IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DELCOR ASSET CORPORATION and MYLAN PHARMACEUTICALS INC.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 17-1653-RGA
GLENMARK PHARMACEUTICALS LIMITED, GLENMARK PHARMACEUTICALS INC., USA and STIEFEL WEST COAST, LLC,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
GLENMARK'S THIRD COUNTERCLAIM

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I. INTRODUCTION

Mylan Pharmaceuticals Inc. ("MPI") and Delcor Asset Corporation (collectively, "Plaintiffs") hereby move the Court to dismiss Glenmark Pharmaceuticals Ltd. and Glenmark Pharmaceuticals Inc.'s ("Glenmark") Third Counterclaim, alleging monopolization and attempted monopolization under federal antitrust law. To state an antitrust monopolization claim, a plaintiff must set forth *factual* allegations that plausibly show that the defendant possesses monopoly power in a carefully defined relevant product market, and that the defendant acquired that power through some unlawful means. Glenmark fails to allege sufficient facts on both fronts.

This case concerns a clindamycin antibiotic foam used to treat acne in teenagers and adults. Glenmark alleges that, for purposes of its monopolization claim, "the relevant product market is the market for treatment with topical clindamycin foam." Counterclaim (D.I. 12) ¶ 53. Single-product relevant markets (such as a market limited to "topical clindamycin foam"), however, are exceptionally rare and presumptively implausible. Yet, even if that were not the case, Glenmark alleges no facts to add credence to its bald assertion that topical clindamycin foam is a market unto itself. Devoid of a single factual allegation to explain what makes topical clindamycin foam unique, or why other acne treatments should be excluded from the relevant market, Glenmark's monopolization claim is a hurriedly cobbled together set of conclusory allegations which must be dismissed.

Glenmark likewise alleges nothing to support its assertion that Plaintiffs possess "market power" in its (improperly defined) relevant market. Glenmark alleges, in nothing more than a conclusory fashion, that "Mylan, with the collaboration of Delcor, has obtained and/or maintained market power," *id.* ¶ 55, and that Plaintiffs have a "dominant market position." *Id.* ¶ 58. But those unadorned assertions fall well short of the pleading threshold required to state a monopolization

claim. Simply put, Plaintiffs do not possess market power simply because Glenmark says so. Glenmark's monopolization claim should be dismissed.

II. ALLEGATIONS IN GLENMARK'S COUNTERCLAIMS

The Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 *et seq.* requires that any company that wishes to market a new brand-name drug must submit a New Drug Application ("NDA") to the Food and Drug Administration ("FDA"). Counterclaim (D.E. 12) ¶¶ 10–11. In the NDA, the applicant must identify all patents covering the referenced drug. *Id.* ¶ 12. If the NDA is approved by the FDA, the relevant patents are then listed in the FDA's "Orange Book." *Id.* ¶ 13.

In order to market a generic copy of a brand-name drug, a manufacturer must submit an Abbreviated New Drug Application ("ANDA") to the FDA. *Id.* ¶¶ 15–16. In its ANDA, the generic applicant is required to make "certifications" about the patents listed in the Orange Book. *Id.* ¶ 17. A "Paragraph IV Certification" indicates that the ANDA applicant believes the patent is either invalid, unenforceable, or not infringed by the ANDA product. *Id.* ¶ 18. A party making a Paragraph IV Certification must notify the patent holder and the party that submitted the NDA. *Id.* ¶ 19. After receiving notice of the Paragraph IV Certification, the patent holder may sue for infringement. *Id.* ¶ 20.

MPI is the holder of NDA No. 050801, which covers a drug known as Evoclin®. *Id.* ¶¶ 30–31. Evoclin® is a topical antibiotic foam indicated to treat acne in adolescents and adults. *Id.* ¶¶ 31. The active ingredient in Evoclin® is an antibiotic called clindamycin. *Id.* ¶¶ 27, 31. MPI's NDA lists two patents with claims that cover Evoclin®—U.S. Patent Nos. 7,141,237 (the "'237 patent") and 7,374,747 (the "'747 patent")—both of which are published in the Orange Book. *Id.* ¶ 34.

In September 2017, Glenmark submitted ANDA No. 210778, seeking approval to sell a generic version of Evoclin®. *Id.* ¶ 36. Glenmark's ANDA included Paragraph IV Certifications that the '237 and '747 patents would not be infringed by Glenmark's ANDA product. *Id.* ¶ 37. On

September 29, 2017, Glenmark notified Plaintiffs of its Paragraph IV Certifications. *Id.* ¶ 38. On November 15, 2017, Plaintiffs filed this patent infringement lawsuit asserting that Glenmark's ANDA infringes the '237 and '747 patents. *Id.* ¶ 42.

On January 12, 2018, Glenmark answered Plaintiffs' complaint and asserted three counterclaims. In its Third Counterclaim, Glenmark alleges that Plaintiffs violated federal antitrust laws (specifically Sherman Act § 2, which prohibits the acquisition or maintenance of monopoly power through improper means) when they filed this patent infringement lawsuit. Glenmark alleges, in conclusory fashion, that Plaintiffs' patent litigation is "both objectively and subjectively baseless," *id.* ¶ 54, and that the decision to file this lawsuit was motivated solely "by an intent to interfere with Glenmark's business relationships." *Id.* ¶ 57.

In outlining the elements for a monopolization claim, Glenmark alleges that, "[f]or antitrust purposes, the relevant product market is the market for treatment with topical clindamycin foam." *Id.* ¶ 53. But Glenmark offers no allegations (not even conclusory allegations) to explain, rationalize, or justify its bald assertion that "topical clindamycin foam" constitutes the relevant antitrust product market. Although Glenmark notes that topical clindamycin foam is an antibiotic product used to treat acne, *id.* ¶ 31, it says nothing about how the product works, the circumstances in which it is generally prescribed, or anything that makes topical clindamycin foam unique from (or similar to) other comparable products. Nor does Glenmark allege whether or not there are other antibiotic treatments (oral, topical, or otherwise), or non-antibiotic treatments, that are reasonably interchangeable with topical clindamycin foam. Finally, Glenmark does not offer any allegations related to cross-elasticity of demand between topical clindamycin foam and other products. In short, the sum total of Glenmark's allegations about the relevant product market are found in

Glenmark's one conclusory statement that "the relevant product market is the market for treatment with topical clindamycin foam." *Id.*

Glenmark also offers a conclusory assertion that Plaintiffs "obtained and/or maintained market power in the relevant product and geographic markets." *Id.* ¶ 55; *see also id.* ¶ 58 (alleging that Plaintiffs have "a dominant market position"). But Glenmark provides no factual allegations to explain, support, or rationalize its conclusory assessment that Plaintiffs possess market power. Glenmark does not allege Plaintiffs' market share (even within Glenmark's unduly restricted market). On the contrary, Glenmark concedes that there is at least one other company (Perrigo) that currently markets a topical clindamycin foam. *Id.* ¶ 32. Glenmark also does not allege a single fact that might suggest that Plaintiffs have the ability to profitably raise Evoclin® prices without losing sales, or that Plaintiffs have the power to prevent competitors from expanding their output of comparable acne medications. In short, the only basis for Glenmark's assertion that Plaintiffs possess market power is Glenmark's own self-serving statement.

III. STANDARD OF REVIEW

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim lacks facial plausibility unless the complaint contains "factual content" sufficient to allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations" to state a claim for relief. *Id.* at 679.

IV. ARGUMENT

Glenmark's Third Counterclaim falls woefully short of the pleading standards required to state a claim for monopolization or attempted-monopolization. Glenmark both (1) fails to define the relevant product market with the factual detail required under federal antitrust law, and (2) fails to plead facts to support a plausible inference that Plaintiffs possess monopoly power, even within Glenmark's ill-defined relevant market. Accordingly, Glenmark's antitrust counterclaim should be dismissed.

A. Glenmark fails to adequately allege a relevant product market to support its claims for monopolization or attempted monopolization.

To state an antitrust monopolization claim, a plaintiff must plead "(1) the possession of monopoly power *in the relevant market* and (2) the willful acquisition or maintenance of that power" through some exclusionary conduct. *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 306–07 (3d Cir. 2007) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966)) (emphasis added). To state a claim for attempted monopolization, a plaintiff must plead that the defendant "(1) had the specific intent to monopolize *the relevant market*, (2) engaged in anti-competitive or exclusionary conduct, and (3) possessed a sufficient market power to come dangerously close to success." *BarrLabs., Inc. v. Abbott Labs.*, 978 F.2d 98, 112 (3d Cir. 1992) (emphasis added). For both claims, the starting point is to define the relevant market.

The party asserting a monopolization claim bears the burden of pleading facts to define the relevant product market. *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436 (3d Cir. 1997); *Brader v. Allegheny Gen. Hosp.*, 64 F.3d 869, 877 (3d Cir. 1995) ("[T]he complaint should allege viable relevant markets."). "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Queen City Pizza*, 124 F.3d at 436 (quoting *Brown Shoe Co. v. United*

States, 370 U.S. 294, 325 (1962)). "Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in [its] favor, the relevant market is legally insufficient and a motion to dismiss may be granted." *Queen City Pizza*, 124 F.3d at 436.

"Cases in which dismissal on the pleadings is appropriate frequently involve either (1) failed attempts to limit a product market to a single brand, franchise, institution, or comparable entity that competes with potential substitutes or (2) failure even to attempt a plausible explanation as to why a market should be limited in a particular way." *Todd v. Exxon Corp.*, 275 F.3d 191, 200 (2d Cir. 2001) (collecting cases). Glenmark's antitrust counterclaim fails on both fronts.

1. Glenmark makes no attempt to define the relevant market with reference to the rule of interchangeability.

For antitrust purposes, products are "interchangeable" if "one product is roughly equivalent to another for the use to which it is put." *Queen City Pizza*, 124 F.3d at 436 (quoting *Allen-Myland, Inc. v. Int'l Bus. Machines Corp.*, 33 F.3d 194, 206 (3d Cir. 1994)). Even if there is "some degree of preference for the one [product] over the other," two products are deemed interchangeable if "either would work effectively" for the intended use. *Id.* Courts assessing reasonable interchangeability consider factors such as "price, use, and qualities." *Queen City Pizza*, 124 F.3d at 437 (*Tunis Brothers Co., Inc. v. Ford Motor Co.*, 952 F.2d 715, 722 (3d Cir. 1991)). Courts also heavily factor the cross elasticities of demand between the product at issue and its potential substitutes—that is, whether a rise in the price of one product will tend to increase demand for another. *Queen City Pizza*, 124 F.3d at 437–38.

In its Counterclaim, Glenmark asserts—in a purely conclusory manner—that "the relevant product market [in this case] is the market for treatment with topical clindamycin foam."

Counterclaim (D.I. 12) ¶ 53. But Glenmark offers no factual allegations to explain the rationale behind that conclusion. Beyond noting that topical clindamycin foam is an acne treatment, *id.* ¶ 31, Glenmark says almost nothing of what topical clindamycin foam is, how it is used, or what makes it unique from comparable products. Glenmark does not allege that topical clindamycin foam is differentiated from other acne treatments, nor does it explain what would persuade a doctor to prescribe topical clindamycin foam over available alternatives. Glenmark does not allege Plaintiffs' selling price for topical clindamycin foam, much less attempt to argue that Plaintiffs can profitably raise the price of Evoclin® without driving up the demand for other products. And, importantly, Glenmark does not attempt to explain its conspicuous omissions. Indeed, Glenmark doesn't even set forth a conclusory statement that no economically substitutable product exists. Simply put, Glenmark's allegations—which say nothing about topical clindamycin foam or its respective place in the market—do not come close to approaching the level of detail required to plead a relevant market restricted to a single topical antibiotic foam.[1]

Just two years ago, this Court was confronted with an antitrust claim involving comparably weak market-definition allegations. *See Int'l Constr. Prod. LLC v. Caterpillar Inc. ("ICP")*, C.A.

[1] The following is a complete synopsis of the factual allegations in Glenmark's counterclaim:

- Paragraphs 1 through 5 identify the parties in this lawsuit;
- Paragraphs 6 through 9 concern the court's jurisdiction;
- Paragraphs 10 through 21 describe the regulatory approval process for new drug products and their generic equivalents;
- Paragraphs 22 through 35 discuss the two patents involved in this litigation (the '232 patent and the '747 patent), the applications from which those patents were issued, MPI's NDA for Evoclin®, the inclusion of the '232 and '747 patents in the Orange Book, and Glenmark's ANDA to sell generic clindamycin foam; and
- Paragraphs 36 through 42 discuss Glenmark's ANDA submission, its Paragraph IV Certification and notice letter to Plaintiffs, and Plaintiffs' decision to file this patent litigation.

The remaining paragraphs are all conclusory allegations corresponding with the elements of Glenmark's separate causes of action.

No. 15-108-RGA, 2016 WL 264909, at *8 (D. Del. Jan. 21, 2016) (Andrew, J.). In *ICP*, the plaintiff defined various submarkets that were each limited to a specific type of heavy construction equipment. *Id.* But the plaintiff offered "nothing to explain how the various types of construction equipment differ[ed] from one another." *Id.* This Court held that, because the complaint "advance[d] no facts that define[d] the[] markets 'with reference to the rule of interchangeability and cross-elasticity of demand," the plaintiff's monopolization claim could not survive. *Id.*

Glenmark's threadbare allegations are even more tenuous than the allegations in *ICP*. In *ICP*, the plaintiff at least offered a conclusory assertion that "[t]he closest substitute for each type of new heavy construction equipment is used heavy construction equipment of that type." *Id.* Glenmark does not even say that much. Glenmark says nothing at all about topical clindamycin foam's interchangeability with other acne treatments. Because Glenmark "fail[s] even to attempt a plausible explanation as to why a market should be limited in a particular way," *Todd*, 275 F.3d at 200, its claim must be dismissed.

Courts routinely dismiss antitrust claims—like those in this case and in *ICP*—where the plaintiff fails to plead the relevant market with reference to the rule of interchangeability and cross-elasticities of demand. *See, e.g.*, *American Sales Co. v. AstraZeneca AB*, No. 10-cv-6062, 2011 WL 1465786, at *4 (S.D.N.Y. Apr. 14, 2011) (dismissing antitrust complaint where the plaintiff failed to "articulate[] how a single anti-heartburn drug has characteristics so unique that a consumer would not respond . . . to a slight price increase by purchasing a different product.); *Teva Pharm. Indus. v. Apotex, Inc.*, 07-cv-5514, 2008 WL 3413862 (D.N.J. Aug, 7, 2008) (dismissing complaint when Plaintiff "fail[ed] to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand."); *Sun Microsystems, Inc. v. Versata Enterprises, Inc.*, 630 F. Supp. 2d 395, 403 (D. Del. 2009) (dismissing monopolization

counterclaim where counter-plaintiff "offer[ed] no allegations regarding "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it"); *Fresh Made, Inc. v. Lifeway Foods, Inc.*, No. 01-cv-4254, 2002 WL 31246922, at *5 (E.D. Pa. Aug. 9, 2002) (dismissing antitrust claim where plaintiff did "not ground its allegations regarding product market with reference to the rule of reasonable interchangeability and cross-elasticity of demand"); *Syncsort Inc. v. Sequential Software, Inc.*, 50 F. Supp. 2d 318, 332 (D.N.J. 1999) (dismissing monopolization counterclaim where counter-plaintiff "failed to mention other products available from other suppliers which are comparable to or substitutable for the product" at issue and "did not explain its rationale for ignoring other existing or potential" substitutes; "The failure of Sequential to define the market in terms of reasonable interchangeability or explain the rationale underlying its narrow proposed market definition is, in itself, grounds for dismissal."); *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1025 (10th Cir. 1992) (affirming district court's dismissal of claim for failure to plead a relevant market; proposed relevant market consisting of only one specific television channel defined too narrowly); *Tower Air, Inc. v. Federal Exp. Corp.*, 956 F. Supp. 270, 280 (E.D.N.Y. 1996) ("Because a relevant market includes all products that are reasonably interchangeable, plaintiff's failure to define its market by reference to the rule of reasonable interchangeability is, standing alone, valid grounds for dismissal."); *B.V. Optische Industrie De Oude Delft v. Hologic, Inc.*, 909 F. Supp. 162, 171–72 (S.D.N.Y. 1995) (dismissal for failure to plead a valid relevant market; "an antitrust complaint must explain why the market it alleges is the relevant, economically significant product market.").

This case is no different. Glenmark's threadbare allegations are insufficient to plead an antitrust counterclaim.

2. A single-product relevant market limited to topical clindamycin foam is not plausible.

Courts have long been suspicious of efforts to narrowly limit the relevant market to a single product. *See Belfiore v. N.Y. Times Co.*, 654 F. Supp. 842, 846 (D. Conn. 1986), *aff'd*, 826 F.2d 177 (2d Cir. 1987) (describing plaintiff's attempt to limit market to "upscale readers" as similar to a "strange red-haired, bearded, one-eyed man-with-a-limp classification"). "Single-brand markets are, at a minimum, extremely rare." *Apple, Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190, 1198 (N.D. Cal. 2008). And while there may be "rare and unforeseen circumstances" where a relevant market may consist of only a single product, such markets are "counterintuitive" and require particularized factual allegations to plausibly show that the product "is so unique that it suffers *no* actual or potential competitors." *Id.* (emphasis in original); *see also Linzer Prod. Corp. v. Sekar*, 499 F. Supp. 2d 540, 554 (S.D.N.Y. 2007) (stating that "it would strain credulity to narrow the relevant product market" to a single product).

For plaintiffs bold enough to attempt to define a single-product market, it is not enough to merely allege facts suggesting that a particular product has "unique" characteristics that differentiate it from potential substitutes (something Glenmark doesn't even try to allege in this case). *See United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 394 (1956) ("[W]here there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others. If it were not so, only physically identical products would be a part of the market."). Nor does the existence of patents covering a product suffice to restrict the outer boundaries of the relevant market. *CCPI Inc. v. Am. Premier, Inc.*, 967 F. Supp. 813, 818 (D. Del. 1997) ("[Counter-plaintiff] cannot define the relevant product market by the products covered by the '551 patent. Such a product market definition will not survive a motion to dismiss . . . . [Plaintiff] must refer to any reasonably

interchangeable alternatives in defining the relevant product market."). Instead, the plaintiff must affirmatively allege facts that plausibly demonstrate that the selected product is not reasonably interchangeable with any one of the full panoply of available alternatives. *See Glob. Disc. Travel Servs., LLC v. Trans World Airlines, Inc.*, 960 F. Supp. 701, 706 (S.D.N.Y. 1997) (granting motion to dismiss where plaintiff "made no reasonable showing why TWA airline tickets for travel between cities should be considered a market unto itself, as distinguished from the market consisting of all airline tickets for travel between the paired cities").

In the pharmaceutical arena, courts have repeatedly recognized that a relevant market limited to a particular drug (or class of drugs) is implausible without robust factual allegations justifying the narrow scope.[2] In *Bayer Schering Pharma AG v. Sandoz Inc.*, for example, the court rejected a market definition limited to Bayer's Yasmin® and Yaz® products and two generics. 813 F. Supp. 2d 569, 576 (S.D.N.Y. 2011). The counterclaimant argued that the small product grouping was "unique" because those products were the only oral contraceptives that could also be prescribed to treat a severe premenstrual syndrome known as premenstrual dysphoric disorder. But despite that limiting factor, the court found the narrow market was unsupportable because the plaintiff had not affirmatively alleged facts showing that "there is no combination of drugs [including non-contraceptives] that can serve as a functional substitute for Yasmin and Yaz." *Id.* at 577 (emphasis added). The court explained that while the plaintiff "need not address every

[2] *See, e.g.*, *Asahi Glass Co. v. Pentech Pharms., Inc*., 289 F. Supp. 2d 986, 996 (N.D. Ill. 2003) (Posner, J., by designation) (stating that it "cannot merely be assumed" that Paxil® does not compete with other antidepressant medications); *United States v. CIBA Geigy Corp.*, 508 F. Supp. 1118, 1155 (D.N.J. 1976) (rejecting market limited to hydrochlorothiazide ("HCT") because "CIBA's HCT products compete in a market composed of all products indicated for the treatment of hypertension"); *Kaiser Found. v. Abbott Labs.*, No. 02-cv-2443-JFW (FMOx), 2009 WL 3877513, at *8 (C.D. Cal. Oct. 8, 2009) (rejecting market limited to Hytrin and its generic equivalents because it "excluded other alpha-blockers—such as Cardura (generically, doxazosin), Minipress (generically, prazosin) and Flomax (generically, tamsulosin)").

conceivable, far-fetched alternative," "it must allege sufficient facts about other treatments to make its proposed product market plausible." *Id.*; *see also Bayer Schering Pharma AG v. Watson Pharms., Inc.*, No. 07-cv-01472 (D.I. 143) (D. Nev. Mar. 31, 2010) (granting motion to dismiss claims based on relevant market limited to Yasmin and Yaz).

Similarly, in *American Sales Co. v. AstraZeneca AB*, the court dismissed an antitrust complaint where the plaintiff failed to "articulate[] how a single anti-heartburn drug has characteristics so unique that a consumer would not respond . . . to a slight price increase by purchasing a different product." 2011 WL 1465786, at *4. The court concluded that it was not enough for the plaintiff to merely allege that the target product had a different formulation or different indications. *Id.* at *3. Without allegations plausibly explaining why there are no other products that could be used interchangeably, the complaint fell "well below the threshold to allege a relevant product market." *Id.* at *4.

For purposes of defining a relevant antitrust market, topical antibiotic acne treatments—like topical clindamycin foam—are no different than contraceptives or heartburn medications (like those at issue in *Bayer* and *AstraZeneca*). Indeed, just recently, the Third Circuit rejected an acne-treatment product market that was limited to a single oral antibiotic. *Mylan Pharm., Inc. v. Warner Chilcott Pub. Co.*, No. 12-cv-3824, 2015 WL 1736957, at *9 (E.D. Pa. Apr. 16, 2015) (rejecting argument that relevant market was limited to single molecule acne treatment (doxycycline hyclate), and instead finding that the market included all oral tetracycline antibiotics, including Vibramycin, Dynacin, Solodyn, Oracea, Adoxa, Monodox, and their generic equivalents), *aff'd*, 838 F.3d 421, 436 (3d Cir. 2016) (agreeing with the district court's conclusion "that the market was much broader and consisted of all oral tetracyclines prescribed to treat acne").

In sum, even if Glenmark had alleged facts suggesting that topical clindamycin foam is not interchangeable with available alternatives—which Glenmark does not even attempt to do—such allegations would be entirely implausible. Because there is no way Glenmark can support its unjustifiably restrictive product market, its monopolization counterclaim should be dismissed *with prejudice*.

B. Glenmark fails to plausibly allege that Plaintiffs possess monopoly power.

Glenmark fares no better in its half-hearted attempt to plead that Plaintiffs possess market power in its ill-defined relevant market. "Monopoly power is the ability to control prices or exclude competition in a given market." *Grinnell Corp.*, 384 U.S. at 571. Monopoly power may be inferred from a firm's "possession of a dominant share of a relevant market that is protected by entry barriers." *Harrison Aire, Inc. v. Aerostar Int'l, Inc.*, 423 F.3d 374, 381 (3d Cir. 2005) (citation omitted). A party "relying on market share as a proxy for monopoly power must plead and produce evidence of a relevant product market, of the alleged monopolist's dominant share of the market, and of high barriers to entry." *Id.*

Glenmark's allegations of monopoly power, to the extent they exist at all, consist entirely of threadbare conclusions wholly unsupported by factual content. Glenmark peppers its counterclaim with conclusory statements that Plaintiffs "obtained and/or maintained market power," Counterclaim (D.I. 12) ¶ 55, or that Plaintiffs hold a "dominant market position." *Id.* ¶ 58. But those conclusory assertions, entirely devoid of factual support, cannot sustain an antitrust claim. Glenmark pleads no facts concerning Plaintiffs' share of the relevant market; on the contrary, Glenmark concedes that MPI is not even the only company selling topical clindamycin foam. *Id.* ¶ 32. Glenmark also says nothing of Plaintiffs' pricing for Evoclin®, and certainly offers no facts to support a plausible inference that Plaintiffs have an unrestricted ability to raise prices without fear of losing sales. *See Int'l Constr. Prods.*, 2016 WL 264909, at *9; *see also Rebel Oil*

Co. v. Atl. Richfield Co., 51 F.3d 1421, 1442-43 (9th Cir. 1995) (holding that oligopoly pricing does not show market power sufficient to cause antitrust concern and that "one firm *alone* must have the power to control market output and exclude competition") (emphasis in original).

Simply put, there are no facts in Glenmark's Counterclaim to plausibly suggest that Plaintiffs possess market power. Glenmark's monopolization claim must be dismissed.

V. CONCLUSION

Glenmark's Third Counterclaim fails on numerous fronts. Glenmark fails to allege facts to plausibly suggest that Plaintiffs have monopoly power in a viable relevant product market. For those reasons, Glenmark's Third Counterclaim alleging monopolization and attempted monopolization should be dismissed *with prejudice*.

Respectfully submitted,

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