No. _____

In The
Supreme Court of the United States

SUMOTEXT CORPORATION,

Petitioner,

v.

ZOOVE, INC., VIRTUAL HOLD TECHNOLOGY, LLC, STARSTEVE, LLC, VHT STARSTAR LLC, and MBLOX, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT L. SIRIANNI, JR., ESQUIRE
BROWNSTONE, P.A.
P.O. Box 2047
Winter Park, FL 32790
(407) 388-1900
Robert@BrownstoneLaw.com
Counsel for Petitioner

February 24, 2022

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Under the Sherman Act's burden-shifting "rule of reason" framework, an antitrust plaintiff bears the initial burden of proving that a challenged restraint harms competition "in the relevant market." The relevant market includes the product at issue and all economic substitutes for the product. Accordingly, absent proof of actual detrimental effects on competition, this Court has stated that "[w]hat is called for is an appraisal of the cross-elasticity of demand" between the affected product and any claimed substitutes for that product. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394-395 (1956). "Because the ability of customers to turn to other suppliers restrains a firm from raising prices above the competitive level, the definition of the "relevant market" rests on a determination of available substitutes." *Id*.

The Questions Presented are:

1. Whether the Ninth Circuit applies an unduly lax standard for showing whether other suitable economic substitutes are available for the products at issue, in conflict with the standard applied in other Circuits and in this Court.

2. Whether the Ninth Circuit applies an unduly lax standard for showing whether an expert's testimony is relevant and reliable, in conflict with the standard set forth in Federal Rule of Evidence 702 and as applied in other Circuits and in this Court.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Sumotext Corp., which was Appellant below and Plaintiff in the District Court, has no parent corporation and no publicly traded corporation currently owns 10% or more of its stock.

Respondents are Zoove, Inc., Virtual Hold Technology, LLC; StarSteve, LLC, VHT StarStar LLC, and Mblox, Inc., who were Appellees below and Defendants in the District Court.

RELATED PROCEEDINGS

Sumotext Corp. v. Zoove, Inc.; et al., No. 20-17245 (9th Cir.) (opinion and judgement issued October 27, 2021).

Sumotext Corp. v. Zoove, Inc.; et al., No. 5:16-cv-01370-BLF (N.D. Cal.) (final judgement issued March 6, 2020).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Sumotext Corporation respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The April 19, 2018, Motion to Dismiss decision from the Northern District Court of California is reproduced in the Appendix. (App. 120).

The September 18, 2018, Motion for Relief From Dismissal decision from the Northern District Court of California is reproduced in the Appendix. (App. 116).

The December 19, 2019, Summary Judgment decision from the Northern District Court of California is reproduced in the Appendix. (App. 78).

The January 17, 2020, Daubert decision from the Northern District Court of California is reproduced in the Appendix. (App. 56).

The November 6, 2020, Motion for New Trial decision from the Northern District Court of California is reproduced in the Appendix. (App. 11).

The October 22, 2021, decision from the Court of Appeals for the Ninth Circuit is reproduced in the Appendix. (App. 1).

The November 12, 2021, Petition for Rehearing decision from the Court of Appeals for the Ninth Circuit is reproduced in the Appendix. (App. 148).

JURISDICTION

The Ninth Circuit denied Petitioners' timely filed petition for rehearing on November 12, 2021. (App. at 146). Justice Kagan granted a motion to extend time to file this petition through and including February 24, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among

> the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.
>
> Federal Rule of Evidence 702 provides:
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> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

INTRODUCTION

This Court in *Ohio v. American Express Co*., 138 S. Ct. 2274, 2285 (2018) ("*Am. Express*") recently emphasized that in a Sherman Act "rule of reason" case, the threshold question of defining the relevant market can be decisive in determining whether defendants have the power to harm competition. Since "market power" is the ability to control price or exclude competition within a specific area of business, determining the proper scope of the relevant market can determine

whether liability under the Sherman Act will attach to a specific set of conduct. After all, markets that are defined too narrowly can erroneously suggest market power where it doesn't really exist, while artificially broad market definitions can mask market power and attendant predatory conduct that is harmful to competition and consumer welfare.

Because the boundaries of the relevant market are defined by economic evidence, experts trained in the field of economics are typically called upon to evaluate this evidence with the chief objective of explaining how customers would actually respond—*i.e.*, where actual customers would actually turn—if faced with an increase in price or a reduction in quality. And because "expert economic testimony is critical to most antitrust disputes, the admissibility of that testimony under *Daubert* has become a key battleground in many trials." *See* William Kolasky, *Antitrust Litigation: What's Changed in Twenty-Five Years*, 27 Antitrust 9, n. 2 at 12 (Fall 2012). This case arises at the intersection of these economic principles and two divisions among the courts of appeals. And the Ninth Circuit stands on the wrong end of both splits.

First, the Ninth Circuit applies a uniquely lax standard for determining whether two products are suitable economic substitutes that should be included in the same relevant market. Unlike other courts of appeal that require economic evidence and analysis sufficient to show the degree to which any purported economic substitute exhibits 'cross-elasticity of demand' with the product at issue, the Ninth Circuit

credits witnesses' intuition and perceptions of non-economic indicia to stand on equal footing with economic evidence and analysis showing how actual consumers would actually behave.

Second, the Ninth Circuit applies a uniquely lax standard for showing that an expert's testimony is admissible under the relevance and reliability requirements of Federal Rule of Evidence 702. While other circuits appropriately require expert testimony to be supported by appropriate validation through the *application* of 'reliable principles and methods,' Ninth Circuit caselaw is materially more tolerant with a liberal thrust favoring admission where courts are to exclude only 'nonsense opinions'. Thus, under Ninth Circuit authority, *Daubert's* critical "gatekeeping" function has been watered down such that many threshold challenges to the expert's methodology are deemed matters of an opinion's 'weight' rather than 'admissibility' and will clear what the Ninth Circuit calls 'relevancy's low bar' if the testimony merely 'logically advances' a party's theories in the case.

STATEMENT

A. Background

This case involves restraints of trade and monopolization of the relevant markets surrounding the National Mobile Dial Code Registry of ** ("StarStar") numbers. StarStar numbers are short, memorable "branded mobile phone numbers" that begin with **

and connect consumers to a business's 10-digit phone number. App. 165. For example, a consumer wanting to purchase tickets to a Broadway show can simply dial **TONY (**8669) to speak with ticket purveyor Time Out.[1] Defendant Zoove has operated and administered this national Registry of StarStar numbers since the Registry's commercial launch in 2011 through exclusive contracts it has held with AT&T, Verizon Wireless, Sprint, and T-Mobile. App 121.

From 2012 to 2016, Petitioner Sumotext became what the defendants described as the Registry's most "successful" and "sophisticated" customer and application service provider ("ASP") of StarStar numbers. App. 81. Sumotext eventually leased over 100 StarStar numbers from the Zoove Registry and leveraged the Registry's application programming interfaces ("APIs") to provide value-added software and services to downstream customers that enhanced the StarStar call experience. *See e.g.*, App 121; 171; 81.

Defendant Mblox acquired Zoove in 2014 and sold Zoove in December 2015 to defendant VHT StarStar—an entity owned by VHT (51%) and StarSteve (49%). App. 80; 83; 163. Collectively with Zoove,

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[1] *See* (Trial Exhibits) *e.g.*, App. 165-166 ("The National Mobile Dial Code Registry is the only way for brands to lease their StarStar Code. Dedicated to ensuring brands secure the two- to twelve-digit number combination that best represents their brand, the codes are assigned via the National Mobile Dial Code Registry based on a first-come, first-serve basis."); App. 171 (StarStar Customer Experience); 172 (StarStar Common Use Cases); 173 (Registry's History); 174 (Registry's Carrier Contracts); 175 (Registry's Powerful ASP Reseller Model).

these horizontal competitors of Petitioner Sumotext are the Respondents.

B. Nature Of The Action

After acquiring joint control of the Zoove Registry in December 2015, VHT and StarSteve immediately (i) terminated their rivals' StarStar leases, (ii) blocked their rivals' access to the Registry's APIs, and (iii) dramatically raised prices to the customers they usurped. *See e.g.*, App. 78-79; App. 37.

Beyond the obvious harm to Sumotext and other ASPs, this predatory conduct also harmed downstream customers and end-consumers, as the prices for StarStar numbers increased dramatically at the same time the quantity of numbers and quality of services diminished. This left a captured group of customers with no competing prices, services, or service providers from which to choose. Sumotext initiated this lawsuit in March 2016 because Section 1 and Section 2 of the Sherman Act condemn such conduct.

1. Direct Evidence Of Intent To Monopolize And Restrain Trade

The clean record in this case shows concerted conduct with an intent to restrain trade and monopolize the once competitive markets that surrounded the Zoove Registry for StarStar numbers.

Defendant StarSteve admitted that its purpose in obtaining "complete control" of the Zoove Registry was

"minimizing competition". App. 162 ("This acquisition will give StarSteve complete control of the Carrier Agreements, and Short Code Registry thereby minimizing competition"); App 160 ("Our Joint Venture partner completed the Acquisition of Zoove, Inc. and we now control the Short Code (**Number) Registry"); App. 176 (Defendants' "Strategy To Take Back Numbers").[2] Moreover, Defendant Mblox authored and signed a letter of intent ("LOI") that evidenced its own affirmative intention to join StarSteve's conspiracy on the condition that StarSteve agree to a horizontal group boycott over certain "Direct Category Competitors". App. 152-153 (LOI at Part 4.G.3). This LOI further states that Mblox would sell Zoove to StarSteve in exchange for $4,500,000 and the rights to divide the StarStar market between themselves. *Id*. at Parts 4.G.1-5. These are remarkable documents containing the type of express admissions that are almost unheard of in an antitrust case, especially prior to antitrust discovery. *See e.g.*, *Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) ("division of markets" and "group boycotts" are per se unlawful).

But the district court dismissed defendant Mblox and at the pleadings stage.[3] Specifically, the district court erroneously narrowed the concept of an "agreement"

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[2] At trial VHT StarStar COO Tim Keyes was asked: "by virtue of controlling all of the StarStar leases, you would be able to control your competitor's StarStar contracts, correct?". Keyes: "They wouldn't be our competitors at that time. they would be our customers").

[3] *See e.g.*, App. 121-147 (Order dismissing Mblox); App. 116-119 (order denying Petitioner's request for reconsideration).

in restraint of trade to require a binding contractual obligation. App. 118 ("the portion of the LOI. . . . is designated as non-binding"). And the Ninth Circuit erroneously affirmed this opinion. App. 2 ("But the terms that Sumotext complains of were part of a "proposal" for a "Possible Acquisition," and nothing suggests that those terms were incorporated into a definitive agreement or that Mblox otherwise agreed to be bound by them").

Left with no clear *per se* path for its claims, Sumotext commissioned an economist, Dr. Ryan Sullivan, to conduct an independent market analysis to establish the relevant markets in this case through economic evidence while Petitioner pursued its surviving antitrust claims against the Joint Defendants under the rule of reason.

C. Proceedings Below

1. Both Parties Hire Economic Experts

Dr. Sullivan issued a 127-page expert report to support his proffered opinion that because no other product or service exhibited functional substitutability or 'cross-elasticity of demand' with the products at issue, the trier of fact should evaluate defendants' conduct within two relevant markets: 1) a market for *leasing* StarStar numbers in the U.S.; and 2) a market for *servicing* StarStar numbers in the U.S.

Dr. Sullivan opined that these market definitions were further supported by the direct evidence that the

customers at issue did not "switch" to any substitutes when faced with the dramatic price increases shown in the record. *Cf*. App. 181 (Jury Instruction 35: Relevant Market) ("If, on the other hand, you find that customers would not switch, then you may conclude that the products or services are not in the market."). The district court reviewed Dr. Sullivan's report and deposition and ruled that Dr. Sullivan's testimony would be admissible at trial. *See e.g.* App. 97 ("Dr. Sullivan provides a cogent explanation for his conclusion that StarStar numbers are not reasonably interchangeable with other types of consumer engagement products"); App. 98 ("Dr. Sullivan also indicates that he conducted a significant non-transitory increase in price ("SSNlP") test, commonly used in economic analysis of antitrust to define the relevant market, to determine that the relevant markets in this case are the StarStar leasing and servicing markets"); App. 98 ("Dr. Sullivan's opinions constitute evidence sufficient to meet Sumotext's burden at this stage").

In sharp contrast, the Respondents' economic expert, Dr. Debra Aron, (i) refused to conduct an independent relevant market analysis, (ii) refused to proffer an alternative market definition, and (iii) refused to even proffer a list of potential economic substitutes—let alone test any potential substitutes for 'cross-elasticity of demand.' And the district court acknowledged this unorthodox approach to supporting Respondents' broader relevant market theories before trial:

> "At her deposition, Dr. Aron testified expressly that she was not asked to perform an independent market analysis or to define the relevant markets in this case, and that she did not engage in either task."

App. 63.

> "After reviewing Dr. Aron's report, the Court concludes that she does not offer her own market definitions or opine as to which products constitute adequate substitutes for StarStar numbers."

App. 63.

2. The Threshold Dispute: The Scope Of The Relevant Market

Both parties asked the District Court to address the question of the relevant market before trial. Joint Defendants moved for summary judgment. Petitioner brought a motion pursuant to *Daubert* and Rule 702 to exclude Dr. Aron's testimony.[4]

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[4] The Joint Defendants filed a motion for summary judgement pursuant to Fed. R. Civ. P. 56 (*see* ECF 336 Filed 08/30/19) while Sumotext challenged Dr. Aron's expert testimony under the standard set forth in *Daubert* and its progeny pursuant to Fed. R. Evid. 702 (*see* ECF 339 Filed 08/30/19). *See* also *e.g.*, Edward D. Cavanagh, Matsushita at Thirty: *Has the Pendulum Swung Too Far in Favor of Summary Judgment?*, 82 ANTITRUST L.J. 81, 2 (2018) (Matsushita "encouraged courts to find mechanisms to advance antitrust dispositions to points even earlier in the lives of cases through pretrial evidentiary rulings"); Stephen J. Calkins, *Supreme Court Antitrust 1991-92: The Revenge of the Amici*, 61

The Joint Defendants claimed their conduct was insulated from antitrust laws because "Sumotext's proposed product markets are too narrow". App. 95. Specifically, the Respondents' own executives claimed—without any evidence or discussion of cross-elasticity of demand—that various other products "compete with" StarStar numbers. App 45 (including the Internet, web search, mobile apps, social networks, text messaging, and all 10-digit telephone numbers).

But neither the lay witnesses nor their expert offered any evidence, data, or discussion of how any of these products would or could exhibit the cross-elasticity of demand necessary to properly categorize them as suitable economic substitutes in the same relevant market as StarStar number *leasing* or *servicing*.

3. The Court's Pre-Trial Rulings

Sumotext argued that this self-serving testimony from the defendants' own executives only stated conclusions and not facts and was offered without expert foundation. Sumotext also argued that because Dr. Aron had the opportunity to provide expert foundation for these assertions, but refused, that her testimony was not relevant or reliable under the standards required by Rule 702 and *Daubert*.

In addition to noting Dr. Aron's failure to validate any of her client's theories by submitting any of these

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Antitrust L.J. 269, 298 (1993) ("Matsushita emboldened the courts to address the merits at an early stage").

purported substitutes to economic testing for 'cross-elasticity of demand', *see Supra* Part C.1, the district court also noted the defendants' procedural failures to properly challenge Dr. Sullivan's testimony. App. 104 ("Defendants have not made *Daubert* motion or a proper evidentiary objection with respect to Dr. Sullivan"). But rather than make any express relevance or reliability determinations before trial per the court's gatekeeping duties under *Daubert* and Rule 702, the district court left the question of the relevant market to the jury and a battle of the experts and deferred to the jury to determine the relevance and reliability of Dr. Aron's opinion in the first instance.[5]

> It will be up to the jury to determine whether StarStar numbers are so unique as to comprise a distinct market as argued by Sumotext, or whether StarStar numbers are part of a broader market of mobile engagement as argued by Defendants.

App. 101.

> Where, as here, two qualified economists espouse conflicting views about the effect of a particular economic principle on the case, a "battle of the experts" arises. The proper course is to allow each side to attack the

[5] App. 78-155 (denying Joint Defendants' MSJ); App. 56-77 (denying Plaintiff's Daubert motion). See also e.g., App. 65 (the district court "finds Dr. Aron's criticisms of Dr. Sullivan's report to be appropriate expert rebuttal"); *Id*. (finding that methodological challenges "goes to the weight" of the opinions and "not their admissibility"); App. 9 ("Authority to determine the victor in such a 'battle of expert witnesses' is properly reposed in the jury.").

> others with contrary expert opinion, other contrary evidence, and cross-examination.

App. 68

4. Both Experts Testify At Trial

As the last witness at trial, Dr. Aron testified to the very issue she had claimed not to analyze and gave a false imprimatur of expertise to the speculative opinions of defendants' own executives. For example, she asserted to the jury that the "evidence I discuss below indicates that *the relevant market is much larger than StarStar numbers and StarStar services and includes a much broader set of consumer engagement products*". App. 64 (emphasis added). Over Sumotext's objections, *see* App. 6 at n. 1, Dr. Aron's decidedly inexpert "expert" testimony proved to be the winning formula. *See e.g.*, App. 11 ("Following a two-week trial, a jury rendered a verdict for Defendants"); App. 183-192 (jury only answered two questions from its 10-page verdict form, relating to the issue of market definition).

5. The District Court Changed Its Mind After Hearing Dr. Aron's "Persuasive" Testimony

The district court denied Petitioner's Rule 59 motion for new trial, concluding that it was persuaded by the speculation of executives and untested substitution opinions of defendants' expert that the market included additional products notwithstanding the lack of analysis or reliable methodology on the issue

of cross-elasticity or other evidence of substitution. App. 46; *See also* App. 35 ("Dr. Aron identified many products that *appear to perform a similar function*, and *meet a similar need*, to StarStar numbers" and made clear that "it's not plausible that none of these calls to action compete with StarStar numbers") (emphasis added).

Considering the prejudicial impact of Dr. Aron's *ipse dixit* on the district court, there can be no question that Dr. Aron's summary witness testimony was the determining, and at a minimum prejudicial, factor that caused the jury to conclude that the defined relevant markets did not exist. After all, before trial, the district court had determined the opposite. *Cf*. App. 107 ("That evidence [the defendants' flawed argument] actually supports Sumotext's position that [VHT StarStar] eliminated facilities necessary for Sumotext and other ASPs to service StarStar numbers, as it makes clear that third parties no longer have access to information regarding StarStar numbers. Absent such access, *ASPs have been eliminated from the StarStar servicing market*").

On appeal to the Ninth Circuit, Sumotext argued that permitting the jury to hear Dr. Aron's testimony left the jury unnecessarily vulnerable to confusion and manipulation by a summary witness who had been admitted and given unwarranted credibility as an economic expert on the question of market definition. Nevertheless, the Ninth Circuit affirmed and cited Ninth Circuit caselaw for the proposition that "Rule 702 inquiry is flexible and should be applied with a

liberal thrust favoring admission." App. 4. "Expert testimony is relevant if "it logically advances a material aspect of the proposing party's case." App. 6. Noting again that challenges to "market definitions, as well as [] methodology" were simply part of the "battle of expert witnesses" that is "properly reposed in the jury." App. 9.

Under the standards of Rule 702 employed in the other circuits, the sheer fact that Dr. Aron admitted before trial that she failed to conduct an independent relevant market analysis and refused to even proffer a list of potential economic substitutes that could be submitted to economic scrutiny would have certainly prohibited her testimony's admission. Her testimony regarding supposed substitute products that should be included in the relevant market was not the product of any reliable or testable expert methodology and hence failed to requirements of Rule 702 for admissibility.

REASONS FOR GRANTING THE PETITION

I. Two Important Questions Are Dividing The Courts Of Appeal

The Ninth Circuit's decision in the case merits review because it exposes two recurring and material conflicts between the Ninth Circuit and other circuits on two important federal evidentiary standards. *See* S. Ct. R. 10(a). This Court has emphasized the importance of identifying the evidentiary standards that

are applicable to an inquiry before a jury should be asked to judge such a battle:

> Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the *applicable evidentiary standards*.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986) (emphasis added).

Because the definition of the relevant market is a complicated economic question, it is incumbent upon parties proposing or challenging the scope of the market to produce admissible expert testimony on the issue, and specifically on the cross-elasticity of any proposed substitute products. Virtually all rule of reason cases turn on this threshold question, and hence the proof required, and the standards for expertise used to introduce such proof are important and recurring questions.

A. Circuits Are Divided On The Standard For Determining Whether Two Products Are Suitable Economic Substitutes

1. Legal Standard

Absent direct evidence of anticompetitive effects, this Court has pronounced that "[w]hat is called for is an appraisal of the cross-elasticity of demand in the trade". *See United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394-395, 76 S.Ct. 994, 100 L.Ed. 1264 (1956) (*Cellophane Case*). *Id*. (the economic term describing "the responsiveness of the sales of one product to price changes of the other").

"Because the ability of customers to turn to other suppliers restrains a firm from raising prices above the competitive level, the definition of the "relevant market" rests on a determination of available substitutes." *Id* "If a slight decrease in the price [] causes a considerable number of customers [] to switch [], it would be an indication that a high cross-elasticity of demand exists between them; that the products compete in the same market". *Id*. *See also Am. Express* at 2285 ("[T]he relevant market "is the arena within which significant substitution in consumption or production occurs.").

The Ninth Circuit generally acknowledges that the "relevant market is defined as the area of effective competition." App. 8. "It includes "the product at issue as well as all economic substitutes for the product." *Id*. And, that "the principle most fundamental to product market definition is 'cross-elasticity of demand.'" *Kaplan v. Burroughs Corp*., 611 F.2d 286, 291-92 (9th

Cir. 1979). But, unlike other circuits, it does not require admissible evidence of cross-elasticity.

Even though Dr. Aron admitted that her opinions had not been submitted to, or validated by, any economic testing, the panel here affirmed the district court's decision to permit Dr. Aron to tell the jury that the relevant market in this case was much broader than Dr. Sullivan had defined and should have included a host of substitutes asserted by her clients that she was unable to identify, and had not tested, before trial. And even Dr. Aron herself admitted that such an opinion could not reliably come from intuition:

> "Well, I think that's exactly the point, is that in order to determine how different products can be and still be in the same market, *we can't intuit that*. *That's not a thought experiment*. *We have to do an actual analysis* to determine where the market boundaries are."

Trial Testimony of Dr. Aron. *See also* App. 32 ("Dr. Aron testified that merely observing that a product has unique characteristics is insufficient to show that it is in a distinct market". . . . one must "do a market definition analysis to figure out whether those differences are meaningful enough that customers view the products as so different that they don't view them as reasonably substitutable").

Then, the Ninth Circuit panel here credited the conclusory opinions of the defendants' own executives as "substantial evidence" that other products were suitable economic substitutes for StarStar numbers.

App 8 ("Testimony from industry executives provided substantial evidence showing that the relevant markets were broader than Sumotext proposed").

2. Practical Indicia Such As Functional Interchangeability Are Subordinate To Cross-Elasticity Of Demand

The court below afforded Respondents that license because in the Ninth Circuit, cross-elasticity of demand is not a requirement for showing that two products are suitable economic substitutes, but merely one of many 'practical indicia' (such as 'functional' substitutability or interchangeability) to be considered. But as the Sixth Circuit explained, the more theoretical ideas of interoperability, like *Brown Shoe*'s "practical indicia come into play only after the 'outer boundaries of a product market are determined' by evaluating 'the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Kentucky Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing Inc*., 518 F.3d 908, 918 (6th Cir. 2009) (quoting *Brown Shoe Co*., 370 U.S. at 325).

Moreover, to other circuits that have addressed the issue, cross-elasticity of demand is not merely a factor to be considered, but a requirement. Even if products appear to perform a similar function or serve a similar need, economic analysis is required before

they should be included in the same relevant market.[6] *See e.g.*:

- *Unitherm Food Sys, Inc. v. Swift-Eckrich, Inc*., 375 F.3d 1341, 1363 (Fed. Cir. 2004) (requiring "economic evidence," and invalidating jury verdict based on expert testimony that emphasized practical considerations of "technological substitution" without explaining how they equated to "economic substitution").
- *Hayden Pub. Co. v. Cox Broad. Corp.*, 730 F.2d 64, 70-71 (2d Cir. 1984) ("There is persuasive authority for interpreting [*United States v. E.I.*] *du Pont* [*de Nemours & Co.*, 351 U.S. 377 (1956)] as requiring consideration of cross-elasticity of demand in determining an appropriate market definition. . . . We are persuaded that, as a general rule, the process of defining the relevant product market requires consideration of cross-elasticity of demand.").
- *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 496 (2d Cir. 2004) (opining that bioequivalent, functionally-interchangeable branded and generic drugs were in separate product markets).

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[6] *See* App. 35 ("Dr. Aron identified many products that appear to *perform a similar function, and meet a similar need*,") (emphasis added); *See also* ABA Model Jury Instructions In Civil Antitrust Cases, 73, n. 2. (2016) ("In assessing whether products are within the relevant market, the jury must consider not only whether the products are functionally similar but also whether the products are economically interchangeable. That is, there must be cross-price elasticity of demand.").

- *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1064 (3d Cir. 1978) (finding that despite a certain degree of functional interchangeability among antibiotics, specific class of antibiotics was separate product market based on court's finding that there was a lack of price sensitivity and cross-elasticity of demand).

- *FTC v. Lundbeck, Inc.*, 650 F.3d 1236, 1240-43 (8th Cir. 2011) (finding that two products that were functionally interchangeable were nonetheless in separate product markets due to low cross-elasticity of demand between the two).

- *United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 248 (8th Cir. 1988) (detailing that functionally interchangeable sweeteners are separate product markets because "a small change in the price of [one] would have little or no effect on the demand for [the other]").

- *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 996 (11th Cir. 1993) (excluding from the market functionally interchangeable products where the "record provides no support for finding significant cross-elasticity of demand or supply between" them).

Indeed, even the Eleventh Circuit, which has a slightly more liberal standard, has said that while direct measures of "supply and demand elasticity" are not *universally* required in measuring the scope of the relevant market, courts should resort to "other factors" only when good elasticity measures are unavailable.

U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 995 (11th Cir. 1993) (quoting *In re Int'l Tel. & Tel.*, 104 F.T.C. 209, 409 (1984)).

However, the Ninth Circuit does not excuse the requirement that a party offer evidence of cross-elasticity merely when it is unavailable. It does not require that evidence at all. And that allows expansion or contraction of the relevant market's scope based on sheer speculation about the effect of anticompetitive conduct that would not pass muster in any other circuit.

While Ninth Circuit credits self-serving testimony that is completely untethered to economic evidence or analysis of 'cross-elasticity of demand,' other circuits appropriately require a party's relevant market theories—particularly those asserting theories of substitutability—to undergo economic scrutiny supported by relevant and reliable economic evidence. And specifically, they require economic evidence that tends to show whether the customers at issue were likely to pay a predatory miscreant's supracompetitive prices or whether they would "switch."

This materially laxer evidentiary standards on this important federal question simply cannot be squared with any proper understanding of the economic principles underlying this Court's substantive antitrust legal standards.

B. Circuits Are Divided On The Standard For Determining Whether An Expert's Testimony Is Admissible Under Rule 702

1. Legal Standard

Courts rely on expert witnesses to explain the significance of scientific and technical evidence to juries—where experts are "even permitted to testify to the ultimate issue the jury is tasked with deciding in the case" per Fed. R. Evid. 704. *See* Evan M. Tager Et Al., *Admissibility Of Expert Testimony: Manageable Guidance For Judicial Gatekeeping*, at 3 (2020). This can put jurors with little or no scientific or technical training "at an enormous disadvantage" because they "can be easily overwhelmed, confused, and misled by hired-gun[s]." *Id.* at 4 (citing *Daubert*, 509 U.S. at 595 for the proposition that "expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it"). "It was precisely because of these risks that the Supreme Court articulated the threshold standard for the admission of such testimony in *Daubert*". *Id*. And the Court completed its instruction with a full trilogy of decisions that effectively ended the 77-year reign of *Frye* and resulted in the 2000 amendment to the Federal Rule of Evidence 702.[7]

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[7] *See Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U. S. 579 (1993) ("*Daubert*"); *General Electric Co. v. Joiner*, 522 U. S. 136 (1997) ("*Joiner*"); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 at 152 (1999) ("*Kumo Tire*"). *See also Frye v. United States*, 54 App. D. C. 46, 47, 293 F. 1013, 1014 (1923) ("*Frye*").

While *Frye* essentially focused on one question—whether the expert's opinion is based on principles that had gained "general acceptance" in the relevant discipline—the *Daubert* trilogy now requires that an expert's opinion must derived from actual "methods and procedures of science". *See e.g.*, *Daubert*, 509 U.S. at 590; 595 ("The focus, of course, must be *solely on principles and methodology*, not on the conclusions that they generate."); *Id*. at 589-590 (screening out opinions that are merely "subjective belief or unsupported speculation"); *Joiner*, 522 U.S. at 146 ("screening out opinions where "there is simply too great an analytical gap between the data and the opinion proffered" and screening out "opinion evidence that is connected to existing data only by the [expert's] *ipse dixit*".

Since the *Daubert* line of jurisprudence now expressly requires that the "[p]*roposed testimony must be supported by appropriate validation*", *see* 509 U.S. at 590 (emphasis added), Rule 702's 2000 amendment expressly says the proponent of an expert witness now has the burden to prove that the proposed testimony has been validated by the *application* of "reliable principles and methods". *See* Fed. R. Evid. 702(c)-(d).

2. The Relevance And Reliability Of Expert Testimony Is Inherently Dependent Upon Its Appropriate Validation

While the Ninth Circuit acknowledges that to "satisfy Rule 702, expert testimony must be relevant and

reliable", *see* App. 4, Ninth Circuit caselaw applies a materially laxer evidentiary standard for the proponent of that expert to prove that it's expert's opinion is admissible—often wholly ignoring the express language from 702(c)-(d) requiring that the opinion has been validated by the *application* of "reliable principles and methods".

For example, the Ninth Circuit panel here cited Ninth Circuit caselaw for the proposition that "Rule 702 inquiry is flexible and should be applied with a liberal thrust favoring admission." App. 4. "Expert testimony is relevant if "it logically advances a material aspect of the proposing party's case." App. 6 ("Her testimony thus clears relevancy's low bar"). Noting again that challenges to "market definitions, as well as [] methodology" were simply part of the "battle of expert witnesses" that is "properly reposed in the jury." App. 9. But there can be no battle of "experts" if one of the proposed witnesses has failed the standards set forth in Rule 702 and the Daubert line of cases. It is not left to a jury to decide whether a proposed expert has applied a reliable methodology; that is for the court at the admissibility stage. It is only *after* a proposed witness has been validated as an expert that the jury gets to choose between competing opinions or methods where either method passes the 702 threshold. Otherwise, the jury is left with precisely the danger obeing misled and confused that the Daubert line of cases squarely rejects. In *General Electric Co. v. Joiner*, the Court firmly rejected the view that there is "a preference for admissibility" that requires a "particularly stringent

standard" of appellate review of decisions to exclude expert testimony. 522 U.S. 136, 140-43 (1997). The decision below manages to violate both those clear precedents at once.

The Ninth Circuit is widely recognized for its lax approach to admissibility, as it permits the trial judge to "screen the jury" only from "unreliable nonsense opinions." *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969 (9th Cir. 2013); *see also*, *e.g.*, *United States v. Magana-Gonzalez*, 781 F.App'x 615, 616 (9th Cir. 2019). The Ninth Circuit's lax "nonsense" standard allows district courts to ask only whether the expert's testimony "has substance such that it would be *helpful* to a jury." *Alaska Rent-A-Car*, 738 F.3d at 969-70 (emphasis added); *see also Pomona*, 750 F.3d 1036 (same). This represents a material divergence between the Ninth Circuit's standard and what is applied by virtually every circuit, save the Eighth Circuit's "so-fundamentally-unsupported" standard. *See* Petition for Writ of Certiorari No. 21-1100, filed February 9, 2022, *3M Company; Arizant Healthcare, Inc., V. George Amador*.

These materially laxer standards have been widely recognized by scholars. *See e.g.*, Victor E. Schwartz & Cary Silverman, *The Draining of* Daubert *and the Recidivism of Junk Science in Federal and State Courts*, 35 Hofstra L. Rev. 217, 218-19 (2006) ("[S]ome courts have misinterpreted their 'flexibility' in applying the *Daubert* factors to the point of abdication of their gatekeeper role."); David E. Bernstein, *The Misbegotten Judicial Resistance to the Daubert*

Revolution, 89 Notredame L. Rev. 27, 28 (2013) (noting that changes to the "traditional laissez-faire law of expert testimony provoked resistance from some federal judges who favored more liberal rules of admissibility."); See Mark A. Behrens & Andrew J. Trask, *The Rule of Science and the Rule of Law*, 49 Sw. L. REV. 436 at Introduction (2021) ("Further, there is wide variability in the outcomes of substantially similar cases. The "liberal thrust" by some courts to permit expert testimony has resulted in chaos."); *Id*. at 452 ("Sound science does not change from one jurisdiction to the next and is neither conservative nor liberal. Thus, it is not clear why we should tolerate wide divergences in the treatment of scientific evidence. The current disarray undermines uniformity and predictability in the law and encourages forum-shopping").

The Ninth Circuit's divergence has also been acknowledged by Thomas Schroeder, the head of the Fed R. Evid. 702 Rules Committee. *See* Hon. Thomas D. Schroeder, *Toward A More Apparent Approach to Considering the Admission of Expert Testimony*, 95 Notre Dame L. Rev. 2039, 2043 (2020) (finding that "some courts appear to be abdicating their charge under the Federal Rules of Evidence and *Daubert* and its progeny to make the hard call on admissibility. The end result in such cases is to relegate to the jury the very decisions Rule 702 contemplates to be beyond jury consideration."); *Id*. at 2050 n.85 ("Ninth Circuit caselaw appears to interpret *Daubert*" in ways that "set it apart from most" circuits).

Even judges within the Ninth Circuit have acknowledged the split and their Ninth Circuit obligation to interpret Rule 702 differently than other circuits. *See In re Roundup Prods. Liab. Litig.*, 358 F. Supp. 3d 956, 959 (N.D. Cal. 2019) (finding that "district courts in the Ninth Circuit must be more tolerant of borderline expert opinions than in other circuits", mindful that "a wider range of expert opinions (arguably much wider) will be admissible in this circuit"). *See also* Petition for Writ of Certiorari No. 21-241, filed August 16, 2021, in *Monsanto Company v. Edwin Hardeman*.

Under the standards of Rule 702 employed in the other circuits, the sheer fact that Dr. Aron admitted before trial that she failed to conduct an independent relevant market analysis and refused to even identify—let alone test—any of the purported substitutes identified by her client for 'cross-elasticity of demand' would have certainly prohibited her testimony from being admitted in any other circuit.

In the alternative, if this Court is not inclined to use this case as its vehicle for plenary review of the important questions presented, it should at a minimum hold this case for the pending petitions in *Monsanto Company v. Edwin Hardeman*, No. 21-241, and *3M Company; Arizant Healthcare, Inc., V. George Amador*, 21-1100. The court is awaiting the views of the Solicitor General in *Monsanto*, suggesting that it finds the Rule 702 question important and potentially worthy of more serious consideration. The Brief in Opposition is not yet due in *3M*. Should the court grant either

of those cases and agree that Rule 702 requires more serious gatekeeping of supposedly expert opinions, such a determination would support a GVR in this case.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari or, in the alternative, hold this case pending the disposition of the petitions in *Monsanto* and *3M*.

Respectfully submitted,

ROBERT L. SIRIANNI, JR., ESQ.
Counsel of Record
BROWNSTONE, P.A.
P.O. Box 2047
Winter Park, Florida 32790-2047
(o) 407-388-1900
(f) 407-622-1511
Robert@BrownstoneLaw.com
Counsel for Petitioner

Dated: February 24, 2022