacts with the US is far more attenuated than what Tevra alleges—BAH GmbH discussed generic entry and a "second brand" strategy at a high level on a handful of occasions with BHC LLC, but it was BHC LLC that ultimately made the choice or took any steps to implement that strategy in the US. The contacts Tevra points to only show routine high-level strategic communications between corporate affiliates pertaining to generic competition throughout the world. Such contacts are similar to those courts have found to be insufficient for showing a foreign entity is subject to personal jurisdiction. For example, in *EcoDisc Tech. AG v. DVD Format/Logo Licensing Corp.*, the court rejected the plaintiff's attempt to claim Japanese corporation DVD Forum was subject to personal jurisdiction in the US by "piggy-back[ing] off" an affiliated company's contacts, even where the plaintiff had alleged that DVD Forum "made the determinations that form the basis for this lawsuit" and the affiliate "used this judgment" as the basis for anticompetitive conduct worldwide, including in the US. 711 F.Supp.2d 1074, 1089 (C.D. Cal. 2010).

Further, while BAH GmbH and BHC LLC are mere affiliates with no evidence of oversight or control over each other, SAC ¶ 9, courts have even found a foreign parent's ordinary oversight over its domestic subsidiary to be insufficient to support that the parent is subject to specific jurisdiction. *See Unocal*, 248 F.3d at 926 ("[A] parent corporation may be directly involved in the activities of its subsidiaries without incurring liability[.]") (citing *United States v. Bestfoods*, 524 U.S. 51, 72 (1998)); *Los Gatos Mercantile, Inc. v. E.I. DuPont de Nemours & Co.*, No. 13–CV–01180–BLF, 2015 WL 4755335, at *11 (N.D. Cal. Aug. 11, 2015) ("Without something more—for

example, allegations or evidence that [the foreign parent's] officers attended meetings or participated in communications by which price increases were agreed upon, or, indeed, even *knew* that price increases *were* being agreed upon—the proffered evidence suggests nothing more than a parent's ordinary oversight over its subsidiary."); *see also Walden*, 571 U.S. at 286 ("[A] defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction."); *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1070 (9th Cir. 2015) ("The existence of a parent-subsidiary relationship is insufficient, on its own, to justify imputing one entity's contacts with a forum state to another for the purpose of establishing personal jurisdiction."). BAH GmbH is not the parent of BHC LLC, and Tevra has not adequately alleged any control or approval by BAH GmbH over BHC LLC's decision-making, so the contacts here are even more attenuated than what courts have found to be insufficient to show specific jurisdiction in parent-subsidiary cases.

Tevra argues that BAH GmbH's contacts with BHC LLC are sufficient to support personal jurisdiction because "anticompetitive conduct that violates the Sherman and Clayton Acts is most certainly *not* 'anodyne' or 'routine.'" Opposition, ECF No. 211 at 21. The Court disagrees. Insufficient contacts are insufficient contacts, regardless of whether they pertain to allegedly "anticompetitive conduct." Alleging that a foreign entity's attenuated contacts pertain to "anticompetitive conduct" does not automatically make those contacts sufficient to show personal jurisdiction in the US. Tevra also argues that Bayer's understanding of the requirements for showing personal jurisdiction are too exacting, and "[t]here is no requirement that, *e.g.*, Frank Rautenberg or Imke Rottman personally call up the PetSmart in the Coleman Avenue shopping plaza to discuss what products should go where on the flea and tick portion of that PetSmart's shelves." Opposition, ECF No. 211 at 21. While the Court agrees with Tevra that personal jurisdiction does not require personal phone calls to US vendors from BAH GmbH employees, it requires more than the routine, high-level strategic communications between affiliates that Tevra has alleged. *See, e.g., Walden*, 571 U.S. at 286; *Unocal Corp.*, 248 F.3d at 926.

Tevra further argues that even if some of the contacts it points to pertain to countries other than the US, such contacts are still sufficient to show that BAH GmbH is subject to personal jurisdiction in the US because they show that "the second brand strategy was a global strategy,

directed and coordinated worldwide by BAH GmbH." Opposition, ECF No. 211 at 22. Based on the parties' evidence, Tevra has failed to show that BAH GmbH directed the second brand strategy throughout the world. *See, e.g.*, Asimow Decl., ECF No. 200-1, Ex. 11 at 6 ("[n]o global, strategic intent to engage in defining & executing on 2nd brand strategies across our portfolio and geographies"); SAC ¶ 186 ([redacted]); Asimow Decl., ECF No. 200-1, Ex. 9 at 1 ("a country-by-country decision is required")); *id.*, Ex. 6 at 58:19–59:7 ([redacted]); *id.*, Ex. 5 at 114:21–25 (former BAH GmbH employee indicating he is not "aware of any strategy relating to generic flea and tick products in the U.S. that was directed by [BAH GmbH]."). Further, even if Tevra had adequately alleged that BAH GmbH directed and led a global second brand strategy effort, Tevra's allegations regarding BAH GmbH's high-level strategic communications with its US affiliate are not sufficient to show that BAH GmbH directed the second brand strategy in the US. *EcoDisc*, 711 F.Supp.2d at 1092 (no express aiming where conduct "did not target California or American residents in particular").

Accordingly, Tevra fails to show that the second prong of the *Calder* effects test is met.

iii. Foreseeable Harm in U.S.

The third requirement of the *Calder* effects test is that the defendant's conduct must "caus[e] harm that the defendant knows is likely to be suffered in the forum state." *Schwarzenegger*, 374 F.3d at 803. "The "brunt" of the harm does not have to be suffered in the forum state; as long as a "jurisdictionally sufficient amount of harm is suffered in the forum state, it does not matter that even more harm might have been suffered in another state." *In re W. States*, 715 F.3d at 744.

Since Tevra's personal jurisdiction claim against BAH GmbH pertains exclusively to its involvement with Bayer's "second brand" strategy in the US, the question of whether Tevra has pled sufficient facts to satisfy the foreseeable harm requirement hinges on two questions related to that strategy. First, the Court considers whether it is plausible that the "second brand" strategy itself is anticompetitive. Second, if the "second brand" strategy itself was anticompetitive, the question is whether Tevra has sufficiently pled that BAH GmbH's involvement in that strategy caused

foreseeable anticompetitive harm. The Court considers each question in turn.

Adequacy of Tevra's Allegations that "Second Brand" Strategy was Anticompetitive

The first question is whether it is plausible that the "second brand" strategy caused foreseeable anticompetitive harm—whether or not BAH GmbH was involved. The parties dispute whether the "second brand" strategy is anticompetitive. Bayer argues that the "second brand" strategy is procompetitive as a matter of law because it involves the introduction of a product, which courts favor. Motion, ECF No. 200 at 16, 21. In response, Tevra points to (1) several academic articles supporting that the purpose and effect of an authorized generic is to defeat or delay competition from generics by shutting them out of store shelves and (2) Bayer documents indicating the purpose of the "second brand" strategy was to "block generic competition." Opposition, ECF No. 211 at 17, 22. On reply, Bayer argues that Tevra's academic articles are irrelevant because they pertain to the sale of authorized generics during the Hatch-Waxman Act's 180-day exclusivity period, which is not at issue here. Reply, ECF No. 216 at 11–12.

The Court agrees with Tevra. Tevra alleges facts indicating that Bayer considered the "second brand" strategy to be a means to "block generic competition." SAC ¶¶ 115–16. Accordingly, it would be premature for the Court to find that the introduction of an authorized generic is procompetitive as a matter of law when Bayer allegedly considered it to be a tool for blocking competition. Tevra also cites ample authority in the academic literature indicating that the introduction of an authorized generic is a well-established strategy for suppressing or defeating generic competition. *See, e.g.*, Peelish, *Antitrust and Authorized Generics: A New Predation Analysis*, 72 Stanford L. Rev. 791, 796 (2021) (describing authorized generics as a way to "thwart generic entry and extend the length of [] patent and market exclusivity"). Bayer argues that these academic articles are inapposite, since they pertain to the Hatch-Waxman Act's 180-day exclusivity period. Reply, ECF No. 216 at 11–12. But the Court does not consider the import of Tevra's cited articles to be so limited. For example, one of the articles identifies "scarce…retail shelf space" as a factor that can make an authorized generic anticompetitive, which parallels Tevra's allegations. SAC ¶ 116 (alleging Bayer's authorized generic was a "shelf-space filler").

While Bayer correctly points out that Tevra does not cite any cases in support of its position,

the Court finds Bayer's cases to be inapposite. Reply, ECF No. 216 at 11. In *Walgreen Co. v. AstraZeneca Pharm. L.P.*, a key part of the court's ruling that AstraZeneca's introduction of a new drug did not cause antitrust injury is that there was "no allegation that AstraZeneca eliminated any consumer choices." 534 F.Supp.2d 146, 151 (D.D.C. 2008). Here, Tevra alleges that the "second brand" strategy eliminated or at least suppressed generic competition by monopolizing store shelf space. SAC ¶¶ 114–19. Similarly, while the Second Circuit's opinion in *Berkey Photo, Inc. v. Eastman Kodak Co.* generally supports a monopolist's ability to introduce new products, the court also recognized that the success of a product "based on any form of coercion" is improper. 603 F.2d 263, 287 (2d Cir. 1979). Bayer's other cases focus on innovative and improved products, which are inapposite when Bayer's "second brand" strategy allegedly involved simply repackaging its imidacloprid topicals with a generic label. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 891 (2007) ("*New* products and *new* brands are essential to a dynamic economy.") (emphasis added); *Allied Orthopedic*, 592 F.3d at 998 ("[I]nvention and innovation is necessarily tolerated by the antitrust laws.") (citations and quotation marks omitted); *Cal. Computer Prods., Inc. v. IBM Corp.*, 613 F.2d 727, 744 (9th Cir. 1979) ("IBM, assuming it was a monopolist, had the right to redesign its products to make them more attractive to buyers whether by reason of lower manufacturing cost and price or improved performance."); *see also* Hollis, *The Anti-Competitive Effects of Brand-Controlled 'Pseudo-Generics' in the Canadian Pharmaceutical Market*, 29 Canadian Public Policy 21, 22 (2003) (stating authorized generics "are likely to increase prices of both generic and brand-name drugs").

Accordingly, the Court finds that it cannot rule as a matter of law at this stage that Bayer's "second brand" strategy was procompetitive and could not plausibly be associated with antitrust injury in the US. Thus, contacts related to the "second brand" strategy could be sufficient for showing that the "foreseeable harm" element of the *Calder* effects test is met.

Adequacy of Tevra's Allegations Regarding BAH GmbH's Involvement

Since the Court has found that Tevra plausibly alleges that Bayer's "second brand" strategy was anticompetitive, the Court next considers whether Tevra's allegations regarding BAH GmbH's involvement with that strategy are sufficient to meet Tevra's burden for showing that BAH GmbH

caused foreseeable anticompetitive harm in the U.S.

The Court finds that based on the attenuated nature of the contacts between BAH GmbH and the US as discussed above, Tevra has failed to show the "foreseeable harm" element is met. Tevra has not shown that BAH GmbH "directed and led" the "second brand" strategy in the US. Rather, Tevra has only pointed to routine and high-level communications between corporate affiliates BAH GmbH and BHC LLC, with BHC LLC ultimately making the decision whether to pursue the "second brand" strategy in the US. *See, e.g.*, SAC ¶ 186; Asimow Decl., ECF No. 200-1, Ex. 6 at 58:19–59:7; *id.*, Ex. 5 at 114:21–25. Even if the "second brand" strategy could be plausibly associated with anticompetitive harm in the US, Tevra has failed to show that such harm was reasonably foreseeable in light of BAH GmbH's high-level strategic communications about generic competition throughout the world. Ultimately, BHC LLC still had to choose to pursue the "second brand" strategy, which was independent of BAH GmbH's conduct.

Accordingly, the Court finds that Tevra has failed to show that the third prong of the *Calder* effects test is met.

* * *

While Tevra has pointed to intentional acts, it has not adequately alleged that those acts were expressly aimed at the US or that they caused harm that BAH GmbH knew was likely to be suffered in the forum state. Therefore, the Court finds that Tevra has failed to show that BAH GmbH's contacts satisfy the *Calder* effects test or the "purposeful direction" prong required for a showing of specific jurisdiction here.

b. Arising Out of Forum-Related Activities

After purposeful availment or purposeful direction, the second requirement for specific jurisdiction is that the claim "arises out of or relates to the defendant's forum-related activities." *Schwarzenegger*, 374 F.3d at 802. To satisfy this requirement, the defendant's forum-related activities must be a "but for" cause of the plaintiff's claims. *Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1088 (9th Cir. 2000), *overruled in part on other grounds by Walden*, 571 U.S. at 285.

The Court finds that Tevra has failed to adequately allege that BAH GmbH's forum-related

activities were a "but for" cause of Tevra's claims. As discussed above, Tevra's allegations do not support the inference that BAH GmbH "directed and led" Bayer's "second brand" strategy in the US, particularly in light of Bayer's submitted evidence that BHC LLC was responsible for deciding whether or not to pursue the strategy in the US. *See* SAC ¶ 186; Asimow Decl., ECF No. 200-1, Ex. 5 at 114:21–25; *id.*, Ex. 6 at 58:19–59:7. Rather, Tevra's allegations merely indicate that BAH GmbH engaged in routine, high-level strategic communications with BHC LLC, which Tevra has not adequately alleged were a "but for" cause of BHC LLC's ultimate decision to pursue the "second brand" strategy.

Accordingly, the Court finds that Tevra has failed to meet its burden regarding the second prong of the test for specific jurisdiction.

c. Reasonableness

Because Tevra has not met its burden to satisfy the first two prongs of the test, the Court does not reach the third prong. *Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064, 1068–69 (9th Cir. 2017)

* * *

The Court finds that Tevra has not met its burden for showing that BAH GmbH is subject to personal jurisdiction in the Northern District of California. Accordingly, the Court GRANTS Bayer's Motion to Dismiss Tevra's claims against BAH GmbH under Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction.

VI. LEAVE TO AMEND

Since this is the second time the Court has dismissed Tevra's claims against BAH GmbH for lack of personal jurisdiction and Tevra had access to extensive discovery, the Court finds that Tevra has shown a repeated failure to cure deficiencies in its pleadings by amendment and that further amendment would be futile. Accordingly, the Court DISMISSES the claims against BAH GmbH WITHOUT LEAVE TO AMEND.

VII. ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that:

(1) Bayer's 12(b)(6) Motion to Dismiss the Second Amended Complaint for failure to state a

claim is DENIED; and

(2) Bayer's 12(b)(2) Motion to Dismiss all claims against Bayer Animal Health GmbH for lack of personal jurisdiction is GRANTED WITHOUT LEAVE TO AMEND.

Dated: January 6, 2022

BETH LABSON FREEMAN
United States District Judge