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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-3089

IN RE: MERCK MUMPS VACCINE ANTITRUST LITIGATION

MERCK & CO., INC.,
APPELLANT.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 2-12-cv-03555)
District Judge: Honorable Chad F. Kenney

Argued July 9, 2024

Before: SHWARTZ, PHIPPS, and MONTGOMERY-REEVES, *Circuit Judges*.

(Opinion filed: October 7, 2024)

Jessica L. Ellsworth **[ARGUED]**
Kristina Alekseyeva
Neal K. Katyal
Danielle D. Stempel
Michael J. West

Hogan Lovells US
555 Thirteenth Street NW
Columbia Square
Washington, DC 20004

Lisa C. Dykstra
R. Brendan Fee
Zachary M. Johns
Morgan Lewis & Bockius
2222 Market Street, 12th Floor
Philadelphia, PA 19103

Sally W. Bryan
Kathleen Hardway
Dino S. Sangiano
Venable LLP
750 E. Pratt Street, Suite 900
Baltimore, MD, 21202

Counsel for Appellant Merck & Co, Inc.

Jonathan Edelman
Kellie Lerner
Laura Song
Robins Kaplan
1325 Avenue of the Americas, Suite 2601
New York, NY 10019

Deepak Gupta **[ARGUED]**
Gupta Wessler
2001 K Street NW, Suite 850 North
Washington, DC 20006

Jeffrey L. Kodroff
John A. Macoretta
Dianna J. Zinser
Spector Roseman & Kodroff
2001 Market Street, Suite 3420
Philadelphia, PA 19103

Counsel for Appellees Chatom Primary Care PC, on behalf of itself and all others similarly situated; Dr. Andrew Klein; & John Ivan Sutter, M.D.

OPINION[*]

MONTGOMERY-REEVES, Circuit Judge:

Antitrust law does not bar regulated parties from petitioning the government. And a petition is not a sham merely because it seeks and obtains a selfish result.

In the late 1990s, the Food & Drug Administration (the "FDA") approached Merck & Co., Inc. ("Merck") with concerns about the end-of-shelf-life potency of its mumps vaccine, the sole licensed mumps vaccine available in the United States. At the FDA's suggestion, Merck boosted the initial potency of its vaccine, presumably with the hope that increasing beginning-of-shelf-life potency would increase end-of-shelf-life potency too. This fix did not work. But Merck did not reveal that failing to the FDA because Merck was concerned that diminishing the relevant drug-label claims could hasten the arrival of

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[*] This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

competition by lowering the regulatory bar that a competitor would need to clear to show that its mumps vaccine was not inferior to Merck's, an apparent prerequisite for FDA approval. So rather than reveal that its vaccine might be misbranded, Merck allegedly (1) concealed its ongoing potency problems, (2) ran a flawed clinical trial, and (3) relied on that unreliable data to persuade the FDA to license a less potent vaccine.

Appellees are a collection of physicians and physicians' groups who filed a class-action lawsuit alleging that they bought Merck's mumps vaccines at inflated prices. Among other things, their complaint alleges that Merck unlawfully extended its apparent monopoly by making false drug-label claims with the goal of thwarting competition, in violation of § 2 of the Sherman Act, 15 U.S.C. § 2. After lengthy discovery, Merck moved for summary judgment on a few grounds, including that the *Noerr-Pennington* doctrine purportedly shielded Merck from liability under the Sherman Act because the asserted harm to competition flowed from Merck's genuine and successful petitioning of the FDA. The District Court rejected Merck's motion for summary judgment on the antitrust claim and granted Merck's request to file an interlocutory appeal under 28 U.S.C. § 1292(b). This appeal followed.

The record contains troubling evidence that Merck sought to extend its apparent monopoly by misrepresenting facts about its mumps vaccines on the FDA-approved drug labeling. But those allegedly false claims were the result of Merck's genuine and successful petitioning of the FDA. And *Noerr-Pennington* immunity is not vitiated "simply because [the relevant petitioning] ... ha[d] a commercial impact and involve[d] conduct that

can be termed unethical." *E. R.R. Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127, 141 (1961). Thus, there is no genuine dispute of material fact that *Noerr-Pennington* immunity attaches to Merck's alleged anticompetitive scheme. And we will reverse-in-part the District Court's order denying summary judgment.

I. BACKGROUND[1]

Because Merck moved for summary judgment, the following recitation of the facts resolves all disputes and draws all reasonable inferences in Appellees' favor. *Physicians Healthsource, Inc. v. Cephalon, Inc.*, 954 F.3d 615, 618 (3d Cir. 2020).

A. Facts

From 1967 until 2022, Merck was the sole licensed manufacturer of mumps vaccines in the United States. Merck accompanied doses of its vaccine[2] with FDA-approved labeling that provided information about the drug, including its "shelf life, minimum potency requirements, basis for licensure, and effectiveness[.]" *See* App. 10,029. Merck had an ongoing duty to ensure that its drug label was accurate. *Wyeth v. Levine*, 555 U.S. 555, 570–71 (2009) ("[I]t [is] ... a central premise of federal drug regulation that the manufacturer bears responsibility for the content of its label at all times.").

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[1] We write for the benefit of the parties and recite only essential facts. For a more detailed discussion of the factual background, see this Court's related decision in *United States ex rel. Krahling v. Merck & Co.*, No. 23-2553, 2024 WL 3664648, at *1–5 (3d Cir. Aug. 6, 2024).

[2] Merck sold two branded mumps vaccines during the years relevant to this appeal, MMR-II and ProQuad. For simplicity—and because the vaccines used the same mumps component—we refer to a singular "vaccine" when discussing Merck's mumps vaccines.

In the late 1990s, the FDA raised concerns that Merck's mumps vaccine might be sub-potent toward the end of its 24-month shelf life, meaning that doses might not contain the minimum amount of live virus stated on the drug label. Merck agreed—at the FDA's suggestion—to boost the initial potency of its vaccine, presumably with the hope that overfilled doses would have enough buffer to remain potent through the end of their shelf life.

Overfilling doses did not fix the end-of-shelf-life potency problem with Merck's mumps vaccine. But Merck did not share that information with the FDA because Merck was concerned that the FDA might—at a minimum—order Merck to reduce the drug-label claims about the shelf life and seroconversion of its mumps vaccine.[3] Weakening label claims was not a palatable option to Merck because a rival pharmaceutical manufacturer, GlaxoSmithKline ("GSK"), sold a comparable mumps vaccine in Europe and wanted to bring that vaccine to the United States. Merck feared that GSK's domestic launch was "imminent." App. 4840. And Merck was wary of hastening GSK's arrival by lowering the bar to entry, as GSK needed to show that its mumps vaccine was not inferior to Merck's mumps vaccine to gain FDA approval. So rather than open the door to competition by disclosing that its mumps vaccine might be misbranded, Merck sought to extend its apparent monopoly by (1) misrepresenting or concealing information about the end-of-shelf-life potency of its

[3] Seroconversion "refers to a person going from being 'seronegative' prior to vaccination, which generally means lacking pathogen specific antibodies, to being 'seropositive' after vaccination, which means possessing such antibodies." *In re Merck Mumps Vaccine Antitrust Litig.*, 685 F. Supp. 3d 280, 293 (E.D. Pa. 2023).

vaccine and (2) filing a Supplemental Biologics License Application ("sBLA") seeking the FDA's approval to maintain the existing drug-label claims about shelf life and seroconversion with a less potent vaccine.

To support its sBLA, Merck ran a new trial—called Protocol 007—to demonstrate that Merck could reduce the potency of its vaccine without impairing the existing drug-label claims about seroconversion. According to Appellees, Protocol 007 was a flawed study that did not reliably capture immunogenicity.[4] Nonetheless, Merck leveraged the results of Protocol 007 to persuade the FDA to approve Merck's sBLA. As a result of the FDA's approval, Merck continued to make unsupported or misleading claims about the shelf life and seroconversion of its mumps vaccine on the drug label.

GSK could not replicate Merck's drug-label claims about seroconversion. And that led GSK to conclude that the FDA would view GSK's mumps vaccine as inferior to Merck's. Eventually, GSK accessed the methodology underlying Protocol 007 and relied on the same or similar assays[5] as Merck to establish non-inferiority. The FDA—which knew about Merck's end-of-shelf-life potency problems and the alleged flaws with Protocol 007, *see United States ex rel. Krahling v. Merck & Co.*, No. 23-2553, 2024 WL 3664648, at *8 (3d Cir. Aug. 6, 2024)—accepted GSK's clinical evidence and, in 2022, approved

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[4] Immunogenicity "provides information about how a subject's immune system responds to different stimuli, including vaccination." *In re Merck Mumps Vaccine Antitrust Litig.*, 685 F. Supp. 3d at 293.

[5] Assays refer to types of tests. See, e.g., Assay, Oxford English Dictionary, https://www.oed.com/dictionary/assay_n?tab=meaning_and_use#37098486 (last visited Sept. 29, 2024) ("The trying (of a person or things); trial imposed upon or endured by any object, in order to test its virtue, fitness, etc.").

GSK's application to sell a competing mumps vaccine in the United States.

To date, the FDA has not asked Merck to change the relevant drug-label claims, issued a recall, ordered revaccinations, or taken any other action against Merck for the purported issues with its mumps vaccine. The Centers for Disease Control and Prevention (the "CDC") continues to buy mumps vaccines from Merck and GSK. *Id.* at *5. And the CDC's Advisory Committee on Immunization Practices continues to recommend Merck's mumps vaccine and deems it "fully interchangeable" with GSK's vaccine. *Id.*

B. Procedural History

Appellees are a collection of physicians and physicians' groups who claim that they bought Merck's mumps vaccine at an inflated price. Their operative complaint alleges several claims against Merck, including monopolization in violation of § 2 of the Sherman Act, 15 U.S.C. § 2. After lengthy discovery, Merck moved for summary judgment on a few bases, including that (1) *Noerr-Pennington* immunity purportedly attached to all of Merck's allegedly anticompetitive conduct, and (2) Appellees purportedly failed to adduce evidence of antitrust injury.

The District Court granted-in-part and denied-in-part Merck's motion for summary judgment,[6] rejecting Merck's contentions that it was entitled to summary judgment on *Noerr-Pennington* immunity and antitrust injury. Merck sought and obtained the District Court's

[6] The District Court granted Merck's motion for summary judgment with respect to Appellees' state-law claims. Appellees do not challenge that decision on appeal, so we do not address it.

permission to file an interlocutory appeal under 28 U.S.C. § 1292(b). This Court accepted the appeal.

II. DISCUSSION[7]

"[T]his case is and always has been about Merck's label for its [mumps vaccines] and its use of those labels to keep GSK out of the market." App. 264. So our analysis begins—and ends—with the FDA-approved drug label.

A. Law

"Section 2 of the Sherman Act 'makes it unlawful to monopolize, attempt to monopolize, or conspire to monopolize, interstate or international commerce.' " *Mylan Pharms. Inc. v. Warner Chilcott Pub. Ltd. Co.*, 838 F.3d 421, 433 (3d Cir. 2016) (quoting *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 306 (3d Cir. 2007)). Appellees assert that Merck violated § 2 by "implement[ing] a scheme to unlawfully protect its monopoly" through "false and misleading claims on its mumps-vaccine labels that GSK needed to match to enter the U.S. market." Response Br. 1. According to Appellees, "Merck knew [that] neither its vaccine, nor GSK's, could meet those claims." *Id.* But Merck did not reveal that

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[7] The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1367. We have jurisdiction under 28 U.S.C. § 1292(b).

We exercise plenary review over the District Court's order denying summary judgment. *Huber v. Simon's Agency, Inc.*, 84 F.4th 132, 144 (3d Cir. 2023) ("Our review of an order granting [or denying] summary judgment is plenary, meaning we review anew the District Court's summary judgment decision, applying the same standard it must apply." (cleaned up) (quoting *Ellis v. Westinghouse Elec. Co.*, 11 F.4th 221, 229 (3d Cir. 2021))). Summary judgment is appropriate only if there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. *Id.* (citing Fed. R. Civ. P. 56(a)).

reality to the FDA or the pubxlic. As a result, "Merck's strategy succeeded: it delayed GSK's entry into the U.S. market by over a decade." *Id.*

The record contains evidence that Merck sought to extend its apparent monopoly by artificially raising the bar that GSK had to clear to obtain FDA approval for its competing mumps vaccine. That alleged anticompetitive conduct might not have violated the Sherman Act, however, because "[a] party who petitions the government for redress generally is immune from antitrust liability" even if their petitioning "causes an anti-competitive effect." *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 122 (3d Cir. 1999) (collecting cases).

This petitioning immunity—named the *Noerr-Pennington* doctrine after a pair of seminal Supreme Court decisions, *see E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965)—is rooted in a few considerations, including constitutional-avoidance concerns related to the First Amendment's Petition Clause, *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc. ("P.R.E.")*, 508 U.S. 49, 56 (1993), and the notion that Congress did not intend to proscribe harm to competition that "is the result of valid government action, as opposed to private action," *Noerr*, 365 U.S. at 136.[8] The immunity extends to petitioning of

[8] *See also City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 383 (1991) ("As we have described, Parker and Noerr are complementary expressions of the principle that the antitrust laws regulate business, not politics; the former decision protects the States' acts of governing, and the latter the citizens' participation in government."); *Edinboro Coll. Park Apartments v. Edinboro Univ. Found.*, 850 F.3d 567, 572 (3d Cir. 2017) ("In *Parker v. Brown*, 317

all three branches of government, including administrative agencies like the FDA. *Cheminor*, 168 F.3d at 122 ("This immunity extends to persons who petition all types of government entities—legislatures, administrative agencies, and courts." (citing *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972))).

While *Noerr-Pennington* immunity is broad, its scope "is not absolute." *In re Wellbutrin XL Antitrust Litig. Indirect Purchasers Class*, 868 F.3d 132, 148 (3d Cir. 2017). And controlling precedent recognizes one exception implicated here: petitions that are "not genuinely aimed at procuring favorable government action" are deemed a sham and receive no immunity. *P.R.E.*, 508 U.S. at 58 (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 n.4 (1988)). "[E]vidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham." *Id.* at 59 (collecting cases). Rather, the sham exception hinges on whether the petitioner sought to use the invocation of governmental process—as opposed to the result of that process—to harm competition. If the former, the petition is a sham, and no immunity attaches. If the latter, the petition is not a sham, and the sham exception does not apply.

For a petition to be a sham, two things must be true. First, the petition "must be objectively baseless in the sense that no reasonable [petitioner] could realistically expect success on the merits." *P.R.E.*, 508 U.S. at 60. Second, the petitioner must subjectively intend to "use ... governmental process—as opposed to the outcome of that

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U.S. 341 (1943), the Supreme Court held that the Sherman Act does not prohibit anticompetitive state action.").

process—as an anticompetitive weapon" "to interfere directly with the business relationships of a competitor." *Armstrong Surgical Ctr., Inc. v. Armstrong Cnty. Mem'l Hosp.*, 185 F.3d 154, 158 n.2 (3d Cir. 1999) (cleaned up) (quoting *P.R.E.*, 508 U.S. at 60–61). Courts consider the petitioner's "subjective motivation" "[o]nly if [the] challenged [petition] is objectively meritless." *P.R.E.*, 508 U.S. at 60. Thus, evidence of a petitioner's subjective intent cannot create a genuine dispute of material fact about whether *Noerr-Pennington* immunity applies if a petition has objective merit. *See id.*

When a petition contains misrepresentations, this Court "determine[s] whether [the] petition [is] objectively baseless under the [first step of the] Supreme Court's test in *PRE*, without regard to those [false] facts[.]" *Cheminor*, 168 F.3d at 123 (emphasis omitted). Even if a petition would be objectively meritless with the truth, the petition is not a sham unless the plaintiff "pass[es] the second[ ] 'subjective test'" by showing that the petitioner's subjective "purpose was [*not*] to secure the *outcome* of the [governmental] process" that they invoked. *Armstrong*, 185 F.3d at 158 n.2. *See also Omni*, 499 U.S. at 380 ("A 'sham' situation involves a defendant whose activities are 'not genuinely aimed at procuring favorable government action' at all, not one 'who genuinely seeks to achieve his governmental result, but does so *through improper means*.'" (quoting *Allied Tube*, 486 U.S. at 500 n.4, 508 n.10)).

B. Party Arguments

Merck argues that its purported anticompetitive scheme boils down to successfully petitioning the FDA to maintain the existing claims about seroconversion, shelf life, and potency that Merck included on the drug label for

its mumps vaccine. *Noerr-Pennington* immunity shields legitimate petitions that seek to harness government action for selfish purposes. *See, e.g., P.R.E.*, 508 U.S. at 58 ("In short, 'Noerr[-Pennington immunity] shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.' " (quoting *Pennington*, 381 U.S. at 670)). Merck claims that its alleged anticompetitive scheme fits that bill, so it is immune from liability under the Sherman Act.

Appellees respond that there is a genuine dispute of material fact about whether *Noerr-Pennington* immunity bars their antitrust claim for three main reasons. First, Appellees argue that "Merck's responses to [the] FDA [were] not petitioning actions but rather required answers in a regulatory proceeding" and thus were a "mere *incident* of regulation" not cloaked by immunity. Response Br. 58–59 (quoting *Litton Sys., Inc. v. Am. Tel. & Tel. Co.*, 700 F.2d 785, 807 (2d Cir. 1983)). Second, Appellees argue that Merck's petitions were a sham because "Merck knowingly misrepresented the specifications of its vaccines," and those "misrepresentations caused [the] FDA to have 'no negative feedback.' " *Id.* at 61–62 (quoting App. 5575, 9784). Third, Appellees appear to argue that even if *Noerr-Pennington* immunity shields Merck's communications with the FDA, summary judgment is improper because "Merck's misleading public label claims" were themselves—or were the result of—private conduct, not government action. *Id.* at 54, 54–58. And Appellees claim that they can rely on "facts indisputably outside of *Noerr* protection" to prove that Merck violated the Sherman Act, like "public statements," "internal documents" from Merck and GSK, "and unrebutted expert testimony." *Id.* at 31.

The following analysis begins by addressing whether Merck petitioned the FDA and then turns to the sham exception and Merck's non-petitioning conduct.

C. Analysis

There is no genuine dispute of material fact that *Noerr-Pennington* immunity shields Merck from liability for its alleged anticompetitive conduct. For starters, we have no trouble concluding that Merck's communications with the FDA involved petitioning. Required or not, those communications sought to persuade the FDA to approve or refrain from changing the claims about seroconversion, shelf life, and potency that Merck included on the drug label for its mumps vaccine. Asking the FDA to raise the bar for competition by confirming that Merck—and, by extension, GSK—must meet inflated claims about immunogenicity to sell a mumps vaccine in the United States fell within the heartland of petitioning activity. *See, e.g., Noerr*, 365 U.S. at 136 (describing petitioning as "an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly."). And nothing was incidental or passive about the FDA's continued approval of Merck's drug-label claims in response to petitioning designed to elicit that exercise of governmental discretion.[9]

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[9] *See also Wyeth*, 555 U.S. at 568 ("Generally speaking, a manufacturer may only change a drug label after the FDA approves a supplemental application."); *cf. Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962) (no petitioning involved because the defendants "were engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws"); *Litton*, 700 F.2d at 806–07 ("filing of ... tariffs" with the Federal Communications Commission was "a mere incident of regulation" not entitled to immunity because "[t]he decision to

Likewise, it is apparent that Merck's petitioning was not a sham.[10] "A winning [petition] is by definition a reasonable effort at petitioning for redress and therefore not a sham." *P.R.E.*, 508 U.S. at 60 n.5. There is no dispute that Merck succeeded in persuading the FDA to approve the relevant claims about seroconversion, shelf life, and potency that Merck included on the drug label for its mumps vaccine. So it appears at first blush that Merck's petitioning necessarily had objective merit because it persuaded the FDA.

Appellees push back on this analysis by pointing to evidence that Merck allegedly withheld or misrepresented information when corresponding with the FDA. Even if we assume that Merck's petitions would lack objective merit without those alleged falsehoods,[11] Appellees concede that they "do not allege injury from the process at all, never mind an abuse of that process," Response Br. 63. Thus, Appellees' theory of the case

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impose and maintain the ... tariff was made in [the defendant-company's] boardroom, not at the [Commission]"); *In re ZF-TRW Airbag Control Units Prods. Liab. Litig.*, 601 F. Supp. 3d 625, 751 (C.D. Cal. 2022) (mandatory responses to government agency did not involve petitioning because the responses did not "urge [the agency] to exercise its administrative discretion by taking or refraining from an action" (cleaned up)).

[10] Because it is apparent that Merck's petitioning was not a sham, we need not—and do not—decide whether the sham exception is limited to the adjudicative sphere, or whether Merck's communications with the FDA should be characterized as adjudicative or legislative.

[11] At least with respect to immunogenicity, that is a dubious premise considering that the FDA has not ordered Merck to change the relevant drug-label claims or taken any action against Merck after learning of the alleged end-of-shelf-life potency problems and Protocol 007. *See Krahling*, 2024 WL 3664648, at *7–8.

seems to be that Merck intended to use the *result* of petitioning the FDA to thwart competition by "ma[king] misrepresentations that caused [the] FDA to give 'no negative feedback'" about Merck's end-of-shelf-life potency problems and the sBLA. *Id.* (quoting App. 5575, 9784). By definition, Merck cannot have intended to commit a sham if it sought to use the result of petitioning the government (*i.e.*, FDA-approved drug label claims)—as opposed to the petitioning itself—to harm competition. *See P.R.E.*, 508 U.S. at 60–61. And Appellees do not explain how there can be a genuine dispute of material fact about whether Merck subjectively intended to commit a sham if there is no evidence that Merck's invocation of process itself harmed competition. Thus, Appellees have failed as a matter of law to satisfy the subjective prong of the *P.R.E.* test because there is no genuine dispute of material fact that Merck did not intend to commit a sham. And there is no need to send this case to trial on objective merit if a reasonable jury could not find that the subjective prong of the *P.R.E.* test is met. *Cf. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.").[12]

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[12] Several of our sister circuits appear to recognize a standalone exception to *Noerr-Pennington* immunity for petitions—made in an adjudicative setting—containing fraudulent misrepresentations. *See, e.g., Amphastar Pharms. Inc. v. Momenta Pharms., Inc.*, 850 F.3d 52, 56 (1st Cir. 2017) ("Noerr-Pennington immunity ... has a well-established exception for knowing misrepresentations, at least in the administrative and adjudicatory contexts." (cleaned up)); *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 842 (7th Cir. 2011) ("[T]here is little doubt that fraudulent misrepresentations may

render purported petitioning activity a sham not protected from antitrust liability." (cleaned up)); *Kottle v. Nw. Kidney Ctrs.*, 146 F.3d 1056, 1060 (9th Cir. 1998) ("[I]n the context of a judicial proceeding, if the alleged anticompetitive behavior consists of making intentional misrepresentations to the court, litigation can be deemed a sham if a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy." (cleaned up)). *See generally* Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application, ¶ 203a–b, d–f (last updated May 2024).

Appellees expressly disclaim reliance on a separate exception for fraudulent misrepresentation. Response Br. 65 (arguing that the Seventh Circuit's opinion in *Mercatus* is distinguishable because it "addressed a separate exception for fraudulent misrepresentation—an exception the Third Circuit rejects" (first citing 641 F.3d at 845–46; and then citing *Cheminor*, 168 F.3d at 124)). Thus, Appellees have waived any argument based on that purported exception. *Barna v. Bd. of Sch. Dirs. of the Panther Valley Sch. Dist.*, 877 F.3d 136, 147 (3d Cir. 2017) ("Waiver ... is the intentional relinquishment or abandonment of a known right." (cleaned up)); *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 336 (3d Cir. 2009) ("[E]xplicitly disclaim[ing]" an argument "clearly demonstrates ... that the issue is waived"). And we may not address it on appeal. *TD Bank N.A. v. Hill*, 928 F.3d 259, 276 n.9 (3d Cir. 2019) ("[W]e may affirm on any ground supported by the record as long as the appellee did not waive—as opposed to forfeit—the issue." (collecting cases)).

Moreover, even if we were to construe Appellees' brief as forfeiting—as opposed to waiving—an argument based on the fraudulent-misrepresentation exception, *but see Barna*, 877 F.3d at 147 ("Forfeiture is the failure to make the timely assertion of a right, an example of which is an inadvertent failure to raise an argument." (cleaned up) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993))), *Cheminor* expressly declined to adopt a standalone exception for fraudulent misrepresentations in the adjudicative sphere. 168 F.3d at 123 (The plaintiff "argues either that *Noerr-Pennington* immunity does not apply at all to petitions containing misrepresentations or that [the petitioner's] alleged misrepresentations led to the conclusion" that the relevant petition "was objectively baseless. We decline to carve out a new exception to the broad immunity that Noerr-Pennington provides. Rather, we will determine whether [the]

petition was objectively baseless under the Supreme Court's test in *PRE*, without regard to those facts that [the plaintiff] alleges [the petitioner] misrepresented." (emphasis removed)). *See also id.* at 131–32 (Sloviter, J., dissenting) ("The majority's decision to disregard the facts that [the plaintiff] alleges [the petitioner] misrepresented is contrary to the position of the two other courts of appeals that have considered this issue. Both of these courts read *PRE* to preserve a fraud exception to antitrust immunity, although they vary in their interpretation of that exception." (citations omitted); "Unlike the majority, I conclude that the District Court erred in recognizing only a single exception to *Noerr-Pennington* immunity based on 'objective baselessness[.]' ").

A few months later, this Court's decision in *Armstrong* clarified that a plaintiff still must show that the petitioner sought to use government process itself—as opposed to the result of that process—as an anticompetitive weapon to invoke the sham exception to *Noerr-Pennington* immunity, confining the narrow exception that *Cheminor* recognized to the first prong of the *P.R.E.* test, objective merit. *See* 185 F.3d at 158 n.2. In so doing, Armstrong explained that "[w]hile *Cheminor* focuse[d] on the sham exception to *Noerr* immunity, it also reject[ed the plaintiff's] more general argument that '*Noerr-Pennington* immunity does not apply at all to petitions containing misrepresentations.' " Id. (quoting *Cheminor*, 168 F.3d at 123). *Armstrong* then seems to have—like *Cheminor*—rejected a general fraud exception to *Noerr-Pennington* immunity, explaining that "[l]iability for injuries caused by ... state action is precluded even where it is alleged that a private party urging the action did so by bribery, deceit or other wrongful conduct that may have affected the decision making process." *Id.* at 162. *See also id.* at 164 (Schwartz, D.J., dissenting) ("With its decision today, the majority holds private parties who make misrepresentations that pervasively influence the decision making process of public entities are entitled to immunity under both the state action immunity doctrine and the *Noerr–Pennington* immunity doctrine.").

While reasonable minds can and do differ, *see* Dissenting Op. at 4–6, we read *Cheminor* and *Armstrong* to reject a standalone exception to Noerr-Pennington immunity for petitions containing fraudulent misrepresentations in this context. And we are bound by those decisions even if we disagree with the result that they produce in this appeal. *United States v. Harris*, 68 F.4th 140, 146 (3d Cir. 2023)

Finally, Appellees' attempt to rely on evidence of Merck's non-petitioning conduct to establish an antitrust violation has a minor flaw and a major flaw. The minor flaw is that Appellees sometimes appear to treat *Noerr-Pennington* immunity like an evidentiary privilege that bars the use of genuine petitions to prove an antitrust violation. But *Noerr-Pennington* immunity is not a rule of evidence that prevents plaintiffs from using the contents of a genuine petition to prove an antitrust violation. Rather, *Noerr-Pennington* immunity is a substantive principle of antitrust law—derived from the statutory text and purpose of the Sherman Act—that shields defendants from liability based on the notion that "[t]he federal antitrust laws ... do not regulate the conduct of private individuals in seeking anticompetitive action from the government." *Omni*, 499 U.S. at 379–80.[13] So the question is not whether Appellees adduced non-petition evidence showing that Merck schemed to unlawfully extend its apparent monopoly. Rather, the question is whether the evidence that Appellees adduced supports a reasonable

("[I]t is a well-established 'tradition of this court' that an opinion with precedential authority 'is binding on subsequent panels.'" (quoting 3d Cir. I.O.P. 9.1)).

[13] *See also Pennington*, 381 U.S. at 670 n.3 ("It would of course still be within the province of the trial judge to admit ... evidence" of an alleged conspiracy between private parties and a government actor "under the established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny." (cleaned up) (collecting cases)); *Nat.-Immunogenics Corp. v. Newport Trial Grp.*, No. SACV 15-02034 JVS(JCGx), 2018 WL 6137597, at *3 (C.D. Cal. May 16, 2018) ("*Noerr-Pennington* insulates parties from liability for their petitioning conduct, it is not an independent evidentiary privilege.").

inference that it was Merck's private conduct—not the FDA's exercise of regulatory discretion, which Merck's petitioning sought to induce—that delayed the launch of GSK's competing vaccine.

The major flaw is that the evidence Appellees adduced cannot link Merck's private conduct to GSK's delay without passing through the drug-label claims about seroconversion, shelf life, and potency that Merck persuaded the FDA to approve. That regulatory approval was an act of governmental discretion, not Merck's private conduct in the marketplace, and thus is shielded by *Noerr-Pennington* immunity.

The crux of Appellees' theory of antitrust injury is that Merck "delayed the launch of [GSK's] competing vaccine by over a decade" by making or preserving "deceptive statements on its mumps-vaccine labels." Response Br. 29. Those deceptive statements caused delay, Appellees assert, because GSK's plan for its mumps vaccine aimed to match the publicly available information within Merck's label. That was necessary, in Appellee's view, because GSK needed to configure its vaccine to reach the relative effectiveness of Merck's vaccine. Thus, "Merck's false, inflated labeling claims [allegedly] delayed GSK's entry by over a decade" by improperly exaggerating the claims about "potency, shelf-life, and seroconversion" that GSK had to meet to show that its vaccine "was 'non-inferior' to Merck's vaccine," a prerequisite "[t]o gain U.S. approval." *Id.* at 5–6 (cleaned up).

The trouble for Appellees is that the heart of their case—allegedly false or misleading claims about seroconversion, shelf life, and potency that Merck included on the FDA-approved label for its mumps vaccine—was both the object and the result of Merck's

successful petitioning of the FDA. When the FDA approached Merck with concerns about the end-of-shelf-life potency of its mumps vaccine, Merck had two main options: (1) reveal that its mumps vaccine might be misbranded and then consider remedial actions, like reducing the 24-month shelf life that Merck listed on the drug label; or (2) persuade the FDA that overfilling doses fixed that problem with end-of-shelf-life potency even though Merck knew that was not true and then file an sBLA requesting the FDA's permission to maintain the existing drug-label claims about seroconversion with a less potent, and hence longer-lasting, mumps vaccine. Merck chose the second option. That gambit worked. And the FDA did not order Merck to change its drug label or take any action against Merck after learning the truth about the purported problems with its vaccine. So even if Merck publicly admitted to misrepresenting claims on its mumps vaccine, Appellees cannot show how their harm flowed from Merck's *private* conduct when the FDA—*government* process—approved the label. That is because GSK's vaccine *still* would have lacked approval and licensure on account of the FDA who—with knowledge of the purported problems—allowed Merck to retain its existing drug-label claims. Thus, there is no genuine dispute of material fact that GSK's delay was caused by *the FDA's* exercise of regulatory discretion in response to Merck's successful petitioning. And *Noerr-Pennington* immunity bars Appellees' § 2 claim against Merck as a matter of law because the antitrust injury that Appellees assert is the result of government action, not private conduct. *See, e.g., Omni*, 499 U.S. at 379–80.[14]

[14] Of course, had Appellees raised a genuine dispute of material fact about whether an exception to Noerr-Pennington immunity

Appellees' brief contains some scattered arguments to the contrary. None changes our analysis. For example, Appellees seem to argue that Merck engaged in private conduct every time that it printed or distributed its allegedly deceptive drug label because it was Merck—not the FDA—that arranged those publications. "Prospective drug manufacturers work with the FDA to develop an appropriate label when they apply for FDA approval of a new drug." *Merck Sharp & Dohme Corp. v. Albrecht*, 587 U.S. 299, 304 (2019) (citations omitted). The end result of that work is a drug label that the manufacturer provides or makes available to physicians, pharmacies, patients, and other interested parties. *See id.* at 303–04 ("Although we commonly understand a drug's 'label' to refer to the sticker affixed to a prescription bottle, in [some] context[s] the term refers more broadly to the written material that is sent to the physician who prescribes the drug and the written material that comes with the prescription bottle when the drug is handed to the patient at the pharmacy." (citing 21 U.S.C. § 321(m))). Thus, Appellees appear to suggest an overbroad rule that would vitiate *Noerr-Pennington* immunity whenever a pharmaceutical manufacturer successfully petitions the FDA to sell a new drug, as a plaintiff could evade immunity by focusing on the contents of the FDA-approved label instead of the FDA's discretionary decision to approve the drug. We are reluctant to remove *Noerr-Pennington* immunity root-and-stem from the drug-approval process. And Appellees offer no controlling authority to support that sweeping proposition.

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applies, like the sham exception, Merck could be liable under the Sherman Act even if the alleged antitrust injury flowed from Merck's petitioning of the FDA.

Moreover, Appellees fail to explain how it was Merck's decision to publish the label—instead of the FDA's decision to approve the underlying drug-label claims—that delayed GSK's entry. As discussed above, Appellees' core theory of antitrust injury is that Merck sought to thwart competition by raising the bar that GSK had to clear to obtain FDA approval. Merck's allegedly false or misleading label claims may have helped cause that impediment. But that is because *the FDA* approved those statements and thus could be expected to hold other pharmaceutical manufacturers to the same standard when examining non-inferiority.[15] Accordingly, based on the evidence and arguments presented here, there is no genuine dispute of material fact that it was the FDA's approval of the relevant claims that Merck included on its drug label that allegedly delayed GSK's entry to the U.S. market. And Appellees' attempt to cast the content of Merck's FDA-approved drug label as private conduct fails.[16]

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[15] Things might be different, for example, if a pharmaceutical manufacturer included information on a drug label that the FDA did not approve. And a rival manufacturer inferred that its vaccine was inferior based on the false impression that the FDA had approved those unapproved claims. We are not presented with that sort of fringe circumstance here, however, as Appellees base their claim on information that the FDA allowed Merck to include on the drug label for its mumps vaccine.

[16] The handful of cases that Appellees cite do not support their assertion that Merck's drug-label claims involved private conduct because none of those cases relied on government-approved information heightening a government-imposed licensing requirement to show antitrust injury. *Cf. Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129, 1138 (3d Cir. 1993) (collective rate setting approved by insurance regulators); *Barton's Disposal Serv., Inc. v. Tiger Corp.*, 886 F.2d 1430, 1436–37 (5th Cir. 1989) (suggesting that "predatory

Next, Appellees cite internal documents allegedly showing that Merck intentionally sought to thwart competition so that Merck could keep collecting monopoly rents. These documents support a reasonable inference that Merck acted with anticompetitive intent. But anticompetitive intent does not defeat *Noerr-Pennington* immunity. *Noerr*, 365 U.S. at 140 (The "legality" of a petition "[is] not at all affected by any anticompetitive purpose it may have had."). And Appellees cannot explain how Merck's *internal* machinations delayed GSK's arrival without passing through the FDA-approved drug-label, which was the object and result of Merck's genuine petitioning—and thus involved government action, not private conduct—for the reasons offered above.

Last, Appellees imply that Merck's decision *not* to inform the FDA about problems with Merck's mumps vaccine—as opposed to actively misrepresenting facts while corresponding with the FDA—did not constitute petitioning and thus fell under the umbrella of private conduct. Merck's alleged decision to omit facts from the petitions that it filed with the FDA about the relevant drug-label claims was "incidental" to Merck's "valid effort to influence governmental action," *Allied Tube*, 486 U.S. at 499 (quoting *Noerr*, 365 U.S. at 143), as Merck naturally had to decide what information to include—and what information to omit—when petitioning the FDA. Indeed, categorizing omissions as private conduct would seem to carve out a vast exception to *Noerr-Pennington* immunity, as plaintiffs could evade the doctrine altogether—include its exceptions, like the sham-petition

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pricing" may be private conduct); *In re: Lipitor Antitrust Litig.*, 868 F.3d 231, 264 (3d Cir. 2017) (private settlement agreement submitted to government); *Litton*, 700 F.2d at 807 (unilateral tariff).

exception—by focusing on omissions from petitions instead of the petitions themselves. *See, e.g.*, *Allied Tube*, 486 U.S. at 507 (explaining that *Noerr-Pennington* immunity does not apply to "commercial activities simply because they have a political impact" (citing *Noerr*, 365 U.S. at 141)).

Given that concern, we are satisfied that the existing limitations on immunity, like the sham-petition exception, suffice to preserve antitrust liability consistent with the spirit and purpose of the *Noerr-Pennington* doctrine.[17] We therefore reject Appellees' argument that Merck's decision to omit information when corresponding with the FDA constituted private conduct in the marketplace, categorically unprotected by *Noerr-Pennington* immunity.

* * * * *

In sum, we hold that (1) Merck engaged in petitioning activity when it sought and obtained the FDA's approval to make the relevant drug-label claims; (2) Merck's petitioning conduct was not a sham because it genuinely sought and obtained that governmental action; and (3) Appellees' alleged antitrust injury flows from the FDA's discretionary decision to approve Merck's drug-label claims, not Merck's private conduct. Accordingly, Merck is entitled to summary judgment on the antitrust claim because *Noerr-Pennington* immunity shields Merck from liability for its alleged scheme to unlawfully raise the

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[17] As mentioned above, *see infra* note 12, other circuit courts appear to recognize a standalone exception to *Noerr-Pennington* immunity for fraudulent misrepresentation. Appellees expressly disclaim reliance on that exception, and we read controlling precedent to have expressly declined to adopt that exception, so we do not address it.

regulatory bar for competition by preserving false or misleading claims on the FDA-approved drug label for Merck's mumps vaccine.[18]

III. CONCLUSION

For the reasons discussed above, we will reverse-in-part the District Court's order and remand this case with instructions to enter summary judgment for Merck.

SHWARTZ, Circuit Judge, dissenting.

This case presents an important question: should a party who makes misrepresentations and material omissions when petitioning the government be granted antitrust immunity? I think not. As a result, I depart from my colleagues and would affirm the District Court's order denying Merck summary judgment because a jury should resolve factual disputes over whether Merck made misrepresentations that preclude it from obtaining *Noerr-Pennington* immunity for its petitioning activity. I would also affirm because, even without considering Merck's petitioning activity, a reasonable jury could still conclude that Merck engaged in anticompetitive conduct by maintaining misrepresentations on its vaccine's label to protect its monopoly in the mumps vaccine market.[1]

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[18] Because we hold that Merck is shielded by *Noerr-Pennington* immunity, we need not address whether there is a genuine dispute of material fact about antitrust injury. *See Ethypharm S.A. Fr. v. Abbott Lab'ys*, 707 F.3d 223, 232 n.17 (3d Cir. 2013) (antitrust standing does not implicate Article III jurisdiction).

[1] No party asserts that the vaccine is unsafe or ineffective.

I

A

Under the *Noerr-Pennington* doctrine, "[a] party who petitions the government for redress generally is immune from antitrust liability." *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 122 (3d Cir. 1999). The doctrine is rooted in the First Amendment's right to free speech and to petition the government for redress. *See New W., L.P. v. City of Joliet*, 491 F.3d 717, 722 (7th Cir. 2007) (holding *Noerr-Pennington* is "understood as an application of the [F]irst [A]mendment's [S]peech and [P]etitioning [C]lauses"); *see also E. R. R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138-39 (1961) (holding that subjecting a company's "political activity" but "not business activity" to the antitrust laws would be an "unjustified" congressional invasion into the Bill of Rights). Because, however, the First Amendment's Petitioning Clause does not tolerate abusing government process, the Supreme Court has created the "sham exception" to *Noerr-Pennington Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993) ("*PRE*"). This exception strips immunity from a litigant whose petitioning activity is both (1) "objectively baseless" and (2) subjectively motivated by anticompetitive aims to abuse the governmental process. *Id.*

Related to the notion that immunity should not be conferred to disingenuous actors, some circuits have recognized another exception to *Noerr-Pennington* immunity known as the misrepresentation or fraud

exception.[2] This exception is based on the idea that a party does not have a First Amendment right to misrepresent

[2] Eight federal circuit courts have recognized or otherwise suggested that a misrepresentation exception to *Noerr-Pennington* exists, with some treating it as distinct from the sham exception and others applying it as an exception within the sham exception. The Courts of Appeal for the First, Fifth, Ninth, and Eleventh Circuits have expressly recognized a distinct misrepresentation exception. *See Amphastar Pharms., Inc. v. Momenta Pharms., Inc.*, 850 F.3d 52, 56 (1st Cir. 2017) ("*Noerr-Pennington* immunity ... has a well-established exception for knowing misrepresentations, at least in the administrative and adjudicatory contexts." (internal quotation marks, citation, and alteration omitted)); *Kottle v. Nw. Kidney Ctrs.*, 146 F.3d 1056, 1062-63 (9th Cir. 1998); *St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am.*, 795 F.2d 948, 955 (11th Cir. 1986) ("When a governmental agency ... is acting judicially" then "[m]isrepresentations ... do not enjoy Noerr immunity."); *Woods Expl. & Producing Co. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1298 (5th Cir. 1971) (holding that the filing of false documents related to requests to transport gas to a state agency was not immunized because the "conduct was not action designed to influence policy" and "abuse of the administrative process ... does not justify antitrust immunity"). On different occasions, the Court of Appeals for the Seventh Circuit has seemingly treated the misrepresentation exception as both distinct from the sham exception and incorporated therein. *See U.S. Futures Exch., L.L.C. v. Bd. of Trade of the City of Chicago, Inc.*, 953 F.3d 955, 960 (7th Cir. 2020) ("Fraudulent misrepresentations made in an adjudicative proceeding before an administrative agency are not protected from antitrust liability."); *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 843 (7th Cir. 2011) (explaining when "a misrepresentation renders an adjudicative proceeding a sham"). The Court of Appeals for the Sixth Circuit has applied the misrepresentation as part of the sham exception. *See Potters Med. Ctr. v. City Hosp. Ass'n*, 800 F.2d 568, 580-81 (6th Cir. 1986) ("[K]nowing and willful submission of false facts to a government agency falls within the sham exception to the Noerr-Pennington doctrine. Such knowingly false submissions or intentional misrepresentations constitute an abuse of government process[.]" (internal citations omitted)). The Court of Appeals for the Fourth

material facts while petitioning for government action during an adjudicative proceeding. As the Court of Appeals for the Ninth Circuit observed, a petitioner's misrepresentations to a government agency "deprive[s] the entire [adjudicative] proceeding of its legitimacy." *Kottle v. Nw. Kidney Ctrs.*, 146 F.3d 1056, 1062-63 (9th Cir. 1998). The circuit courts that recognize the misrepresentation exception derive it from the Supreme Court's suggestion in an antitrust case that "[m]isrepresentations ... are not immunized when used in the adjudicatory process." *Cal. Motor Transp. Co. v.*

Circuit has noted that the exception may exist, but it did not reach the issue as the plaintiff there failed to establish any material fraud or deceit. *See Balt. Scrap Corp. v. David J. Joseph Co.*, 237 F.3d 394, 401-02 (4th Cir. 2001) (noting that whether a misrepresentation exception to *Noerr-Pennington* exists is an open question, but that if one does, "it extends only to the type of fraud that deprives [an adjudicative proceeding] of its legitimacy"). Likewise, the Court of Appeals for the District of Columbia Circuit, in determining whether *Noerr-Pennington* applied to certain common law tort claims outside of the antitrust context, has suggested that the doctrine would not extend immunity to an entity's misrepresentations. *See Whelan v. Abell*, 48 F.3d 1247, 1254-55 (D.C. Cir. 1995) ("However broad the First Amendment right to petition may be, it cannot be stretched to cover petitions based on known falsehoods .... [A] knowing assertion of false claims is not protected by *Noerr-Pennington*[.]").

Trucking Unlimited, 404 U.S. 508, 513 (1972).[3, 4] For the exception to apply, the misrepresentation must have been (1) "intentionally made, with knowledge of its falsity[,]" and (2) "material, in the sense that it actually altered the outcome of the proceeding." *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 843 (7th Cir. 2011) (citing, inter alia, *Cheminor*, 168 F.3d at 124).

B

Although our Court has not expressly recognized a misrepresentation exception, our precedent does not foreclose it. Our caselaw counsels against tolerating a party's material misrepresentations in petitioning activity during an adjudicative proceeding. In *Cheminor*, for example, we declined to decide whether a misrepresentation exception exists outside of the sham exception but observed, within the confines of the sham exception, that "a material misrepresentation that affects the very core of a litigant's ... case will preclude *Noerr-*

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[3] *See also Cal. Motor Transp. Co.*, 404 U.S. at 513 ("There are many [ ] forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process .... Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of 'political expression.' "). More than two decades later, the Supreme Court again noted the possibility of a misrepresentation exception. *See PRE*, 508 U.S. at 61 n.6 ("We need not decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations.").

[4] *See supra* note 1. Although *Woods Explorati on & Producing Co.* was decided before *California Motor*, its view that Noerr-Pennington protects "action designed to influence policy" but not "abuse of the administrative process" echoes *California Motor*. 438 F.2d at 1298.

Pennington immunity[.]" 168 F.3d at 124 (emphasis omitted).

Less than four months after *Cheminor*, we made a statement in *Armstrong Surgical Center, Inc. v. Armstrong County Memorial Hospital*, that, read out of context, could be viewed as foreclosing a misrepresentation exception. *See* 185 F.3d 154, 162-63 (3d Cir. 1999). Specifically, we stated that

> the Sherman Act [ ] forecloses liability predicated on anticompetitive injuries that are inflicted by states acting as regulators. Liability for injuries caused by such state action is precluded even where it is alleged that a private party urging the action did so by bribery, deceit or other wrongful conduct that may have affected the decision making process.

Id. Putting aside whether that dispute arose in the legislative or adjudicative context,[5] this quoted language appears at the conclusion of the Court's discussion of a Supreme Court case that seemingly rejected a misrepresentation exception in legislative-type proceedings, namely a zoning board's enactment of an ordinance. *Id.* at 161-62 (discussing *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365 (1991)). Thus, the *Armstrong* Court's use of the phrase "states acting as regulators" within its discussion of a state body acting in a legislative context shows that it was speaking of proceedings where an agency is engaged in promulgating regulations, rather than where an agency enforces regulations against a particular entity in a judicial-like

[5] *Armstrong* involved antitrust claims that arose after the state health department denied a medical practice a certificate of need that was required to operate in the state. 185 F.3d at 156-57.

adjudicative setting. *Id.* at 162. This matters because the misrepresentation exception applies only to adjudicative, as opposed to legislative, proceedings. *See U.S. Futures Exch., L. L.C. v. Bd. of Trade of the City of Chicago, Inc.*, 953 F.3d 955, 960 (7th Cir. 2020); *see also Cal. Motor Transp. Co.*, 404 U.S. at 513 (distinguishing between the "political arena" and an "adjudicatory process"). Therefore, the above quoted language in *Armstrong* reflects only the uncontroversial rule that there is no misrepresentation exception in legislative proceedings, which accords with our sister circuits.[6]

Accordingly, I would recognize a misrepresentation exception to *Noerr-Pennington* the context of adjudicative proceedings.

C

Because the misrepresentation exception applies only in the adjudicative context, I consider next whether Merck's petitioning activity occurred in an adjudicative or legislative proceeding. To determine whether a proceeding is adjudicative or legislative for *Noerr-Pennington* immunity purposes, courts consider:

> (1) the general nature of the authority exercised by the agency; (2) the formality of the agency's fact-finding process; (3) the extent to which fact gathering is subject to political influence; (4)

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[6] Moreover, a close reading of *Armstrong* shows that this statement was dicta because the ultimate holding was based on the absence of evidence to suggest that the misrepresentations there were material, *Armstrong Surgical Ctr., Inc.*, 185 F.3d at 163, and thus the statement was not necessary for the Court's holding. *See Tyler v. Cain*, 533 U.S. 656, 663 n.4 (2001) (noting that dictum is "not binding" and is different from a holding, with dictum not being necessary to the end result (citation omitted)).

> whether the agency received any testimony under oath, affirmation, or penalty of perjury; and (5) whether the agency acted ultimately as a matter of discretionary authority or instead acted in accordance with more definite standards subject to judicial review.

U.S. Futures Exch., L.L.C., 953 F.3d at 960; *see also Mercatus Grp., LLC*, 641 F.3d at 844-48 (noting that whether an agency is acting in an adjudicative or legislative capacity is circumstance dependent).

The record here shows that Merck's communications with the FDA occurred in the adjudicative context. Specifically, (1) the nature of the proceeding was similar to a judicial proceeding in that the FDA was evaluating the evidence to determine whether, and to what extent, to impose sanctions on Merck; (2) the factfinding was conducted by independent, subject-matter experts; (3) the decision-making was made by unelected experts, not subject to the whims of political pressure; (4) false statements to the FDA are subject to criminal penalties, *see* 18 U.S.C. § 1001; and (5) the threatened actions in the FDA's Warning Letter would have been subject to judicial review, *see* 21 C.F.R. § 12.140 (procedures for judicial review of the FDA Commissioner's final decisions). *See U.S. Futures Exch., L.L.C.*, 953 F.3d at 960; *cf. St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am.*, 795 F.2d 948, 950-55 (11th Cir. 1986) (concluding that an antitrust case based on alleged misrepresentations to a state licensing authority could move forward because the agency acted more judicially than legislatively).

Accordingly, because (1) there is a misrepresentation exception to *Noerr-Pennington* immunity for petitioning activity in adjudicative proceedings; (2) the exception may

apply here because Merck's communications with the FDA occurred in an adjudicative setting; and (3) there are factual disputes about whether Merck knowingly and intentionally made material misrepresentations to the FDA, I would affirm the order denying Merck summary judgment and allow a jury to resolve those disputes and, based upon those findings, allow the District Court to determine whether an exception bars Merck from being cloaked with *Noerr-Pennington* immunity.[7] *See Rock River Commc'ns, Inc. v. Universal Music Grp., Inc.*, 745 F.3d 343, 352 (9th Cir. 2014) (noting that it is premature and "not appropriate" to rule on exceptions to *Noerr-Pennington* "where the facts are disputed" (characterizing *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1253-54 (9th Cir. 1982))).

II

Separately, even if we were to ignore Merck's petitioning activity with respect to its Form 483, Warning Letter, and BDPR communications with the FDA,[8] the remaining facts, viewed in Plaintiffs' favor, provide a basis for a reasonable jury to find that Merck engaged in

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[7] Although the briefing and oral argument focused on the sham exception, the briefs mention the misrepresentation exception. Thus, it is fairly before us, and "[w]e may affirm on any ground supported by the record as long as the appellee did not waive – as opposed to forfeit – the issue." *Montemuro v. Jim Thorpe Area Sch. Dist.*, 99 F.4th 639, 646 (3d Cir. 2024) (quotation marks, italics, and alteration omitted). Moreover, Appellee's suggestion that the misrepresentation exception is not recognized in this Circuit was not a waiver as it was not an "intentional relinquishment or abandonment of a known right" because the statement was premised upon an incorrect understanding of our precedent. *Id.* (internal quotation marks and citation omitted).

[8] Merck seeks to invoke *Noerr-Pennington* immunity only for these three activities.

unlawful anticompetitive behavior.[9] In short, the record, viewed in Plaintiffs' favor, shows that (1) Merck's MMR-II label was approved in the 1970s and was continually used thereafter; (2) decades after the label was approved, Merck learned that the public-facing label may not be accurate with respect to the seroconversion rate[10] and potency/shelf-life claims,[11] and withheld that information from the public;[12] and (3) Merck was reluctant to modify the claims on its approved label because doing so would make it easier for its competitor, GSK, to enter the market and cut into Merck's monopoly and profits.[13]

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[9] I am not treating *Noerr-Pennington* as an evidentiary rule, *see* Majority Op. at *24, but rather, I am examining the record to determine whether there is a basis for antitrust liability without regard to Merck's three FDA petitioning activities at issue in this case.

[10] Merck knew that data suggested that its mumps vaccine was not providing the protection its label suggested against the types of virus strains people would likely encounter.

[11] Specifically, Merck's internal documents show that it knew that even after overfilling the vaccine, it could not guarantee that by end-expiry its potency claims on its label would be accurate. Indeed, Merck's scientist who was tasked with developing the assay used to support its label claims designed the assay with that goal in mind and "without considering the impact on accuracy." App. 5133-34. Moreover, Merck acknowledged internally that there was no correlation between the ELISA assay it designed and the results from the more accurate PRN assay. Accordingly, there are factual disputes about whether Merck's label claims were supported by the science.

[12] Merck was aware that the public would want to know this information and that disclosure about sub-potent vaccine lots could have resulted in a recall, vaccine tracing, and large numbers of revaccinations.

[13] *See, e.g.*, App. 5031 (Merck presentation noting that "[r]elaxing the criteria for success would lower the bar for the competition"); App. 5037 (Merck email noting "lowering the seroconversion rate in the label would help GSK"); App. 5379 (Merck memo noting its decisions

Therefore, focusing only on what Merck learned about potential inaccuracies on its label after the label was approved[14] and its internal reaction to that data, including

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about whether to pursue label and testing changes could "facilitate licensure of Priorix"); App. 4962 (Merck report noting commercial impacts of reducing shelf life); App. 7716 (Merck email noting "concern if [GSK] has better sensitivity and higher seroconversion rates – competition??"); App. 4840 (Merck Defense Action Plan noting MMR-II was "under threat of significant change and disruption due to" GSK); App. 4844 (Merck likewise noting MMR-II was "under imminent threat"); App. 5195 (Merck acknowledging that Priorix"s licensure would "significantly increase competition"); App. 5291 (Merck noting its "defensive activity"); App. 4840-42 (Merck Defense Action Plan Background); App. 5291-92 (Merck email regarding strategy in light of GSK licensing efforts).

For every month that Merck maintained its monopoly by keeping GSK out of the market, it earned an additional $10 million in revenue. In light of Merck"s financial interest in keeping GSK out of the market, a reasonable jury could conclude that Merck knowingly stood by its label"s misrepresentations to (1) make it harder for GSK to gain FDA approval and thus (2) thwart competition. Evidence that GSK paused developing its MMR vaccine after it could not mirror Merck"s label corroborates such a conclusion. To be sure, other factors could have contributed to the GSK vaccine"s pause, e.g., budget constraints. However, a jury could reasonably conclude that GSK"s budget would not have been prohibitively constrained were it not for extra-high costs of matching Merck"s misleading label. Accordingly, a jury should decide whether Merck"s misrepresentations or omissions, or GSK"s own business decisions, delayed GSK"s entry into the market.

[14] Plaintiffs do not assert that Merck made any knowing misrepresentations in connection with its FDA communications associated with the original approval of MMR-II. Nor do they do not seek to hold Merck liable for any petitioning activity arising from those communications. This is a critical distinction because Merck"s decision to continue to include misrepresentations on its public-facing label is divorced from any petitioning activity associated with the label"s original approval as the misrepresentations and omissions at issue here occurred only after the label was already approved.

withholding information about the label's inaccuracies from the public to protect Merck's monopoly,[15] the record viewed in Plaintiffs' favor would permit a reasonable jury to find that Merck violated the antitrust laws by engaging in anticompetitive acts that are "on some basis other than the merits." *LePage's Inc. v. 3M*, 324 F.3d 141, 147 (3d Cir. 2003) (en banc).[16]

Therefore, the original petitioning activity is independent from Merck"s decision to maintain its label for the express purpose of preventing GSK from entering into the mumps vaccine market.

[15] *See, e.g.*, App. 5506 (Merck email noting data suggested it would "need to get [a] label change").

[16] Additionally, viewing the facts in Plaintiffs' favor, a reasonable jury could find that Merck's actions caused Plaintiffs' injuries because (1) GSK was clearly "willing and able to supply [Priorix] but for [Merck's] exclusionary conduct[,]" *Meijer, Inc. v. Biovail Corp.*, 533 F.3d 857, 862 (D.C. Cir. 2008); and (2) Plaintiffs' injury—lack of price erosion and therefore higher prices for the mumps vaccine—was directly related to Merck's successful efforts to keep GSK out of the marketplace. Moreover, contrary to my Colleagues' assertion, see Maj. Op. at *27, a reasonable jury viewing the facts in Plaintiffs' favor could conclude that the need for the FDA to approve a license for GSK's vaccine before GSK could enter the market does not break the chain of causation because (1) the FDA was not an intervening actor because GSK put its licensing efforts on hold due in part to the challenges it faced mirroring Merck's allegedly misleading label even before going through the FDA approval process; and (2) GSK's delayed market entry, based on the FDA's requirement that it mirror Merck's label claim, was a foreseeable consequence of Merck's alleged label misrepresentations, *see In re Flonase Antitrust Litig.*, 798 F. Supp. 2d 619, 629 (E.D. Pa. 2011) ("Intervening conduct does not sever the chain of causation [ ] where that conduct was in turn proximately caused by the defendant's antitrust violation. Intervening conduct also does not sever the chain of causation where that conduct was a foreseeable consequence of the original antitrust violation."); *see also In re Suboxone Antitrust Litig.*, 622 F. Supp. 3d 22, 78 (E.D. Pa. 2022) (same). The jury may also consider whether the actions of the FDA broke the chain of causation.

III

For the foregoing reasons, I would affirm the District Court's order denying Merck summary judgment and as a result, respectfully dissent.

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: MERCK MUMPS VACCINE ANTITRUST LITIGATION	:	CIVIL ACTION Master File No. 12-3555
THIS DOCUMENT RELATES TO: ALL ACTIONS	:	

MEMORANDUM

Kenney, J. **July 27, 2023**

Chatom Primary Care, P.C., Andrew Klein, M.D., and John I. Sutter, M.D. (collectively, "Plaintiffs") bring this proposed class action on behalf of direct purchasers of Defendant Merck & Co., Inc.'s ("Merck") mumps vaccines. Plaintiffs' remaining claims allege that they were overcharged for Merck's mumps vaccines as a result of Merck's unlawful monopolization of the Mumps Vaccine Market in violation of Section 2 of the Sherman Act and New Jersey and New York state laws. Plaintiffs' case arises from the same underlying allegations of fraud that spawned the related False Claims Act ("FCA") case, *U.S. ex rel. Krahling v. Merck & Co., Inc.*, 10-cv-4374 (E.D. Pa.). Presently before the Court are Merck's Motion for Summary Judgment (ECF No. 272) and Merck's Motion

to Exclude Evidence from Dr. Thomas Copmann Pursuant to Federal Rule of Evidence 702 and Daubert (ECF No. 305). These motions have been fully briefed. For the reasons set forth below, Merck's Motion for Summary Judgment is granted in part and denied in part, and Merck's Motion to Exclude Evidence from Dr. Thomas Copmann is denied. An appropriate Order will follow.

I. BACKGROUND

This Section will begin by providing a brief overview of the vaccine approval process in the United States. Then the Court will discuss Merck's mumps vaccines, mumps cases in the United States following the introduction of a vaccine, GlaxoSmithKline's ("GSK")[1] mumps vaccines, Merck's alleged unlawful conduct, and finally, GSK's path to approval of its mumps vaccine. The facts set forth in this Section are derived from the undisputed evidence of record submitted by the parties and the disputed evidence of record viewed in the light most favorable to Plaintiffs.[2]

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[1] GSK was previously known as "SmithKlineBeecham," "SKB," or "SB." *See* ECF 295 at 8 n.5.

[2] The Court notes that in response to many of the facts Plaintiffs put forth in their Corrected Statements of Disputed Material Facts concerning Merck's alleged anticompetitive conduct, Merck did not admit or dispute the facts, but rather, claimed the facts "do not bear on the issues material to Merck's Motion for Summary Judgment." *See* ECF No. 301 at 1. The Court finds Merck's position that its purported unlawful conduct is not material to the arguments contained in its Motion for Summary Judgment unconvincing. For example, Merck's first argument is that even if Merck had submitted fraudulent information to the government, this amounts to petitioning activity that is protected from antitrust liability under the *Noerr-Pennington doctrine*. However, Merck refused to admit or dispute the facts relating to those submissions to the government. Given the fact that Merck incorporated by reference its Motions for Summary

A. The Vaccine Approval Process in the United States

Bringing a vaccine to market in the United States is an expensive, complex, and rigorous endeavor. In order to sell a vaccine in the United States, Food and Drug Administration ("FDA") approval and licensure are required. ECF No. 274 ¶ 58; ECF No. 277 ¶ 58. In deciding whether to license a vaccine, the FDA assesses the vaccine's safety, efficacy, manufacturing, and product labeling. ECF No. 274 ¶ 60; ECF No. 277 ¶ 60. As to safety and efficacy, the FDA bases its analysis on three phases of clinical trials. ECF No. 274 ¶ 61; ECF No. 277 ¶ 61. However, before beginning any clinical trials, a pharmaceutical manufacturer must submit an Investigational New Drug application ("IND") to the FDA. ECF No. 274 ¶ 62; ECF No. 277 ¶ 62. An "IND describes the vaccine, the method of manufacture, [] quality control tests for release, [and also] . . . information about the vaccine's safety and ability to elicit a protective immune response (immunogenicity) in animal testing, as well as the proposed clinical protocol for studies in humans." *Id.* Thereafter, three phases of clinical trials proceed as follows. In Phase I, "small groups of people receive the trial vaccine." ECF No. 274 ¶ 61; ECF No. 277 ¶ 61. "In Phase II, the clinical study is expanded and [the] vaccine is given to people who have characteristics (such as age and physical health) similar to those for whom the new vaccine is intended." *Id.* Finally, "[i]n Phase III, the vaccine is given to thousands of people and tested for

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Judgment in the FCA Action, many of the facts can be deemed undisputed. *See* ECF No. 273 at 9 n.1. In any event, the Court must view the evidence in the light most favorable to the nonmoving party and it will do so as to those facts Merck did not admit or dispute.

efficacy and safety." *Id.* Once these three phases are completed, manufacturers submit a Biologics License Application (BLA) to the FDA for approval of the vaccine for use in the United States. ECF No. 274 ¶ 73; ECF No. 277 ¶ 73.

B. Merck's Mumps Vaccines

Merck was the first licensed mumps vaccine provider in the United States and the sole licensed mumps vaccine provider in the United States from 1967 until June 2022, when the FDA licensed GSK's mumps vaccine. ECF No. 267 ¶ 1; ECF No. 277 ¶ 1; FDA, June 3, 2022 Approval Letter – PRIORIX, https://www.fda.gov/media/158962/download (last visited July 25, 2023). Currently, Merck sells two vaccines which contain a mumps component: MMR-II and ProQuad. ECF No. 267 ¶ 2; ECF No. 277 ¶ 2. MMR-II was licensed in the United States in 1978 and is a trivalent product containing vaccines for measles, mumps, and rubella ("MMR"). ECF No. 267 ¶ 1; ECF No. 277 ¶ 1. ProQuad was licensed in the United States in 2005 and is a quadrivalent product containing vaccines for measles, mumps, rubella, and varicella (chicken pox) ("MMRV"). *Id.*

C. Mumps Cases Following a Vaccine

The CDC reports that after Merck introduced the mumps vaccine in 1967, mumps cases in the United States decreased by more than 99%. ECF No. 274 ¶ 7; ECF No. 277 ¶ 7. Specifically, mumps cases decreased "from 152,209 in 1968 to 231 in 2003." CDC, Mumps Cases & Outbreaks, https://www.cdc.gov/mumps/outbreaks.html (last visited July 25, 2023). Notably, however, "mumps cases and outbreaks reported in the United States have increased since 2006" with most of these cases involving

people who were vaccinated.[3] *Id.* The CDC currently reports that two doses of the mumps vaccine are 88% (range 31% to 95%) effective at preventing mumps. ECF No. 274 ¶ 6; ECF No. 277 ¶ 6. In April 2019, the director of the FDA's Center for Biologics Evaluation and Research ("CBER") issued a statement reaffirming that the FDA "work[s] diligently to assess safety and effectiveness of all licensed vaccines for their intended uses [and] [t]he MMR vaccine is very effective at protecting people against measles, mumps, and rubella." ECF No. 275-8 at 3.

D. GSK's Mumps Vaccines

GSK, like Merck, manufactures two mumps-containing vaccines. First, GSK manufactures Priorix, an MMR (measles, mumps, rubella) vaccine, which was first licensed for sale in Europe in 1998 and was then licensed in the United States in 2022.[4] ECF No. 274 ¶¶ 49, 52; ECF

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[3] According to the CDC, in 2006, 6,584 cases of mumps were reported in the United States. In 2007, there were 800 reported cases of mumps. In 2008, 454 cases were reported. In 2009, 1,991 cases were reported. In 2010, 2,612 cases were reported. In 2011, 404 cases were reported. In 2012, 229 cases were reported. In 2013, 584 cases were reported. In 2014, 1,223 cases were reported. In 2015, 1,329 cases were reported. In 2016, 6,366 cases were reported. In 2017, 6,109 cases were reported. In 2018, 2,251 cases were reported. In 2019, 3,780 cases were reported. In 2020, 616 cases were reported. In 2021, 154 cases were reported. In 2022, 322 cases were reported. *See* CDC, Mumps Cases & Outbreaks, https://www.cdc.gov/mumps/outbreaks.html (last visited July 25, 2023); *see also* ECF No. 277 ¶ 7 n.3.

[4] In June 2022, after the conclusion of briefing for the present motions, but prior to oral argument, the FDA approved GSK's Priorix vaccine. See FDA, June 3, 2022 Approval Letter – PRIORIX, https://www.fda.gov/media/158962/download (last visited July 25, 2023).

No. 277 ¶¶ 49, 52. Second, GSK manufactures Priorix-Tetra, an MMRV (measles, mumps, rubella, varicella) vaccine, which is licensed *outside* the United States. ECF No. 274 ¶¶ 50–51; ECF No. 277 ¶¶ 50–51. The mumps strain contained in GSK's Priorix and Priorix-Tetra vaccines is derived from the mumps strain in Merck's mumps-containing vaccines. ECF No. 274 ¶ 54; ECF No. 277 ¶ 54. GSK does not view the mumps component in Priorix as different from the mumps component in Merck's MMR-II, and GSK's clinical studies show that GSK's mumps component is noninferior to Merck's mumps component. ECF No. 274 ¶ 57; ECF No. 277 ¶ 57. In the FDA's Summary Basis for Regulatory Approval of Priorix, the Review Committee confirmed this, finding: "In clinical studies, vaccine-specific antibody responses to measles, mumps, and rubella viruses following administration of PRIORIX were shown to be non-inferior to antibody responses induced by the licensed M-M-R II vaccine." FDA, June 3, 2022 Summary Basis for Regulatory Action for PRIORIX, https://www.fda.gov/media/159545/download (last visited July 25, 2023).

E. Merck's Alleged Anticompetitive Conduct

Based on the allegations in the related FCA case, Plaintiffs contend that Merck's submissions to the FDA and, in turn, its labels for its mumps vaccines contain false and misleading information related to the efficacy and seroconversion rates of Merck's mumps vaccines and because of this conduct, Merck precluded GSK from obtaining a license to sell its MMR vaccine and caused Plaintiffs to be overcharged. *See generally* Amended Complaint, ECF No. 26. Outlined below is an overview of the specific evidence relating to Merck's competitive

intelligence regarding GSK's potential entrance into the Mumps Vaccine Market and Merck's alleged false and misleading conduct as to its mumps vaccines.

1. Merck Learns of GSK's Potential Entrance

In the late 1990s, Merck recognized that MMR-II was under "imminent threat of a major competitive launch" in the United States from GSK's Priorix. ECF No. 295-1 ¶ 31; ECF No. 301 ¶ 31; *see also* ECF No. 286, Ex. 81. Internal Merck documents reveal that in the face of GSK's impending launch, in 1996, Merck established a "Competitive Defense Task Force for M-M-R II." ECF No. 295-1 ¶ 32; ECF No. 301 ¶ 32; ECF No. 286, Ex. 81. These documents indicate that the marketing elements for the MMR-II Competitive Defense Task Force were to: (1) "Pursue a proactive tactical plan including initiatives to delay and disrupt the launch of Priorix into the market"; (2) "Launch a marketing and positioning plan to maintain the [MMR-II] advantage by preserving share in priority segments and emphasizing the long-term safety and efficacy profile"; and (3) "Set the stage for a new product platform including the use of recombinant albumin and the introduction of MMRV." ECF No. 286, Ex. 81 at MRK-CHA00285279. In June 1999, the Competitive Defense Task Force for MMR-II reported that since the Task Force was created in 1996, the "team has succeeded in 'raising the bar' for the competition at every available opportunity including a successful presentation to CBER in January [and] [a]lthough, we will probably never know whether that presentation had the effect of raising issues for the Priorix file, we do know that [GSK] will most likely not launch in the U.S. until 4Q99." *Id.* at MRKCHA00285278.

2. Merck Mumps Vaccine Label Claim Issues

In the late 1990s, around the same time Merck learned of GSK's imminent threat of launch in the United States, Merck and CBER engaged in discussions concerning the potency figure on Merck's mumps label. ECF No. 295-1 ¶ 36; ECF No. 301 ¶ 36. At that time, the MMR-II label specified that "the dose . . . contains not less than . . . 20,000 TCID50 of the . . . Mumps Virus" (the "Potency Claim"). *Id.* TCID stands for Tissue Culture Infectious Dose and is a measure of vaccine potency (i.e., the volume of live cells in the vaccine), which vaccine manufacturers and the FDA typically convert to a $\log_{10}$ scale. *Id.* Thus, the potency on the label equated to 4.3 on a $\log_{10}$ scale. ECF No. 295-1 ¶ 37; ECF No. 301 ¶ 37. During Merck's communications with CBER, it became evident that "the agency did not agree with [Merck's] proposal that the specifications noted in [Merck's] label were the minimum release potencies for [MMR-II]. Instead, [CBER] defined these specifications as end-expiry potencies," meaning it wanted the labeled potency to be the amount of live virus in the vaccine at the end of its shelf life, which for MMR-II has always been 24 months. ECF No. 295-1 ¶ 36; ECF No. 286, Ex. 82 at MRK-CHA00207706. Accordingly, as an interim measure to comply with CBER's request, Merck "overfilled" its mumps vaccines (i.e., put more live virus in each dose) in order to ensure that the vaccine would comply with the 4.3 $\log_{10}$ potency claim at the end of the 24-month shelf life. ECF No. 295-1 ¶ 41. Merck continues to overfill each mumps vaccine dose to this day. *Id.*

In 2000, after Merck implemented the "overfill," FDA inspectors visited Merck's manufacturing division and

issued a Form 483,[5] which cited Merck's failures in reporting mumps vaccines lots that fell below the potency claim prior to the expiry of the 24-month shelf life. ECF No. 295-1 ¶ 42. Merck submitted a response to the Form 483, but the issues identified in the Form 483 were raised again by the FDA in a February 9, 2001, Warning Letter. ECF No. 295-1 ¶ 42; ECF No. 295-1 ¶ 42. A Warning Letter is issued to a manufacturer when the "FDA finds that a manufacturer has significantly violated FDA regulations." FDA, About Warning and Close-Out Letters, https://www.fda.gov/inspections-compliance-enforcement-and-criminalinvestigations/warning-letters/about-warning-and-close-out-letters (last visited July 25, 2023). The February 2001 Warning Letter indicated that "investigators reported that the data in [Merck's] files showed that a number of . . . lots manufactured before the formulation was changed during February 2000 failed to meet the minimum potency specification." ECF No. 286, Ex. 124 at MRKCHA00209402. The Warning Letter directed Merck to "submit an analysis of Mumps stability data describing the range of potencies you would expect the various Mumps Vaccine products to reach at the two-year expiration date." *Id.* In creating this analysis, the FDA directed Merck to "assume the initial potency is the minimum release potency specification that was in effect

[5] "An FDA Form 483 is issued to firm management at the conclusion of an inspection when an investigator(s) has observed any conditions that in their judgment may constitute violations of the Food Drug and Cosmetic (FD&C) Act and related Acts." FDA, FDA Form 483 Frequently Asked Questions, https://www.fda.gov/inspections-compliance-enforcement-and-criminalinvestigations/inspection-references/fda-form-483-frequently-asked-questions (last visited July 25, 2023).

before 2000" and "summarize the available data regarding product efficacy at the lower end of this potency range." *Id.* In concluding, the Warning Letter stated that "[f]ailure to promptly correct these deviations may result in regulatory action without further notice" which could include "license suspension and/or revocation." *Id.*

In developing its response to the Warning Letter, Merck internally identified it had, prior to increasing the release potency, released to market 225 lots of MMR-II that had an end-expiry potency potentially lower than 4.3 $\log_{10}$ minimum mumps potency specification, with 107 of these lots being "a compliance issue," as they were projected to, at 24 months, fall below 4.0 $\log_{10}$.[6] ECF No. 295-1 ¶ 43; ECF No. 286, Ex. 128. Merck instituted a "Fact Finding" ("a prelude to a potential product recall") to track down all 107 lots that were a potential compliance issue. ECF No. 286, Ex. 128. While drafts of Merck's Warning Letter response referenced these "sub-potent lots," Merck's final version of its response did not specifically mention these lots. ECF No. 295-1 ¶ 46; *see also* ECF No. 286, Ex. 130 (draft 2001 Warning Letter Response); ECF No. 286, Ex. 131 (draft 2001 Warning Letter Response); ECF No. 286, Ex. 132 (Merck's Mar. 8, 2001 Response to February 2001 Warning Letter). Instead, Merck responded to the FDA's Warning Letter by explaining:

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[6] While Merck's email discussing the issue and its working drafts of its response to the February 2001 Warning Letter reference 223 lots being at risk of falling below 4.3 $\log_{10}$ and of those 223, 106 lots being at risk for falling below 4.0 $\log_{10}$, Plaintiffs point out that the spreadsheet attached to the email identifies 255 and 107 lots, respectively. *See* ECF No. 295-1 ¶ 43 n.78.

[I]f it is assumed that the initial potency is 4.3 log TCID50/dose, the minimum release potency specification in effect prior to February 2000, the expected average potency at expiry is 3.6 log TCID50/dose. In order to estimate the range of potencies around the average loss rate, the standard deviation of the loss rate was calculated and found to be 0.3 logs. Therefore, the 95% upper and lower confidence limits for mumps potency at the end of a two year expiry is estimated to be 3.9 and 3.3 log TCID50/dose, respectively.

ECF No. 132 at MRK-CHA01537609. In March and April of 2001, Merck sent the FDA two Biologics Product Deviation Reports ("BPDRs"), reporting similar potency problems, but represented that the "overfill" solved the issue. ECF No. 295-1 ¶ 48; ECF No. 292, Ex. 269 (March 2001 BPDR), Ex. 270 (April 2001 BPDR). In April 2001, the FDA closed its Warning Letter without requiring any lots to be withdrawn from the market. ECF No. 302 at 15–16.

Internal correspondence in 2002 at Merck indicates, however, that Merck's "corrective actions (adding more mumps and increasing the release specification) did not ensure [Merck met] 4.3/dose at expiry as previously indicated." ECF No. 295-1 ¶ 48; ECF No. 287, Ex. 137. Instead, Merck calculated that "approx. 7% of the lots [were] expected to be <4.3 at expiry." *Id.* Merck questioned whether the FDA would have responded differently if it knew about the potency values below 4.3/dose. *Id.* Additional internal documents and correspondence from this time indicate that if Merck's potency claim were to remain at 4.3 $\log_{10}$ at expiry, the shelf life would need to be changed to 12 months or less, but that such adjustment would have a commercial impact,

including "[i]nternational loss of share due to a competitive disadvantage ([GSK's proposed vaccine is] at 24 months)." ECF No. 295-1 ¶ 50; *see also e.g.*, ECF No. 287, Ex. 140.

Apart from implementing the overfill in 1999, beginning in 1997, Merck also discussed with the FDA conducting a clinical trial to support a label change of a mumps end-expiry potency lower than 4.3 $\log_{10}$. ECF No. 295-1 ¶ 57. This clinical trial would become known as Protocol 007, officially titled "A Study of M-M-R II at Mumps Expiry Potency in Healthy Children 12-18 Months of Age." ECF No. 295-1 ¶ 57. Two types of tests were used in Protocol 007: (1) a plaque reductions neutralization assay ("PRN") and (2) an enzyme linked immunosorbent assay ("ELISA"). Both of these tests are used to measure immunogenicity, which provides information about how a subject's immune system responds to different stimuli, including vaccination. ECF No. 295-1 ¶¶ 4–6; *see also, e.g.*, ECF No. 283 at 208. The most common immunological response evaluated in vaccine studies is the development of antibodies induced by the vaccine. ECF No. 295-1 ¶ 4. One way to measure immunogenicity is "seroconversion," which refers to a person going from being "seronegative" prior to vaccination, which generally means lacking pathogen specific antibodies, to being "seropositive" after vaccination, which means possessing such antibodies. *Id.*

a) The PRN

A PRN indirectly measures antibodies based on their capacity to neutralize the virus of interest. ECF No. 295-1 ¶ 7. A PRN is considered a functional immunogenicity assay—meaning it evaluates the functioning of the antibodies, not merely their presence. ECF No. 283 at 210.

In a PRN, a blood serum is incubated with the virus in a clear well (*i.e.*, a container). ECF No. 295-1 ¶ 8. If the virus is not neutralized, the virus causes "plaques" (or holes) in the cells. *Id.*; *see also* ECF No. 283 at 293–94. The theory is that if the test sample has neutralizing antibodies, they will prevent the virus from infecting the cells, meaning there would be fewer plaques. ECF No. 283 at 294. In the Protocol 007 PRN, pre-vaccinated serum samples are compared to post-vaccinated serum samples to determine if, as a result of vaccination, the child could be said to have seroconverted. ECF No. 295-1 ¶ 8. The PRN in Protocol 007 was designed to compare seroconversion rates across higher and lower potencies. ECF No. 295-1 ¶ 58. CBER set two statistical criteria that the experimental groups had to meet in order to consider the lower potency acceptable as compared to the existing potency. ECF No. 286, Ex. 95 at MRK-CHA00001468. First, the seroconversion rate in the group receiving the candidate end-expiry potency could not be more than 5% less than the seroconversion rate in the group receiving the control, and second, the lower limit of the confidence interval of the seroconversion rate in the group receiving the candidate end-expiry potency would have to be above 90%. *Id.*

Initially, Merck engaged in initial testing using its mumps virus strain (*i.e.*, the Jeryl Lynn strain) and other "wild-type" virus strains, meaning those naturally occurring. ECF No. 295-1 ¶ 62. However, initial testing of the wild-type virus resulted in seroconversion rates well below 95%, so Merck used the Jeryl Lynn strain, which was yielding seroconversion above 90%. *Id.* Additionally, Merck included rabbit antibodies, specifically anti-human Immunoglobin G ("antiIgG") in the serum samples. ECF

No. 295-1 ¶ 65. This anti-IgG PRN was referred to as the AntiIgG Enhanced Neutralization Test ("AIGENT"). *Id.*

After finalizing the design of the PRN, Merck performed the AIGENT in a research lab supervised by Dr. David Krah. ECF No. 295-1 ¶¶ 73–74. According to the relators in the related FCA case, Dr. Krah directed his lab staff to selectively recount pre-positive samples and change pre-positive samples to make them pre-negative, and also directed his staff to falsify data. *Id.* ¶ 74. Once the FDA was made aware of these allegations, FDA investigated and issued a Form 483, listing among other observations that "raw data [was] being changed with no justifications." *Id.* ¶ 80; *see also* ECF No. 289, Ex. 219 (August 6, 2001 Form 483).

b) The ELISA

The second test that was performed as part of Protocol 007 was an ELISA. In an ELISA, serum samples are added to a plastic microtiter wells coated with antigens—which are structures that bond to particular antibodies. ECF No. 283, Ex. 55 (Pasetti Report). If the serum contains antigen-specific antibodies, those antibodies bind to the antigens, triggering a secondary reaction that changes the color of the solution. *Id.* This color can be measured by a device called a spectrophotometer to determine whether or not there has been sufficient color change to identify a positive result. *Id.*

c) Merck's MMR-II sBLA

Initially, to be allowed to support a supplemental Biologics License Application ("sBLA") to lower the minimum mumps potency specification on the MMR-II label with the Protocol 007 testing, Merck was instructed by the FDA to demonstrate a correlation between the

results of Merck's ELISA and AIGENT tests. ECF No. 295-1 ¶ 70. Based on the data produced in the Protocol 007 study, Merck submitted an sBLA in January 2004 requesting a lower potency figure on its label. ECF No. 283, Ex. 39 (Kessler Report) ¶ 330. In 2007, CBER determined that "the information and data submitted are inadequate for final approval." *Id.* ¶ 333. CBER also noted: "[h]owever, the science related to immunogenicity of [MMR II] has substantially evolved since our initial testing requirements [and] use of ELISA data to evaluate the effect of difference in product potency is now acceptable." *Id.* ¶ 336. In response, Merck submitted an amendment providing additional information, including data from the Protocol 007 ELISA and ELISA data from previous Merck studies. In December 2007, the FDA approved Merck's sBLA to change the labeled potency from 4.3 to 4.1 $\log_{10}$ $TCID_{50}$. *Id.*

d) Merck's ProQuad BLA

In August 2004, Merck submitted its ProQuad BLA. ECF No. 283, Ex. 39 (Kessler Report) ¶ 330. To support this application, Merck used data from Protocol 007 and provided information about the correlation between the PRN and the ELISA from Protocol 007. ECF No. 288, Ex. 183 ¶ 116. In September 2005, the FDA approved Merck's ProQuad BLA. *Id.* ¶ 332.

F. GSK's Path to FDA Approval

To obtain approval of its mumps vaccine, GSK understood that it needed to conduct headto-head clinical trials to study the immunogenicity and safety of MMR-II versus Priorix and demonstrate that Priorix was non-inferior to MMR-II. ECF No. 274 ¶¶ 63, 65; ECF No. 277 ¶¶ 63, 65. Accordingly, as GSK's corporate designee testified, the clinical development plan for Priorix was

based on mirroring Merck's label. ECF No. 295-1 ¶ 131; ECF No. 301 ¶ 131. GSK understood this process would be very costly and time-consuming. ECF No. 274 ¶¶ 63, 65; ECF No. 277 ¶¶ 63, 65. For the Phase III clinical trials for Priorix, the FDA required GSK to conduct five separate studies: four non-inferiority studies and one safety study. ECF No. 274 ¶ 66; ECF No. 277 ¶ 66. As GSK explained, clinical trials involving children typically cost a minimum of $10 million and involve more burdensome documentation compared to clinical trials with only adults. ECF No. 274 ¶ 67; ECF No. 277 ¶ 67.

GSK began this process in July 1997 when it submitted an IND to the FDA to begin clinical trials for Priorix. ECF No. 274 ¶ 68; ECF No. 277 ¶ 68. However, in August 1997, the FDA put GSK's Priorix program "on clinical hold" due to concerns, including about GSK's safety data, indicating that the FDA needed additional data concerning "neurovirulence testing, the ELISA assay used to determine seronegativity and the reverse transcriptase assay testing of the viral seed and viral bulk." ECF No. 274 ¶ 69, ECF No. 277 ¶ 69; ECF No. 280-1 at 220; ECF No. 275-19 at 2. Thereafter, in March 1998, the FDA sent GSK a letter with fifty-two comments on GSK's proposed clinical development plan for Priorix. ECF No. 274 ¶ 70; ECF No. 277 ¶ 70. GSK internally summarized the FDA's comments as criticisms of its proposed United States IND study, including the proposed study's design and the types of assays to be used to test each vaccine component, and criticisms concerning other studies to be submitted in its BLA, including the quality of data derived from GSK's clinical testing outside the United States, the safety of the mumps strain, and the sample sizes of those studies. *Id.* Following discussions between the FDA and GSK, in June

1998, the FDA lifted the clinical hold. ECF No. 274 ¶ 71; ECF No. 277 ¶ 71; ECF No. 280-1 at 227, 233.

Nonetheless, discussions between the FDA and GSK concerning the clinical development of Priorix continued with the FDA requesting information on, inter alia, vaccine lots, documentation of the measles virus strain development, and how GSK intended to validate assays used to test the measles, mumps, and varicella components. ECF No. 274 ¶ 72; ECF No. 277 ¶ 72. In March 1999, the FDA denied GSK's request for a "pre-BLA meeting," which typically occurs before a manufacturer submits a final BLA for vaccine approval. ECF No. 274 ¶ 73; ECF No. 277 ¶ 73. GSK believed the FDA denied their request for the pre-BLA meeting because the "FDA does not consider [the] safety database as acceptable" and "FDA needs [an] additional safety study." ECF No. 275-23 at 5. Then, in October 1999, GSK internally reported that the FDA's decision to require an additional safety study remained unchanged. ECF No. 275-13 at 11; ECF No. 274 ¶ 76; ECF No. 277 ¶ 76. GSK estimated that this safety study requested by the FDA would cost between $10 million to $20 million, and GSK wanted to "avoid" conducting such a large safety study. ECF No. 275-25 at 5–6; ECF No. 274 ¶¶ 75, 77; ECF No. 277 ¶¶ 75, 77. Comments from the FDA during this time period also indicate that the FDA required additional information on mumps serology. ECF No. 295-1 ¶ 137; ECF No. 301 ¶ 137; ECF No. 295-13 at 10–11.

Thereafter, between 2000 and 2001, GSK deprioritized development of its MMR vaccine. ECF No. 295-1 ¶ 139; ECF No. 301 ¶ 139. The reason for this de-prioritization was that Merck's MMRV vaccine, ProQuad, was expected to be on the market in 2001, and accordingly, GSK wanted

to wait until the position of Merck with respect to MMRV was clear. ECF No. 274 ¶ 78; ECF No. 277 ¶ 78. GSK planned to follow Merck's progress and if Merck's MMRV succeeded, GSK would revive its development of MMRV, but if Merck's MMRV failed, it would prioritize Priorix. ECF No. 247 ¶ 80; ECF No. 277 ¶ 80. Evidence from GSK's documents indicates that it would cease all work during the two-year period except it would address outstanding MMR and Varicella IND questions, answer FDA questions on neurovirulence, continue to work on the level of serology in order to validate its mumps and varicella assays for future U.S. trials, and conduct certain neurovirulence testing. ECF No. 275-28 at 19.

In March 2002, GSK completed a risk assessment for the development of Priorix and Priorix-Tetra in the United States, and its marketing team recommended GSK "[p]ursue MMRV" and "[r]e-address MMR only if MMRV has proven not viable from a development perspective." ECF No. 274 ¶ 81; ECF No. 277 ¶ 81; ECF No. 275-31 at 11. GSK estimated that it would cost $33.1 million to develop MMR, $34.8 million to develop MMRV, and a combined $23.2 million in additional costs across both products. ECF No. 274 ¶ 81; ECF No. 277 ¶ 81. But in 2003, GSK's United States development of Priorix was put on hold due to business reasons and GSK stated it would revisit in the end of 2004 in light of study results and competitive intelligence status. ECF No. 275-33 at 4; ECF No. 275-34 at 7; ECF No. 274 ¶ 83; ECF No. 277 ¶ 83. One of the business reasons for discontinuing development of Priorix was that Merck's MMRV vaccine was near licensure in the United States. ECF No. 274 ¶ 84; ECF No. 277 ¶ 84.

Following Merck's licensure of ProQuad in 2005, by 2006, there was a renewed interest by GSK to bring a mumps vaccine to the United States market. ECF No. 295-1 ¶ 143; ECF No. 301 ¶ 143. After ProQuad was approved in 2005, the CDC indicated it preferred the use of the quadrivalent MMRV vaccine over separate injections of MMR and varicella vaccines. ECF No. 274 ¶ 87; ECF No. 277 ¶ 87. [redacted]. ECF No. 274 ¶ 89; ECF No. 277 ¶ 89. Moreover, in 2009, the CDC updated its recommendation to prefer separate injections of MMR and varicella vaccines for the first dose, and MMRV, rather than separate MMR and varicella injections, for the second dose. ECF No. 274 ¶ 87; ECF No. 277 ¶ 87. Accordingly, GSK shifted its focus from Priorix-Tetra (MMRV) to Priorix (MMR), as it saw a potential opportunity for Priorix as a first dose option. ECF No. 274 ¶¶ 88–89; ECF No. 277 ¶¶ 88–89.

In 2009, Merck's ELISA became commercially available when Merck's lab was purchased by an independent research company, PPD. ECF No. 295-1 ¶ 148; ECF No. 301 ¶ 148. In April 2011, GSK decided to use Merck's ELISA and notified the FDA of this intention in December 2011. ECF No. 295-1 ¶ 149; ECF No. 301 ¶ 149. In April 2012, the FDA gave GSK permission to use Merck's ELISA. ECF No. 295-1 ¶ 150; ECF No. 301 ¶ 150. Accordingly, in 2012, GSK commenced five Phase III clinical studies for Priorix, which GSK estimated would cost between $57.1 million and $66.8 million to complete. ECF No. 274 ¶ 91; ECF No. 277 ¶ 91.

In 2014, when GSK learned of the complaint in the related FCA case, GSK internal correspondence questioned whether the allegations could enable GSK to

bring its mumps vaccine to the United States market sooner. ECF No. 295-1 ¶ 152; ECF No. 301 ¶ 152; see also ECF No. 283 at 135 (email correspondence asking whether the allegations "could have implications on our 'non inferiority' benchmark for the US registration??"); see also *Id.* at 139 (email correspondence wondering whether "anything will (or can) come of this??? Earlier introduction of Priorix and Varilrix in the US????").

Additionally, in preparing for an investor event in 2015, GSK's Chairman of Vaccines was informed internally that GSK's Phase III trials started so late because:

> [D]iscussions with CBER about the Eps [endpoints] and assays to be used in phase III . . . proved to be protracted, since we could not meet the serological acceptability criteria for mumps that CBER required for Phase III success with our mumps assay (they required "a lower bound . . . for the response rate ≥90%") . . . . [U]ltimately, having access to the Merck Mumps ELISA which they licensed to PPD facilitated these discussions.

ECF No. 295-1 ¶ 153; ECF No. 301 ¶ 153; *see also* ECF No. 283 at 56.

On January 4, 2018, GSK's corporate designee was deposed and explained various business and budgetary considerations relating to GSK's development of its mumps vaccine in the United States. ECF No. 275-46. Specifically, GSK explained that its leadership had "always grappled with this vaccine for a couple of reasons; the low sales, the impact on the portfolio is more qualitative than quantitative, and because the schedule in the US is such that you receive varicella the same time you

would get MMR and we don't have a varicella[.]" ECF No. 275-46 at 137:5-13. Additionally, GSK identified five reasons why it did not yet have a mumps vaccine approved in the United States:

> 1. GSK deprioritized development of mumps-containing vaccines for business reasons, including budgetary concerns and opportunities with other products more in line with GSK's business strategy of focusing on adult vaccines;
>
> 2. GSK was concerned that Priorix sales would be low;
>
> 3. GSK did not actively pursue Priorix prior to 2009 because it believed that the market would shift from MMR to MMRV vaccines;
>
> 4. But then GSK did not pursue a MMRV vaccine either, because [redacted] and
>
> 5. GSK believed a mumps-containing vaccine would have a qualitative, but no quantitative, impact on its overall product portfolio.

ECF No. 274 ¶ 97; ECF No. 277 ¶ 97. GSK stated that there were no other reasons that GSK was not on the market with a mumps-containing vaccine. ECF No. 274 ¶ 98; ECF No. 277 ¶ 98. GSK also testified that it was not aware of any statement on Merck's product labels for MMR-II or ProQuad that foreclosed GSK from commercializing the mumps vaccine in the United States. ECF No. 274 ¶¶ 100–101; ECF No. 277 ¶¶ 100–101. However, GSK testified that the entire clinical development plan for Priorix was based on "mirroring" Merck's label claims. ECF No. 295-1 ¶ 131; ECF No. 301 ¶ 131.

In September 2019, a GSK executive told investors that it had completed the Phase III studies and it was "programming now the next step . . . submission of that asset to the regulators." ECF No. 295-1 ¶ 154; ECF No. 301 ¶ 154. Public approval documents from the FDA reveal that the FDA approved GSK's mumps vaccine Priorix in June 2022. FDA, June 3, 2022 Approval Letter – PRIORIX, https://www.fda.gov/media/158962/download (last visited July 25, 2023).

II. PROCEDURAL HISTORY

On June 25, 2012, Chatom Primary Care, P.C., filed a class action complaint against Merck based on the allegations of fraud alleged in the qui tam action, U.S. ex rel. Krahling v. Merck & Co., Inc., 10-cv-4374 (E.D. Pa.). On July 9, 2012, Dr. Andrew Klein filed a class action complaint against Merck also based on the allegations in the qui tam action. On August 2, 2012, this Court consolidated Chatom Primary Care, P.C. v. Merck & Co., Inc., No. 2:12-cv-03555 and Dr. Andrew Klein and Merck & Co., Inc., No. 2:12-cv-03857. ECF No. 23. Thereafter, on September 20, 2012, Plaintiffs, Chatom Primary Care, P.C., Andrew Klein, M.D., and John I. Sutter, M.D., filed a Consolidated Amended Class Action Complaint. ECF No. 26. The Consolidated Amended Class Action Complaint set forth six claims for relief: (1) Monopolization in Violation of Section 2 of the Sherman Act, 15 U.S.C. § 2; (2) Violation of State Consumer Protection Laws; (3) breach of contract; (4) violation of Pennsylvania's Express Warranty Law, Pa. Stat. Ann. Tit. 13, § 2313; (5) violation of Pennsylvania's Implied Warranty Law, Pa. Stat. Ann. Tit. 13, § 2314; and (6) unjust enrichment. *Id.*

On November 19, 2012, Merck filed a Motion to Dismiss Plaintiffs' Amended Complaint. ECF No. 40. On September 4, 2014, the Court granted in part and denied in part Merck's Motion to Dismiss. ECF Nos. 63, 65. The Court denied the motion to dismiss the antitrust claim, granted the motion to dismiss the state law claims, except those claims brought under the New York Deceptive Acts and Practices Act ("NYDAPA") and the New Jersey Consumer Fraud Act ("NJCFA"), and granted the motion to dismiss Count III, Count IV, Count V, and Count VI in their entireties. United States ex rel. Krahling v. Merck & Co., Inc., 44 F. Supp. 3d 581, 558– 59,609–610 (2014).

Years of discovery practice and accompanying motion practice followed until January 10, 2020, when Merck filed a Motion for Summary Judgment. ECF No. 272. Plaintiffs filed an Opposition on February 10, 2020 (ECF No. 279) and filed a corrected Opposition on February 20, 2020 (ECF No. 295). On March 10, 2020, Merck filed a Reply in Support of its Summary Judgment Motion (ECF No. 302), and Plaintiffs filed a Sur-Reply on March 17, 2020 (ECF No. 312).

Additionally, on March 12, 2020, Merck filed a Motion to Exclude Evidence from Dr. Thomas L. Copmann Pursuant to Federal Rule of Evidence 702 and Daubert. ECF No. 305. That Motion has also been fully briefed. See ECF Nos. 319 (Plaintiffs' Opposition); 323 (Merck's Reply); 324 (Plaintiffs' Sur-Reply).

On December 5, 2022, this case was reassigned from the Honorable C. Darnell Jones, II to the Honorable Chad F. Kenney. ECF No. 340. This Court heard oral argument on Defendant's Motion for Summary Judgment on January 24, 2023. ECF No. 342.

III. MERCK'S MOTION FOR SUMMARY JUDGMENT

A. Legal Standard

A district court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Indeed, "[s]ummary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Wright v. Owens Corning, 679 F.3d 101, 105 (3d Cir. 2012) (quoting Orsatti v. New Jersey State Police, 71 F.3d 480, 482 (3d Cir. 1995)). A fact is "material" if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). There is a genuine issue of material fact if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The party moving for summary judgment has the initial burden "of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (internal quotation marks omitted). Once the moving party has met this burden, the non-moving party must counter with "specific facts showing that there is a genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (internal

quotation marks and citation omitted); see also Fed. R. Civ. P. 56(c).

The non-movant must show more than the "mere existence of a scintilla of evidence" for elements on which the non-movant bears the burden of production. Anderson, 477 U.S. at 252. The non-movant opposing a motion for summary judgment may not "rely merely upon bare assertions, conclusory allegations or suspicions." Fireman's Ins. Co. v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982). Additionally, the non-moving party "cannot rely on unsupported allegations, but must go beyond pleadings and provide some evidence that would show that there exists a genuine issue for trial." Jones v. United Parcel Serv., 214 F.3d 402, 407 (3d Cir. 2000). Moreover, arguments made in briefs "are not evidence and cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion." Jersey Cent. Power & Light Co. v. Lacey Twp., 772 F.2d 1103, 1109–10 (3d Cir. 1985).

When determining the existence of a genuine issue of material fact, a court must "examine the evidence of record in the light most favorable to the party opposing summary judgment, and resolve all reasonable inferences in that party's favor." Wishkin v. Potter, 476 F.3d 180, 184 (3d Cir. 2007). The court need only decide whether "a fair-minded jury could return a verdict for the plaintiff on the evidence presented." Anderson, 477 U.S. at 252. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial'" and the court should grant summary judgment in favor of the moving party. Matsushita Elec. Indus. Co., 475 U.S. at 587 (citation omitted).

B. Discussion

1. Antitrust Claim

Merck argues that it is entitled to summary judgment on Plaintiffs' antitrust claim for the following reasons. First, it argues that Plaintiffs' Section 2 Sherman Act claim is foreclosed by the *Noerr-Pennington* doctrine. Second, it argues that to the extent Plaintiffs base their Section 2 claim on any of Merck's public statements about its mumps-containing vaccines, those statements are not actionable. Third, it argues that Plaintiffs cannot prove causal antitrust injury. Lastly, it argues that Plaintiff Dr. John I. Sutter is not a direct purchaser and therefore lacks antitrust standing to bring a Sherman Act claim. The Court will address each argument in turn.

a) *Noerr-Pennington* Doctrine

"Under the *Noerr-Pennington* doctrine, '[t]hose who petition [the] government for redress are generally immune from antitrust liability.'" *Fed. Trade Comm'n v. AbbVie Inc.*, 976 F.3d 327, 359–60 (3d Cir. 2020) (quoting *Prof'l Real Estate Inv'rs., Inc. v. Columbia Pictures Indus., Inc. ("PRE")*, 508 U.S. 49, 56 (1993)). The doctrine applies to petitioning before "all departments of the Government," including the Executive Branch and its agencies, like the FDA. *A.D. Bedell Wholesale Co. v. Philip Morris Inc.*, 263 F.3d 239, 250 (3d Cir. 2001) (quoting *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1979)); *see also In re Lipitor Antitrust Litig.*, 868 F.3d 231, 273 (3d Cir. 2017) ("Petitions to administrative agencies are consequently also immune from antitrust liability."). Nonetheless, this doctrine is not absolute; rather, the "scope of *Noerr Pennington* immunity depends on the 'source, context, and nature of the competitive restraint at issue.'" *A.D. Bedell*, 263 F.3d

at 251 (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988)). "On the one hand, parties may be immune from liability for 'the antitrust injuries which result from the [government] petitioning itself' or 'the antitrust injuries caused by government action which results from the petitioning.'" *In re Lipitor Antitrust Litig.*, 868 F.3d at 264 (quoting *A.D. Bedell*, 263 F.3d at 251). "On the other hand, '[i]f the restraint directly results from private action there is no immunity.'" *Id.* (quoting *A.D. Bedell*, 263 F.3d at 251). This means that "immunity will not categorically apply to private actions somehow involving government action." *Id.* "Immunity applies to 'political activity with a commercial impact' but not 'commercial activity with a political impact.'" *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.*, 622 F. Supp. 3d 22, 76 (E.D. Pa. 2022) (quoting *Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129, 1138 (3d Cir. 1993)).

Courts have found *Noerr-Pennington* to not apply when the petitioning is a request to the government to perform "a ministerial act" or the petitioning is a "mere incident of regulation." *See, e.g.*, *In re Buspirone Pat. Litig.*, 185 F. Supp. 2d 363, 370 (S.D.N.Y. 2002); *Litton Sys., Inc. v. AT&T Co.*, 700 F.3d 785 (2d Cir. 1983) (holding AT&T's submission of its tariff rates to FCC for publication—that FCC did not need to review or approve prior to publication—did not warrant *Noerr-Pennington* immunity because decision to impose and maintain the interface tariff was made in the AT&T boardroom, not at the FCC). Therefore, "it is critical to distinguish between activities in which the government acts or renders a decision only after an independent review of the merits of a petition and activities in which the government acts in a merely ministerial or nondiscretionary capacity in direct

reliance on the representations made by private parties." *In re Buspirone*, 185 F. Supp. 2d at 369. An example of a ministerial act is the listing of a patent with the FDA for publication in the Orange Book, which courts have repeatedly found is not petitioning activity eligible for *Noerr-Pennington* immunity as the FDA did not independently confirm that the patent listing was correct. *Id.* at 370; *see also American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001) (FDA administers Orange Book listings in ministerial fashion).

Additionally, there is an exception to *Noerr-Pennington* immunity for "sham petitions." Under this exception, a "party is not entitled to immunity where the activity 'ostensibly directed toward influencing governmental action [ ] is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor . . . .'" *In re Flonase Antitrust Litig.*, 795 F. Supp. 2d 300, 309 (E.D. Pa. 2011) ("*Flonase I*") (quoting *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1965)). A two-step test has been established to determine whether petitioning is a sham. *PRE*, 508 U.S. at 60–61. Courts consider government petitioning a sham if: (1) it is "objectively baseless in the sense that no reasonable [party] could realistically expect success on the merits" and (2) it is "an attempt to interfere *directly* with the business relationships of a competitor, through the use of the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon." *Id.* (internal quotation marks and citations omitted). And while the Third Circuit has expressly declined to recognize a "fraudulent misrepresentation" exception to *Noerr-Pennington* immunity, it has explained that "a material misrepresentation that affects the very core of a litigant's

case" is relevant to the objectively baseless prong of the sham exception. *Cheminor Drugs, Ltd. V. Ethyl Corp.*, 168 F.3d 119, 123 (3d Cir. 1999).

In cases involving the pharmaceutical industry, application of the two-part test has often been invoked in the context of determining whether manufacturers' use of citizens petitions to the FDA are a sham and whether bringing patent litigation to invoke the 30-month stay under the Hatch-Waxman framework is a sham. *See, e.g., In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 694 (2d Cir. 2009) (applying *PRE* to a citizen petition filed with FDA and patent litigation and finding sham exception adequately pled); *AstraZeneca AB v. Mylan Labs. Inc.*, No. 00–cv–6749, 2010 WL 2079722, at *3 (S.D.N.Y. May 19, 2010) (applying *PRE* to patent infringement litigation and granting motion to dismiss as the activity was not a sham and thus immunized by *Noerr-Pennington*); *Flonase I*, 795 F. Supp. 2d 300 (E.D. Pa. 2011) (denying *Noerr-Pennington* immunity under the sham exception when defendant filed citizens petitions). While administrative petitions are "less susceptible than lawsuits to the sham exception, [they] still carry the potential for antitrust liability." *In re DDAVP*, 585 F.3d at 686; *see also Flonase I*, 795 F. Supp. 2d at 309–10 ("Although *PRE* only discussed the sham exception in the context of litigation, the test also generally applies to petitions to administrative agencies.").

Additionally, "[i]t is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." *Calif. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 514 (1972). "Where certain conduct is immunized from antitrust liability, a court must

still 'consider evidence of the remaining challenged conduct in the aggregate to see if it is sufficient to support antitrust liability.'" *In re Suboxone*, 622 F. Supp. 3d at 77 (quoting *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 839 (7th Cir. 2011)).

Here, Merck asserts *Noerr-Pennington* immunity applies because, even if Merck submitted fraudulent information to the government, Plaintiffs' alleged injuries are caused by government action, *i.e.*, the standard the FDA required GSK to meet in designing clinical testing for its mumps vaccine. ECF No. 273 at 25. Plaintiffs argue that Merck's conduct is not petitioning activity; rather, it was a commercial decision to market its mumps vaccines with a false and misleading label and that Merck's response to FDA enforcement is a mere incident of regulation. *See* ECF No. 295 at 66–69. Merck replies by stating that it "has never argued that statements made to the public were immunized" by *Noerr-Pennington*, just that the submissions to the FDA allegedly containing false information that Plaintiffs' claim resulted in the agency holding GSK to a higher standard are immune. ECF No. 302 at 10–11.

The Court agrees that Merck's submission to the FDA could be considered petitioning activity. Additionally, the submissions at issue are not requests to the government to perform "a ministerial act" nor is the petitioning a "mere incident of regulation." As described above, the key consideration for this exception is whether the government acts in a merely ministerial or nondiscretionary capacity in direct reliance on the representations made by private parties' acts or if the government renders a decision only after an independent review of the merits of a petition. Considering the

submissions to the FDA described in the parties' briefing—submission of Protocol 007 data, a white paper that Merck submitted to the FDA, a response to an FDA Form 483, a response to an FDA Warning Letter, and certain BPDRs—in all of these instances, the FDA is not acting in a merely ministerial or non-discretionary capacity based on the representations made by Merck. Instead, the FDA is independently reviewing the merits of each of the submissions. One does not have to look beyond the back-and-forth between the FDA and Merck to see that the FDA was actively reviewing Merck's submissions and exercising its discretion.

Turning to the sham exception, the Court must first examine whether the submissions to the FDA had an objective basis. However, "[t]he question of whether a petition is a sham is generally a question of fact for the jury" and "[a] court should only rule on the objective baselessness prong as a matter of law [w]here there is no dispute over the predicate facts of the underlying petitions." *Flonase I*, 795 F. Supp. 2d at 310 (internal quotations and citations omitted). Accordingly, the Court declines to grant summary judgment in favor of Merck on *Noerr-Pennington* grounds because genuine issues of material fact remain. Merck did not describe the petitioning at issue in its Statement of Undisputed Facts in Support of its Motion for Summary Judgment (ECF No. 274), but rather, just cited to the Plaintiffs' general allegations in the Amended Complaint. Additionally, in its response to the paragraphs in Plaintiffs' Additional Disputed Facts in Opposition to Summary Judgment that described the facts surrounding the submissions to the FDA, Merck stated: "The statements in this paragraph are not material to the issues in Merck's Motion for Summary Judgment because they do not bear on whether

Plaintiffs' claims are barred by the *Noerr-Pennington* doctrine, whether Merck's conduct caused antitrust injury to Plaintiffs, or any other basis upon which Merck moved for summary judgment. Merck reserves the right to dispute the statements in this paragraph at any trial in this action." *See, e.g.*, ECF No. 301, Response to ¶ 48. Because of this response, there remain disputes as to the predicate facts of the underlying petitions at issue.

Finally, the Court notes that even if Merck's petitioning conduct is immune under *Noerr-Pennington*, Plaintiffs allege that the anticompetitive business regime centered on Merck's false and misleading label claims, and as such, the petitioning may be relevant to showing Merck's intent.

For the foregoing reasons, this Court declines to grant summary judgment in favor of Merck on the grounds that the *Noerr-Pennington* doctrine bars Plaintiffs' antitrust claim

b) Public Statements

In addition to arguing that its statements to the FDA are immune from antitrust liability, Merck also argues that to the extent Plaintiffs base their antitrust claim on purported misstatements to the public at large, that theory fails under the Sherman Act. Specifically, Merck asserts that even if its statements about its own MMR product to potential customers "may have been wrong, misleading, or debatable," such statements are not actionable as antitrust violations in the absence of coercion, and additionally, because a truthful disclosure would not have made a difference in the competitive process. ECF No. 273 at 42–43. In support of this argument, Merck relies on four cases that this Court finds distinguishable from the present case. ECF No. 273 at 42–

43 (citing *Santana Prods., Inc. v. Bobrick Washroom Equip., Inc.*, 401 F.3d 123, 133 (3d Cir. 2005); *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 524–25 (5th Cir. 1999); *Rambus v. FTC*, 522 F.3d 456, 466 (D.C. Cir. 2008); *Eisai Inc. v. Sanofi-Aventis U.S.*, No. 08-4168, 2014 WL 1343254 (E.D. Pa. Mar. 28, 2014)).

First, *Santana* held that wrong, misleading, or debatable statements by one competitor about another competitor's products are indicative of competition on the merits and therefore do not constitute a "restraint of trade" for purposes of an antitrust violation. 401 F.3d at 132. Putting aside the fact that the Third Circuit has acknowledged that the *Santana* holding was phrased in "overly broad terms," *West Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 109 n.14 (3d Cir. 2010), *Santana* is distinguishable on the facts as it involved statements about a competitors' product; whereas here, Plaintiffs' claims focus on the allegedly fraudulent statements Merck made about its own product. Second, *Stearns* is also factually distinct from this case as it concerned competitors bidding on contracts to provide airline boarding bridges to municipal airports. 170 F.3d at 524. *Stearns* explained that there could be no exclusionary conduct as long as the decision on the choice of supplier remained "in the hands of the consumer," but the court also noted that "bribery and threats are not competition on the merits" and that "[s]everal cases have found violations of section 2 when the monopolist engages in what appears to be normal competitive behavior, but has manipulated representatives of the consumer to the point that the integrity of the decisional process has been violated." *Id.* at 526. Here, Plaintiffs did not have a choice of supplier, and therefore, this case does not directly support Merck's argument. Third, in *Rambus*, the court

determined that the alleged deception did not harm the competitive process. 522 F.3d at 466. In contrast, as will be described *infra*, there is a dispute of material fact as to whether Merck's allegedly false and misleading label claims were a material cause of GSK's delayed market entry. Lastly, Merck points to *Eisai* for the proposition that "[w]hile it is theoretically possible that false statements about a rival to potential investors and customers can be a form of anticompetitive conduct, it would be a rare case in which such false statements in-and-of themselves would be sufficient to support an antitrust violation." 2014 WL 1343254, *37 (internal quotations and citation omitted). However, as the Court is unaware of any public statements Merck made about GSK's vaccine, the Court does not see how *Eisai* is applicable to this case.

In conclusion, there are disputes as to material fact as to whether Merck's alleged deception impaired the competitive process, and therefore, the Court declines to grant summary judgment to Merck on the aspects of Plaintiffs' antitrust claim based on Merck's statements to the public.

c) Antitrust Injury

In antitrust actions, plaintiffs are required to "establish antitrust standing, which is distinct from Article III standing." *In re Wellbutrin XL Antitrust Litig.*, 868 F.3d 132, 163 (3d Cir. 2017). "To establish antitrust standing, [] plaintiff[s] must show they have suffered an antitrust injury— that is, an 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes [the] defendant['s] acts unlawful.'" *Id.* (quoting *Ethypharm S.A. France v. Abbott Laboratories*, 707 F.3d 223, 233 (3d Cir. 2013)). Thus,

plaintiffs must show that a defendant's antitrust violation was a "material cause" of their injuries. *In re Flonase Antitrust Litig.*, 798 F. Supp. 2d 619, 627 (E.D. Pa. 2011) ("*Flonase II*") (citations omitted). "An antitrust violation is a 'material cause' of an injury if it is a proximate cause of that injury." *Id.* (citations omitted).

"That a regulatory or legislative bar can break the chain of causation in an antitrust case is beyond fair dispute." *In re Wellbutrin XL Antitrust Litig.*, 868 F.3d at 165. However, "an antitrust violation can be the proximate cause of a plaintiff's injury even if there are additional independent causes of the injury." *In re Suboxone*, 622 F. Supp. 3d at 78 (citations omitted). Moreover, "[e]ven if an antitrust violation is not the material cause of an injury and the only material cause is some intervening conduct, courts have consistently found the causation requirement satisfied and the chain of causation intact where that intervening conduct was the foreseeable consequence of the original antitrust violation." *Flonase II*, 798 F. Supp. 2d at 628. Ultimately, "[w]hether conduct constitutes intervening conduct that breaks the chain of causation and whether intervening conduct is a foreseeable consequence of a defendant's actions are questions of fact to be submitted to the jury." *Id.* (citation omitted).

In order to establish antitrust injury here, Plaintiffs must show that the harm they say they experienced—inflated prices for mumps vaccines—was caused by Merck's allegedly unlawful conduct. Plaintiffs allege that they have created a triable issue of fact as to whether Merck's conduct materially caused their harm because they have put forth evidence that: (1) Merck kept GSK off the market by maintaining false and misleading

statements on the mumps vaccine labels; and (2) Merck kept GSK off the market by failing to disclose potency failures, staving off a massive recall. ECF No. 295 at 52–55. Merck on the other hand argues: (1) GSK's independent business decisions, not Merck's conduct, delayed GSK's development of Priorix; and (2) Plaintiffs' claims that FDA would have "lowered the bar" absent Merck's conduct is pure speculation that does not forge the necessary causal link. ECF No. 273 at 26–34.

The Court finds that there is sufficient evidence to raise a genuine issue of material fact as to whether it was Merck's conduct that was a material cause of Plaintiffs' injuries. Numerous pieces of evidence submitted with the briefings establish this dispute and the Court will point to a few herein. First, there is evidence that GSK had protracted discussions with the FDA on the serological acceptability criteria for mumps and it was only after Merck licensed their mumps ELISA (the test that Plaintiffs alleged was scientifically flawed) to PPD, and GSK was able to use Merck's ELISA, that GSK was finally able to complete its Phase III clinical trials and enter the market. *See, e.g.*, Jan. 24, 2023 Hr'g Tr. at 19:18–20:1. There is additional evidence contained in Merck's internal documents stating that they were out of compliance, but changing their label was unacceptable because it would allow GSK to enter the market. Moreover, after GSK got access to Merck's ELISA and the approval to use Merck's ELISA in 2012, GSK received approval in 2022, which fits within the exact time frame, Plaintiffs' expert, Dr. Copmann, predicted GSK would receive approval once it received access to Merck's allegedly flawed ELISA. See *Id.* at 20:18–20. Additionally, the fact that GSK's corporate designee testified as to different reasons for GSK not obtaining approval until

2022 does not, at summary judgment, break the causal connection between the alleged antitrust violation and Plaintiffs' injury, as the corporate designee also testified that GSK had to mirror Merck's allegedly false label claims. Moreover, the actions taken by the FDA and GSK in response to Merck's allegedly false label claims are foreseeable consequences of Merck's alleged misconduct.

Therefore, while a jury may well conclude that GSK's independent business reasons and the FDA decision-making process break the chain of causation, whether these reasons are the proximate cause of Plaintiffs' injury is a question of fact for the jury. Accordingly, the Court finds genuine issues of material fact remain as to the question of whether Merck caused Plaintiffs' alleged injury.

d) Antitrust Standing

To have standing to sue for damages under the antitrust laws, a private plaintiff must be a direct purchaser of the product from the defendant. 15 U.S.C. § 4; Ill. *Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977); *Warren Gen. Hosp. v. Amgen Inc.*, 643 F.3d 77, 79 (3d Cir. 2011). Merck argues that Dr. Sutter does not have antitrust standing because although his practice, "John Ivan Sutter, MD, PA"—which is a distinct corporate entity and not a named plaintiff—made purchases of Merck's mumps vaccine, Dr. Sutter did not personally make those purchases. ECF No. 273 at 44. Dr. Sutter's deposition testimony and his records showing payment make it clear that it was his corporate entity, not him personally, that purchased the mumps vaccines from Merck. ECF No. 274 at 42; ECF No. 302 at 27. In response, Plaintiffs point to Merck's own sales data that does not reveal a customer named "John Ivan Sutter, MD,

PA.;" rather, the sales data contained customers "John Ivan Sutter, MD" and "John Sutter," both in Clifton, New Jersey, that purchased $36,530 worth of MMRII and ProQuad between 1998 and 2007. ECF No. 277 ¶ 42. In reply, Merck argues that Plaintiffs' contention that because the sales data does not include the word "PA" to signify the corporate entity, it is referring to Dr. Sutter in his individual capacity, cannot defeat summary judgment because it is pure speculation. ECF No. 302 at 27–28 (citing, *inter alia*, *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990) ("speculation or conjecture does not create a material factual dispute sufficient to defeat entry of summary judgment")). While this Court agrees that Plaintiffs' argument that Dr. Sutter personally purchased the mumps vaccines seems speculative in the face of Dr. Sutter's own testimony and his documented evidence, the Court finds this to be an issue of fact, that it cannot resolve at summary judgment.

2. State Law Claims

Merck argues that it is entitled to summary judgment on Plaintiffs' New Jersey and New York consumer protection claims. Merck argues that Dr. Sutter's New Jersey consumer protection claim fails "because, by his own admission, the mumps vaccine is not sold to the public at large and thus is not a product covered by the statute." ECF No. 273 at 12. Additionally, Merck argues Plaintiffs failed to establish the essential element of causation for their consumer protection claims. *Id.* For the following reasons, the Court finds that Merck's mumps vaccines constitute merchandise under the NJCFA, but finds that Plaintiffs have not created a genuine issue of material fact that they would have acted any differently if Merck's label claims had said anything different.

a) "Merchandise" under the NJCFA

The NJCFA prohibits sellers of "merchandise" from engaging in any "unconscionable or abusive [commercial practice], deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression or omission of any material fact with intent that others rely upon such concealment." N.J. Stat. Ann. § 56:8-2. The NJCFA defines "merchandise" as "any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale." *Id.* § 56:8-1(c). New Jersey has interpreted "the public," as used in this definition of "merchandise," to refer to the "public at large." *Princeton Healthcare Sys. v. Netsmart New York, Inc.*, 29 A.3d 361, 365 (N.J. App. Div. 2011) (collecting cases). Notably, "it is the character of the transaction rather than the identity of the purchaser which determines if the Consumer Fraud Act is applicable." *J & R Ice Cream Corp. v. California Smoothie Licensing Corp.*, 31 F.3d 1259, 1273–74 (3d Cir. 1994) (citation omitted).

Accordingly, some courts have "dismissed NJCFA claims relying on services or goods that are only offered to a select group of individuals." *City of Atl. City v. Zemurray St. Capital, LLC*, 192 F. Supp. 3d 563, 568 (D.N.J. 2016) (citations omitted). On the other hand, however, "at least one judge in [the district of New Jersey] has determined that the NJCFA can encompass claims for merchandise that is 'expensive, uncommon, or only suited to the needs of a limited clientele.'" *Id.* (citing *Prescription Counter v. AmerisourceBergen Corp.*, No. 04-5802, 2007 WL 3511301, at *14 (D.N.J. Nov. 14, 2007)). Courts have summarized the distinction in this line of cases, stating that "where courts permitted claims to go forward

seemingly about goods not available to the general public, those goods are generally standardized and did not require individual bargaining"; "[b]ut where claims were not permitted to proceed, those usually dealt with specific agreements and individualized negotiations." *Id.* (citing *Naporano Iron & Metal Co. v. Am. Crane Corp.*, 79 F. Supp. 2d 494, 509 (D.N.J. 1999)).

Merck argues that Plaintiffs' NJCFA claim fails because the mumps vaccines were not available "to the public at large," therefore, the mumps vaccines do not qualify as "merchandise" under the NJCFA. ECF No. 273 at 46–47. In support of this argument, Merck points to Dr. Sutter's deposition testimony stating that the mumps vaccine is not available "to the public at large," but rather, the vaccine must be purchased by licensed medical professionals. ECF No. 247 ¶ 43; ECF No. 277 ¶ 43. However, looking at the character of the transaction rather than the identity of the purchaser, the Court finds that Merck's mumps vaccines are standardized and not the result of individual bargaining. As indicated by Plaintiffs, Merck's mumps vaccines are made under standard formulas and conditions and are administered uniformly to the general public. ECF No. 295 at 80. The mumps vaccines are not customized to each patient, but rather are sold in a uniform package and administered in a uniform dose. *Id.* Additionally, Merck has not demonstrated that the transaction was subject to individualized negotiations.

Therefore, the Court finds that Merck's mumps vaccines are "merchandise" under the NJCFA and thus will deny summary judgment on this ground.

b) Causation Elements of Plaintiffs' State-Law Claims

To prove their claims under the NYDAPA and the NJCFA, Plaintiffs must show causation. *See Frederico v. Home Depot*, 507 F.3d 188, 202 (3d Cir. 2007) (explaining that the NJFCA requires a causal link between the practice and the harm); *In re Currency Conversion Fee Antitrust Litig.*, 230 F.R.D. 303, 310 (S.D.N.Y. 2004) (explaining that the NYDAPA requires a plaintiff to prove that the defendant's material deceptive act caused the injury). Under the NJCFA, "[c]ourts have generally found causation to be established for [NJCFA] purposes when a plaintiff has demonstrated a direct correlation between the unlawful practice and the loss; they have rejected proofs of causation that were speculative or attenuated." *Heyert v. Taddese*, 70 A.3d 680, 700 (N.J. App. Div. 2013); *see also Fleisher v. Fiber Composites, LLC*, No. 12-cv-1326, 2012 WL 5381381, at *10 (E.D. Pa. Nov. 2, 2012) (explaining under the NJCFA, plaintiffs must articulate a causal nexus between the defendant's conduct and plaintiffs' ascertainable loss). "Under the [NYDAPA], plaintiffs need not prove reliance, but at a minimum, the complaint must allege that the plaintiffs saw the deceptive statements prior to purchasing the defendant's product, and that the defendant's deceptive act or practice caused harm." *Fleisher*, 2012 WL 5381381, at *10 (cleaned up) (citations omitted).

Here, Plaintiffs allege in their Complaint that as "a direct and proximate result of Merck's misrepresentations and omissions, the Plaintiffs . . . were damaged" and Plaintiffs "would not have purchased or used Mumps Vaccine had they known the truth." ECF No. 26 ¶¶ 167–168. But the undisputed evidence shows that Plaintiffs would not have acted any differently if the labels said anything different. Dr. Klein does not dispute that he did not regularly review the package insert for Merck's

MMR-II vaccine, other than in the context of this case and to check the dosing schedule. ECF No. 274 ¶ 33; ECF No. 277 ¶ 33. Similarly, Dr. Sutter never investigated whether the statements in Merck's label related to efficacy, effectiveness, or seroconversion were false and misleading prior to reviewing the Complaint in the related FCA action. ECF No. 274 ¶ 44; ECF No. 277 ¶ 44. Accordingly, Plaintiffs cannot establish the causal nexus required to prove their state-law claims. *See, e.g.*, *Fleisher*, 2012 WL 5381381, at *10 (dismissing NJCFA and NYDAPA claims because "at the minimum" the plaintiff must have seen "the deceptive statements prior to purchasing the defendant's product"); *Gale v. Int'l Bus. Mach. Corp.*, 9 A.D.3d 446, 447 (N.Y. 2d Dep't 2004) ("If the plaintiff did not see any of these statements, they could not have been the cause of his injury.").

Plaintiffs argue that they had "no choice" but to buy Merck's product because there was no alternative. However, this is beside the point, as Plaintiffs must prove a causal nexus between the alleged false statement and their decision to purchase, and here, Plaintiffs never reviewed or evaluated the alleged misstatements in connection with a purchase, making proof of a causal nexus impossible.

Plaintiffs additionally argue that all that they need to show is that they did not receive the benefit of the bargain—*i.e.*, they bought a product that was ultimately worth less than the product that was promised. ECF No. 295 at 77–78. However, the cases Plaintiffs rely on in support of this argument are inapposite. *Smajlaj v. Campbell Soup Co.* found that a different element of the plaintiff's NJCFA claim, the ascertainable loss element, was satisfied if the plaintiff did not receive the benefit of

the bargain. 782 F. Supp. 2d 84, 97, 99 (D.N.J. 2011). Additionally, *Rodriquez v. It's Just Lunch, Int'l* was a class certification decision which therefore has no bearing on this motion. 300 F.R.D. 125, 147 (S.D.N.Y. 2014).

Accordingly, because Plaintiffs have not shown that they would have acted any differently if the labels said anything different, Merck is entitled to judgment as a matter of law on Plaintiffs' state-law claims.

3. Conclusion

For the foregoing reasons, Merck's Motion for Summary Judgment as to the antitrust claim will be denied and Merck's Motion for Summary Judgment as to the NYDAPA and NJCFA claims will be granted.

IV. MERCK'S MOTION TO EXCLUDE EVIDENCE FROM DR. COPMANN

A. Legal Standard

Federal Rule of Evidence 702 provides:

> 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.

Fed. R. Ev*Id.* 702. This Rule places district courts in the role of the "gatekeeper," requiring courts to "ensure that any and all [expert] testimony . . . is not only relevant, but

reliable." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993)) (internal quotations omitted). Rule 702 has "a liberal policy of admissibility," *Pineda v. Ford Motor Co.*, 520 F.3d 237, 243 (3d Cir. 2008) (citation omitted), and accordingly, the "rejection of expert testimony is the exception and not the rule." *Dorman Prods. v. PACCER, Inc.*, 201 F. Supp. 3d 663, 689 (E.D. Pa. 2016) (quoting Fed. R. Ev*Id.* 702 Advisory Committee Note). The Third Circuit has explained that to survive a *Daubert* challenge, an expert must satisfy three "restrictions on expert testimony: qualification, reliability, and fit." *Schneider ex rel. Estate of Schneider v. Fried*, 320 F.3d 396, 404 (3d Cir. 2003) (citations omitted). The party offering the expert must prove each of these requirements by a preponderance of the evidence. *In re TMI Litig.*, 193 F.3d 613, 663 (3d Cir. 1999).

To qualify as an expert, Rule 702 requires the "expert witness to have 'specialized knowledge' regarding the area of testimony." *Betterbox Commc'ns Ltd. v. BB Techs., Inc.*, 300 F.3d 325, 327 (3d Cir. 2002). The Third Circuit has instructed courts to interpret the qualification requirement "'liberally,' recognizing that 'a broad range of knowledge, skills, and training qualify an expert as such.'" *Thomas v. CMI Terex Corp.*, No. 07-3597, 2009 WL 3068242, *5 (D.N.J. Sept. 21, 2009) (quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 741 (3d Cir. 1994) ("*Paoli II*")). "[I]t is an abuse of discretion to exclude testimony simply because the trial court does not deem the proposed expert to be the best qualified or because the proposed expert does not have the specialization that the court considers most appropriate." *Pineda*, 520 F.3d at 244 (quoting *Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d 777, 782 (3d Cir. 1996)).

The reliability requirement of *Daubert* "means that the expert's opinion must be based on the 'methods and procedures of science' rather than on 'subjective belief or unsupported speculation'; the expert must have 'good grounds' for his or her belief." *Paoli II*, 35 F.3d at 742 (citation omitted). "The reliability requirement is not to be applied 'too strictly' and is satisfied as long as the expert has 'good grounds' for his or her opinion." *Apotex, Inc. v. Cephalon, Inc.*, 321 F.R.D. 220, 228 (E.D. Pa. 2017) (quoting *Holbrook*, 80 F.3d at 784). "[I]n making reliability determinations, courts must err on the side of admission rather than exclusion." *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 857 (3d Cir. 1990) ("*Paoli I*").

Lastly, Rule 702 requires the expert testimony fit the issues in the case. "Testimony 'fits' a case when it is 'relevant for the purposes of the case and . . . assist[s] the trier of fact.'" *In re Flonase Antitrust Litig.*, 884 F. Supp. 2d 184, 190 (E.D. Pa. 2012) ("*Flonase III*") (quoting Schneider, 320 F.3d at 404). Finally, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596 (citing *Rock v. Arkansas*, 483 U.S. 44, 61 (1987)).

B. Discussion

Plaintiffs proffer Dr. Thomas L. Copmann ("Dr. Copmann") to provide an expert opinion on the possible effects of Merck's conduct on GSK's ability to obtain regulatory approval of its own mumps vaccine, Priorix, and to opine on when Priorix would have obtained regulatory approval in the United States if not for Merck's actions. ECF No. 309 at 8. Merck's Motion to Exclude Evidence from Dr. Thomas L. Copmann Pursuant to

Federal Rule of Evidence 702 and Daubert argues that: (a) Dr. Copmann's opinion about how the FDA would have reacted to different disclosures by Merck is not admissible; (b) Dr. Copmann's opinions about how GSK would have reacted to different disclosures by Merck are not admissible; and (c) Dr. Copmann's estimate that it would take 8 to 10 years for GSK to secure FDA approval for a vaccine is baseless and unreliable. ECF No. 306.

1. Dr. Copmann's Qualifications

Dr. Copmann is qualified to offer expert testimony in this case. Dr. Copmann holds a bachelor's degree in biochemistry, a master's in endocrinology, and a doctorate in physiology. Additionally, Dr. Copmann has thirty years of experience helping to bring pharmaceutical products to market and in such role, he has worked closely with the FDA and CBER in handling NDAs, BLAs, and INDs for dozens of drugs and biological products, many of which involved noninferiority analyses and ELISA testing. Dr. Copmann has authored dozens of comments to the FDA and CBER and has met with the agencies hundreds of times. Additionally, Dr. Copmann has written various articles and comments about the development and regulation of biological products. Moreover, Dr. Copmann was nominated by a senior FDA official, Dr. Carolyn Hardegree, to serve on the CDC's Advisory Committee on Immunization Practices ("ACIP") as the liaison representative for the Pharmaceutical Research and Manufacturers of America ("PhRMA"), which demonstrates the high regard FDA officials hold Dr. Copmann's experience and judgment.

Contrary to Merck's assertion, the fact that Dr. Copmann has not worked for the FDA does not disqualify him. Experience at the FDA is not required to opine about

FDA regulations. *See Wolfe v. McNeil-PPC, Inc.*, 881 F. Supp. 2d 650, 658–59 (E.D. Pa. 2012) (finding two experts that did not work at the FDA qualified to testify about FDA regulations); *AstraZeneca LP v. Breath Ltd.*, 88 F. Supp. 3d 326, 385 n.54 (D.N.J. 2015) (permitting testimony of "regulatory lawyer who [] practiced before the FDA for over 35 years, possess[ed] knowledge that [could] assist the Court in understanding the manner in which the FDA issues rules and regulations"). Moreover, the fact that Dr. Copmann has never previously served as an expert, does not undermine Dr. Copmann's qualifications. *See United States v. Lee*, 339 Fed. App'x 153, 159 (3d Cir. 2009) (noting that the fact that it was an individual's "first time testimony as an expert does not undermine [his] qualifications").

Accordingly, the Court finds that Dr. Copmann possesses specialized knowledge greater than the average layman and he is therefore qualified to testify under the Third Circuit's liberal requirements for expert testimony.

2. Reliability and Fit of Dr. Copmann's Opinions

Merck first objects to Dr. Copmann's opinion that if Merck had revised its label, "[t]his would *have likely resulted in the FDA taking a more flexible approach* in reaching an agreement with GSK on an appropriate serological assay to demonstrate how well Priorix protected children from disease," and would have allowed GSK to demonstrate non-inferiority using tests it had already developed and studies it had already conducted, resulting in GSK launching Priorix sooner. ECF No. 306 at 11 (citing Dr. Copmann Report at ¶ 19). Merck argues that this opinion is unreliable and untestable *ipse dixit* and that it is unhelpful because Dr. Copmann cannot, and

does not, explain how likely the FDA would have been to take the actions he posits. *Id*. at 12.

The Court finds this opinion is reliable as it is well-grounded in Dr. Copmann's experience and the record. *See, e.g., Center City Periodontist, P.C. v. Dentsply Int'l, Inc.*, 321 F.R.D. 193, 202 (finding the "totality" of expert's knowledge and experience provides a reliable basis for opining on the FDA's regulatory and administrative requirements but excluding the opinion because it did not fit the facts of the case). Dr. Copmann considered over 600 documents produced in this matter; analyzed dozens of studies and publications; and reviewed or attended multiple depositions. Considering the intricacies of this case, his opinion on the process by which the FDA would review GSK's application would be helpful to the trier of fact.

Merck points to case law for the proposition that even a qualified expert cannot testify to state of mind or beliefs. ECF No. 306 at 13 (citing *Wolfe*, 881 F. Supp. at 660–62 (recognizing expert could not opine regarding the FDA's state of mind); *Deutsch v. Novartis Pharms. Corp.*, 768 F. Supp. 2d 420, 442 (E.D.N.Y. 2011) (noting "the opinions of [expert] witnesses on the intent, motives, or states of minds of corporations, regulatory agencies, and others have no basis in any relevant body of knowledge or expertise" (citation omitted))). However, the Court finds that Dr. Copmann is not opining on the FDA's state of mind; rather his opinion is how the FDA would have likely responded under the operative statutes and regulations to disclosures Merck allegedly should have made, but did not. *See Flonase III*, 907 F. Supp. 2d at 644 (finding reliable expert report about how the FDA would have responded to certain submissions). Accordingly, the Court

finds that Dr. Copmann's opinion regarding the FDA likely taking a more flexible approach is admissible as it is reliable and will assist the trier of fact.

The second opinion that Merck objects to is Dr. Copmann's opinion that if Merck revised its label and the FDA had relaxed its standards for vaccine approval, GSK would have launched its competing Priorix vaccine more quickly. ECF No. 306 at 15. Again, Merck argues that this opinion about what GSK would have done is untestable and unreliable *ipse dixit* that conflicts with uncontroverted testimony that Merck's labels had no effect on GSK's development of Priorix and that the opinion is unhelpful because Dr. Copmann cannot, and does not, explain how likely GSK would have been to launch Priorix any earlier. *Id.* at 15–16.

The Court finds this opinion reliable and that it fits the facts of the case. As discussed *supra* in the discussion of antitrust injury, the Court has found there is a dispute of material fact as to whether the labels played a role in the delay of Priorix coming to the market. While GSK's corporate designee did answer "no" when asked if Merck's labels stopped GSK from commercializing its mumps vaccine, her testimony also indicated that GSK based its development on what was publicly available on Merck's label. *See ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 290 (3d Cir. 2012) (affirming denial of defendant's Daubert motion as "amount[ing] to nothing more than a complaint that [plaintiffs' expert] did not adopt [defendant's] view of the case"). Accordingly, the Court finds this opinion admissible as it is reliable and fits the facts of the case.

The last opinion that Merck objects to is Dr. Copmann's opinion that it would have taken GSK 8 to 10 years to obtain regulatory approval for Priorix once it

reached agreement on an appropriate endpoint for a clinical study because Merck argues the opinion is baseless and unreliable. ECF No. 306 at 19. Merck takes issue with the fact that Dr. Copmann only reviewed four Merck vaccines and four GSK vaccines for this opinion and argues that such a review does not amount to a reliable basis to make his conclusion. Additionally, Merck takes issue with the fact that Dr. Copmann does not look at the specifics of those vaccines to assess if they are relevant comparators and his opinion does not take into account the fact that only a small percentage of vaccine products are actually approved by the FDA. Finally, Merck argues that one third of the vaccines he examined took 12.75 years or longer for approval and therefore his analysis is unreliable as it contains no explanation as to why GSK would have fallen within the low end of the range.

The Court finds this opinion reliable as estimating a competitor's entry date in the but-for world is a routine and necessary aspect of antitrust cases. *See*, *e.g.*, *Apotex*, 321 F.R.D. 220 (permitting expert to opine that if not for a patent settlement, at least one of the first-filer generics would have prevailed at summary judgment and entered the market in 2006); *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. 14-md-02503, 2018 WL 563144 (D. Mass. Jan. 25, 2018) (permitting expert testimony regarding but-for entry dates in antitrust matter where opinion was based on "industry surveys and [the parties] own representations"). Additionally, according to Plaintiffs, Dr. Copmann, looked at every clinical development start date and end date he could find for each prophylactic vaccine licensed in the United States to generate comparator vaccines and calculate his average development timeline. *See* ECF No. 319 at 29. Moreover, Dr. Copmann's eight-to-ten-year estimate is reliable

because it accords with GSK's own estimate. GSK began its Phase III studies for Priorix in the United States in 2012 and launched in 2022. Because there is a rational factual basis underlying Dr. Copmann's estimate that it would take 8 to 10 years for Priorix to come to the market, the Court finds his opinion admissible. Additionally, the Court finds it would be helpful to the trier of fact.

In sum, considering the fact that the Federal Rules of Evidence illustrate a preference for admitting evidence that might assist the trier of fact and this policy extends to the admissibility of expert testimony, the Court finds Dr. Copmann's opinions admissible at this time. Cross examination will be an appropriate means of challenging this expert testimony. The Court will therefore deny Merck's Motion to Exclude Evidence from Dr. Thomas L. Copmann (ECF No. 305).

V. CONCLUSION

For the reasons set forth above, Merck's Motion for Summary Judgment (ECF No. 272) is granted in part and denied in part and Merck's Motion to Exclude Evidence from Dr. Thomas L. Copmann (ECF No. 305) is denied. An appropriate Order will follow.

BY THE COURT:

/s/ **Chad F. Kenney**

CHAD F. KENNEY, JUDGE

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-3089

IN RE: MERCK MUMPS VACCINE ANTITRUST LITIGATION

MERCK & CO., INC.,
Appellant

(D.C. No. 2-12-cv-03555)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge; HARDIMAN, SHWARTZ, KRAUSE, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, and CHUNG, Circuit Judges

The petition for rehearing filed by Appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges

of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied. Judge Shwartz, Judge Krause, and Judge Restrepo voted to grant the petition for rehearing.

BY THE COURT,
s/Tamika R. Montgomery-Reeves
Circuit Judge

Dated: February 10, 2025
JK/cc: All Counsel of Record