UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK

MOSAIC HEALTH, INC. and CENTRAL VIRGINIA HEALTH SERVICES, INC., individually and on behalf of all those similarly situated,

Plaintiffs,

vs.

SANOFI-AVENTIS U.S., LLC, ELI LILLY AND COMPANY, LILLY USA, LLC, NOVO NORDISK INC., and ASTRAZENECA PHARMACEUTICALS LP,

Defendants.

6:21-cv-6507 (EAW)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT

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PRELIMINARY STATEMENT

Defendants' collusion to exploit three multi-billion dollar diabetes medication markets is the only explanation for why they broke a uniform, decades-plus industry discounting practice when no other similarly situated manufacturer among a thousand did so. To convince the Court otherwise, Defendants argued their discount restrictions were limited with few and varied effects. The Court thus granted their motion to dismiss on the narrow ground that Plaintiffs had failed to allege facts that Defendants' policies "had the same or even similar impact on the availability of contract pharmacy 340B drug discounts to covered entities." Opinion at 16 (Opinion), Dkt. 71.

But the truth is that Defendants' restrictions had common, immediate, and dramatic impacts that "ultimately achieved the same result among all Defendants—the elimination of the bulk of their Contract Pharmacy 340B Drug sales." Second Am. Compl. (SAC), ¶ 177, Dkt. 72-1. The proposed Second Amended Complaint alleges these facts in detail with substantial government-compiled data. Defendants do not contest that data. Instead, they pivot to resurrect their other dismissal arguments. This Court was right not to adopt Defendants' arguments and should likewise reject them now.

Plaintiffs have pled a more-than-plausible antitrust conspiracy and respectfully request that the Court grant them leave to file the SAC and proceed with this litigation.

ARGUMENT

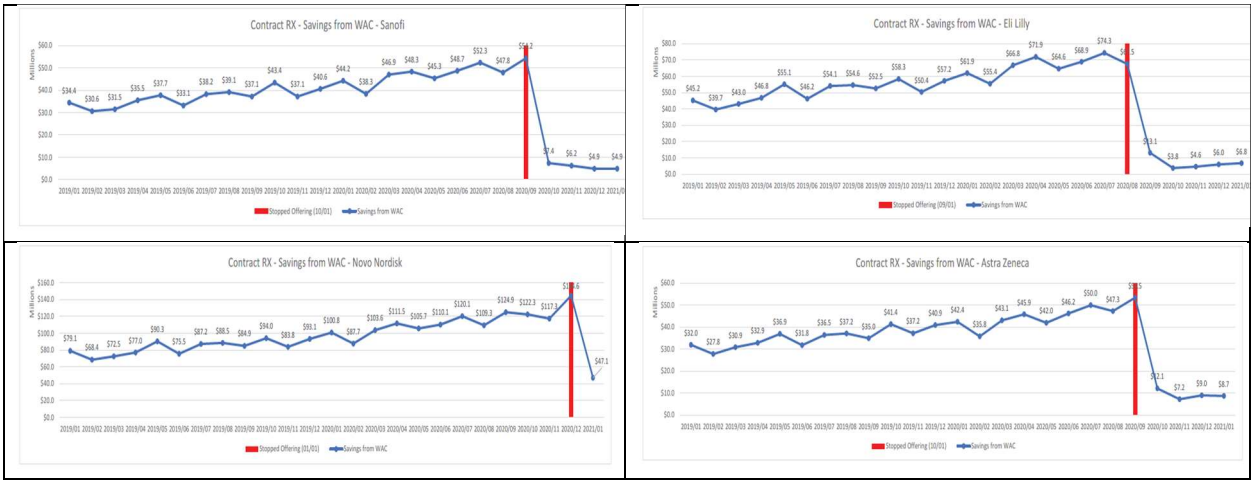
I. THE PROPOSED SAC'S ANTITRUST CLAIMS ARE NOT FUTILE.

A. The proposed SAC sufficiently alleges parallel conduct.

1. Defendants do not contest the immediate and dramatic impacts of their common policies.

As required by the Court's Opinion, the proposed SAC details the common impact Defendants' restrictions had on the availability of Contract Pharmacy 340B Drug Discounts. It

details commonalities in Defendants' policies, *see* SAC, ¶¶ 144–157, the marginal nature of their exceptions, *see id.*, ¶¶ 177–239, and how their restrictions "led to the readily foreseeable immediate cessation of the overwhelming majority of [each Defendants'] Contract Pharmacy 340B Drug Discount sales," *id.*, ¶¶ 194, 214, 226, 239. The SAC further details and quantifies that each Defendant's policy immediately decreased Contract Pharmacy 340B Drug Discount channel sales by 60–90% in volume and 70–95% in lost 340B Savings, *see* SAC, ¶ 8, as illustrated by the exceedingly similar graphs below:



Id., ¶¶ 181, 198, 217, 229.

These are immediate, dramatic, and common impacts. Defendants attempt to brush them off as "a general downward trend in 340B sales" but cannot and do not contest them.[1] Def. Opp. Mem. (Opp.) at 5, Dkt. 74. This is parallel conduct. Just as in *In re Domestic Airline Travel*

[1] Previously, Defendants suggested their policies had little impact on 340B sales and claimed that neither Sanofi nor Eli Lilly had limited access to Contract Pharmacy 340B Drug Discounts. *See, e.g.*, Defs. Reply at 9 (claiming Sanofi did "***not*** limit the number of contract pharmacies"), Dkt. 66; *id.* at 10 (arguing Eli Lilly "allows unlimited contract pharmacies if certain requirements are met"). Those points featured prominently in the Court's analysis. *See* Opinion at 12–13, 15-16 & nn.3–5; *see also id.* at 16 (singling out "Sanofi's policy [as] particularly problematic" for Plaintiffs because the "policy on its face does not limit the number of covered entities that can access contract pharmacy 340B drug discounts"). But such claims were misleading, *see* Plfs. Mem. at 10–11, Dkt. 72-3, and Defendants abandon them now.

Antitrust Litigation, 221 F. Supp. 3d 46, 69 (D.D.C. 2016), where the airline defendants acted in parallel when they "all took steps that limited capacity growth," so too here, Defendants acted in parallel when they all took steps that limited Contract Pharmacy 340B Drug Discounts. They "achieved the same or a substantial similar end result," as this Court required. Opinion at 15. Instead of challenging this, Defendants restate prior arguments (e.g., *Astra*), to which Plaintiffs respond below and by incorporating their prior opposition memorandum (Dkt. 58).

2. Defendants' common restrictions were parallel, notwithstanding staggered announcements and varied exceptions.

Because Defendants cannot contest the common overall impacts of their policies, they instead emphasize "nuance[s]" within their common restrictions. Opp. at 8. But, as this Court recognized, competitors cannot evade antitrust laws simply by using "slightly different methods" to achieve "the same or a substantially similar end result." Opinion at 14–15. If the law were otherwise, competitors could conspire to impose naked restraints (like reducing discounts) simply by varying their approaches—*e.g.*, by staggering rollout dates or by adding exceptions. The antitrust laws are not so toothless. Conspiracies are not always "tidy and symmetric," *In re Interest Rate Swaps Antitrust Litig.*, 261 F. Supp. 3d 430, 479 (S.D.N.Y. 2017), and "[p]laintiffs are not required to plead parallel conduct that is simultaneous or identical," *In re Farm-Raised Salmon & Salmon Prods. Antitrust Litig.*, 19-21551, 2021 U.S. Dist. LEXIS 54321, at *44 nn.22–23 (S.D. Fla. Mar. 23, 2021).

Defendants stress their policies' variations and exceptions. However, parallel conduct can consist of "techniques and stratagems that are consistent and reinforcing but not entirely overlapping." *In re Interest Rate Swaps Antitrust Litig.*, 261 F. Supp. 3d at 479. Defendants' sundry carve-outs matter no more here than in *Ross v. Bank of America, N.A.*, 05 Civ. 7116, 2012 U.S. Dist. LEXIS 19760, at *15 (S.D.N.Y. Feb. 8, 2012), where numerous credit card issuers

implementing mandatory arbitration clauses were deemed to act in parallel, notwithstanding the fact that one had an opt-out exception. Nor does it matter that some Defendants refused discounts outright while others offered commercially unreasonable routes to discounts; just as in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209 (1959), conduct restricting sales is parallel even if some manufacturers limit all sales while others sell only on "highly unfavorable terms." And, in eliminating the vast majority of Contract Pharmacy 340B Drug Discounts, it is immaterial that the decrease was 95% for one Defendant and 70% for another, *see* SAC, ¶ 8, just as it was immaterial in *In re Domestic Airline Travel Antitrust Litigation*, 221 F. Supp. 3d at 69, that air carriers did "not reduce or limit capacity in identical amounts." The conduct, whatever the minor variation, remains parallel.

Defendants also protest that they did not announce their restrictions at the exact same time. But, as an initial matter, Defendants ignore that AstraZeneca and Sanofi revealed their restrictions one business day apart to be effective on the very same day—in short, at the exact same time. *See* SAC, ¶¶ 337–341. While all four Defendants announced their restrictions within just over four months, *see* SAC, ¶¶ 133–140, Defendants exaggerate that timeline to a misleading 19 months by counting later-arising modifications, *see* Opp. at 7. In any event, "conduct separated by months and even years can be [sufficiently] reasonably proximate" to constitute parallel conduct. *Int'l Constr. Prods., LLC v. Caterpillar, Inc.*, Civ. No. 15-108, 2020 U.S. Dist. LEXIS 142555, at *10 (D. Del. Aug. 10, 2020); *see, e.g.*, *PharmacyChecker.com, LLC v. Nat'l Ass'n of Bds. of Pharmacy*, 530 F. Supp. 3d 301, 318, 334 (S.D.N.Y. 2021) (seven months); *In re Pork Antitrust Litig.*, 495 F. Supp. 3d 753, 769–772 & n.12 (D. Minn. 2020) (several years); *In re Pool Prods. Distrib. Mkt. Antitrust Litig.*, 158 F. Supp. 3d 544, 558–559 (E.D. La. 2016) (four months); *Ross*, 2012 U.S. Dist. LEXIS 19760, at *15 (three years); *In re Plasma-Derivative*

Protein Therapies Antitrust Litig., 764 F. Supp. 2d 991, 996, 1002 (N.D. Ill. 2011) (two years); *accord Modern Home Inst., Inc. v. Hartford Accident & Indem. Co.*, 513 F.2d 102, 110 (2d Cir. 1975) (treating rejections over four months as "parallel behavior"). As Plaintiffs allege, Defendants' conduct here was sufficiently parallel because it was announced "closely enough" both "to prevent covered entities from moving business from one Defendant to another," SAC, ¶¶ 133, 303, and to "effectively deprive[] regulators of the ability to feasibly sanction [any one of] them," *id.*, ¶¶ 308–309. Parallel conduct requires no more.

B. Together, the SAC's allegations plausibly suggest concerted action.

After challenging parallel conduct, Defendants attempt to again dissect the plus factors to argue that the SAC does not support an inference of conspiracy. Yet, the Second Circuit has rejected this approach, admonishing that the "character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *United States v. Apple, Inc.*, 791 F.3d 290, 319 (2d Cir. 2015) (quotation marks omitted).

Defendants ultimately fail to offer any viable alternative explanation for their conduct. Their proffered theories nowhere account for why these four Defendants imposed their novel restrictions when a thousand others did not. Their penny-pricing argument is not only procedurally improper on this motion, but it is also overstated, as their diabetes drugs were not all penny priced, and the argument does not explain why Defendants acted alone, since many other manufacturers also sold penny priced drugs but did not restrict discounts when Defendants did. *See* Plfs. Opp. Mem. at 11 n.5 (Plfs. Opp.), Dkt. 58. Nor do Defendants offer any theory apart from collusion to explain how Sanofi publicly announced that it would impose its restrictions just one business day after AstraZeneca *privately* announced its own, with both selecting the same October 1 start date.

Thus, the most plausible inference—and certainly *a* plausible inference—is the only one that explains Defendants' conduct: Defendants worked together to protect their market share for top-selling diabetes drugs (their cartel motive, *see* SAC, ¶¶ 276–277, 299–303) and to ensure that the government was in no position to rescind healthcare coverage over those drugs (their joint leverage, *see* SAC, ¶¶ 304–309).[2] Contrary to Defendants' repeated claims, *see* Opp. at 1, 4 & n.2, 9, these objectives are consistent with portfolio-wide restrictions, beyond diabetes drugs, as such restrictions were effective in protecting market share on the blockbuster diabetes drugs of outsized financial importance, *see* SAC, ¶¶ 6, 83–85, 102–112, and in preventing revocation of federal healthcare coverage, *see id.*, ¶¶ 306–309, all while shielding Defendants' otherwise blatant conspiracy. Again, Defendants offer no alternative explanation for why they alone acted at the time. The SAC need only present one "plausible version of the events" (even if the Court "finds a different version more plausible"), and the SAC readily meets that standard. *Anderson News, LLC v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012).

C. The *Illinois Brick* arguments are immaterial at this stage and wrong.

1. The Court does not need to decide this question now.

Defendants rehash arguments that *Illinois Brick* bars Plaintiffs' damages recovery under federal law. But those erroneous arguments are irrelevant to futility. Even if accepted—which they should not be—each antitrust claim would remain in the SAC: the federal antitrust claims would remain as to injunctive relief, and the State antitrust claims (both as to lost 340B Savings

[2] Defendants' argument that they had no need for "safety . . . in numbers" to prevent losing healthcare program coverage is contradicted by their admission that they "***remain***[] concerned" about that risk. Opp. at 14 (emphasis in original). And their separate 340B suits do not show independent action as Defendants insist, *see id.*, but, rather, reveal more concerted action—with three suits filed on the same day and a fourth filed just three days later. *See* SAC, ¶¶ 293–296.

damages and overcharge damages) would remain viable under State antitrust laws. Accordingly, the Court need not resolve this argument to decide the motion to amend. *Cf.* Opinion at 9 n.2.

2. In any event, Defendants' *Illinois Brick* arguments lack merit.

In any event, *Illinois Brick* does not apply to the lost 340B Savings damages because those damages are not based on any sales and, necessarily then, are not based on overcharges. Instead, these damages are readily calculated by identifying "340B-eligible transactions that would have been filled with 340B Drugs if the Defendants had not restricted access to Contract Pharmacy 340B Drug Discounts," SAC, ¶ 353, without considering overcharges or any amounts passed through a distribution chain, *see* Plfs. Opp. at 40–46. That calculation does not implicate *Illinois Brick*'s concerns with duplicative liability, dilution of the incentive to sue, or allocation complexity, *see id.*; indeed, the Government has already calculated monthly losses, *see* SAC, ¶ 346 (Novo Nordisk, $97.5 million; Eli Lilly, $63.7 million; AstraZeneca, $46 million; Sanofi, $43 million). Consequently, Plaintiffs' lost 340B Savings damages do not arise, as Defendants insist, from being the "second purchaser in the chain of distribution," *see* Opp. at 20, and are not tied to a technical 340B definition of "overcharge," *see id.* at 17–18. Rather, as Eli Lilly aptly explained, Defendants' restrictions "will not result in any overcharge because there is no order and no sale." SAC, ¶ 148. With no sale, there is no *Illinois Brick* impediment.

Defendants erroneously claim that "Illinois Brick precludes *all* indirect purchaser damages claims . . ., not just overcharges," relying on *Drug Mart Pharmacy Corp. v. American Home Products Corp.*, No. 93-CV-5148 (ILG), 2002 WL 31528625, at *7–8 (E.D.N.Y. Aug. 21, 2002) and *Howard Hess Dental Laboratories, Inc. v. Dentsply International, Inc.*, 424 F.3d 363, 373–76 (3d Cir. 2005). Opp. at 17. But that is wrong. In the cited cases, damages depended on a measurement of overcharges, which is irrelevant to calculating lost 340B Savings here. *See* Plfs. Opp. at 45. And the Supreme Court in *Blue Shield of Virginia v. McCready*, 457 U.S. 465,

472 (1982) held, contrary to Defendants' contention, that damages claims may be pursued by an indirect purchaser—there, a health plan member (downstream) suing her healthcare plan (upstream) for not reimbursing her psychologist (midstream)—because a plaintiff calculating damages without reference to a defendant's charges "offer[s] not the slightest possibility of a duplicative exaction." Thus, while "Illinois Brick applies to bar damage recoveries based on overcharges to intermediaries that are passed on to indirect purchasers," "[i]t does not apply any time a buyer is an indirect purchaser and pays an overcharge." Areeda & Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 346f (4th ed. 2022).

Defendants next advance two unsupported boycott arguments. First, they characterize the SAC as alleging a boycott and argue that *Illinois Brick* applies "even if there is an alleged concerted refusal to deal." Opp. at 18. But Defendants' own authority states that "a boycott theory will not be barred by *Illinois Brick*." *Drug Mart Pharmacy Corp.*, 2002 WL 31528625, at *7; *see also In re Brand Name Prescription Drugs Antitrust Litig*., 123 F.3d 599, 606 (7th Cir. 1997) ("If [manufacturers'] refusal . . . were successfully challenged as a boycott, the *Illinois Brick* rule, which is a rule concerning overcharges, would fall away"). And nothing in *Kansas v. Utilicorp. United Inc.*, 497 U.S. 199 (1990), which Defendants cryptically cite, says otherwise.

Second, Defendants argue that antitrust law allows them to conspire to restrict discounts through an agreement to limit most contract pharmacy sales, so long as they do not limit all sales. But complete foreclosure of access to defendants' products is not required to state an antitrust claim, including a boycott claim. *See Klor's, Inc.* 359 U.S. at 209 (finding a group boycott even though some conspirators sold products, albeit on "highly unfavorable terms"). Defendants also point out that limited sales at non-discounted prices continued to occur at contract pharmacies, *see* Opp. at 18–19, despite Defendants' policies, *see* SAC, ¶¶ 144–153, but

antitrust courts have long recognized that failed or incomplete attempts at concerted action to raise prices remain *per se* antitrust violations, *see, e.g.*, *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 362–363 (3d Cir. 2004) (noting incomplete or "failed attempt to fix prices" remains illegal); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656 (7th Cir. 2002) ("An agreement to fix list prices is . . . a per se violation of the Sherman Act even if most or for that matter all transactions occur at lower prices.").

Defendants' final arguments are simple mischaracterizations of the SAC. Plaintiffs have carefully defined their damages to delineate lost 340B Savings, on the one hand, *see* SAC, ¶ 353 (defining lost 340B Savings revenues as damages from the inability to purchase 340B Drugs at contract pharmacies at all and the consequent lost savings or revenue opportunities), and overcharge damages, on the other, *see id.*, ¶ 352 (defining overcharge damages arising from less frequent purchases of 340B drugs without discounts). But Defendants treat the two distinct categories as one, only to then turn around and argue that they contradict each other. Opp. at 17–18. The contradiction is of their own creation. Likewise, Defendants ignore the SAC's careful pleading, which carved all *Illinois Brick* overcharge damages out of the federal claim, *see* SAC at 99 (limiting first claim to "lost 340B Savings revenue" as opposed to "overcharges"), to assert that Plaintiffs are attempting the very opposite. Opp. at 19–20. But that is not so; Plaintiffs do not seek to plead an exception to *Illinois Brick* and are not claiming overcharge damages under the federal cause of action.

In sum, *Illinois Brick* does not apply to Plaintiffs' lost 340B Savings damages, which arise from Defendants' collusion that prevented Plaintiffs from purchasing discounted drugs, not because of any sales or overcharges. These damages are clearly recoverable under federal law.

II. THE PROPOSED SAC'S UNJUST ENRICHMENT CLAIMS ARE NOT FUTILE.

The SAC's unjust enrichment claims comport with those approved by this Court in *Miami Products & Chemical Co. v. Olin Corp*., No. 1:19-cv-00385 EAW, Dkt. 501, 2022 U.S. Dist. LEXIS 154213 (W.D.N.Y. Aug. 26, 2022). Defendants seek to distinguish *Miami Products* by arguing Plaintiffs allege a conspiracy to "'limit or eliminate' certain 340B sales, not to charge more for them." Opp. at 24. But the SAC expressly limits its unjust enrichment claims to the overcharges arising from Plaintiffs' actual purchases of undiscounted 340B-eligible drugs. *See* SAC at 105. Defendants' argument is doubly ironic, as they vigorously assert elsewhere in their brief that *all* of Plaintiffs' damages are in essence overcharge damages. *See* Opp. at 17-18.

Finally, in direct contradiction of the Second Circuit's decision in *Langan v. Johnson & Johnson Consumer Cos.*, 897 F.3d 88, 93 (2d Cir. 2018), Defendants argue that all State law claims, other than those arising under New York and Virginia law, must fail. However, under the law in this Circuit and consistent with the allegations of the SAC,[3] the named plaintiffs, with standing to assert their own State law claims, may seek to represent absent class members with claims under other States' laws. *Id.*; *see also* Plfs. Opp. at 51-52.

CONCLUSION

For the reasons stated above, in Plaintiffs' motion (Dkt. 72-3), and in Plaintiffs' prior opposition (Dkt. 58), Plaintiffs respectfully request that the Court grant their motion and enter an order permitting Plaintiffs to file the proposed SAC.

[3] Plaintiffs' State law claims are specifically alleged "[o]n behalf of Plaintiffs and Class members under their respective States' laws." *See* SAC at 101.

Dated: November 3, 2022
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