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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

JAMES R. CLAYWORTH et al.,

Plaintiffs and Appellants,

v.

PFIZER, INC. et al.,

Defendants and Respondents.

A131804

(Alameda County  
Super. Ct. No. RG04172428)

Fifteen retail pharmacies sued 20 defendants, alleging they conspired to fix the prices on their pharmaceuticals sold in the United States at prices higher than those of the same drugs in Canada in violation of the Cartwright Act (Bus. & Prof. Code, § 16720 et seq.) and the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.). Defendants moved collectively (and in three cases, individually) for summary judgment, arguing that plaintiffs could not produce evidence creating a triable issue of fact that defendants engaged in price fixing. The trial court agreed, and in comprehensive orders granted summary judgment for defendants. Plaintiffs appeal, contending that the trial court erred in granting summary judgment, and also asserting numerous procedural claims, including some that would have caused the motions not to be heard when they were—and not by the judge who heard them. We conclude that none of the procedural claims has merit, and on our de novo review further conclude that summary judgment was properly granted. We thus affirm.

## BACKGROUND<sup>1</sup>

### The Parties

Plaintiffs are 15 retail pharmacies in California.<sup>2</sup> Defendants are, with two exceptions, research-based pharmaceutical companies that manufacture and distribute brand-name pharmaceuticals throughout the United States.<sup>3</sup> The California Supreme Court has described the relationship between plaintiffs and defendants as follows: “[Defendants] sell their drugs to wholesalers at a price referred to as the wholesale acquisition cost. In turn, various independent entities use the wholesale acquisition cost to calculate and publish benchmark drug prices, termed the average wholesale price, for use in the industry. Wholesalers resell the drugs to [plaintiffs] at prices based on a percentage of the average wholesale price. . . . [¶] In turn, [plaintiffs] sell the drugs to . . . consumers . . . .” (*Clayworth, supra*, 49 Cal.4th at p. 765.)

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<sup>1</sup> The factual background of this case is well known to the parties and the court. We include only the salient facts here, and defer to the California Supreme Court’s opinion in *Clayworth v. Pfizer* (2010) 49 Cal.4th 758 (*Clayworth*) for additional background information.

<sup>2</sup> Plaintiffs are James Clayworth, R.Ph., an individual, dba Clayworth Pharmacy and Clayworth Healthcare; Marin Apothecaries, Inc., dba Ross Valley Pharmacy; Golden Gate Pharmacy Services, Inc., dba Golden Gate Pharmacy; Pediatric Care Pharmacy, Inc.; Chimes Pharmacy, Inc.; Mark Horne, R.Ph., an individual, dba Burton’s Pharmacy; Meyers Pharmacy, Inc.; Benson Toy, R.Ph., an individual, dba Marin Medical Pharmacy; Seventeen Fifty Medical Center Pharmacy, Inc.; Tony Mavrantonis, R.Ph., an individual, dba Jack’s Drug; Julian Potashnick, R.Ph., an individual, dba Leo’s Pharmacies; Jerry Shapiro, R.Ph., an individual, dba Uptown Drug, Co.; Tilley Apothecaries, Inc., dba Zweber’s Apothecary; RP Healthcare, Inc.; Rohnert Park Drugs, Inc.; and JGS Pharmacies, Inc., dba Dollar Drugs.

<sup>3</sup> The manufacturer defendants are Abbott Laboratories; AstraZeneca LP; Novartis Pharmaceuticals Corp.; Allergan, Inc.; Boehringer Ingelheim Pharmaceuticals, Inc. (Boehringer); Eli Lilly & Company; Johnson & Johnson; Janssen Pharmaceutical, Inc.; Ortho-McNeil Pharmaceutical, Inc.; Ortho Biotech, Inc.; GlaxoSmithKline PLC (GSK); Pfizer, Inc.; Hoffman-La Roche; Aventis Pharmaceuticals, Inc.; Amgen, Inc. (Amgen); Purdue Pharma L.P.; Merck & Co., Inc.; Bristol-Myers-Squibb Company; and Wyeth. The two non-manufacturer defendants are Johnson & Johnson Health Care Systems Inc. (JJHCS), described in this litigation as “the contracting physical distribution and electronic connectivity arm for the operating companies inside of the [Johnson &

## **The Complaint**

On August 26, 2004, plaintiffs filed a complaint alleging antitrust violations and unfair business practices arising out of defendants' price-setting practices for pharmaceuticals sold in the United States. Shortly thereafter, the case was designated complex and assigned to the Honorable Ronald M. Sabraw for all purposes. In the order designating the case as complex, Judge Sabraw early on signaled his intent to actively manage the case, setting an initial case management conference and advising that "the parties must be prepared to discuss at length the nature of the case, both factually and legally, as well as the projected management of the case at each stage. This is not a perfunctory exercise. The primary objective of the [conference] is to develop a comprehensive plan for a just, speedy and economical determination of the litigation."

Plaintiffs amended their complaint once as a matter of right, and defendants successfully demurred to that amended complaint, as well as a second amended complaint that followed. In the orders sustaining the demurrers, Judge Sabraw directed plaintiffs to clarify their theories of the case and satisfy the specificity-in-pleading requirements applicable to antitrust claims.

The result was the complaint operative here: a 23-page, third amended complaint filed on May 6, 2005 "for violations of the Cartwright Act (Bus. & Prof. Code §16700 et seq.) and the Unfair Competition Law (Bus. & Prof. Code §17200 et seq.[]) [UCL]." It set forth five causes of action, the first three alleging violations of the Cartwright Act, the last two alleging violations of the UCL.

The thrust of the third amended complaint was that defendants conspired "to eliminate price competition and fix prices in the United States" by agreeing "they would not sell their drugs at or below the price at which they sold those same drugs in Canada . . . ." This theory, which became known in this litigation as the "Canadian floor

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Johnson] corporation," and Pharmaceutical Research and Manufacturers of America (PhRMA), a U.S.-based nonprofit trade association of which all defendants are members. PhRMA was previously known as the Pharmaceutical Manufacturers Association, or PMA. We use PhRMA throughout for consistency purposes.

conspiracy,” was detailed in paragraph 5, a paragraph plaintiffs repeatedly referenced throughout the third amended complaint as embodying the alleged conspiracy.

Paragraph 5 alleged as follows:

“5. The Defendants, pursuant to their unlawful combination and agreement, charge more for their drugs sold in the United States, including California, than they charge for the same drugs sold outside of the United States, including Canada. The Defendants agreed to eliminate price competition and fix prices in the United States, including California, by, *inter alia*:

“(a) Using the prices charged in Canada as a floor or minimum price level;

“(b) Acting in concert to restrict reimportation and/or purchase of lower priced foreign drugs;

“(c) Restricting price competition from generics and brand name variations of existing drugs;

“(d) Selling drugs for fixed prices above the prices in Canada (so that the prices charged in the United States, including California, would be higher than the prices for the same drugs sold outside of the United States, including Canada);

“(e) Agreeing that they would not sell their drugs at or below the price at which they sold those same drugs in Canada, and/or other countries outside of the United States; and

“(f) Agreeing and ensuring each other that they would maintain their agreement to charge more in the United States, including California, than they charged outside of the United States, particularly Canada.”

According to the third amended complaint, PhRMA was the instrument through which the conspiracy was facilitated: “[E]ach of the Defendants has executive-level officers that serve on the Board of Directors for PhRMA and its committees and subcommittees. PhRMA’s Board of Directors, its committees and subcommittees meet on a regular basis. It is partly within these meetings that the Defendants’ chief executive officers and chief marketing officers agreed between and among themselves to fix the prices at which their drugs are sold in the United States, including California.”

Discussions concerning the conspiracy purportedly took place at “PhRMA conventions, conferences, or events, and events organized by Defendants’ [*sic*] at corporate offices, hotels, yachts, and resorts . . . ,” where “Defendants’ highest officials, including their chairmen, presidents, chief executive officers, and top marketing executives” engaged in communications to further their agreement to fix prices.

As noted, the first three causes of action asserted violations of the Cartwright Act. The first alleged a trust to restrain trade, or more specifically to restrict commerce, “by agreeing to maintain high non-competitive prices for drugs sold in the United States, including California, and to eliminate sources of lower and competitive-priced drugs from coming into the United States, including California, to protect the price-fixing conspiracy alleged in paragraph 5 . . . .” The second alleged a trust to fix prices, namely “to increase and/or maintain the high price of drugs sold in the United States, including California, relative to prices in Canada and other countries.” And the third alleged a trust to prevent competition and limit availability by “eliminat[ing] sources of lower and competitive priced pharmaceuticals in the United States, including California, as alleged herein, and [by] increas[ing] or maintain[ing] the high non-competitive prices of pharmaceuticals sold in the United States, including California, relative to prices in other countries.”

All three trusts were accomplished, plaintiffs alleged, by “agreeing to maintain high artificial prices in the United States, including California; restricting importation of lower priced pharmaceuticals into the United States, including California; and taking collective action to stop such importation by placing foreign wholesalers and retailers on artificial quotas to stop these customers from shipping lower-priced drugs into the United States, including California; refusing to sell to foreign wholesalers and retailers who ship lower-priced drugs into the United States, including California; agreeing with wholesalers and retailers not to sell to persons who ship drugs into the United States, including California; and requiring all foreign wholesalers and retailers of Defendants’ drugs to refuse to sell drugs to United States and California citizens at prices the same or lower than the sales price for these same drugs in Canada.”

The fourth cause of action alleged an unfair business practice in violation of the UCL. Specifically, plaintiffs asserted that defendants engaged in “unfair competition . . . by charging the plaintiffs more for the same drugs than they charge others outside the United States, particularly Canada; and charging ‘the same low prices charged in Canada and Europe’ to favored customers in the United States. These price differentials for the same drugs are unfair.”

The fifth cause of action alleged illegal business practices in violation of the UCL, namely that defendants’ violations of the Cartwright Act also constituted illegal business practices.

Plaintiffs prayed for restitution, treble damages, and injunctive relief, that the court “enjoin[] and restrain[] Defendants from charging higher prices to Plaintiffs than Defendants charge customers outside the United States, including Canada, for the same drugs.” Plaintiffs also sought attorney fees and costs.

Significantly, nowhere in the third amended complaint did plaintiffs allege that defendants conspired to tie increases in their pharmaceutical prices to the Consumer Price Index (CPI).

### **Demurrer to the Third Amended Complaint**

Defendants filed a demurrer to the third amended complaint. On July 1, 2005, Judge Sabraw entered an order overruling it in part and sustaining it in part. He observed that in his orders sustaining the demurrers to the first and second amended complaints, he directed plaintiffs “to (1) clarify their legal theories and (2) state facts in support of those theories.” He concluded that the conspiracy claims in the third amended complaint satisfied those directives, because plaintiffs alleged the dates, means, and effects of the alleged conspiracy, as well as “overt acts in furtherance of the conspiracy, including the charging of higher prices in California and (otherwise legal) efforts to restrict the importation of drugs into the United States.” This, Judge Sabraw reasoned, “allege[d] sufficient parallel conduct by the Defendants to raise an inference of coll[u]sion and permit the claim to proceed under the heightened standards for pleading a claim under the Cartwright Act.” Judge Sabraw thus overruled defendants’ demurrer as to the first three

causes of action for violations of the Cartwright Act, as well as the fifth cause of action alleging illegal business practices under the UCL.

Turning to the fourth cause of action, the “unfair” UCL claim, Judge Sabraw explained that it was “unclear at the Court of Appeal level what standard the trial courts should apply in an ‘unfair’ UCL claim” because “ ‘[t]he Supreme Court has not yet enunciated a legal test for unfairness in consumer actions under the unfair competition law.’ ” Given the split of authority on this issue,<sup>4</sup> he concluded he would follow the law requiring that “UCL unlawful and unfair claims brought by private parties . . . be tethered to specific constitutional, statutory or regulatory provisions.” (See *Scripps Clinic v. Superior Court*, *supra*, 108 Cal.App.4th at p. 940; *Gregory v. Albertson’s, Inc.* (2002) 104 Cal.App.4th 845, 854.) And under this standard, “Plaintiffs have not identified any fundamental policy in any constitutional, statutory, or regulatory provision that precludes Defendants from seeking the highest price for their products.” Judge Sabraw further explained that he “would normally grant Plaintiffs leave to amend to state a claim against a defendant that is related to a pending claim against that defendant,” but he observed that this was not “a normal case . . . .” Instead, he described it as “a complex case alleging antitrust claims against all the major companies in a large industry,” and concluded that it was “appropriate to focus the claims in this case on the central allegation that all Defendants have unlawfully conspired or colluded to sell their drugs in California for prices that are higher than the prices charged in Canada.” He thus sustained the demurrer

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<sup>4</sup> Compare *Quacchia v. DaimlerChrysler Corp.* (2004) 122 Cal.App.4th 1442, 1453 [“conduct can be ‘unfair’ even if no other law prohibits the challenged conduct” and is “ ‘determined by weighing the utility of the practice against the gravity of the harm to the consumer’ ”]; *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 940 [“the public policy which is a predicate to the action must be ‘tethered’ to specific constitutional, statutory or regulatory provisions”]; and *In re Firearm Cases* (2005) 126 Cal.App.4th 959, 980-981 [UCL unfair claims in the consumer context use the definition of unfairness in the Federal Trade Commission Act, 15 U.S.C. § 45(n), which provides that a practice may be deemed unfair if “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition”].

to plaintiffs' fourth cause of action without leave to amend, but also without prejudice to plaintiffs pursuing the claim in a separate lawsuit.

### **Discovery**

After Judge Sabraw entered his July 1, 2005 order on the demurrer to the third amended complaint, defendants answered, and the case was finally at issue. But even before that point, the parties were already engaging in discovery, which had apparently started as far back as December 2004, if not before.<sup>5</sup>

Over the following two years, the parties participated in nearly monthly case management conferences before Judge Sabraw. Following each conference, Judge Sabraw issued thorough and detailed case management orders typically addressing a wide range of issues. While we need not discuss all of them here, we discuss a few at length for illustrative purposes—and because some of the discovery issues are relevant to plaintiffs' claims on appeal.

In an April 18, 2005 case management order, Judge Sabraw directed the parties to be prepared on April 21 to “discuss how to focus the discovery, substantive motions, and trial in this case.” Noting that the “lawsuit appears to allege that the Defendants have conspired not to sell prescription drugs in California for prices that are below or equal to the prices in Canada,” he advised that “[t]he trial will be focused on the claims asserted and the discovery should be focused on obtaining evidence to prove or disprove those claims. This is not a general administrative investigation into the business practices of the pharmaceutical industry.” Judge Sabraw then proceeded to suggest certain case management ideas, but reiterated that “[c]ounsel should be prepared to discuss these . . . ideas and propose their own at the hearing/case management conference.”

The April 21 case management conference apparently proceeded as scheduled, and on April 28 Judge Sabraw issued a follow-up order. There, he addressed the specific

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<sup>5</sup> The record contains an “Order regarding February 1, 2005 Case Management Conference” in which Judge Sabraw noted that there was no stay on discovery and ordered the parties “to meet and confer about Defendants’ responses to Plaintiffs’ First Set of Interrogatories.”

pharmaceuticals that would be subject to discovery, establishing the following procedures for selecting what would become known as the “Identified Drugs”:

“FOCUSING DISCOVERY—THE ‘IDENTIFIED DRUGS.’

“[T]he Court will require that on or before May 5, 2005, each Defendant produce to the Plaintiffs a list that identifies its 20 top selling drugs (by gross sales) for each year 2000 through 2004. The Court will also require Defendants’ liaison counsel to provide those lists to the Court on or before May 10, 2005 . . . . From these lists, the Court will identify 5-15 drugs for each Defendant and those drugs will be ‘the identified drugs.’ . . . .

“Plaintiffs and Defendants may file briefs of no more than 10 pages on May 10, 2005, suggesting how many drugs should be identified for each defendant, which drugs should be identified, and why any particular drug (or sub-market of drug) should be identified. The briefs may include as attachments a proposed table for each defendant identifying the suggested drug and any other relevant information about the drug (sub-market for drug, prior investigations or lawsuits regarding the drug, average disparity from Canada price etc).

“If any party wants a hearing on the Court’s selection of the identified drugs, liaison counsel must notify the Court on or before May 10, 2005. If a hearing is requested, the Court will conduct a hearing on the issue of which drugs will be the identified drugs on May 25, 2005 at 10:00 a.m.”

Judge Sabraw then turned to the general scope of discovery and made the following recommendations regarding appropriate guidelines, recommendations subsequently entered as an order of the court:

“GLOBAL ISSUES—SUBSTANTIVE SCOPE

“The discovery must be focused on the claims asserted. Without some focus on ‘the needs of the case,’ C.C.P. 2019(b)(2), the discovery sought would be similar to that disapproved of in *Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 222, where the Court noted ‘[Plaintiff]’s 12-page demand might as well be condensed into a single sentence: Produce everything in your possession which in any

way relates to gun mounts.’ This case concerns price fixing. Except as limited by other parts of this order, Defendants should provide all information directly relevant to (1) what prices Defendants charged for the identified drugs and (2) how they set those prices. The relevance of information will probably decrease as it moves away from pricing issues.” The information, he continued, should relate to “(1) price setting practices (including national policies) that affect or have affected the price of the identified drugs in California and (2) California specific policies” for the time period “January 1, 1995 through the present.”

The parties submitted the required briefing regarding the “Identified Drugs,” and a hearing followed. Judge Sabraw then issued a preliminary list of the “Identified Drugs,” and afforded the parties an opportunity to make objections and suggest substitutions. A tentative ruling with further revisions followed, as well as another hearing.

On July 11, 2005, Judge Sabraw entered an order regarding “the Identified Drugs” that would be the subject of discovery. This is how he put it: “The initial discovery, and perhaps all discovery, will be limited to the pricing and price setting practices for the Identified Drugs. Defendants have represented to the Court that each of the following Identified Drugs is (1) marketed in the United States, (2) marketed in Canada, (3) sold through retail pharmacies, and (4) is a discrete drug. Plaintiffs have suggested that the list of Identified Drugs be modified further based on the following considerations: (5) whether the drug is a top seller; (6) whether the drug caters to a small population; (7) whether the brand name is different in the United States and Canada; (8) whether the drug has is [*sic*] subject to competition from generic drugs; (9) whether the drug has been discontinued; and (10) whether the drug has a pricing history. The Court finds that the additional considerations suggested by Plaintiffs although relevant, are not sufficiently material to be used as determinative criteria in selecting the Identified Drugs.” With that, Judge Sabraw identified defendants’ top and high selling drugs, listing at least eight drugs for all manufacturer defendants, except for Boehringer (for which he identified four) and Amgen (for which he later identified three). All told, there were 111 pharmaceuticals subject to discovery.

Extensive discovery ensued, both written and testimonial. In terms of written discovery, plaintiffs served on each defendant two sets each of requests for production of documents, requests for admission, and special interrogatories, as well as three sets of form interrogatories.

Deposition discovery included plaintiffs taking, by defendants' calculation, nearly 60 depositions.<sup>6</sup> A significant issue arose concerning "apex" depositions, described as "depositions of senior officers (CEO, President, Vice President, Chairpersons of the Board, members of the Board of Directors) of the defendants." Plaintiffs noticed apex depositions very early in the discovery process, but Judge Sabraw stayed them, ordering plaintiffs to seek leave of court prior to renoticing them, which leave would be granted upon a showing that "the 'apex' deponent has 'unique or superior personal knowledge of discoverable information.'"<sup>7</sup> He further explained he "would expect that such a showing would ordinarily follow completion of written discovery and PMK [person most knowledgeable] depositions." However, later revisiting the issue at plaintiffs' request, Judge Sabraw permitted plaintiffs "to take one apex deposition per Defendant. That apex deposition can be the chairman, the president, the CEO, or some other senior executive. Plaintiffs may select the apex deponent for each Defendant." Plaintiffs subsequently took a total of 19 apex depositions, including more than one for some defendants.

Plaintiffs were also permitted to notice up to three PMK depositions per defendant, with additional PMK depositions upon a showing of good cause. There was no limit on percipient witness depositions. Despite this access to discovery, plaintiffs apparently made, as Judge Sabraw would later describe it, "a strategic decision to pursue written discovery and to seek to depose only high-level employees of the Defendants and [not] depose sub-apex witnesses concerning the Defendants' price-setting practices."

In addition to seeking discovery from defendants, plaintiffs also pursued discovery from third parties that had some relationship to the manufacture, distribution, and/or sale

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<sup>6</sup> As plaintiffs do not dispute defendants' calculation, we accept it as a reliable representation.

<sup>7</sup> See *Liberty Mutual Ins. Co. v. Superior Court* (1992) 10 Cal.App.4th 1282.

of drugs. In that regard, plaintiffs sought discovery from McKesson (a distributor), First Data Bank (a publisher of pharmaceutical industry information), Health Net (an insurance provider), AmeriSourceBergen (a drug wholesaler), and Walgreens (a large chain pharmacy).

Both sides filed numerous discovery motions, and Judge Sabraw ruled on each and every one (and often motions for reconsideration) with attention and detail. While the record does not reflect every discovery motion filed, it does show at least 22 filed by plaintiffs and 15 by defendants. These were in addition to the numerous—and we mean numerous—discovery disputes Judge Sabraw and his research attorney resolved informally.

Discovery continued right up to November 30, 2006, when plaintiffs filed opposition to the summary judgment motions at issue here. Plaintiffs were permitted to depose any witness who submitted a declaration in support of defendants' motions. Accordingly, after the motions were filed, plaintiffs took at least 15, perhaps as many as 24, additional depositions of officers and employees of various defendants.

### **Motions for Summary Judgment or Adjudication**

On August 21, 2006, after more than a year and a half of discovery, plaintiffs moved for summary adjudication of certain affirmative defenses asserted by defendants, most notably the pass-on defense. Under this defense, defendants asserted that plaintiffs could not prevail because they did not sustain damages from any alleged overcharges since they passed on the claimed overcharges to their customers or their customers' insurers. Whether the pass-on defense was a cognizable defense in California was an open question, and plaintiffs argued that California law did not recognize it, and it should be dismissed.

On September 15, 2006, defendants filed a joint opposition to plaintiffs' motion, as well as a joint cross-motion for summary judgment or, in the alternative, summary adjudication regarding the applicability of the pass-on defense (collectively with plaintiffs' motion, the pass-on motions). In both, defendants argued that the pass-on defense was viable in California and defeated all of plaintiffs' claims. The pass-on

motions were set to be heard on November 30, 2006, a date later continued to December 5.

Also on September 15, Amgen filed a separate motion for summary judgment or, in the alternative, summary adjudication (the Amgen motion). The Amgen motion went to the merits of plaintiffs' claims, namely plaintiffs' allegations that defendants conspired to fix drug prices in the United States at higher levels than those in Canada. The motion was supported by a notice of motion; a memorandum of points and authorities; a separate statement of undisputed material facts; and a request for judicial notice of certain sections of the Canadian Patent Act. Amgen also submitted three declarations, of: Pete Feldman, senior director, strategic planning and operation, in Amgen's oncology business unit; Michael Savin, its vice president in sales and marketing operations; and Mack Anderson, its counsel. The declarations sought to authenticate 66 exhibits contained in a "compendium of exhibits" submitted in support of the motion. Amgen's motion was originally set to be heard on November 30, the same day as the pass-on motions.

Two weeks later, on September 29, three more summary judgment motions were filed: (1) a motion of all defendants (except for Amgen, PhRMA, and JJHCS)<sup>8</sup> for summary judgment (the joint motion); (2) a motion of PhRMA for summary judgment (the PhRMA motion); and (3) a motion of JJHCS for summary judgment (the JJHCS motion), which, when referred to collectively with Amgen's motion, will be called the "merits motions." These three motions were set to be heard on December 15, 2006.

Like Amgen's motion, the joint motion was directed at the merits of plaintiffs' allegations, arguing that plaintiffs could not demonstrate a triable issue of material fact concerning the existence of the Canadian floor conspiracy. It was the most voluminous of the merits motions, consisting of a notice of motion; a 34-page memorandum of points and authorities; a separate statement of undisputed facts; a request for judicial notice of "the Canadian Patent Act and certain guidelines promulgated by the PMPRB, a quasi-judicial body established by the Patent Act in 1987"; and a declaration of Aton Arbisser,

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<sup>8</sup> PhRMA and JJHCS separately joined in this motion.

counsel for Novartis, authenticating documents submitted in a 1046-page compendium of exhibits. The compendium contained discovery responses and excerpts of deposition testimony, as well as 14 declarations of defendants' CEOs and other high ranking officers and executives.

PhRMA's motion differed from the joint motion in that it focused on PhRMA's role in the alleged conspiracy. It argued that it was a "bona fide trade association" that "advoca[tes] for public policies that advance the discovery of life-saving and life-enhancing new medications for patients by pharmaceutical and biotechnology research companies." PhRMA disputed that it was a "sham" organization established to facilitate the alleged conspiracy, and argued that the *Noerr-Pennington*<sup>9</sup> doctrine permitted it "to petition the government to take, or refrain from taking, action[s] . . . , even if such efforts benefit the advocate and even if they are intended to restrict or eliminate competition." PhRMA's motion consisted of a notice of motion; a memorandum of points and authorities; a separate statement of undisputed material facts; and a compendium of exhibits, which included the declarations of Alan F. Holmer, president and CEO of PhRMA until January 2005, and Jennifer A. Carmassi, its counsel.

Lastly, JJHCS's motion focused on its assertion that it did not manufacture, distribute, sell, or set the prices of pharmaceuticals sold in the United States or Canada. It consisted of a notice of motion; a memorandum of points of authorities; a separate statement of undisputed facts; and declarations of Curt M. Selquist, chairman of JJHCS, and Samuel R. Miller, its counsel.

### **Plaintiffs' Request for a Continuance**

On November 13, 2006, plaintiffs sought a continuance of the merits motions pursuant to Code of Civil Procedure section 437c, subdivision (h) (437c(h) request). The 437c(h) request was based on what plaintiffs claimed to be newly discovered evidence, described by them as follows: "(1) evidence that the Defendants have employed the

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<sup>9</sup> See *Eastern R. Conf. v. Noerr Motors* (1961) 365 U.S. 127, 139-140, and *Mine Workers v. Pennington* (1965) 381 U.S. 657, 670.

sporting theory of justice regarding Plaintiffs' discovery, especially regarding PhRMA documents; (2) evidence that Defendants entered into a price fixing agreement through PhRMA; (3) evidence that pricing and price-setting practices were conducted at meetings at PhRMA." More specifically, plaintiffs cited deposition testimony by Peter Dolan, former CEO of Bristol Meyers Squibb, that they claimed established that prices and price-setting practices regarding the U.S. and Canada were discussed at PhRMA meetings; deposition testimony of Hoffman-La Roche's Kevin O'Leary concerning a "Pledge" made by various pharmaceutical manufacturers to limit price increases to increases in the CPI; and documents recently produced by GSK purporting to show its efforts to prevent the reimportation of its pharmaceuticals into the United States.

Plaintiffs' request came on for hearing on November 20 on shortened time. Following argument, Judge Sabraw denied plaintiffs' request, finding that they had failed to identify as required by the statute facts that "may exist but cannot, for reasons stated, then be presented." (Code Civ. Proc., § 437c, subd. (h).) As he put it: "Plaintiffs have not identified information essential to opposing the motions for summary judgment that they could not have obtained at an earlier date. To the extent the motion is based on the Court's discretionary ability to continue the motions for summary judgment, the court exercises its discretion and denies the motion because Plaintiffs have had an adequate opportunity to prepare their cases and develop evidence to oppose the motions for summary judgment." Judge Sabraw went on to note that plaintiffs "d[id] not so much identify facts essential to justify opposition that may exist as identify facts that they have already discovered and seek the opportunity to obtain further information about those facts."

Apparently addressing a complaint by plaintiffs that they had been "thwarted" in discovery, Judge Sabraw responded, "[I]t is because the court has imposed parameters on discovery as to scope, type, and scheduling of discovery. At the outset, the Court stated, 'The trial will be focused on the claims asserted and the discovery should be focused on obtaining evidence to prove or disprove those claims. This is not a general administrative investigation into the business practices of the pharmaceutical industry.' . . . . The

evidence does not support the argument that the Plaintiffs have been thwarted because Defendants have failed to comply with their discovery obligations as defined by the Court. The motions for summary judgment will not be continued based on the possibility that the Court might make substantial changes in the discovery parameters.”

Plaintiffs filed a petition for a writ of mandate in this court, seeking to compel Judge Sabraw to grant their section 437c(h) request. We summarily denied it.

### **Plaintiffs’ Oppositions to the Merits Motions**

On November 30, 2006, plaintiffs filed opposition to the merits motions, submitting a single opposition to the joint motion and the motions of PhRMA and JJHCS.<sup>10</sup> The opposition was supported by a separate statement responding to defendants’ undisputed material facts and submitting additional facts of their own; a declaration of plaintiffs’ counsel Joseph M. Alioto, Jr. attaching 77 exhibits; and a request for judicial notice of 11 of the exhibits appended to the Alioto declaration. In the opposition, plaintiffs renewed their request for a continuance under section 437c, subdivision (h), reiterating their “belie[f] that additional facts exist that are essential to their opposition of Defendants’ motions for summary judgment.”

On December 13, 2006, defendants filed replies in support of the merits motions, and responded to plaintiffs’ additional facts in their separate statement response.

### **Tentative Ruling Granting Defendants’ Pass-On Motion and Plaintiffs’ Attempt to Challenge Judge Sabraw**

Meanwhile, on December 1, Judge Sabraw issued a 26-page tentative ruling on the motions set for hearing on December 5, specifically the pass-on motions and the Amgen motion. There, Judge Sabraw analyzed the pass-on issue, ultimately holding that the affirmative defense was available in California and defeated plaintiffs’ claims.

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<sup>10</sup> Plaintiffs had previously filed separate opposition to the Amgen motion. It was supported by a separate statement disputing Amgen’s material facts, a request for judicial notice of six assorted documents, and a declaration of plaintiffs’ counsel Russell F. Brasso attaching 24 exhibits.

Consequently, the tentative ruling granted summary judgment for defendants, and dropped plaintiffs' pass-on motion and Amgen's merits motion as moot.

After Judge Sabraw issued his tentative ruling, but before the motions came on for hearing, plaintiffs moved to disqualify him, via plaintiffs' "Objection/Motion for Disqualification" filed December 4. Plaintiffs took exception with various of Judge Sabraw's discovery orders, his denial of their request to continue the summary judgment motions, and his so-called "rush to judgment" in granting summary judgment in the tentative ruling, claiming that he "systematically demonstrated a prejudice towards plaintiffs and favoritism towards defendants" and was not impartial. Plaintiffs' statement of disqualification was lengthy, supported by a 19-page declaration by plaintiffs' counsel Alioto in which he purported to detail Judge Sabraw's objectionable conduct. The declaration, in turn, appended over 100 pages of exhibits.

On December 5, the day the pass-on motions and Amgen's merits motion were set to be heard, Judge Sabraw struck plaintiffs' statement of disqualification as untimely, nevertheless agreeing to continue the hearing to December 15 to afford plaintiffs an opportunity to seek a writ of mandate. On December 12, plaintiffs did petition for a writ of mandate. On December 14, we denied it.

### **Hearing on the Pass-On Motions**

On December 15, the pass-on and merits motions came on for hearing before Judge Sabraw, following which argument he took the motions under submission. On December 19, Judge Sabraw granted summary judgment in favor of defendants, holding, consistent with his tentative ruling, that the pass-on defense was a cognizable defense in California. As such, plaintiffs could not demonstrate that they sustained any damages because the undisputed evidence showed that they increased their prices to consumers corresponding to any price increase imposed by defendants. He also concluded that plaintiffs lacked standing to assert a claim under the UCL since they did not suffer any damages. Since the pass-on defense defeated all of plaintiffs' claims, defendants were entitled to summary judgment, which was thereafter entered. Because the case was

resolved based on the pass-on defense, Judge Sabraw dropped the merits motions as moot.

### **Plaintiffs' First Appeal**

Plaintiffs appealed from the judgment. We affirmed, agreeing with Judge Sabraw that the pass-on defense was viable under California law and that the undisputed evidence established that plaintiffs did not suffer any damages and thus could not recover on their Cartwright Act or UCL claims. (*Clayworth v. Pfizer, Inc.*, July 25, 2008, A116798) [nonpub. opn.]

Plaintiffs successfully petitioned the California Supreme Court for review, and that court reversed, holding that the pass-on defense was not permitted in California and that summary judgment was improperly granted. (*Clayworth, supra*, 49 Cal.4th at p. 763.) It then remanded for further proceedings. (*Id.* at p. 791.)

### **Plaintiffs' Attempts to Disqualify Judge Brick After Remand**

After learning that on remand to the Alameda County Superior Court the matter would likely be assigned to the Honorable Steven A. Brick, on August 5, 2010, Covington & Burling, LLP (Covington), counsel for defendant Boeringher, filed a substitution of attorney removing itself as counsel. The substitution was apparently prompted by the fact that Judge Brick's sister-in-law was a partner of the Covington firm.

On September 2, 2010, the matter was in fact assigned to Judge Brick for all purposes. Twelve days later, plaintiffs filed a statement for the disqualification of Judge Brick, demanding his "mandatory disqualification" under Code of Civil Procedure section 170.1, subdivision (a)(5), and also claiming that "his family connection to Covington" was sufficient to establish a doubt about his impartiality such that he should also be disqualified under subdivision (a)(6)(A)(iii).<sup>11</sup> The statement was based not only on Covington's prior representation of Boeringher in this case, but also its continued representation of Boeringher, as well as numerous other defendants, in unrelated matters.

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<sup>11</sup> Plaintiffs also filed a preemptory challenge pursuant to Code of Civil Procedure section 170.6. The challenge was denied on the ground that they previously filed a successful section 170.6 challenge to the Honorable Jon S. Tigar.

After defendants objected to plaintiffs' request, plaintiffs filed a supplemental statement of disqualification, and Judge Brick filed a verified answer disputing the existence of any facts requiring his disqualification. The disqualification request was assigned to the Honorable Faye D'Opal of the Marin County Superior Court, following which assignment plaintiffs filed a second supplemental statement of disqualification, this one appending 148 more pages of exhibits.<sup>12</sup>

On November 24, 2010, Judge D'Opal entered a six-page order denying the disqualification request. She held that (1) no lawyer from Covington was a "lawyer in the proceeding," making section 170.1, subdivision (a)(5) inapplicable, and (2) a family relationship with a lawyer who works in a law firm that is not appearing before the judge but represented certain defendants on unrelated matters was not a fact upon which a person might reasonably entertain doubt that the judge would be able to be impartial, making subdivision (a)(6) inapplicable.

Once again, plaintiffs petitioned this court for a writ of mandate. Once again, we denied it. This time, plaintiffs petitioned the California Supreme Court for review, which was denied.

### **Hearing On the Merits Motions**

With the case now revived in the superior court, the parties picked up where they left off when Judge Sabraw had entered summary judgment for defendants—with the four merits motions still to be resolved.

On January 14, 2011, Judge Brick held the twenty-first case management conference in the case. In a statement prepared for that conference, plaintiffs urged that discovery be reopened before the court ruled on the merits motions: "Defendants, unlike Plaintiffs, are not interested in up-dated discovery. They prefer a rush to judgment based on discovery that was propounded more than 4 years ago. [¶] Under CCP §§ 2030.070, 2031.050, Plaintiffs (and Defendants) are entitled to obtain 'any later acquired discovery'

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<sup>12</sup> Judge D'Opal subsequently struck this second supplement "as no facts suggesting new grounds for disqualification learned of or arising after the filing of the first statement of disqualification [were] presented therein."

to supplement the previous discovery responded to more than 4 years ago. Obviously, under any reasonable judicial measure, Plaintiffs should be permitted to update the written discovery previously propounded to and verified by 17 Defendants.” Plaintiffs reiterated this position in the section of their statement identifying any “potentially dispositive motions”: “Defendants have proposed that their ‘mooted motions’ for summary judgment be *revived* and *decided* before any discovery can be undertaken by Plaintiffs. Plaintiffs object to Defendants’ joint proposal to rush to judgment and request that discovery be permitted up to an [*sic*] including the discovery cut-off date of August 15, 2011. In the meantime, the parties can disclose and depose expert witnesses . . . . Any summary judgment motions should not be heard until expert witness depositions are completed.”

Judge Brick disagreed, and his order following the conference set argument on the merits motions for February 17, 2011, when they in fact came on for hearing, based on the original motion papers, oppositions, and replies filed in the fall of 2006.<sup>13</sup> After hearing lengthy argument spanning the morning and much of the afternoon, Judge Brick took all four motions under submission.

### **Orders Granting Summary Judgment**

On March 7, 2010, Judge Brick entered three separate orders granting the merits motions. The first order, 36 pages of thorough analysis, granted the joint motion and the Amgen motion. After detailing the relevant procedural history and the applicable standard of review, Judge Brick considered defendants’ moving burden. This, he concluded, defendants satisfied by providing “admissible evidence describing, in varying levels of detail, the process by which the ‘list price’ (‘wholesale acquisition cost’ or ‘WAC’) was set and periodically reevaluated within each Defendant company. . . . [¶] Defendants’ detailed declarations state facts showing that prices were independently determined, based upon Defendants’ individual market analyses which generally utilized

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<sup>13</sup> The only newly-filed paper appears to be defendants’ joint objections to plaintiffs’ evidence, filed on January 28, 2011.

public information. [Citation.] They tend to belie collusion on pricing. They also tend to show that Defendants responded to market forces by providing rebates and discounts to customers that had the power to influence the volume of prescriptions written. [Citation.] This showing is sufficient to meet Defendants’ initial burden of demonstrating independence rather than collusion.”

Judge Brick then considered the request in plaintiffs’ opposition for a continuance, which he denied because “[p]laintiffs have not shown that facts essential to justify an opposition may exist or valid reasons that those facts could not have been obtained through more diligent efforts and presented with their opposition . . . .”

With that, Judge Brick turned to the substance of plaintiffs’ opposition, noting that plaintiffs bore the burden of “ ‘present[ing] evidence that would allow a reasonable trier of fact . . . to find an unlawful conspiracy more likely than not.’ ” And, he held, plaintiffs failed to satisfy this burden.

In terms of direct evidence, Judge Brick explained that plaintiffs “based a significant portion of their written opposition on evidence of a different agreement, arguing that they have *direct evidence* of an agreement to raise prices in line with the Consumer Price Index (‘CPI’).” He described this as “problematic” for two reasons. First, the third amended complaint alleged a conspiracy to fix drug prices in California by using Canadian prices as a floor; it did not allege an agreement to tie price increases to the CPI. Second, plaintiffs would be collaterally estopped from amending to plead the alleged CPI conspiracy because plaintiffs were class members—and, apparently, one plaintiff a class representative—in a prior, unsuccessful action based on the same theory. (See *Brand Name Prescription Drugs Antitrust Litigation* (N.D. Ill. Feb. 10, 2000, Civ. A. No. 94 C 897) 2000 WL 204064 at \*1.)

Judge Brick then turned to plaintiffs’ indirect evidence of conspiracy, and noted that while “[t]hey argued the doctrine of ‘conscious parallelism’ in their papers with respect to their unpleaded CPI theory,” the doctrine also “arguably relate[d] to the Canadian floor theory, as well,” which plaintiffs confirmed at the hearing they had not abandoned. He thus undertook an analysis of plaintiffs’ circumstantial evidence of the

Canadian floor conspiracy, ultimately concluding that plaintiffs did “not provide[] any competent evidence with respect to the pricing of Defendants’ drugs (vis-à-vis Canada, or otherwise) during the relevant time period,” or any evidence tending to prove that the alleged parallel conduct was “conscious.” There was “a complete failure of proof.”

Having found no evidence of parallel pricing, conscious or otherwise, Judge Brick could have stopped there. But he did not, and proceeded to examine plaintiffs’ evidence on the “plus factors” required to corroborate evidence of conscious parallelism, concluding that plaintiffs’ evidence on the “plus factors” failed to suggest collusion. In light of that, he granted the joint motion for summary judgment.

In the same order, Judge Brick also granted summary judgment in favor of Amgen. He concluded that Amgen met its moving burden by “provid[ing] detailed testimony demonstrating that, during the relevant time frame it set prices in the U.S. (including for the Identified Drugs) independently from other Defendants through a bottom-up, collaborative process; that this process involved a large number of employees, who considered a wide range of permissible, precompetitive factors and there was little if any involvement by Amgen’s CEO/Chairman in this process; and that pricing information (including pricing actions or price setting policies) was not discussed with or released to other Defendants, other than when a new price was made public.” Amgen’s evidence further showed that “[p]ricing for Canada is set by different employees, through a different process.”

Judge Brick then concluded that, as in their opposition to the joint motion, plaintiffs failed to carry their burden of presenting evidence showing that the conspiracy was “ ‘more likely than not.’ ” First, he reiterated, the direct evidence cited by plaintiffs in claimed support concerned an alleged conspiracy to increase prices in step with the CPI, which failed for the two reasons explained above. Second, plaintiffs claimed to have satisfied their burden by presenting evidence that Amgen wrongfully offered “secret rebates” to customers. Again, Judge Brick held that this alleged conspiracy was not pleaded in the third amended complaint and could not defeat summary judgment. He

therefore concluded that the absence of evidence regarding the Canadian floor conspiracy constituted grounds for granting summary judgment for Amgen.

Judge Brick closed his order by ruling on evidentiary matters. He granted the requests for judicial notices by both plaintiffs and defendants, and sustained in part and overruled in part both sides' objections to evidence. This included sustaining 32 of defendants' objections, three of which rulings plaintiffs assert as error here, which we discuss below.

By separate orders, Judge Brick also granted the motions of PhRMA and JJHCS. As to PhRMA's motion, he preliminarily explained that the motion was technically moot because of his ruling on the joint motion. Nevertheless, he went on to address the merits of the motion, concluding that PhRMA carried its initial burden of demonstrating that it was engaged in "legitimate and routine trade association activities" and that it did not participate in or aid and abet the alleged conspiracy. Plaintiffs, he held, failed to present evidence creating a triable issue as to whether PhRMA was engaged in illegitimate information-sharing activities. As he explained it, "Plaintiffs nominally dispute all of PhRMA's material facts concerning its mission and activities, . . . but none of the evidence cited by Plaintiffs creates a triable issue that PhRMA is not engaged in activities that are legitimate information sharing, as opposed to anti-trust violations. It bears mention that numerous of Plaintiffs' responses to undisputed facts do not comply with the California Rules of Court. They fail to identify the evidence that they assert creates a triable issue or provide a citation to the relevant exhibit, page and line number. [Citations.] In some instances, Plaintiffs simply cross-referenced all of their 'Additional Facts' they provided in responses to the Joint Motion (without providing further detail). In others, Plaintiffs failed to cite to any evidence at all, and instead resort to argument. Such tactics do not create triable issues." Despite these failings, Judge Brick went on to examine the exhibits in the record and found no evidence supporting plaintiffs' alleged facts.

Lastly, as to JJHCS's motion, Judge Brick held that JJHCS met its initial burden by providing admissible evidence demonstrating that "it [did] not have any involvement

in setting list prices for any pharmaceutical products sold in California (or the U.S.) or in Canada.” Plaintiffs, in turn, failed to carry their burden. Specifically, their written opposition was the same one submitted in opposition to the joint motion, which was largely premised on the unpleaded CPI theory and did not present arguments specific to JJHCS . From what Judge Brick could “glean[]” from plaintiffs’ separate statement responding to JJHCS’ material facts, however, plaintiffs attempted to demonstrate triable issues as to the following: “(1) JJHCS engaged in the alleged price-fixing conspiracy through its parent, Johnson & Johnson, a separately incorporated ‘umbrella’ holding company headed by William Weldon, suggesting that the two entities are, in essence, alter egos; (2) JJHCS participated in PhRMA meetings—through Johnson & Johnson’s head, Mr. Weldon, and thus was involved in the alleged conspiracy; (3) JJHCS negotiates contracts involving net prices; (4) JJHCS participated in a senior prescription discount program, which involved an agreement on prices; and (5) JJHCS agreed to restrict price competition from generics and brand name variations.” But, according to Judge Brick, plaintiffs failed to plead alter ego allegations or introduce any evidence that would support them. Further, he concluded, plaintiffs produced no evidence that JJHCS had any involvement in setting list prices.

Judgment was entered for defendants on March 14, 2011. This timely appeal followed.

## **DISCUSSION**

### **A. Plaintiffs’ Claims on Appeal**

Plaintiffs assert numerous errors on appeal, only one of which attacks the summary judgment, arguing essentially that plaintiffs presented evidence creating triable issues of material fact regarding the existence of a conspiracy to fix prices, and thus no defendant, including PhRMA, JJHCS, or Amgen on their individual motions, was entitled to summary judgment. The remaining claims assert procedural errors that, if well taken, would have had the merits motions heard at a later time—and by a different judge. These specific claims are: (1) Judge Sabraw abused his discretion in limiting discovery; (2) plaintiffs’ request for Judge Brick’s disqualification should have been granted

because he had a conflict of interest that prevented him from ruling on the merits motions; (3) Judge Brick erred in denying plaintiffs’ request to reopen discovery before the merits motions were heard; (4) Judge Brick erred in sustaining defendants’ objections to plaintiffs’ exhibits 1, 111, and 117; and (5) Judge Sabraw erred in sustaining the demurrer without leave to amend on plaintiffs’ fourth cause of action for unfair business practices. Since certain of these procedural issues would necessitate reversal if well taken, we begin with discussion of these issues.

**B. Judge Sabraw Properly Managed the Case, Including the Scope and Course of Discovery**

Plaintiffs’ first procedural argument is that the trial court “erroneously limited plaintiffs’ discovery.” Hardly.

Before turning to a discussion of why, we digress briefly to discuss the subject of case management—and in particular as it pertains to antitrust cases.

*Volkswagen of America, Inc. v. Superior Court* (2001) 94 Cal.App.4th 695 involved the validity of a San Francisco Superior Court general order in asbestos cases. Holding that the Judicial Council did not intend to preempt such an order in complex litigation, our colleagues in Division Five set forth the two factors supporting the holding, a discussion pertinent here:

“First, effective January 1, 2000, the Judicial Council adopted [California Rule of Court,] rule [3.400] et seq. to govern complex civil cases. Rule [3.400](a) defines a complex case as ‘an action that requires *exceptional judicial management* to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel.’ (Italics added.) The Judicial Council could not have intended rule [3.400](a) to stand like an unarmed sentry warning courts of impending disaster from complex litigation while leaving them powerless to take the steps necessary to meet the onslaught. . . .

“This conclusion is supported by a second factor. The Judicial Council adopted rule [3.400] et seq. on October 22, 1999. (See Judicial Council of Cal., minutes of

meeting (Oct. 22, 1999) pp. 18-19.) On that same date, and as part of the same process, the Judicial Council authorized the Administrative Office of the Courts to distribute to all judges in this state a manual that explains how complex cases should be managed. (See Judicial Council of Cal., minutes of meeting, *supra*, p. 18.) The manual[ is] entitled Deskbook on the Management of Complex Civil Litigation . . . (Judicial Council of Cal., Deskbook on the Management of Complex Civil Litigation [(2011)] § 3.52, pp. 3-35, 3-37 (hereafter Deskbook).)” (*Volkswagen of America, Inc. v. Superior Court*, *supra*, 94 Cal.App. at pp. 704-705.)

The Deskbook notes in its preface that “[s]tate and federal judges around the country have been actively managing complex litigation for several decades, and complex litigation has been the subject of intense scholarly scrutiny and evaluation. Drawing upon the wealth of materials available, this deskbook relies upon the Federal Judicial Center’s *Manual on Complex Litigation, Third Edition*, and the National Center of State Courts’ *Managing Mass Tort Cases: A Resource Book for State Trial Court Judges*. . . . The Complex Civil Litigation Task Force was convinced that the recommendations found in these sources reflect the best thinking available today on how to manage complex cases. We want to acknowledge our gratitude to the authors of these sources for providing the initial direction and basis upon which the task force relied in developing recommendations that are consistent with California authorities and practices. [¶] . . . [T]he deskbook is intended to provide judges with ideas about management that have proven useful and effective over the years. We hope you find this deskbook to be a useful tool.” (Deskbook, *supra*, at p. xv.)

Chapter 3 of the Deskbook addresses specialized areas, the first of which is antitrust. (See § 3.01 et seq.) Antitrust is “included in the list of provisionally complex cases in California Rules of Court, Rule 3.400(c) because litigation involving such claims can require voluminous documentary and testimonial evidence; extensive discovery; complicated legal, factual, and technical (particularly economic) questions; numerous parties and attorneys; and substantial sums of money calling for ‘exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to

expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel' [Cal. Rules of Ct., Rule 3.400(a)]." (§ 3.01, p. 3–2.)

The Deskbook then goes on to say that “[a]ntitrust cases often involve the collection, assimilation, and evaluation of vast amounts of evidence regarding numerous transactions and other economic data. . . . Effective management of such cases depends on the adoption of pretrial procedures to facilitate the production and utilization of this material and its efficient presentation at trial. Among the measures that may be useful are the following: [¶] **Limiting scope of discovery.** Early attention to the issues may make feasible establishment of reasonable limits on the scope of discovery. Limits may be fixed with reference to the transactions alleged to be the subject matter of the case, to the relevant products or services, or to geographical areas and time periods. Limits should, however, be subject to modification if a need for broader discovery later appears. For discussion of discovery in complex cases generally, see § 2.50 et seq.” (§ 3.03, p. 3-6.)

As noted, the federal manual was a source for the Deskbook, and it covers the subject of case management in antitrust cases in even more detail. Part III of that manual is entitled “Particular Types of Litigation.” Chapter 30 deals with antitrust, and describes how antitrust litigation can involve voluminous documentary and testimonial evidence, extensive discovery, complicated legal and factual questions, numerous parties and attorneys, and substantial sums of money, thus calling for application of procedures for the management of complex litigation. The manual elaborates:

“Effective management of antitrust litigation requires identifying, clarifying, and narrowing pivotal factual and legal issues as soon as practicable. [Citation.] Unless the judge and the attorneys give early attention to these issues, substantial time may be wasted on claims subject to summary dismissal, on class action disputes not critical to the class-certification ruling, and on discovery not relevant to the later-refined issues regarding liability of damages. Defining the issues at an early stage may enable the court to structure the litigation so as to limit the scope and volume of discovery, reduce cost and delay, facilitate the prospects of settlement, and improve the trial.

“The procedures for pretrial management of complex litigation discussed in section 11 apply generally to antitrust litigation. . . .” (West’s Manual for Complex Litigation (Federal Judicial Center 4th ed. 2004) § 30, pp. 519-520.) And the referenced section 11 counsels that “Discovery control in complex litigation may take a variety of forms, including time limits, restrictions on scope and quantity, and sequencing.” It then goes on to list the following examples of discovery “limits that a judge might consider,” elaborating on each limit: time limits and schedules; limits on quantity; and phased, sequenced, or targeted discovery. (*Id.* at §11.422, pp. 53-54.)

Those, then, were the well-developed criteria and guidance by which Judge Sabraw was to manage this 20-defendant case. And as is apparent from the above, he did so in exemplary fashion. And without prejudice to plaintiffs who, as is also apparent from the recitation of facts discussed above, had access to full discovery here.

Despite that, plaintiffs contend that there were four categories of discovery they were denied. Specifically:

First, plaintiffs contend that Judge Sabraw “limited document discovery to prices and price setting practices thereby limiting production of documents price fixing [*sic*] of specific drugs and denying discovery of the top level agreement to stabilize prices.” In fact, discovery was broader than plaintiffs claim. Judge Sabraw required defendants to produce documents relating to “national policies that affect or have affected the price of identified drugs.” But to the extent that any discovery was limited to prices and price setting practices, the case was about defendants’ price setting practices, and such limitation was therefore appropriate. Plaintiffs were afforded discovery concerning pricing decisions on the 111 Identified Drugs—drugs, not incidentally, selected in part based on plaintiffs’ input—for a ten year period, which we consider a reasonable scope.

Second, plaintiffs complain that Judge Sabraw “refused to require the production of defendants [*sic*] documents showing efforts to restrict re-importation of drugs saying such action was legal.” In support of this argument, plaintiffs cite page 3 of an order granting a motion to quash a subpoena to nonparty Johnson & Johnson, in which Judge Sabraw granted the motion as to plaintiffs’ request for documents from “Johnson &

Johnson to Canadian wholesalers that refer[red] or related to the threats or warnings of termination of sales by J&J for selling and/or distributing pharmaceutical drugs in the United States.” Plaintiffs make no attempt to explain how a nonparty’s actions would in any way be relevant to the alleged conspiracy.

Third, plaintiffs argue that Judge Sabraw “denied production and allowed redaction of documents arguably subject to the associational privilege. However, such documents are discoverable under footnote 3 to the *Pennington* case to show the purpose and character of non-protected action.” The trial court order cited in support of their argument was an “order following in camera review of PhRMA documents to determine whether redactions are proper.” For purposes of the in camera review, PhRMA had been permitted to redact privileged information, but not information that it believed to be irrelevant. Judge Sabraw determined that PhRMA took “a narrow view of what constitutes relevant information,” explaining, “For example, PhRMA has not produced information concerning the importation of drugs from Canada. Although this information might not be directly relevant to the existence of a conspiracy to use the Canadian price as a floor for drugs in California, it is relevant for purposes of discovery.” Judge Sabraw then ordered PhRMA to produce certain documents or excerpts. We fail to understand how an order directing PhRMA to produce documents could support plaintiffs’ claim that Judge Sabraw “denied production and allowed redaction of documents arguably subject to the associational privilege.”

Finally, plaintiffs object that Judge Sabraw unreasonably limited the depositions of defendants’ apex deponents to three and a half hours, while allowing defendants to depose “plaintiffs [*sic*] apex people” for two days. To begin with, plaintiffs did not have “apex people.” Judge Sabraw defined apex deponents as “senior officers (CEO, President, Vice President, Chairpersons of the Board, members of the Board of Directors),” while this court in *Liberty Mutual Ins. Co. v. Superior Court*, *supra*, 10 Cal.App.4th 1282, 1289, the seminal case on apex depositions, referred to “a corporate president or other official at the highest level of corporate management.” Plaintiffs here were small businesses whose officers were involved in daily decisions and were produced

for depositions as both fact and corporate “most knowledgeable” witnesses. They were clearly differently situated than defendants’ apex deponents.

In any case, plaintiffs have failed to establish that the time limit placed on apex depositions was unreasonable. They assert that it was “not sufficient to cover the factual issues in the case,” but do not identify any subjects they were unable to cover or any questions that went unanswered. And, of course, plaintiffs made a “strategic decision” not to depose subapex witnesses, a decision that could account for any perceived lapses in the information plaintiffs received through discovery.

Plaintiffs have shown no error, and certainly not any that plaintiffs demonstrate would have made a difference in the outcome here.

**C. The Order Denying Plaintiffs’ Request for Judge Brick’s Disqualification Was Correct, an Order Plaintiffs Cannot Even Challenge Here**

On August 26, 2010, we remanded the case to the Alameda County Superior Court, which on September 2 assigned the matter to Judge Brick. As noted, plaintiffs sought to remove him from the case, including with their improper preemptory challenge and their later request to disqualify him for cause, including with two supplemental statements for disqualification. Plaintiffs assert that the refusal to disqualify Judge Brick was error.

The challenge involved here was plaintiffs’ September 14, 2010 request to have Judge Brick removed for cause, pursuant to Code of Civil Procedure section 170.1, subdivisions (a)(5) and (a)(6). The former provides in pertinent part that a judge shall be disqualified if “[a] lawyer . . . in the proceeding is the spouse, former spouse, child, sibling, or parent of . . . the judge’s spouse or if such a person is associated in the private practice of law with a lawyer in the proceeding”; the latter, if “[a] person aware of the facts might reasonably entertain doubt that the judge would be able to be impartial.”

To recap, the basis of plaintiffs’ challenge was the relationship between Judge Brick and his sister-in-law, a relationship that plaintiffs describe here as follows: “The facts are undisputed. Judge Brick’s sister-in-law was a partner in Covington & Burling.

[Citation.] For years the Covington firm represented one of the defendants in this case, from complaint, demurrers, discovery, summary judgment on the pass-on defense, the filing of a motion for summary judgment on the merits, appeals, and reversal. It was only when it became apparent that the case would be assigned to Judge Brick that they substituted ou[t] [citation], while continuing to represent most of the defendants in other matters.”

The defendant was Boehringer Ingelheim Pharmaceuticals, Inc., and it is true that Covington represented it in this litigation and that Judge Brick’s sister-in-law was a member of that firm. It is also true, however, that Covington substituted out as counsel on August 5, 2010,<sup>14</sup> before the case was assigned to Judge Brick.

Following Judge Brick’s response to plaintiffs’ challenge, it was assigned to Judge D’Opal of the Marin County Superior Court, who issued a detailed order finding that (1) no attorney at Covington was a “lawyer in the proceeding,” thus making Code of Civil Procedure, section 170.1, subdivision (a)(5) inapplicable; and (2) some relationship between a judge and an attorney at a firm that represents certain defendants on other matters unrelated to the litigation in issue—but not the case before the court—is not a fact upon which a person “might reasonably entertain doubt that the judge would be able to be impartial,” making subdivision (a)(6) inapplicable.

Plaintiffs filed a petition for writ of mandate in this court on December 7, 2010, which we denied. Plaintiffs then filed a petition for review in the Supreme Court, which was also denied. That ends the matter—plaintiffs’ claim is not properly before us.

Section 170.3, subdivision (d) provides that “The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal . . . .” (See also *People v. Hull*

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<sup>14</sup> Plaintiffs contended below that the “purported substitution” was “defective for three reasons” and that Covington was still counsel of record when the matter was assigned to Judge Brick. Judge D’Opal rejected this contention, concluding that “sufficient evidence supports the basic fact that Covington was not ‘a lawyer in the proceeding’ when the Presiding Judge assigned this case to Judge Brick for all purposes . . . .” Plaintiffs do not challenge this conclusion on appeal.

(1991) 1 Cal.4th 266, 276 [section 170.3, subdivision (d) “prescribes the exclusive means of appellate review of an unsuccessful peremptory challenge motion”]; *D.C. v. Harvard-Westlake School* (2009) 176 Cal.App.4th 836, 849-850; *Sears, Roebuck & Co. v. National Union Fire Ins. Co.* (2005) 131 Cal.App.4th 1342, 1348-1349.)

Faced with this law, plaintiffs’ reply argues that the California Supreme Court has countenanced appellate review of such a claim on an appeal from the final judgment when due process issues are raised. They rely on *People v. Brown* (1993) 6 Cal.4th 322 (*Brown*), citing the following passage: “[T]he [United States Supreme Court] has made it clear that a defendant has a due process right to an impartial judge, and that violation of this right is a fatal defect in the trial mechanism. In view of this established federal constitutional authority, to foreclose appellate attack on the fundamental constitutional integrity of the judgment would be a radical and extreme step. It would simultaneously (i) preclude traditional full appellate review of defendant’s federal constitutional claim, and (ii) impair what defendant asserts is his state constitutional right of appeal.” (*Id.* at pp. 333-334.) *Brown* does not avail plaintiffs.

*Brown*, a death penalty case, was decided on remand from the United States Supreme Court. The California Supreme Court found no error requiring retrial of the guilt or penalty issues, but reversed the penalty judgment and remanded for reconsideration of the automatic motion for modification of the death verdict. (*Brown, supra*, 6 Cal.4th at p. 326.) Prior to the rehearing, defendant moved pursuant to Code of Civil Procedure section 170.1, subdivision (a)(6)(C), to disqualify the trial judge on the basis of lack of impartiality. Declarations of defense counsel and her investigators indicated that the trial judge had engaged in ex parte communications with them concerning her investigation, which involved contacting jurors. The judge who heard the disqualification motion denied it, and the trial court denied the automatic motion for modification of the death verdict. (*Brown, supra*, 6 Cal.4th at pp. 326-327.)

The Supreme Court went on to hold that *Brown*’s claim could be made on appeal. But not on any basis giving solace to plaintiffs, the court holding as follows: “It is enough to determine that his argument is credible; given the maxim that a statute must be

construed, if possible, to avoid constitutional issues, we will not ascribe to the Legislature an intent to bar appellate review of defendant’s due process claim. [Citations.] [¶] These factors lead us to construe the statute as applied to defendant’s claim as follows: Section 170.3(d) applies to all *statutory* judicial disqualification claims—even those claims based on statutory provisions that, like section 170.1, subdivision (a)(6)(C), appear to codify due process grounds for relief—but section 170.3(d) does not apply to, and hence does not bar, review (on appeal from a final judgment) of *nonstatutory* claims that a final judgment is constitutionally invalid because of judicial bias. [¶] Our conclusion does not alter our construction of section 170.3(d) in [*People v.*] *Hull*, *supra*, 1 Cal.4th 266. Even in a capital case, the denial of a *statutory* judicial disqualification motion is not subject to interlocutory appeal; instead, all litigants who seek to challenge denial of a statutory judicial disqualification motion are relegated to writ review as described in section 170.3(d).” (*Brown*, *supra*, 6 Cal.4th at p. 335.) Here, of course, plaintiffs’ challenges were *statutory*.

But even if plaintiffs could make the claim, it would fail. Judge Brick’s sister-in-law’s firm had substituted out, making Code of Civil Procedure section 170.1, subdivision (a)(5) inapplicable. And plaintiffs demonstrate no facts or circumstances by which “[a] person aware of the facts might reasonably entertain a doubt that [Judge Brick] would be able to be impartial” under section 170, subd. (a)(6). Plaintiffs cite no authority—and we have found none—that relied upon subdivision (a)(6) to disqualify a judge based merely upon the client of an in-law’s law firm. As defendants put it, “The Legislature drew the line in section 170.1(a)(5) between family relationships that require recusal and those that do not. There is no reason to believe a broader sweep is required to protect the integrity of the judiciary.” We agree.

The few cases cited by plaintiffs are easily distinguishable. *Stitt v. State Bar* (1978) 21 Cal.3d 616, involved disqualification of a State Bar hearing officer where the officer’s law partner was litigating another matter against the parties appearing before the officer. *Tumey v. Ohio* (1927) 273 U.S. 510 and *Ward v. Village of Monroeville* (1972) 409 U.S. 57, 61, held that judges were disqualified from cases where they benefitted—

either directly (*Tumey*) or indirectly (*Ward*)—from fines they imposed. Judge Brick’s relationship to his sister-in-law is a far cry.

**D. Judge Brick Did Not Abuse His Discretion In Denying Plaintiffs’ Request to Continue the Merits Motions To Allow For Additional Discovery**

Plaintiffs next contend, in a brief argument of less than a page, that Judge Brick erred in denying their Code of Civil Procedure section 437c, subdivision (h) request for continuance of the summary judgment hearing.<sup>15</sup> Plaintiffs show no error.

Code of Civil Procedure section 437c, subdivision (h) provides that if the party opposing summary judgment shows by declaration that essential evidence “may exist but cannot, for reasons stated, then be presented, the court shall deny the motion” or continue it for a reasonable period. (See *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395.) The reason for the declaration is for the party to “ ‘show that its proposed discovery would have led to “facts essential to justify opposition.” ’ ” (*Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 325-326.) This means, as the leading practical treatise describes it, that a party seeking a continuance has to show the following “requirements”:

“[10:207.15] **Requirements:** The opposing party’s declaration in support of a motion to continue the hearing should show the following:

- *Facts* establishing a *likelihood that controverting evidence may exist* and *why* the information sought is *essential* to opposing the motion;
- The *specific reasons* why such evidence cannot be presented at the present time;
- An estimate of the *time* necessary to obtain such evidence; and
- The specific steps or procedures the opposing party intends to utilize to obtain such evidence. [See CCP §437c(h); see also *Roth v. Rhodes* (1994)]

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<sup>15</sup> It should be recalled that plaintiffs had first sought to continue the motion on November 13, 2006, by a request to Judge Sabraw. Judge Sabraw denied it, a ruling that plaintiffs unsuccessfully challenged by writ petition. Plaintiffs’ opposition to the merits motions also contained a 437c(h) request.

25 [Cal.App.]4th 530, 548; . . . *Cooksey v. Alexakis* (2004) 123 [Cal.App.]4th 246, 254, . . . ; *Combs v. Skyriver Communications, Inc.* [(2008) 159 [Cal.App.4th 1242,] 1270, . . .—declarations did not explain why information sought was essential to opposing motion or why additional time was needed].”

(Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) § 10:207.15, p. 10-83.)

If the declaration(s) do not measure up, the court may deny the request (*Cooksey v. Alexakis, supra*, 123 Cal.App.4th 246, 253-254; *Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 716), a denial we review for abuse of discretion. (*Combs v. Skyriver Communications, Inc., supra*, 159 Cal.App.4th 1242, 1270; *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 100; *FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 72; *Roth v. Rhodes, supra*, 25 Cal.App.4th at pp. 547-548.) We find no abuse here. And plaintiffs’ argument certainly does not demonstrate any.

Plaintiffs’ entire argument is as follows: “Note that the language of the Legislature is mandatory and requires denial or continuance when essential facts are shown by affidavit. Here plaintiffs’ [*sic*] submitted lengthy declarations from their counsel showing what specific evidence existed, how it had been requested early in the litigation but not produced and how it bore specifically on the conspiracy. [Citation.] For example the Canadian internet pharmacy documents, while requested early in the litigation, were not produced until after a long fight and then only partially and after the summary judgment was filed. Clearly discovery was needed to flesh out these documents and provide the story that the documents only suggested. That the lower court called these documents inadmissible hearsay merely reinforces the necessity for discovery.” We read the record differently.

The extensive discovery in this case was described in detail above, including two sets each of requests for production of documents, requests for admission, and special interrogatories, as well as three sets of form interrogatories served on each defendant. The original discovery included plaintiffs taking nearly 60 depositions. In addition,

between the time that defendants moved for summary judgment and plaintiffs filed their opposition, plaintiffs took some two dozen more depositions, including depositions of all but one of the officers and employees who submitted declarations in support of the motions for summary judgment.

As quoted, plaintiffs' brief argument makes the vague claim that the sought-after discovery would have allowed them to "flesh out" some unidentified documents obtained from some defendant(s) in discovery. Such argument is hardly sufficient. As we said in *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546, we are " 'not inclined to act as counsel for . . . [plaintiffs] and furnish a legal argument as to how the trial court's rulings . . . constituted an abuse of discretion.' "

As to plaintiffs' claim below that they might not have deposed the best—or most appropriate—witnesses, Judge Brick aptly observed, "If plaintiffs believe they failed to depose the best witnesses, it is Plaintiffs' own doing."<sup>16</sup>

Beyond all that, plaintiffs do not even attempt to demonstrate why Judge Brick's conclusion—that plaintiffs failed to provide "valid reasons" why essential facts "could not have been obtained through more diligent efforts, and presented with their opposition"—was erroneous. Plaintiffs' request was properly turned down.

#### **E. There Was No Error In Judge Brick's Evidentiary Rulings**

Plaintiffs assert that Judge Brick made "several evidentiary rulings finding documents inadmissible." Rather than "burden" us with "all of these exhibits," plaintiffs focus on three exhibits—numbers 1, 111, and 117.

We begin with the observation that there is no agreement on the standard of review that guides us on the issue here. As we recognized in *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243 (*Nazir*): "Whether abuse of discretion is the proper

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<sup>16</sup> In a similar vein, Judge Sabraw had earlier observed that whatever deficiencies plaintiffs asserted in discovery, it was their own fault. As he put it, "Plaintiffs have had an adequate opportunity to prepare their case and develop evidence to oppose the motions for summary judgment," including "the opportunity to depose the persons responsible for setting prices."

standard of review when rulings on evidentiary objections are based on papers alone presents an interesting question, one that is by no means settled. *Carnes* itself recognizes a split of authority. (*Carnes v. Superior Court*[(2005) 126 Cal.App.4th 688,] 694.) And a leading commentary states the rule this way: ‘Pursuant to the weight of authority, appellate courts review a trial court’s rulings on evidentiary objections in summary judgment proceedings for abuse of discretion. [Citations.]’ (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) ¶ 8:168, p. 8–130 (rev. #1, 2008), italics omitted.)” (*Nazir, supra*, 178 Cal.App.4th at p. 255, fn. 4; see also *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535 [recognizing issue].) But whichever the standard, we find no error here, certainly not reversible error.

Exhibit 1 was a declaration of plaintiffs’ counsel Eric Unrein, which in turn appended as exhibit A the United States Department of Justice’s 292-page file on defendants’ business review letter request concerning the CPI Pledge, documents that Unrein described as having been “obtained at my direction and request . . . from the United States Department of Justice (‘DOJ’), Antitrust Division, related to the business review letter requested on behalf of” PhRMA concerning the “Pledge.”

Defendants objected that the documents were “[n]ot relevant to the conspiracy that survived demurrer here” and that they were “inadmissible hearsay not subject to any exception.” Judge Brick sustained the objection on relevancy grounds, citing Evidence Code sections 210 and 350.

Plaintiffs argue here that the records were “properly authenticated and from the files of the Government and as such was admissible as an official record. . . . Much of it is also admissible as statements of a co-conspirator made in the course and furtherance of the conspiracy.” In making this argument, plaintiffs overlook one significant factor: the ground on which Judge Brick sustained defendants’ objection was relevancy. The records concerned only the alleged CPI conspiracy, a conspiracy not pleaded in the third amended complaint.

Exhibit 111 was an exhibit to the Alioto declaration consisting of 56 pages of documents produced by GSK on or about October 5, 2006, documents plaintiffs describe

in their opening brief as follows: “Much of the document consists of minutes, agenda, and decision memoranda prepared by PhRMA, or the Canadian association Rx&D, and produced from the files of GSK. These documents are: (1) Decision Memorandum For The Board of Directors On Canada Advocacy 7/9/02 [citation]; Memorandum PhRMA ‘Preventing Government Price Controls’ 11/4/02 [citation]; ‘Rx&D Internet Pharmacy Committee Meeting Minutes’ 1/10/03 [citation]; ‘Notice to Canada KIT Staff Work Group’ 1/23/03 [citation]; Memorandum PhRMA ‘Progress In Opposition to Illegal Internet Imports of Medicines’ 4/5/03 [citation]; Memorandum PhRMA ‘Canada Key Issue Team Task Force Meeting’ 5/12/03 [citation]’ Fax from Hohner to PhRMA Board of Directors 5/15/03 with materials for May, 22 Board of Directors Meeting, [citation]; Notice to Canada KIT with Memorandum and Agenda for July 2 meeting, 6/27/03 [citation]. [¶] . . . [¶]

“The balance of Exhibit 111 comes from the files of defendant GSK and include not only GSK prepared documents, or in one case by its consultant and in two cases its competitors Wyeth and AstraZeneca. The first of these is a Timeline prepared by GSK in its regular course of business documenting its cut off of the supply to internet pharmacies, [citation]. The second is an email by Wyeths [*sic*] CEO to GSK’s CEO expressing ‘Nice Job,’ [citation]. The third is an internal GSK Memorandum discussing internet pharmacies and GSK’s actions, [citation]. The fourth document is an internal GSK Memorandum enclosing an unpublished AstraZeneca letter re internet supply, 4/10/03 [citation]; The fifth is an internal GSK Memorandum of an Update on Internet Issue 4/15/03 [citation]. The sixth document is a report from a GSK consultant regarding ‘Communications Recommendations’ 4/1/603 [citation].”

Defendants objected that they were irrelevant. Further, as to documents Bates stamped GSK-CAL-7000101-102 and 7000179-184, defendants also objected that “to the extent that Plaintiffs offer the documents to prove the truth of the matter asserted therein, the documents are inadmissible hearsay not subject to any exception.”

Judge Brick sustained the objection.

Lastly, Exhibit 117 to the Alioto declaration was described by him as “copies of newspaper articles produced by Defendant GSK.” The exhibit consisted of four articles: “Health & Technology: Glaxo Warns Canadian Clients Against Drug Sales to the U.S.,” *Wall Street Journal*, January 13, 2003; “Glaxo Wants Canada Drug Sales to U.S. to Stop,” *Reuters News*, January 13, 2003; “GlaxoSmithKline May Stop Sales to Canada,” *AP Online*, January 11, 2003; and “Will Other Companies Follow GlaxoSmithKline’s Lead?,” *MedAdNews*, May 2003. Defendants objected on hearsay and relevancy grounds, and on lack of foundation as to the fourth article which lacked a Bates stamp number and was not, according to defendants, produced by GSK. Judge Brick sustained the hearsay, lack of foundation, and relevancy objections.

Plaintiffs argue that this “collection of newspaper articles from the files of GSK [is] admissible to show the date of the GSK announcement of restrictions on Internet Pharmacies. These documents are admissible under Evid. Code, § 645.1 [presumed to be that newspaper regularly issued]. They are also admissible under general evidence law.” In claimed support of their position, plaintiffs rely on *Lawlor v. Loewe* (2d Cir. 1913) 209 Fed. 721, 726, citing the following passage: “But in order to show that the dispute between Loewe and the union excited general interest in the community, newspaper articles published in these towns were introduced in evidence, not as proof of the circumstances therein narrated but to show the improbability of the defendants being ignorant of matters which were constantly being made public and were of vital significance to them. . . . It cannot be denied that all this evidence was competent as to those who actually received it or had knowledge of it.”

Plaintiffs have not demonstrated that any of the three challenged rulings was error. But even if they had, they would still not prevail, as reversal is warranted only if plaintiffs can show that a more favorable result was reasonably probable if the evidence had been admitted. (See Evid. Code, § 354; *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574.) This, they have failed to do.

**F. Judge Sabraw Properly Sustained Defendants' Demurrer to the Fourth Cause of Action Without Leave to Amend**

Plaintiffs argue that Judge Sabraw erred in sustaining the demurrer to the fourth cause of action, one of their unfair business practices claims. The argument is all of 11 lines, and asserts that the ruling was error because “plaintiffs should have been allowed to amend, but even so, the law in this District was that UCL claims involve a balancing of the benefits and harm of the business practice. *Quacchia v. DaimlerChrysler Corp.*[, *supra*,] 122 Cal.App.[4th] 1442, 1453. Under this test, the complaint stated a UCL claim.”

The background for this argument begins with Judge Sabraw’s order of April 18, 2005, which again sustained demurrers, this time to plaintiffs’ second amended complaint with leave to amend. On May 6, plaintiffs filed their third amended complaint. Again defendants demurred. On July 1 Judge Sabraw filed his “Order (1) Overruling in Part and Sustaining Without Leave to Amend in Part the Demurrer of Defendants to the Third Amended Complaint . . . .” As pertinent here, the order said: “The Third Amended Complaint alleges that Defendants have conspired to inflate the prices of prescription drugs sold to plaintiffs. [Citation.] The Third Amended Complaint alleges the dates [citation], terms [citations], means [citation], and effects [citations] of the alleged conspiracy. The Third Amended Complaint alleges overt acts in furtherance of the conspiracy, including the charging of higher prices in California and (otherwise legal) efforts to restrict the importation of drugs into the United States. The Court finds that the Third Amended Complaint alleges sufficient parallel conduct by the Defendants to raise an inference of collusion and permit the claim to proceed under the heightened standards for pleading a claim under the Cartwright Act.”

Turning to the UCL claim, Judge Sabraw noted that the Supreme Court had not enunciated a legal test for unfairness in consumer cases and that the Courts of Appeal have gone in three directions. He then held that unfair “claims must be tethered to specific constitutional, statutory, or regulatory provisions” and denied plaintiffs’ request to amend to “state a UCL claim alleging unilateral price discrimination that borrows from

or is tethered to the Robinson-Patman Act, 15 U.S.C. § 13 or some other statute.” Doing so, Judge Sabraw said that “The Court would normally grant Plaintiffs leave to amend to state a claim against a defendant that is related to a pending claim against that defendant. This is not, however, a normal case—this is a complex case alleging antitrust claims against all the major companies in a large industry.”

To begin with, it is not correct to say that the third amended complaint did not state a UCL claim. The fifth cause of action alleged a violation of the “unlawful” prong of the UCL, based on defendants’ actions “collectively” and was predicated on alleged price fixing—as was a portion of plaintiffs’ claim under the unfair prong.

Beyond that, the third amended complaint attempted to inject a new cause of action never attempted before—a claim of price discrimination by each defendant “individually” under the “unfair” prong of the UCL. This is the claim Judge Sabraw rejected. Doing so, he rejected the definition of unfairness in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 186-187, and concluded that “Plaintiffs have not identified any fundamental policy in any constitutional, statutory, or regulatory provision that precludes Defendants from seeking the highest price for their products.”

As we understand plaintiffs’ claim here, they had properly alleged unfairness under the “balancing of the benefits and harms” test, which they claim is the test in this district. Tellingly, plaintiffs did not cite *Quacchia v. DaimlerChrysler Corp., supra*, 122 Cal.App.4th 1442, below, or make any argument about what is the test in “this district.” Despite that, Judge Sabraw independently rejected the balancing test in favor of predictability and consistency with *Cel-Tech* in UCL litigation, noting that courts are “ill suited to regulate prices in a functioning marketplace.”

Moreover, the third amended complaint made no mention of the Robinson-Patman Act, 15 United States Code section 13. However, in the order Judge Sabraw stated that plaintiffs would not be granted leave to amend their unilateral UCL claim to borrow from the Robinson-Patman Act, “find[ing] that a claim that any one defendant engaged in price discrimination is qualitatively different from the central claim that all of the Defendants

have conspired to fix prices.” That said, Judge Sabraw made it clear that rejection of the unilateral price discrimination claim was without prejudice: “If Plaintiffs seek to pursue collateral claims against any of the Defendants they may do so in separate actions.” Plaintiffs chose not to do that. Plaintiffs demonstrate no error, let alone prejudicial error.

With that, we turn to the substantive issue before us—whether Judge Brick properly granted summary judgment for defendants.

## **G. Judge Brick Properly Granted Summary Judgment For Defendants**

### **1. The Cartwright Act and the General Principles**

Enacted in 1907, the Cartwright Act “ ‘generally outlaws any combinations or agreements which restrain trade or competition or which fix or control prices.’ ” (*Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1147; Bus. & Prof. Code, § 16720, subds. (a), (b) [prohibiting “combination[s] of capital, skill, or acts by two or more persons” which restrict trade, or limit or reduce the production or increase the price of any commodity].) A conspiracy to fix prices under the act consists of: (1) the formation and operation of the conspiracy, (2) wrongful act or acts done pursuant to it, and (3) damage resulting from such act or acts. (*Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 316-317 (*Chicago Title*).) Concerted activity is essential to a Cartwright Act claim because the act prohibits “only *contracts, combinations or conspiracies* in restraint of trade.” (*Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410, 1423, disapproved on other grounds in *Reid v. Google, Inc., supra*, 50 Cal.4th 512, 532, fn. 8.)

California courts demand a “ ‘high degree of particularity in the pleading of Cartwright Act violations.’ ” (*G.H.I.I. v. MTS, Inc.* (1983) 147 Cal.App.3d 256, 265.) To state a claim under the Act, it is insufficient to generally allege the elements set forth in the statute. Rather, a plaintiff must allege facts which indicate the existence of a prohibited contract, combination, or conspiracy. (*Chicago Title, supra*, 69 Cal.2d at p. 318 [“General allegations of the existence and purpose of the conspiracy are insufficient and appellants must allege specific overt acts in furtherance thereof.”]); *Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 196 [“An antitrust

claim must plead the formation and operation of the conspiracy and the illegal acts done in furtherance of the conspiracy.”]; *Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1236 [“[I]n order to sufficiently state a cause of action, the plaintiff must allege in its complaint certain facts in addition to the elements of the alleged unlawful act so that the defendant can understand the nature of the alleged wrong and discovery is not merely a blind ‘fishing expedition’ for some unknown wrongful acts.”].)

Direct evidence of the conspiratorial agreement is rarely available. (See *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 857 (*Aguilar*) [plaintiff “must often rely on inference rather than evidence since, usually, unlawful conspiracy is conceived in secrecy and lives its life in the shadows”].) Rather, the conspiracy is usually shown by circumstantial evidence which, in an antitrust case, often takes the form of “conscious parallelism.” (*In re Travel Agent Com’n Antitrust Litigation* (2009) 583 F.3d 896, 903.)<sup>17</sup> As described in *Eddins v. Redstone* (2005) 134 Cal.App.4th 290, 304-305 (*Eddins*): “Conscious parallelism is a pattern of uniform business conduct, not in itself unlawful. [Citation.] To establish consciously parallel behavior, [plaintiff] ‘must show (1) that the defendants’ business behavior was parallel, and (2) that the defendants were conscious of each other’s conduct and that their awareness was an element in their decisional process.’ ” (Fn. omitted.)

But, as the *Eddins* court went on to explain, evidence of conscious parallelism alone is not enough. Rather, plaintiff must also establish that “ ‘ “each defendant engaging in the parallel action acted contrary to its economic self-interest,” [citation] or offer[] other “plus factors” tending to establish that the defendants were not engaging merely in oligopolistic price maintenance or price leadership but rather in a collusive agreement to fix prices or otherwise restrain trade.’ ” (*Eddins, supra*, 134 Cal.App.4th at p. 305; see also *Bell Atlantic Corp. v. Twombly* (2007) 550 U.S. 544, 554 [“The inadequacy of showing parallel conduct . . . without more, mirrors the ambiguity of the

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<sup>17</sup> The Cartwright Act is patterned after the federal Sherman Antitrust Act (15 U.S.C. § 1 et seq.), and decisions under the latter are applicable to the former. (*Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842, 852.)

behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.”]; *In re Flat Glass Antitrust Litigation* (3rd Cir. 2004) 385 F.3d 350, 360 [“plaintiffs basing a claim of collusion on inferences from consciously parallel behavior [must] show that certain ‘plus factors’ also exist.”]; *Harlem River Cons. Co-op., Inc. v. Associated Groc.* (S.D.N.Y. 1976) 408 F.Supp. 1251, 1277.) “Existence of these plus factors tends to ensure that courts punish ‘concerted action’—an actual agreement—instead of the ‘unilateral, independent conduct of competitors.’ [Citation.] In other words, the factors serve as proxies for direct evidence of an agreement.” (*In re Flat Glass Antitrust Litigation, supra*, 385 F.3d at p. 360.)

## **2. Summary Judgment and the Standard of Review**

Code of Civil Procedure section 437c provides that summary judgment is properly granted “if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (Code Civ. Proc., § 437c, subd. (c).) As we confirmed in *Nazir, supra*, 178 Cal.App.4th at p. 253: “[M]oving defendants can meet their burden by demonstrating that ‘a cause of action has no merit,’ which they can do by showing that ‘[o]ne or more elements of the cause of action cannot be separately established . . . .’ (§ 437c, subd. (o)(1); see also *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 486-487.) Once defendants meet this burden, the burden shifts to plaintiff to show the existence of a triable issue of material fact. (§ 437c, subd. (p)(2).)” A plaintiff satisfies his or her burden and creates “a triable issue of material fact if, and only if, the [admissible and properly referenced] evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Aguilar, supra*, 25 Cal.4th at p. 850, fn. omitted.)

Beyond the general rules in section 437c, we are further guided by the opinion in *Aguilar*, where the Supreme Court analyzed at length the parties’ respective burdens in an antitrust case. As Justice Mosk described, once a defendant sustains its initial burden of production, a plaintiff “who would bear the burden of proof by a preponderance of

evidence at trial, must present evidence that would allow a reasonable trier of fact to find in his favor on the unlawful-conspiracy issue by a preponderance of the evidence, that is, to find an unlawful conspiracy more likely than not.” (*Aguilar, supra*, 25 Cal.4th at p. 852.) And he went on: “Ambiguous evidence or inferences showing or implying conduct that is as consistent with permissible competition by independent actors as with unlawful conspiracy by colluding ones do not allow such a trier of fact so to find. Antitrust law, including the Cartwright Act, compels the result. Otherwise, it might effectively chill procompetitive conduct in the world at large, the very thing that it is designed to protect [citation] by subjecting it to undue costs in the judicial sphere. Therefore, in addition, the plaintiff must present evidence that tends to exclude, although it need not actually exclude, the possibility that the alleged conspirators acted independently rather than collusively.”<sup>18</sup> (*Ibid.*) “[I]f the court determines that any evidence or inference presented or drawn by the plaintiff indeed shows or implies unlawful conspiracy *more likely than* permissible competition, it must then deny the defendants’ motion for summary judgment, even in the face of contradictory evidence or inference presented or drawn by the defendants, because a reasonable trier of fact could find for the plaintiff. . . . [¶] But if the court determines that all of the evidence presented by the plaintiff, and all of the inferences drawn therefrom, show and imply unlawful conspiracy *only as likely as* permissible competition *or even less likely*, it must then grant the defendants’ motion for summary judgment . . . .” (*Id.* at pp. 856-857.)

Ultimately, *Aguilar* made clear that “while normal summary judgment principles apply in antitrust cases, ‘an important distinction exists.’ [Citation.] The distinction is that ‘certain “inferences may not be drawn from circumstantial evidence in an antitrust

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<sup>18</sup> The *Aguilar* opinion brought California in line with *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.* (1986) 475 U.S. 574, in which the United States Supreme Court set forth how courts should analyze summary judgment motions involving claims under the Sherman Act, as well as companion cases *Anderson v. Liberty Lobby, Inc.* (1986) 477 U.S. 242 and *Celotex Corp. v. Catrett* (1986) 477 U.S. 317. (*Aguilar, supra*, 25 Cal.4th at p. 848.) Doing so, *Aguilar* liberalized the granting of summary judgment in California. (*Ibid.*; *Nazir, supra*, 178 Cal.App.4th at pp. 248, 285.)

case.” ’ ’ (Eddins, supra, 134 Cal.App.4th at p. 328; see also Matsushita Elec. Industrial Co. v. Zenith Radio, supra, 475 U.S. at p. 588 [“conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy”]; Aguilar, supra, 25 Cal.4th at p. 852.) As a result, it has been said that when opposing a motion for summary judgment in the context of an antitrust claim alleging unlawful collusion, plaintiffs face a “demanding standard of proof.” (In re Baby Food Antitrust (3rd Cir. 1999) 166 F.3d 112, 118.)

On appeal, we review a grant of summary judgment de novo: “ ‘[W]e must decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. [Citations.]’ (Intel Corp. v. Hamidi (2003) 30 Cal.4th 1342, 1348.) Put another way, we exercise our independent judgment, and decide whether undisputed facts have been established that negate plaintiff’s claims.” (Nazir, supra, 178 Cal.App.4th at p. 253.)

With these guidelines in mind, we turn to the evidence presented below.

### **3. Defendants Produced Evidence Demonstrating That They Independently Set the Prices of Their Pharmaceuticals**

As noted, as the moving parties defendants bore the initial burden of making a prima facie showing of the nonexistence of any triable issue of material fact. (Aguilar, supra, 25 Cal.4th at p. 850; Code Civ. Proc., § 437c, subd. (o).) Here, a case alleging horizontal price fixing, this means making “a prima facie showing of the absence of any conspiracy.” (Aguilar, supra, 25 Cal.4th at p. 861.) Defendants carried this initial burden.

Each defendant submitted sworn testimony from its CEO that it did not participate in a conspiracy to set the prices of its pharmaceuticals above the price for the same drugs in Canada. Such testimony was in a declaration, a deposition, or both. (See Eddins, supra, 134 Cal.App.4th at p. 303, fn. 8 [“Each executive asserted his or her studio acted independently and at no time conferred or agreed with any other studio about the terms of its deal, and did not agree with Blockbuster or each other to deny comparable terms to the wholesale distributors.”].)

In addition, defendants submitted evidence by high-ranking employees with personal knowledge of defendants' price-setting practices. This evidence described the process by which each defendant set, and periodically reevaluated, the wholesale acquisition cost for their pharmaceuticals. Judge Brick summarized the process as described in the evidence this way: "Defendants . . . employed generally similar processes for setting prices. Pricing recommendations (including prices for Identified Drugs) were delegated to specific teams, after the consideration of a variety of factors relevant to market participants' willingness to pay (in a competitive market) for the drug. Some defendants also considered other factors: internal (availability of support resources) and external (public policy and/or public relations issues, inflation, etc.). Most engaged in pricing studies and/or testing their tentative price proposals under different market scenarios. Generally, after completing its analysis, the pricing team's recommendations were presented to a senior committee or executive management charged with review and approval."

It is probably sufficient to leave it at that—a succinct summary of defendants' testimony concerning their price-setting practices—and conclude that it was sufficient to carry their initial burden. (See *Aguilar, supra*, 25 Cal.4th at p. 861 ["Through the declarations by their officers and managers and similar employees—and through material from others including third parties—they presented evidence that would require a reasonable jury *not* to find any conspiracy more likely than not."].) Put otherwise, it is not necessary to detail the evidence offered by each and every defendant concerning their price-setting practices.

Nevertheless, we offer the testimony presented on behalf of one randomly-selected defendant—Allergan—as illustrative of the detail defendants provided concerning their independent procedures for arriving at the wholesale acquisition cost for their pharmaceuticals. This detail was shown by the declaration of Julian Gangolli, Allergan's corporate vice president and president, North America, who testified as follows:

"12. Allergan's Product Divisions set the United States prices for their products in a 'bottom-up' manner. Each Product Division has researchers and other employees that

collect, organize and review the necessary information to make pricing decisions for the Division's newly launched and existing products. It is an interactive process between the staff and the Marketing VP's and the Marketing VP's take an active role.

"13. The Division staff consider a variety of factors in developing and setting prices for its products in the United States, including: whether the product is a newly launched product or an existing product; whether the product is under the protection of a patent; Allergan's position in the therapeutic market for the given product; the uniqueness of the product in its therapeutic market; the value that patients, physicians and third party payors place on the product; the product's benefit to patients that receive it; the average cost per therapeutic dose; the presence and prices of competitors' products in the therapeutic market and the presence of other existing Allergan products in the relevant therapeutic market; the size of the potential patient pool; the business objectives of the Company and Division; the return on investment for the Division and the Company; and the costs of research, development, production and marketing.

"14. Ultimately, in setting its prices Allergan must focus on those individuals and groups with the power to influence drug purchasing decisions, such as physicians, patients and third party payors. Because competition is so intense, Allergan attempts to distinguish its products from its competitors' products and provide supportive clinical and pharmoeconomic information to physicians, patients and third party payors that Allergan's products address their health needs safely, effectively and better than the competition. In this effort, the Product Division Staff tracks how Allergan's products are perceived by physicians, patients and payors in comparison to its competitors. Allergan does not price its products with groups such as retail pharmacists in mind because these groups do not determine which pharmaceutical products are purchased or prescribed.

"15. The Product Division Staff constantly reviews and refines its pricing process and decisions. Allergan usually adjusts its product prices in the United States one to two times a year, to account for both inflation and the demands of the marketplace.

"16. To monitor the competitive conditions in the United States, the Product Division Staffs consult public sources of information regarding their competitors'

actions. Allergan does not, however, receive or solicit information from any pharmaceutical manufacturer about the prices of those companies' pharmaceutical products. Similarly, Allergan does not provide information to any pharmaceutical manufacturer regarding its pricing decisions.

“17. The Product Division Staff provides its United States pricing recommendations and supporting information to the Division's Marketing VP for review. The Marketing VP then provides his pricing recommendations to the President North America who in turn forwards them to the President and ultimately the CEO for approval.

“18. The President will either approve or reject the price recommendations of the Division's Marketing VP and President North America. Once approved, the President then notifies the CEO of the price recommendations. The CEO may ask questions of the Division Marketing VP's, President North American and President to clarify certain issues, but I cannot recall an instance where the CEO has overridden a pricing decision made by them.

“19. The aforementioned discussion describes Allergan's price-setting practices for its products in the United States. The Product Division Staffs and the respective Marketing VP's set the United States product prices independently of pricing decisions for Allergan's products in other countries. They do *not* consider the prices of Allergan's products in other countries, including Canada. In Canada, the prices of Allergan's products are largely dictated by government controls.

“20. Allergan also considers the placement of its products on the 'formularies' of Third Party Payors, such as health-care insurers or managed-care organizations. Third Party Payors create formularies to designate the drugs that are within their healthcare plans. They may also establish tiers within the formulary that set different levels of reimbursement for the drugs in their plans. A patient enrolled in a Third Party Payor plan may select a drug that is not on its formulary, but he will pay more for it than he would for a drug on formulary. Simply, a patient will pay more for a drug that is not on a preferred tier of a formulary.

“21. Because Third Party Payors control access to large pools of potential patients, they demand rebates from Allergan and other pharmaceutical manufacturers in return for placing the manufacturer’s products on their formularies. Allergan seeks to negotiate with Third Party Payors so that its products are placed on the most favorable formulary tiers.

“22. Formulary placement is very important to Allergan and has tremendous impact on the amount of Allergan’s products that are sold. If a Third Party Payor refuses to place Allergan’s products on its formulary or declines to place them in a preferred tier, Allergan could lose substantial numbers of sales because physicians and patients will seek products that are on the formulary and its preferred tiers. As such, Allergan aggressively competes with other manufacturers to ensure that its products are on the formularies of Third Party Payors. The effect of this competition is that Allergan’s rebates to Third Party Payors and government agencies ultimately reduce the net price of its products.”

Similar declarations were submitted on behalf of other defendants: Patrick Bruen, marketing advisor, U.S. strategic pricing, for Eli Lilly and Company; J. Martin Carroll, president and chief operating officer, and Christine Marsh, executive director of contracts, both of Boehringer; Joaquin Duato, president of Ortho Biotech, Inc.; Pete Feldman, senior director, Strategic Planning and Operation, oncology business unit of Amgen; David Moules, vice president of strategic pricing, contracting and marketing of Smith Kline Beecham Corp. dba. GlaxoSmithKline; Kendall O’Brien, president, chief financial officer and vice president of finance of Ortho-McNeil Pharmaceutical; Kevin O’Leary, vice president of customer planning and contracting of Roche Laboratories Inc. (a wholly-owned subsidiary of Hoffman-La Roche Inc.); Robert Spurr, vice president of the strategic business group of Ortho-McNeil Janssen Pharmaceutical Services; Raymond Tiedemann, vice president, global pricing, forecasting and contracting at Wyeth Pharmaceuticals, Inc.; Janet Vergis, president of Janssen Pharmaceutical, Inc.; and

John R. Freeberry, former head of the pricing strategy group of AstraZeneca Pharmaceuticals LP.<sup>19</sup>

#### **4. Plaintiffs' Burden of Proof**

##### **A. Direct Evidence of a Conspiracy**

###### **i. The CPI Theory**

With the burden shifted to them, plaintiffs were obligated to present evidence that would permit a reasonable trier of fact to find the existence of a conspiracy more likely than not. This, Judge Brick held, plaintiffs failed to do. Plaintiffs challenge this holding on appeal, relying, as they did below, on what they claim is direct evidence. But not direct evidence of the pleaded Canadian floor theory, but direct evidence that defendants conspired to peg increases in their pharmaceutical prices to the CPI.<sup>20</sup> Plaintiffs' challenge fails, both procedurally and substantively.

As plaintiffs describe it in their opening brief, the price of prescription drugs rose precipitously in the 1980's, such that by the early 1990's there was significant public and political criticism of the increasing drug prices. In order to stave off potential price

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<sup>19</sup> Plaintiffs argued below that defendants failed to meet their initial burden because their evidence consisted merely of "bald denials" that they engaged in collusive behavior. This, they argued, was insufficient under *Aguilar*. As is seen from the foregoing, plaintiffs' description was myopic. The evidence did more than baldly assert that defendants set their prices independently—it established that prices were independently determined, based upon defendants' individual market analyses which generally utilized public information. In any event, plaintiffs do not reiterate this argument on appeal, which we construe as a concession that defendants' evidence satisfied their initial burden of production.

<sup>20</sup> Plaintiffs variously describe this conspiracy in their opening brief: "to voluntarily restrain their price increases"; "to not increase their prices in excess of the CPI"; "to hold . . . the increase in the weighted average of changes in the net prices . . . to an approximate level not greater than . . . the Consumer Price Index"; "to limit [a company's] price increases, if any, on the entire line of its prescription drug products in any calendar year to an amount not to exceed the increase in the CPI"; "to peg future price increases to the CPI"; to keep "prices in line with the CPI or CPI plus 1 to two-and-a-half percent." And it appears that at some point, plaintiffs' theory morphed into a conspiracy to use the CPI as a floor, rather than a ceiling.

regulation by the government, PhRMA’s board of directors passed a resolution—what plaintiffs called a “Pledge”—described by them as follows. The Pledge directed PhRMA’s then-chief to “discuss with President-Elect Clinton, his transition staff, members of his Administration and members of Congress whether these Government officials would have an interest in exploring whether individual pharmaceutical manufacturers should undertake voluntarily and independently to hold for a reasonable period of time—given stable market conditions and government policies supportive of innovation—the increase in the weighted average of changes in the net prices of that company’s prescription drug products to an approximate level not greater than one or more externally controlled indices such as the Consumer Price Index, and whether such actions should be confirmed to the Government by a series of reports to document actual results of these undertakings.”<sup>21</sup> This resulted in John Ferguson, then counsel for PhRMA, sending a request for a business review letter to the United States Department of Justice, seeking an antitrust exemption permitting pharmaceutical companies to agree to use the annual increase in the CPI as a ceiling on pharmaceutical price increases.<sup>22</sup>

According to plaintiffs, their evidence showed that defendants then adopted this pricing policy which, again according to plaintiffs, constituted a per se violation of California’s antitrust law. But whether plaintiffs’ evidence concerning the “Pledge” in fact showed what they claimed, it is irrelevant. As Judge Brick properly concluded, such evidence could not defeat summary judgment because plaintiffs never pleaded any conspiracy related to the CPI. The only conspiracy pleaded in the third amended complaint—and the sole focus of discovery—was the Canadian floor conspiracy.

The scope of a motion for summary judgment is determined by the pleadings. (*Rosales v. Battle* (2003) 113 Cal.App.4th 1178, 1182), a principle plaintiffs conceded in their opposition to the joint motion: “each of Plaintiffs’ Cartwright Act claims, as stated

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<sup>21</sup> As discussed above, Judge Brick properly sustained defendants’ objections to all documents pertaining to the “Pledge.” We discuss these documents to provide context for plaintiffs’ opposition, not because they have any evidentiary value.

<sup>22</sup> The request was ultimately denied.

in the Third Amended Complaint, controls the present motion.” In light of the specificity-in-pleading requirements in an antitrust case (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 196; *Chicago Title, supra*, 69 Cal. 2d at pp. 317, 326-328), Judge Sabraw twice required plaintiffs to amend their complaint to allege their conspiracy claims in greater detail. The result was the third amended complaint, a complaint that can only be read to allege the Canadian floor conspiracy. It cannot be fairly read to incorporate a conspiracy among defendants to tie price increases to the CPI.

Our conclusion finds support throughout the third amended complaint, where plaintiffs made repeated reference to the Canadian floor conspiracy. As quoted above, paragraph five summarized the alleged conspiratorial agreement, as follows:

“5. The Defendants, pursuant to their unlawful combination and agreement, charge more for their drugs sold in the United States, including California, than they charge for the same drugs sold outside of the United States, including Canada. The Defendants agreed to eliminate price competition and fix prices in the United States, including California, by, *inter alia*:

“(a) Using the prices charged in Canada as a floor or minimum price level;

“(b) Acting in concert to restrict reimportation and/or purchase of lower priced foreign drugs;

“(c) Restricting price competition from generics and brand name variations of existing drugs;

“(d) Selling drugs for fixed prices above the prices in Canada (so that the prices charged in the United States, including California, would be higher than the prices for the same drugs sold outside of the United States, including Canada);

“(e) Agreeing that they would not sell their drugs at or below the price at which they sold those same drugs in Canada, and/or other countries outside of the United States; and

“(f) Agreeing and ensuring each other that they would maintain their agreement to charge more in the United States, including California, than they charged outside of the United States, particularly Canada.”

And then there was paragraph 6: “The Defendants sell their drugs in the United States, including California, for prices that are 50% to 400% higher than the price those same drugs are sold for in Canada and countries outside of the United States, such as Mexico, Ireland, and the United Kingdom. . . .” And paragraph 8: “The character and nature of the agreement among and between the Defendants are that the Defendants agreed not to charge at or below the prices charged for the same drugs in Canada and elsewhere . . . ; that the prices charged in the United States, including California, will be higher than those charged outside of the United States, such as Canada; that the Defendant would continue to abide by the agreement to charge higher prices in the United States, including California, than they charge for the same drugs in Canada and elsewhere . . . .” Many other such examples are peppered throughout the third amended complaint, including in the causes of action and prayer for relief. In short, “Canada” or “Canadian” are mentioned at least 38 times, “Consumer Price Index” or “CPI” not once.<sup>23</sup>

Plaintiffs attempt to circumvent this failure by arguing that the third amended complaint alleged one, generic conspiracy—“Defendants agreed to eliminate price competition and fix prices in the United States”—that was broad enough to encompass the CPI theory, as well as the Canadian floor conspiracy. This is what they argue: the third amended complaint “alleges one conspiracy, not several separate conspiracies. Paragraph 5 of the [third amended complaint] alleges: ‘The Defendants agreed to eliminate price competition and fix prices in the United States, including California, by, *inter alia*:’ [Citation] [¶] The [third amended complaint] goes on to allege a series of overt acts engaged in by the defendants. The so-called ‘Canadian Floor Conspiracy,’ so named by the defendants and picked up by the lower court to limit plaintiffs’ discovery, is contained in only one of the subparagraphs, out of 6 sub-paragraphs, following the

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<sup>23</sup> In their reply brief, plaintiffs attempt to justify this omission: “Plaintiffs do not contend that the ‘pledge injured them, as indeed it is hard to see how a maximum price agreement hurt the pharmacists. This in itself explains why the ‘pledge’ or ‘CPI’ was not mentioned in the [third amended complaint] . . . .”

*‘inter alia.’* The other 5 sub-paragraphs allege acts to limit re-importation, acting to limit price competition from generics and brand name variations, selling drugs at fixed prices higher in the United States than in other countries, not selling drugs in the United States at or lower than the prices charged in other countries, agreeing and ensuring each other that they would maintain their agreement to charge more in the United States.” This argument is without merit.

As noted, a claimed antitrust violation must be pleaded with specificity. The conspiracy plaintiffs now claim to assert—that defendants generally conspired to fix pharmaceutical prices—would not have satisfied these specificity-in-pleading requirements. Nor do the pleading requirements permit plaintiffs to rely on the vagaries of *“inter alia”* to bring a new, unpleaded conspiracy into the case. Indeed, this is precisely why Judge Sabraw twice required plaintiffs to amend their complaint.

Our reading of the third amended complaint is confirmed by Judge Sabraw’s orders on defendants’ demurrers. Each time he sustained the demurrers, he required plaintiffs to provide further facts concerning the precise price-fixing conspiracy at issue. Each time plaintiffs responded by providing greater details about the Canadian floor conspiracy. The following sequence makes the point:

In his April 18, 2005 order sustaining the demurrer to the second amended complaint, Judge Sabraw said that “The Court finds that Plaintiffs’ theories are not defined adequately in the [Second] Amended Complaint. The [Second] Amended Complaint alleges generally that Defendants have conspired to inflate the prices of prescription drugs sold in California, but does not allege the substance of the unlawful agreement or how it is implemented.

“At the hearing, Plaintiffs stated that their claim is that all of the Defendants have agreed not to sell any prescription drugs in California for prices that are lower than the price they charge in Canada. The claim is apparently in the nature of horizontal price fixing because the Defendants all allegedly agreed to restrict competition in California by letting the prices charged in Canada operate as a floor or minimum price level. Such a claim would be clear. In addition, this is a recognized antitrust claim. [Citation.]

Plaintiffs may file a [Third] Amended Complaint that articulates this (or any other) claim clearly.

“Plaintiffs must support their claims with factual allegations. The factual allegations must be related to the claims. At the hearing the Plaintiffs articulated the terms of an alleged industry-wide agreement, but they must also allege overt acts in furtherance of that industry-wide agreement, the means used to effectuate the industry-wide agreement, and the effects of the conspiracy.

“The [Third] Amended Complaint must allege facts relating to the price fixing conspiracy. Plaintiffs cannot simply allege the existence of an industry-wide conspiracy without reference to specific facts. Allegations might include that the prices of prescription drugs are uniformly higher in California than Canada, prices of specific drugs in the United States rise and fall depending on the prices approved by regulatory authorities in Canada, profit margins are higher in the United States than in Canada, the alleged cartel has ‘punished’ members of the cartel that have lowered their California prices below the Canada prices, and other matters.”<sup>24</sup>

Likewise, Judge Sabraw’s July 1, 2005 order sustaining defendants’ demurrer to plaintiffs’ fourth cause of action described the case as “a complex case alleging antitrust claims against all the major companies in a large industry,” and concluded that it was “appropriate to focus the claims in this case on the central allegation that all Defendants have unlawfully conspired or colluded to sell their drugs in California for prices that are higher than the prices charged in Canada.”

Beyond the language of the third amended complaint, we find support for our conclusion elsewhere in the record. For example, in his April 18, 2005 case management

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<sup>24</sup> In a case management order ten days later, Judge Sabraw reiterated that in their third amended complaint “Plaintiffs are encouraged to clarify whether their claim is that Defendants agreed not to sell drugs in California for below the Canada price (but permit independent competition above that floor) or to sell drugs for fixed prices above the Canada price (so the price in California would fluctuate in tandem with the Canada price) or to sell drugs for fixed prices (that happen to be above the Canada price) or some combination of these theories.”

order, Judge Sabraw stated, “This lawsuit appears to allege that the Defendants have conspired not to sell prescription drugs in California for prices that are below or equal to the prices in Canada. The trial will be focused on the claims asserted and the discovery should be focused on obtaining evidence to prove or disprove those claims. This is not a general administrative investigation into the business practices of the pharmaceutical industry.”

Additionally, the Identified Drugs that were the focal point of discovery were selected in part because they were sold in both the United States and Canada. In his April 28, 2005 order recommending limitations for discovery, Judge Sabraw suggested that the “average disparity from Canada price” would be a factor in selecting the Identified Drugs. And in his July 11, 2005 order listing the Identified Drugs, he represented that they were selected in part based on defendants’ representations that their lists identified drugs that were marketed in the United States and Canada.

In a June 2006 order concerning plaintiffs’ claims that defendants improperly redacted documents relating to PhRMA, Judge Sabraw ordered plaintiffs to identify the 3,000 documents they claimed were wrongly redacted and PhRMA to then produce unredacted copies of the documents for in camera review. Then, after reviewing the documents, Judge Sabraw observed, “PhRMA has taken a narrow view of what constitutes relevant information. For example, PhRMA has not produced information concerning the importation of drugs from Canada. Although this information might not be directly relevant to the existence of a conspiracy to use the Canadian price as a floor for drugs in California, it is relevant for purposes of discovery. The Court could identify, and has identified, information that is related to collaboration among the Manufacturer Defendants, to the prices of drugs in Canada, to the antitrust concerns of PhRMA, and to other matters that are relevant as the Court has defined the scope of relevance in prior orders.”

In these and many other instances, Judge Sabraw conveyed his understanding that the case was about the Canadian floor conspiracy. Not once did plaintiffs attempt to correct this understanding. Not once did they suggest that any CPI conspiracy was in

play. And not once did they attempt to file an amended complaint seeking to allege the CPI conspiracy.

Defendants evidenced a similar understanding. In their moving papers in support of the joint motion, they summarized plaintiffs' allegations as follows: "Plaintiffs claim that Manufacturer Defendants' CEOs orchestrated a price-fixing conspiracy pursuant to which each Defendant agreed to price its drugs in the United States higher than the prices charged for similar drugs in Canada. As the Court ruled in its Order on Defendants' Demurrer to Plaintiffs' Third Amended Complaint: '[I]t is appropriate to focus the claims in this case on the central allegation that all Defendants have unlawfully conspired or colluded to sell their drugs in California for prices that are higher than the prices charged in Canada.' "

JJHCS's moving papers were similar, providing this detailed summary in its statement of facts: "This Court has repeatedly stated that 'the claims in this case concern an alleged multilateral conspiracy among the defendants to not sell drugs in California below the Canada price. Order of Aug. 28, 2006 . . .; see also Order of Apr. 18, 2005 . . . ('At the hearing, Plaintiffs stated that their claim is that all of the Defendants have agreed not to sell any prescription drugs in California for prices that are lower than the price they charge in Canada.');

Hr'g Tr. . . . dated June 30, 2005 . . . ('And indeed when you look at the contentions here [in the Third Amended Complaint], it's just simply that there's this floor, for lack of a better description, that is alleged to be agreed to by the manufacturers, the defendants in this instance.');

Order of July 1, 2005 . . . (stating that the focus of this case is on 'the central allegation that all Defendants have unlawfully conspired or colluded to sell their drugs in California for prices that are higher than the prices charged in Canada').

"Plaintiffs have also consistently represented that their claim centers on an alleged agreement among Defendants to maintain prices in California that are higher than those charged for the same pharmaceutical products in Canada. In describing their claim at the hearing on Defendants' demurrer to the Second Amended Complaint, Plaintiffs stated: [¶] 'What we've charged here is—and it's very rudimentary and elementary and the

defendants have acknowledged it—that each of these defendants that we have named have conspired to charge higher prices in the United States than they do in other countries, including Canada. So the charge is here. They either fix the price here, they either had an agreement to charge higher prices here or they did not.’ [¶] Hr’g Tr. . . . dated Apr. 8, 2005 . . . . Plaintiffs have repeatedly characterized their claim in this manner throughout the case. See, e.g., [Third Amended Complaint ¶¶ 5-6; Apr. 8, 2005 Tr. . . . (‘In our case, we have said over and over again the agreement is and is [sic] specific about this, the agreement is don’t charge—you must charge higher than you are charging in Canada. That’s the whole point of it.’); June 30, 2005 Tr. . . . . (‘The parallel conduct, I would respectfully submit and as we’ve alleged in the complaint, is obvious. The obvious nature of the parallel conduct is that all these people are charging more in the United States and Canada than they are charging in Canada.’).”

But Judge Sabraw and defendants were not alone in operating under the understanding that the conspiracy at issue was the Canadian floor conspiracy. So, too, were plaintiffs themselves. As late as November 13, 2006, a mere 17 days before their oppositions to the merits motions were due, plaintiffs’ request for a continuance of the merits motions was in part premised on November 10, 2006 deposition testimony of Bristol Myers Squibb CEO Peter Dolan which, plaintiffs argued, consisted of newly discovered evidence because “[c]ontrary to prior testimony of PMK witnesses and CEOs of Defendants, Mr. Dolan testified that prices and price-setting practices regarding the United States and Canada were discussed at the meetings conduct at PhRMA.”<sup>25</sup> Plaintiffs’ request made no mention of the CPI theory.

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<sup>25</sup> Plaintiffs had previously sought to reopen Dolan’s apex deposition on other grounds. In an August 28, 2006 order denying that request, Judge Sabraw observed, “The Court will presume for this motion that the allegedly collusive and illegal settlement between Bristol Myers Squibb and Apotex is relevant to the claims in this case. The Court notes, however, that the claims in this case concern an alleged multilateral conspiracy among the defendants to not sell drugs in California below the Canada price. The claims in this case do not encompass every potentially unlawful action that any of the defendants may have engaged in for the purpose of obtaining higher prices for their products.”

Plaintiffs took a similar position on December 4, 2006, one day before Amgen's merits motion was set to be heard. On that day, just after Judge Sabraw issued his tentative ruling granting summary judgment based on the pass-on defense, plaintiffs filed their unsuccessful request to disqualify him. In it, they explained, "This private antitrust suit is the only case existing in the U.S. challenging the pricing practices of defendants who are the largest industrial companies in the world in terms of net profits. For many years defendants have established a substantial pricing differential between the US, including California and other foreign countries, particularly Canada. These substantial price differentials have not and could not be explained by usual economic standards, but are inflated artificially. . . ." Plaintiffs then went on to quote paragraph 5 of the third amended complaint, which detailed the Canadian floor conspiracy.

Indeed, plaintiffs continued to describe the conspiracy as that involving Canadian prices even *after* the matter was remanded and assigned to Judge Brick. In their September 14, 2010 statement seeking Judge Brick's disqualification, plaintiffs reiterated their claim that the lawsuit was "the only case existing in the U.S. challenging the pricing practices of defendants who are the largest industrial companies in the world in terms of net profits. For many years defendants have established a substantial pricing differential between the U.S. including California and other foreign countries, particularly Canada."

In sum, as plaintiffs themselves repeatedly confirmed, this case was about one conspiracy, and one conspiracy only—the Canadian floor conspiracy. This was the conspiracy pleaded. The CPI conspiracy was not. It could not defeat summary judgment. (See, e.g., *Laabs v. Victorville* (2008) 163 Cal.App.4th 1242, 1258 [in opposition to city's motion for summary judgment, plaintiff could not raise theory that city's placement of street lighting constituted dangerous condition, as theory was not mentioned in, or encompassed by, either original or amended complaint]; *Nein v. HostPro, Inc.* (2009) 174 Cal.App.4th 833, 851 [plaintiff could not raise issue of oral contract in opposition to motion for summary judgment where operative complaint did not allege that terms of employment relationship were by oral agreement]; *Bosetti v. United States Life Ins. Co. in City of New York* (2009) 175 Cal.App.4th 1208, 1225

[plaintiff could not defeat motion for summary judgment by raising at hearing theory of liability not alleged in complaint].)

Like plaintiffs here, plaintiff in *Aguilar* made a similar attempt to change theories late in the game. The Court of Appeal and Supreme Court rejected the attempt, the Supreme Court noting as follows: “In alleging facts for her Cartwright Act cause of action, Aguilar proceeded on a theory, which was legally sound [citation], that the assertedly unlawful conspiracy consisted of an agreement among the petroleum companies as competitors to restrict the output of CARB gasoline and to raise its price, and was unlawful per se without regard to any of its effects. In granting the petroleum companies summary judgment, the superior court did so on that theory. On appeal, Aguilar apparently attempts to introduce an alternative theory, which was also legally sound [citation], that the assertedly unlawful conspiracy consisted of the various exchange agreements entered into by the various petroleum companies, and was unlawful because of its effects. The Court of Appeal rejected any such attempt as too late. To the extent that Aguilar makes the same attempt on review, we reject it for the same reason.” (*Aguilar, supra*, 25 Cal.4th at p. 866, fn. 35.) The same applies here.

**ii. Defendants Would Be Unduly Prejudiced By An Amendment Asserting The CPI Theory**

When questioned by Judge Brick at the hearing on the motions about where in the third amended complaint the CPI theory was alleged, plaintiffs’ counsel responded that plaintiffs would ordinarily be permitted leave to amend their complaint up until the close of trial. We construe this, as did Judge Brick, as a suggestion that they should be permitted to amend the third amended complaint to allege the CPI theory. This suggestion is wrong.

Code of Civil Procedure section 473 authorizes the trial court, in its discretion, to allow amendments to pleadings “in furtherance of justice”; section 576 permits amendment during trial to conform to proof. And, of course, trial courts are to show “great liberality” in permitting amendments. (*Barba v. Superior Court* (1966) 239 Cal.App.2d 572, 577; *Desny v. Wilder* (1956) 46 Cal.2d 715, 751.) However, where

the rights of the adverse party would be prejudiced by the amendment, granting leave to amend constitutes an abuse of discretion. (*Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 909; *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 354-355 [no error in denying leave to amend]; *Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 175 [same].)

Passing over the glaring fact that plaintiffs never moved for leave to amend to allege the CPI theory,<sup>26</sup> any such amendment would have subjected defendants to extreme prejudice. We cannot state it better than did Judge Brick: plaintiffs' argument that they would have been granted leave to amend up until the close of trial "ignores the procedural posture of this case, including this Court's careful efforts to require a clear statement of Plaintiffs' claims and to manage discovery with respect to those claims for a period of two years. The prejudice to Defendants of starting over now is apparent."

Three times plaintiffs amended their complaint to clarify the alleged conspiracy at issue, finally succeeding. Following this, plaintiffs engaged in extensive discovery for almost two years. Plaintiffs appeared at almost monthly case management conferences before Judge Sabraw, who managed discovery based on the allegations in the third amended complaint. This included seemingly endless discovery disputes, which resulted in more than 37 formal motions before Judge Sabraw, not to mention countless disputes resolved informally. Defendants responded to voluminous written discovery requests,

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<sup>26</sup> Plaintiffs apparently had at least two warnings that there appeared to be a disconnect between the conspiracy alleged in the third amended complaint and the conspiracy argued in their opposition to the merits motions. As Judge Brick explained in his order granting the merits motions: "[O]ne of the court's last orders before the summary judgment motions were originally set to be heard in December 2006 expressly declined to resolve 'whether or in what circumstances Plaintiffs might be required to amend their Complaint if the evidence supports claims that are different from the ones asserts in the Third amended Complaint.' [Citation.] Then, before the February 11 hearings, this Court's tentative ruling asked Plaintiffs to explain where the CPI theory is pleaded." Despite this, plaintiffs never requested leave to amend, electing instead to hang their hats on their insistence that the third amended complaint encompassed the CPI theory.

producing, in defendants' estimation, over one million pages of documents.<sup>27</sup> Deposition discovery included plaintiffs deposing some 60 witnesses, including 19 apex deponents, not to mention the numerous depositions following the motions, including depositions of all but one of the officers and employees who submitted declarations in support of the motions. And none of it pertained to the CPI theory.

Defendants prepared multiple summary judgment motions based on the conspiracy alleged in the third amended complaint. Permitting plaintiffs to change course at this late date, abruptly drop the Canadian floor conspiracy, and start over again with a new conspiracy theory would essentially nullify everything the parties did for two years. Simply put, leave to amend under these circumstances would be unduly prejudicial.<sup>28</sup>

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<sup>27</sup> Again, plaintiffs do not dispute defendants' representation.

<sup>28</sup> It is perhaps the case that any attempt to amend would fail because the proposed claim would be subject to demurrer as being barred by collateral estoppel. (*Yee v. MobileHome Park Rental Review Bd.* (1998) 62 Cal.App.4th 1409, 1429; see generally *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 230 [proposed amendment barred by statute of limitations and no basis for "relation back"].) Specifically:

*In re Brand Name Prescription Drugs Antitrust Litigation, supra*, 2000 WL 204064 (*In re Brand Name*) was a suit by a nationwide class of retail pharmacies against wholesalers and manufacturers of brand name prescription drugs alleging violations of the Sherman Act, 15 United States Code section 1 et seq. As described by the district court: "Class Plaintiffs claim that Defendants entered into a conspiracy to deny them discounts and to peg any future price increases to gains in the Consumer Price Index ('CPI')." (*In re Brand Name, supra*, at \*1.) Describing plaintiffs' proposed methodology as "ill-defined and vague" and "neither capable of evaluation nor meaningful analysis" (*id.* at \*4), the district court concluded that plaintiffs presented no evidence that they were injured by the CPI conspiracy or that would support a jury's award of damages to compensate for any injury (*id.* at \*5) and that plaintiffs demonstrated no basis for the entry of an injunction.

Defendants claimed below that the issue litigated in *In re Brand Name* and the CPI theory belatedly asserted by plaintiffs are identical, and that the CPI issue was decided unfavorably to plaintiffs there. At the hearing on the merits motions, defendants represented, and plaintiffs did not dispute—and indeed, at oral argument here conceded—that plaintiffs here were all class members in the *In re Brand Name* case, and that one of the plaintiffs here was also a named plaintiff there. Thus, defendants argue that collateral estoppel would apply. (See *Pacific Lumber Co. v. State Water Resources*

### iii. Other Direct Evidence: Testimony of Peter Rost

Facing a failure of their unpleaded CPI theory, plaintiffs contend that they in fact produced other direct evidence, this bearing on the Canadian floor conspiracy.<sup>29</sup> This evidence was the entire, 255-page transcript from the deposition of Peter Rost, a former Wyeth vice president, which plaintiffs claim demonstrates an industry-wide agreement to never cut pharmaceutical drug prices. As plaintiffs describe it: “Dr. Rost spent his life in the pharmaceutical industry and has worked for several pharmaceutical manufacturers. While with Wyeth, he was assigned to the Nordic region and in that capacity had pricing authority. When he cut list prices for Wyeth in that region he was immediately confronted by representatives of the pharmaceutical manufacturers. As he testified, first he was contacted by email from the president of the local pharmaceutical manufacturers association, Horken Mondel, and told to ‘tone down his marketing efforts.’ [Citation.] He was then asked by Mr. Mondel to meet with him over lunch. In this meeting, at a private club, ‘he basically asked me to compete less aggressively.’ [Citation.] When this was ineffective, the General Manager for AstraZeneca, Steiner Hoeg, contacted Dr. Rost’s superior, Rume Bremburg, and ‘asked to meet with us privately regarding our marketing and pricing of Lanzo.’ ” At the meeting, Mr. Hoeg “was very upset that we have started competing on price and that we were applying this strategy. And he told us that we are all going to lose out because of this . . . [¶] . . . [¶] because it was going to hurt the industry in general and . . . basically I had broken ranks with the industry. It is like swearing in church. You are lowering prices? You are a branded company? You don’t do that.’ ”

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*Control Bd.* (2006) 37 Cal.4th 921, 943.) This issue was not fully developed or briefed below, and is not necessary to our decision. We thus do not decide it here.

<sup>29</sup> Defendants contend that plaintiffs have abandoned this theory in favor of the CPI theory. They cite plaintiffs’ lead counsel’s statement at the hearing on the pass-on motions that “There is an outstanding agreement to fix prices. . . . By the way, it looks like the floor is CPI, not Canada. CPI long left Canada. But now it’s CPI.” This contention is contrary to plaintiffs’ representation at the hearing on the merits motions, as well as in their briefs on appeal, that they are still pursuing the Canadian floor conspiracy.

Plaintiffs submit that Rost’s testimony constituted “[d]irect evidence, taken in the context of all of plaintiffs’ evidence, requir[ing] a trial and denial of summary judgment.”<sup>30</sup> We disagree, as any fair reading of Rost’s testimony in context makes clear that the conversations he described involved a Swedish trade association and a Swedish competitor (AztraZeneca) who were pressuring him to modify his aggressive pricing of a single product (Lanzo)—in Sweden, in 2000.

**v. Other Direct Evidence: Suppression of Illegal Imports of Prescription Drugs**

Plaintiffs also contend that evidence of defendants’ efforts to prevent re-importation of their drugs from Canada satisfied their burden of proof. As they put it in their opening brief: “As the PhRMA documents demonstrate, the industry was concerned about the U.S.-foreign price differentials and the re-importation of drugs because it put downward pressure on the U.S. prices and brought the threat of price controls. One remedy was to curb the supply of drugs to internet pharmacies. The evidence shows that GSK led the way, but they made sure that the other industry members followed suit in order to avoid retaliation against GSK. The evidence further shows that Pfizer followed suit even though the GSK action was not yet public and that most of the defendants met at this time to discuss the re-importation issue and responses to it. Eventually, all but two of the defendant manufactures [*sic*] took action to curb re-importation.” This argument is problematic for multiple reasons.

First, in claimed support of this argument, plaintiffs rely on Exhibits 111 and 117. As discussed in section E, above, Judge Brick properly sustained defendants’ objections to both exhibits. But even if that evidence were before us, the argument would still fail, because evidence of defendants’ attempts to block Canadian imports is not evidence of an agreement to fix prices. At best, such evidence might demonstrate a “plus factor,” an

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<sup>30</sup> While plaintiffs claim on appeal that Rost’s testimony is so significant that it defeats summary judgment, they did not even mention him in their opposition below, nor cite his testimony in their separate statement of facts. This failure alone is reason enough for us to disregard it. (Code Civ. Proc., § 437c, subd. (b)(3).)

issue we need not reach given the absence of evidence of parallel pricing, discussed below.

**B. Plaintiffs Failed to Present Indirect Evidence Creating a Triable Issue of Fact Concerning the Existence of the Canadian Floor Conspiracy**

Given the absence of *direct* evidence supporting the Canadian floor conspiracy, we lastly turn to whether plaintiffs presented any *indirect* evidence of it. As detailed above, in an antitrust case such as this, circumstantial evidence often takes the form of “conscious parallelism,” or “a pattern of uniform business conduct . . . .” (*Eddins, supra*, 134 Cal.App.4th at pp. 304-305.) Although plaintiffs need not establish “exact uniformity of detail . . . more than a general similarity of action is required for a finding of consciously parallel behavior.” (*Harlem River Cons. Co-op. v. Associated Groc., supra*, 408 F.Supp. 1251, 1277.)

The starting point for plaintiffs was a showing that defendants engaged in parallel conduct, or that they consistently priced the pharmaceuticals they sell in the United States higher than those sold in Canada. Despite the extensive discovery on defendants’ price setting practices for the 111 “Identified Drugs,” plaintiffs failed to produce evidence showing parallel conduct on price-setting. Simply, the record contains no competent evidence that defendants set their prices on their Identified Drugs in the United States higher than the prices for those same drugs in Canada.

Plaintiffs’ additional fact no. 3 asserted that “Defendants’ drug prices are higher in [the United States] than they are for the same drugs sold in the [Canada].” The claimed supporting evidence was (1) a 2004 Congressional Research Service report concluding that, on average, brand name drugs were priced 70% higher in the United States than in Canada; and (2) a 1992 General Accounting Office report entitled “Prescription Drugs: Companies Typically Charge More in the United States Than in Canada.” Neither is availing.

As to the Congressional Research Service Report—Exhibit 7 to the Alioto declaration—Judge Brick sustained defendants’ objection on hearsay grounds. Plaintiffs do not challenge that ruling, and the report is not before us.

As to the General Accounting Office report—Exhibit 4 to the Alioto declaration—not only does it predate the filing of this lawsuit by 12 years, but it does not constitute competent evidence that defendants priced their drugs higher in the United States than in Canada. The study was based on pharmaceutical prices as of May 1, 1991, a time frame hardly relevant to a lawsuit filed in August 2004. And it was based on 121 pharmaceuticals, only an estimated 33 of which appear, as best as we can determine, to have been manufactured by defendants. Those drugs do not represent all defendants, and some of the studied drugs were less expensive in the United States than in Canada.

To be sure, plaintiffs submitted voluminous opposition to the merits motions—over 2,000 pages in 77 separate exhibits attached to the Alioto declaration. Defendants lodged 45 objections to plaintiffs’ evidence, and Judge Brick sustained 32 of them, rendering a significant portion of plaintiffs’ evidence inadmissible.<sup>31</sup> Still, they were left with numerous exhibits, comprising hundreds of pages. But nothing in this evidence demonstrated that the prices on defendants’ Canadian pharmaceuticals were consistently below the prices on their American counterparts.

In light of plaintiffs’ failure to introduce either direct evidence concerning the Canadian floor theory or evidence of parallel pricing, they failed to satisfy their burden of producing evidence showing the alleged conspiracy was more likely than not. Plaintiffs demonstrated no triable issue of material fact, and their antitrust case was properly disposed of by summary judgment. (See *Aguilar, supra*, 25 Cal.4th 826; *Filco v. Amana Refrigeration, Inc.* (9th cir. 1983) 709 F.2d 1257, 1266-1267 [affirming summary judgment for defendants where plaintiffs failed to provide evidence that defendants priced at a fixed level; no evidence of parallel conduct]; *Zoslaw v. MCA Distributing Corp.* (9th Cir. 1982) 693 F.2d 870, 884 [finding of parallel conduct lacking where evidence demonstrated significant variation in defendants’ practices and pricing].)<sup>32</sup>

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<sup>31</sup> As discussed *ante*, plaintiffs challenge Judge Brick’s evidentiary rulings only as to three specific exhibits—1, 111, 117—a challenge we concluded was without merit.

<sup>32</sup> We need not consider whether Amgen, PhRMA, and JJHCS were entitled to separate summary judgments.

**DISPOSITION**

The judgment for defendants is affirmed.

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Richman, J.

We concur:

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Kline, P.J.

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Haerle, J.