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I. INTRODUCTION

Defendant, Caremark Inc. ("Caremark"), moves to dismiss Plaintiff Newell's Class Action Complaint pursuant to Fed.R.Civ.P. 12(b)(6). Caremark contends that despite the liberal pleading standards of the Federal Rules, Newell failed to state a claim against it under the federal antitrust laws. Newell disagrees. For the reasons set forth below, Caremark's motion should be denied.

II. STATEMENT OF THE CASE

This case arises out of the alleged antitrust violations of defendants in connection with the sale of Clozaril.

As set forth in the Complaint, Sandoz introduced a revolutionary schizophrenia drug, clozapine, over which it has monopoly power through a manufacturing patent and the trademark of Clozaril. While Clozaril has significant benefits to schizophrenia patients, like Newell, it also has a potentially fatal contraindication, agranulocytosis. Because of this dangerous side-effect, Clozaril users' blood must be frequently monitored and Clozaril treatment stopped, if necessary.

However, rather than allowing the Clozaril patient's physician to draw blood and to choose the laboratory to perform the appropriate analyses at competitive market prices, Sandoz contracted with Caremark to require patients to use the Clozaril Patient Management Service ("CPMS"). Together, the two refuse to sell Clozaril unless the purchasers also purchase blood drawing/monitoring services from the defendants. As Newell alleged in

his Complaint:

Sandoz does not make Clozaril available to patients unless the patient purchases the Clozaril Patient Management System ("CPMS"). The drug can be obtained only through the CPMS at a cost that is unrelated to the dose. Daily doses of 25mgs or 60mgs cost the same: \$172.00 a week or \$8,944.00 a year. The operating principal of the system is "no blood, no drug".

Complaint ¶20. Although, qualified laboratories across the country could perform identical services, defendants' contract in restraint of trade prevents purchasers from seeking these alternative service providers. Complaint ¶¶29-31, 38, 42, 45(C). Newell contends that this combination of drug and service, the so-called "Clozaril Patient Management System" or "CPMS" is an illegal tying arrangement under the antitrust laws.¹

As a result of defendants' tying arrangement and the defendants' agreements, contracts, combinations and conspiracies to effect the same, the cost of obtaining Clozaril and CPMS, including but not limited to the cost of blood collection and laboratory services, has been maintained by defendants at levels which are artificially and prohibitively high and non-competitive. Thus, the distribution of Clozaril and CPMS has been restrained; competition for services related to the sale and distribution of Clozaril has been restrained or foreclosed; and class members who have purchased Clozaril have had to pay artificially inflated and

¹ Caremark seems to argue at 3-4 of its brief that the FDA sanctioned its unlawful practices. However, the FDA has made it clear that the approvability of Clozaril was not dependent upon the use of CPMS. See Complaint ¶33.

non-competitive prices. Complaint ¶45.

Because the defendants' unlawful practices are common to and affect all Clozaril purchasers, Newell filed his Complaint on behalf of himself and other similarly situated purchasers, as a class action. A legal argument follows discussing why Newell's claims are legally sufficient and why Caremark's motion to dismiss is without merit.'

III. LEGAL ARGUMENT

A. THE LEGAL STANDARDS APPLICABLE TO A MOTION TO DISMISS PURSUANT TO FED.R.CIV.P. 12(B)(6)

The standard governing review of 12(b)(6) motions was recently set forth in Ross v. Bolton, 904 F.2d 819 (2d Cir. 1990). There, the Second Circuit held that an action should "not be dismissed, unless it appears plaintiff can prove no set of facts that would entitle him to relief. . . ." Id. at 823, citing, Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Furthermore, the court admonished:

The general rule [is] that pleadings are to be construed in the light most favorable to the pleader and accepted as true

Id., citing, Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). In addition, in ruling on a 12(b)(6) motion, the Court must "draw all reasonable inferences in favor of the plaintiff." Shaw v. Rolex

² As indicated, Newell already filed a motion for class certification with supporting memorandum and will not address the appropriateness of the class procedure, except where Caremark raises certain class issues in its motion to dismiss.

Watch U.S.A., Inc., 745 F.Supp. 982, 984 (S.D.N.Y. 1990)(Conner, J.).

As discussed below, the facts and law demonstrate conclusively that Caremark has utterly failed make the showing required for dismissal under Rule 12(b)(6).

B. NEWELL HAS ADEQUATELY PLEADED THAT HE AND ABSENT CLASS MEMBERS ARE DIRECT PURCHASERS OF CLOZARIL AND THEREFORE HE HAS STANDING TO PURSUE HIS AND THE CLASS'S CLAIMS

Caremark contends that while Newell has adequately pleaded his own purchase of Clozaril, he has not sufficiently pleaded the purchase of Clozaril by absent class members. Therefore, Caremark contends, the entire action must be dismissed. Caremark Brf. at 6. This erroneous argument is based upon Caremark's misreading of Newell's Complaint and a fundamental misunderstanding of the liberal reading afforded pleadings under the Federal Rules of Civil Procedure.

Newell filed his complaint as a class action on behalf of a class of Clozaril purchasers:

All persons in the United States who are purchasers of Clozaril [or for whom Clozaril was recommended by a medical practitioner and were unable to purchase Clozaril as a result of the "Clozaril Patient Management System"].³ The class includes all governmental entities and excludes the defendants and any of their

³ Upon resolution of the instant motion to dismiss, Newell intends to amend his Complaint to delete from the class definition those who did not purchase Clozaril, that part of the quote in brackets above. Thus, the putative class will be comprised of Clozaril purchasers only.

subsidiaries or divisions.

Complaint ¶9(a). Despite the fact that Newell alleges that he is seeking to represent all Clozaril purchasers, Caremark implies that Newell has not stated that absent class members actually purchased the drug. Caremark's picayune reading of Newell's Complaint is incorrect.

Newell specifically alleged the fact that class members purchased Clozaril:

Class members who have purchased Clozaril have had to pay artificially inflated and non-competitive prices . . .

Complaint ¶45(D)(emphasis added). As set forth above, the Complaint fairly alleges that class members purchased Clozaril. See e.g. Fed.R.Civ.P. 8(f)(All pleadings shall be so construed as to do substantial justice). Caremark simply ignores or misreads the Complaint. However, Caremark is plainly on notice that absent class members purchased Clozaril.

Moreover, even if Caremark was correct, the appropriate remedy for insufficient pleading is not dismissal, but amendment. See Iacobucci v. Universal Bank of Maryland, [Current] Fed.Sec.L.Rep. ¶95,643 (S.D.N.Y. 1990)(Keenan, J.)(Leave to replead granted); Friedlander v. Nims, 755 F.2d 810, 813 (11th Cir. 1985)(Leave to amend should be granted if a more carefully crafted complaint might state a claim). See also Fed.R.Civ.P. 15(a)(leave to amend shall be freely given).

Newell sufficiently pleaded standing for himself and class member's standing as purchasers of Clozaril. Caremark's

argument to the contrary is meritless. Its motion to dismiss should be denied.

1. Newell Is Under No Obligation to Identify Absent Class Members in His Complaint

Caremark also contends that Newell failed to specifically identify absent class members. In particular, Caremark states that "Newell fails to identify the government entities harmed by the alleged antitrust violations." Caremark Brf. at 10.¹ Newell has no such obligation under Rule 23 or the federal pleading rules.

Caremark's argument is erroneously premised upon Judge Sand's opinion in State of New York v. Cedar Park Concrete Corp., 665 F.Supp. 238 (S.D.N.Y. 1987). Cedar Park is inapposite. Caremark's reliance upon it is misplaced.

¹ Caremark also contends that insurance companies subrogated to the rights of absent class members must be identified. Caremark Brf. at 6 n.3. For the same reasons set forth above this argument has no merit. The class issue as to who is a proper class member is inappropriately raised in a motion to dismiss. Moreover, it is Newell's position that persons who purchased Clozaril are class members even if they were reimbursed by their insurance companies. See Barkanic v. General Administration of Civil Aviation, 923 F.2d 957, 964 n.8 (2d Cir. 1991)(The collateral source rule prohibits courts from considering benefits received from third parties in determining the extent of the plaintiff's recovery).

Moreover, the Illinois Brick doctrine precludes Caremark from arguing that indirect purchasers of Clozaril and CPMS, like insurance companies, have standing to raise antitrust damage claims. See Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); Kansas v. Utilicorp United, Inc., ___ U.S. ___, 110 S.Ct. 2807 (1990). Under the rationale of these cases, class members' passing on of antitrust damages to their insurance companies cannot confer upon those insurance companies antitrust standing, regardless of any subrogation interest those companies may possess. Caremark's argument to the contrary contradicts its own arguments and should be rejected.

In Cedar Park, the State of New York, as a plaintiff party, sued over 30 defendants for concrete bid-rigging. The case was not a class action. Id. at 242. At issue was whether New York was the real party in interest under Fed.R.Civ.P. 17. Id. at 241-42. Judge Sand recognized that Rule 17 permits a real party in interest to sue as a representative, if authorized:

Under Rule 17(a), a party may sue on behalf of one it represents as long as the relevant underlying federal and state statutes authorize such a suit.

Id. at 241. Because New York raised claims for state subdivisions outside of any stated authority and not as a class action, the court required it to name those subdivisions. Id. at 242, citing, N.Y.Gen.Bus.Law §342-b. Cedar Park does not apply because this is a class action.

Rule 23 authorizes Newell, as a member of a class, to sue in a representative capacity on behalf of all class members. Fed.R.Civ.P. 23(a). Under Rule 23, the real party in interest analysis applies solely to the representative plaintiff, i.e., Newell. See e.g., 1 Newberg, Newberg On Class Actions §2.05 (2d ed. 1985), where the class action commentator observed:

Once threshold individual standing by the class representative is met, a proper party to raise a particular issue is before the court, and there remains no further separate class standing requirement in the constitutional sense.

Id. at 48. Thus, standing considerations only apply to the representative plaintiff, not absent class members. As Mr. Newberg further observed:

An absent class member need not . . . demon-

strate standing in order to participate in the class action, as long as the named plaintiff meets these requirements and the class action itself satisfies the prerequisites of Rule 23(a) and (b).

3 Newberg, Newberg On Class Actions §16.01 at 266 (2d ed. 1985). Having conceded that representative Plaintiff Newell has standing to pursue his individual claims, Caremark's argument regarding the lack of standing of absent class members is inappropriate.

Furthermore, because Newell specifically alleged that absent class members purchased Clozaril, Complaint ¶45(D), Caremark's argument that "Newell does not allege that any government entity has purchased Clozaril therapy directly," is puzzling. As noted above, Newell actually pleaded that absent class members, including governmental entities, purchased Clozaril. Complaint ¶¶ 9(a), 45(D). Caremark's contention that they cannot be a proper class members is therefore groundless.

**C. NEWELL PLEADED ACTIONABLE CLAIMS
AGAINST CAREMARK AND SANDOZ FOR
AN UNLAWFUL TYING ARRANGEMENT
AND PRICE FIXING**

Caremark further contends that Newell failed to allege viable causes of action under the antitrust laws for both an unlawful tying arrangement and price fixing.⁵ Caremark suggests

⁵ Based on the erroneous assumption that Newell has failed to state a claim, Caremark contends that Newell's pendent claims may not be heard as this Court lacks jurisdiction. Caremark Brf. at 5. Caremark is confused. Newell has not asserted any pendent claims, or for that matter, any Section 2 claims. Perhaps Caremark is referring to the pendent claims and Section 2 claims asserted in the complaints filed by the state attorneys general.

that Newell failed to plead an unlawful tie for lack of: 1.) an unlawful relationship between the Defendants; 2.) that the tied service affects a "substantial amount of commerce." Also Caremark argues that Newell failed to plead: 3.) a proper vertical distribution arrangement; and 4.) an actual price fixing agreement. Caremark Brf. at 14. Each of these arguments will be addressed below.

1. An Unlawful Tying Arrangement Has Been Properly Alleged

a. The Combination Between Caremark And Newell Satisfies the Concerted Action Requirement of Section 1 of the Sherman Act

Caremark contends that without concerted action between itself and Sandoz, Newell's cause of action fails. Caremark's argument ignores the multitude of cases in which a single company was found to have violated Section 1 by tying two of its products or services and contracting with its buyers. See e.g., Jefferson Parish Hospital v. Hyde, 466 U.S. 2, 5-14 (1984); Albrecht v. Herald Co., 390 U.S. 145, 150 n.6 (1968); Yentsch v. Texaco, Inc., 630 F.2d 46, 52 (2d Cir. 1980); R & G Affiliates, Inc. v. Knoll International, Inc., 587 F.Supp. 1395, 1399-1400 (S.D.N.Y. 1984).⁶

A tying arrangement by a single company can violate Section 1 because the plurality requirement to contract, combine

⁶ Additionally, Sandoz can be found liable as a co-conspirator to the Caremark tying arrangement. See Albrecht, 390 U.S. 147-56 (conspiracy orchestrated by one party with the aid of other co-conspirators); Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977)(conspiracy to tie claim), cert. denied, 434 U.S. 1086 (1978).

or conspire, is satisfied by the sales agreement between the defendant seller and the purchasers of the tied products or services. As the Supreme Court in Albrecht, supra, held:

Under Parke, Davis petitioner could have claimed a combination between respondent and himself, at least as of the day he unwillingly complied with respondent's advertised price.

Albrecht, 390 U.S. at 150 n.6. While Albrecht was a vertical price fixing case and not a tying arrangement case, the Albrecht rationale applies to both. See R & G, 587 F.Supp. at 1400 (combination element is satisfied when purchaser succumbs to the tie).

Thus, while the buyer's "agreement" to take the seller's package is procured by market power, the sales transaction, whether described as an agreement or merely a combination between buyer and seller, satisfies the concerted action requirement of Section 1. Caremark erroneously reads the Complaint to allege that Sandoz and Caremark were the only participants in the unlawful tying of the sale of blood collection and testing to the sale of Clozaril. Caremark's argument regarding its relationship to Sandoz is immaterial since its liability is not contingent on whether Sandoz is deemed to be part of the unlawful combination. Caremark is liable because it combined with Newell and other purchasers of Clozaril and CPMS.

b. Newell Adequately Pleaded That Caremark's Unlawful Tying Arrangement Involved a Not Insubstantial Amount of Commerce in the Market for Blood Collection and Testing

Caremark argues that the Complaint fails to allege that a not insubstantial amount of commerce in the "tied" market -- the

market for blood collection and testing -- was foreclosed to competition by the tying arrangement. According to Caremark, the Complaint is devoid of any allegation about the degree or amount of the tie's effect on the tied market. Caremark Brf. at 17. Caremark, however, overlooks an entire section of the Complaint, subtitled and devoted entirely to the effect on interstate trade and commerce, which makes clear that the tie in this case affected much more than the requisite "not insubstantial" amount of interstate commerce.

Newell alleged:

IV.
INTERSTATE TRADE AND COMMERCE

10. At all times material hereto, defendants have engaged in and the conduct of their businesses have substantially affected interstate trade and commerce by, among other things:

(a) Purchasing substantial quantities of raw materials in interstate commerce;

(b) Regularly selling and shipping substantial quantities of Clozaril and blood samples related to Clozaril use in interstate commerce;

(c) Regularly selling substantial quantities of laboratory services in interstate commerce;

(d) Regularly using various channels of interstate communication, including telephone lines and the mail, to effect such purchases and sales and for advertising and marketing of their products and services.

11. The unlawful activities alleged herein have had, and will continue to have, a substantial and adverse effect on interstate trade and commerce because competition among persons who collect blood and provide labora-

tory services has been and will be unreasonably restrained.

Complaint ¶¶10-11. Clearly, these allegations alone satisfy the liberal pleading requirements that a not insubstantial amount of commerce has been affected by Caremark's unlawful conduct. See George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 553 (2d Cir. 1977)(Allegations that parties made substantial purchases of materials transported in interstate commerce is a sufficient allegation of effect on interstate commerce to state a cause of action under Sherman Act).

To be actionable, a tying arrangement must affect a "not insubstantial" amount of interstate commerce. Gonzalez v. St. Margaret's House Housing Development Fund Corp., 880 F.2d 1514, 1518 (2d Cir. 1989). This requirement, however, "makes no reference to the scope of any particular market or to the share of that market foreclosed by the tie" Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 501 (1969).⁷ "[N]ormally the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie" Id. "[T]he relevant figure is the total volume of sales tied by the sales policy under challenge, not the portion of this total accounted for by the particular plaintiff who brings suit." Id. at 502. Gonzalez, 880 F.2d at 1518. In Fortner, the Court

⁷ It follows that plaintiff need not, as Caremark contends, define a particular market.

noted that \$200,000 was not an insubstantial amount of commerce, Id., and Caremark itself acknowledges that courts have held as little as \$60,000 to be not insubstantial. Caremark Brf. at 18-19.

Newell easily satisfies these pleading requirements. Had Caremark carefully read the Complaint, it would have found in addition to the section (quoted above) devoted to the affect on interstate commerce, other allegations that every year approximately 7,000 persons in the United States take Clozaril, and that each Clozaril patient has weekly blood samples taken and analyzed. Complaint ¶ 87. Each year, therefore, approximately 364,000 blood samples are taken from Clozaril patients and tested. Id. Even assuming that blood collection and testing are inexpensive -- the Complaint indicates that they are not, see ¶ 20 -- hundreds of thousands of dollars in blood collection and testing services were foreclosed to competitors by the CPMS in 1990. A more realistic estimate is in the millions of dollars. This amount is not de minimis. Gonzalez, supra at 1519 (impact on interstate commerce requires of factual inquiry).

Caremark's argument is plainly wrong. Caremark's motion to dismiss should be denied.

2. Newell Adequately Pleaded an Unlawful Relationship Between the Defendants

a. Agency Relationships May Not Be Determined As a Matter of Law

Caremark also contends that it is an agent of Sandoz and therefore it is incapable of conspiring with its principal.

Caremark Brf. at 15-16. Caremark's legal argument is inaccurate. Courts have found that agents have the capacity to conspire with their principals to violate the Sherman Act. This determination raises questions of fact which cannot be made on a 12(b)(6) motion. Accordingly, Caremark's motion must be denied.

In Bulkferts Inc. v. Salatin Inc., 574 F.Supp. 6 (S.D.N.Y. 1983), Judge Carter found that agents and principals may conspire under the antitrust laws:

Furthermore, a principal and his agent may conspire within the meaning of the Sherman Act; however, this requires scrutiny of a number of elements including what other, if any, activities the agent performs on behalf of his principal, and the degree to which the agent is authorized to exercise his discretion with respect to the transactions in question. Aside from the failure to comply with our local rules, these are factual questions which cannot be addressed on a motion for summary judgment.

Id. at 8 (emphasis added; citation omitted). Other courts have similarly found instances where agents and principals are capable of conspiring. See e.g. Pink Supply Corp. v. Hiebert, Inc., 788 F.2d 1313, 1317-18 (8th Cir. 1986)(several instances where an agent can be found to conspire with its principal include: where interests of the principal and agent diverge; where agent is acting beyond the scope of its agency; and where agent is aware of anticompetitive purpose) and the many cases cited therein.

Agents can conspire with their principals. Additionally, agency relationships require extensive factual investigations which cannot be determined as a matter of law. Thus, Caremark's 12(b)(6) motion should be denied.

**b. Newell's Colloquial Characterization
of Caremark As an Agent for Sandoz Does
Not Insulate Caremark From Antitrust Liability**

Caremark contends Newell failed to state a cause of action based upon a clever, but disingenuous reading of Newell's Complaint. In Paragraph 8 of the Newell's Complaint, Newell stated:

Defendant Caremark, Inc. ("Caremark") is a national home health care company which is the sole agent authorized by defendant Sandoz to collect weekly blood samples from Clozaril patients and to distribute Clozaril to patients and/or health care facilities. Caremark is a subsidiary of Baxter International, Inc., which is a Delaware corporation with its principal place of business at One Baxter Parkway, Deerfield, Illinois.

Complaint ¶8 (emphasis added). Caremark contends that Newell's colloquial use of the word "agent" immunizes Caremark from Section 1 liability because Caremark, as an agent of Sandoz for the collection and testing of blood and distribution of Clozaril, is legally incapable of conspiring with Sandoz. Caremark Brf. at 15-16. Newell disagrees."

Section 1 of the Sherman Act prohibits concerted conduct in restraint of trade. 15 U.S.C. § 1. The Act, in relevant part, states:

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce . . . is declared to be

" As previously noted, Newell intends to amend his Complaint. Based upon newly discovered information, Newell intends to delete the word "agent" in the amended complaint and alternatively plead that Caremark is an independent contractor. This amendment will effectively render the bulk of Caremark's motion to dismiss moot.

illegal.

Id.⁹ Caremark seeks refuge from Section 1 liability based upon a flawed Intra-enterprise conspiracy argument.¹⁰ Caremark erroneously argues that by pleading "sole agent", Newell sabotaged any chance of stating a Sherman Act claim.

In Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), however, the Supreme Court rejected a construction of the Intra-enterprise conspiracy doctrine which focused on formal legal distinctions like Caremark's. In enacting Section 1 of the Sherman Act, the Court reasoned, Congress was concerned with distinguishing between single firm and multi-firm conduct in economic terms. Copperweld, 467 U.S. at 769. Accordingly, for purposes of ascertaining plurality of action under Section 1, the legal relationship between the parties was irrelevant. What was important was whether they were "separate economic actors". Id.

⁹ A tying arrangement is a vertical combination, *i.e.*, a combination between those at different levels of the distribution chain. As the Supreme Court has stated, a tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5 (1958); Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 12 (1984). The Sherman Act proscribes tying arrangements between goods and services. See Virtual Maintenance, Inc. v. Prime Computer, Inc., 735 F.Supp. 231, 233 (E.D.Mich. 1990).

¹⁰ The intra-enterprise conspiracy theory essentially finds that a single entity is incapable of conspiring with itself. See *e.g.* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) (A parent and a subsidiary corporation were not economically distinct and therefore were incapable of forming a Sherman Act conspiracy).

Agency, the relationship wherein there is a manifestation of mutual assent for one to act for the benefit of another is, like the relationship between parent and subsidiary, a legal conceptualization not an economic one. Thus, under Copperweld, it is irrelevant that Newell pleaded that Caremark was an agent to determine the necessary plurality of action under Section 1. Instead, an inspection of the economic relationship must be made. This was the precise import of the Second Circuit's ruling in Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 602 F.2d 1025 (2d Cir.), cert. denied, 444 U.S. 917 (1979), where the court held:

Whether the two actors constitute distinct economic entities for purposes of the Sherman Act is determined by the economic realities of their relationship.

Id. at 1031 n.5. Recognizing that the "economic realities" are the focus, the court provided the following analysis to determine an agency relationship:

In the context of the principal/agent relationship this analysis requires consideration of a number of elements which include: whether the agent performs a function on behalf of his principal other than securing an offer from a buyer for the principal's product; the degree to which the agent is authorized to exercise his discretion concerning the price and terms under which the principal's product is to be sold; and finally whether use of the agent constitutes a separate step in the vertical distribution of the principal's product.

Id. Accord Volvo North America Corp. v. Men's International Professional Tennis Council, 857 F.2d 55, 71 (2d Cir. 1988)(Joint venturers, multiple entities in sporting association, could conspire amongst themselves). Thus, a three-part analysis of the

legal relationship must occur. Even Caremark's cases tell us so.

In Ally Gargano/MCA Advertising, Ltd. v. Cooke Properties, Inc., 1989-2 Trade Cas. (CCH) ¶168,817 (S.D.N.Y. 1989), a case relied on by Caremark, the court recognized that the Intra-enterprise conspiracy doctrine affords defendants, like Caremark, the potential for subterfuge:

Only if the structure of the relationship between two entities is one of independence, rather than agency, can the conduct be labeled concerted within the meaning of the Act.

Because a true agency relationship immunizes the parties from antitrust liability, efforts to invoke the agency label must be closely scrutinized and cannot be allowed to shield substantive relationships violative of the Act. . . .

The crucial inquiry, here, therefore, is whether MCA can fairly be characterized as Cooke's agent . . .

Id. at 62,276-77 (emphasis added). Thus, only after a careful scrutiny of the defendants' evidence (not pleadings) regarding their economic relationship did the court determine that a true agency relationship existed and granted summary judgment.¹¹

Similarly, in North American Produce v. Nick Penachio Co., 705 F.Supp. 746 (E.D.N.Y. 1988), another case cited by Caremark, the court extensively reviewed plaintiffs' complaint to determine whether an agency relationship existed. The court

¹¹ It should be noted that Caremark may not escape liability altogether if factually determined to be an agent of Sandoz. See United States v. Wise, 370 U.S. 405, 410 (1962)(agents are treated as principals and held responsible); United States v. Brown, 1991-1 Trade Cas. (CCH) ¶169,350 at 65,402 (9th Cir. 1991)(same).

particularly focused on the plaintiffs' use of the defendants' facilities to make its determination. Id. at 749-50. Unlike North American, Newell has not alleged any use of Sandoz's facilities by Caremark. Caremark can find no comfort in either Ally Gargano or North American.

Caremark's reading of Newell's Complaint ignores a multitude of indicia that Caremark may not have been an agent of Sandoz. Newell alleged that:

1. Defendant Sandoz agreed, contracted, combined and conspired with defendant Caremark to create the CPMS as the sole source of Clozaril (Complaint ¶21);
2. Defendant Caremark performs blood drawing services and monitors blood test results (Complaint ¶21);
3. Defendant Caremark receives payment of the weekly amount for the field services and Clozaril (Complaint ¶21);
4. Defendant Caremark only makes a payment to Defendant Sandoz in accordance with their unlawful agreement, contract, combination or conspiracy (Complaint ¶21);
5. Both Defendant Sandoz and Caremark use Clozaril as a tying product to require purchasers of Clozaril to also purchase the CPMS; and
6. Both Defendant Sandoz and Caremark are sellers of clozaril as well as the CPMS (Complaint ¶39).

In light of these facts, it is clear that at least the first of the Fuchs elements of agency is not present here: Caremark clearly performs a function other than securing an offer from a buyer for Clozaril -- it draws blood and monitors blood test results as part of the CPMS. Fuchs, 602 F.2d at 1031 n.5. Furthermore, without the terms of the contract between Sandoz and Caremark as evidence, the second Fuchs element of agency can not

presently be determined, i.e., "the degree to which the agent is authorized to exercise his discretion concerning the price and terms under which the principal's product is to be sold". Id. Finally, the third Fuchs element is not met as Caremark sells Clozaril as the tying product to the CPMS and "constitutes a separate step in the vertical distribution" of Clozaril. Id.

Given the economic realities of the relation between these two separate and distinct actors, i.e., Sandoz and Caremark, the two were legally capable of conspiring with each other. Caremark's camouflaging itself with the agency veil must fail, if based on Newell's pleadings alone. As the court in Tameron Distributing Corp. v. Weiner, 418 F.2d 137 (7th Cir. 1969), observed:

[Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911 (5th Cir. 1952)] does not preclude a conspiracy between a corporation and **any agent**. The guiding principle is the requirement that there be more than one independent business entity involved in the combination or conspiracy. Thus in Nelson Radio, the court properly held that the corporation could not conspire with its managing officers and agents who maintained no business identity separate from the corporation itself. On the other hand, where there are distinct entities, the existence of an "agency" relationship between does not foreclose a violation of Section 1 of the Act. We conclude that a combination under the Sherman Act existed between Bronner and Weiner, and that the district court should not have granted summary judgment for Weiner.

Id. at 139 (bold emphasis in original; citations omitted). Thus, claims of agency involve factual determinations which should not be determined on pleadings alone. See Bulkferts, supra; Fuchs,

supra. See also Shepherd Intelligence Systems, Inc. v. Defense Technologies, Inc., 702 F.Supp. 365, 368-69 (D.Mass. 1988).

In short, the exact nature of the Sandoz-Caremark relationship cannot be determined on the pleadings. However, Newell has made sufficient allegations to hold Caremark liable as a co-conspirator with Sandoz.¹²

3. The Complaint Properly States a Price Fixing Agreement Between Sandoz and Caremark

Caremark erroneously contends that Newell failed to adequately allege a vertical price fixing claim because he 1.) failed to allege a vertical distribution arrangement; 2.) failed to allege parties capable of conspiring; and 3.) failed to allege an a price-fixing agreement between Caremark and Sandoz. Caremark Brf. at 19-22. As previously discussed above, Caremark's second argument is plainly wrong. Regarding the remaining two arguments, the following discussion explains why they also lack merit.

¹² If Caremark is truly Sandoz's agent, as Caremark contends, then Sandoz would be liable for its agent's antitrust violation. See American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982). In Hydrolevel, the Supreme Court ruled that a principal may be held civilly liable under the antitrust laws for the acts of its agents performed with apparent authority. The Court reasoned that if a principal is civilly liable for the antitrust violations of its agents, "it is much more likely that similarly antitrust violations will not occur in the future." Id. at 572. "[P]ressure [will be] brought on [the organization] to see to it that [its] agents abide by the law." Id., quoting, United States v. A & P Trucking Co., 358 U.S. 121, 126 (1958). Thus, Caremark's reading of the Complaint would not save Sandoz from liability.

a. Newell Adequately Pleaded a Vertical Distribution Arrangement

Caremark, by virtue of an unfair and distorted reading of Newell's Complaint, insists that a vertical distribution arrangement has not been alleged. Newell disagrees.

Caremark argues inconsistently. On the one hand, Caremark says that because agency has been pleaded, it must be accepted as true. Caremark Brf. at 15. On the other hand, Caremark recognizes Newell's alternative pleading that it is a "reseller" of Clozaril, but contends this pleading must be rejected as false. Caremark Brf. at 21 n.13. Caremark cannot have it both ways. The Court must draw all reasonable inferences in favor of Newell, not just those that Caremark selectively chooses. See Ross v. Bolton, 904 F.2d 819, 823 (2d Cir. 1990); Shaw v. Rolex Watch U.S.A., Inc., 745 F.Supp. 982, 984 (S.D.N.Y. 1990).

Newell alleged that Caremark contracted with Sandoz to act as its exclusive dealer/"agent" for the distribution of Clozaril. Complaint ¶¶8, 21. Sandoz sells the Clozaril to Caremark as they are both alleged to be "sellers of Clozaril". Complaint ¶39. Caremark, in turn, sells the Clozaril purchased from Sandoz to class members. Complaint ¶¶20, 35. Newell also alleged that the two contracted, combined or conspired to artificially raise, fix, maintain or stabilize the price of CPMS. Complaint ¶40. Therefore, Newell adequately pleaded the vertical price-fixing arrangement Caremark obfuscates.

Caremark appears to further argue that, even if it has resold Clozaril, the Complaint does not allege that it conspired with Sandoz to fix the drug's price; instead the Complaint alleges that Caremark and Sandoz agreed on the price of CPMS, which Caremark did not purchase from Sandoz.¹³ This argument fails because Sandoz and Caremark are alleged to have agreed on the price of Clozaril as tied to the sale of CPMS.

As the Supreme Court cautioned in Simpson v. Union Oil Co., 377 U.S. 13 (1964), defendants must not be permitted through "a clever manipulation of words" to hide what in substance is a large-scale price maintenance scheme. Id. at 22. The Court held:

[W]hen a "consignment" device is used to cover a vast gasoline distribution system, fixing prices through many retail outlets, the anti-trust laws prevent calling the "consignment" an agency, for then the end result of United States v. Socony-Vacuum Oil Co., supra, would be avoided by clever manipulation of words, not by differences in substance. The present, coercive "consignment" device, if successful against challenge under the antitrust laws, furnishes a wooden formula for administering prices on a vast scale.

Id. at 21-22. Caremark's attempt to evade antitrust law by a label must fail. Caremark's motion to dismiss should be denied.

¹³ Caremark likens its relationship with Sandoz to a joint venture, each contributing a discrete component of CPMS. Caremark Brf. at 21. However, even joint venturers can be found to conspire to fix prices. See Volvo North America Corp. v. Men's International Professional Tennis Council, 857 F.2d 55, 71 (2d Cir. 1988). By tying the sale of Clozaril to the sale of blood collection and testing, Caremark can not change the fact that it sells the Clozaril it obtains from Sandoz.

b. The Complaint Directly Alleges That Sandoz and Caremark Agreed Upon the Price of CPMS

Caremark argues that Newell's Complaint does not state a vertical price-fixing claim because it lacks any facts that support the conclusion that Sandoz and Caremark agreed on the retail price of CPMS. Caremark Brf. at 22. Caremark errs.

First, the Complaint alleges that Caremark and Sandoz engaged in a contract, combination or conspiracy to fix the price of Clozaril.¹⁴

Second, the Complaint also alleges that defendants, "engaged in and enforced an agreement, contract, combination and conspiracy to artificially raise, fix, maintain or stabilize the price of CPMS in violation of Section 1" Complaint ¶41.

These allegations sufficiently assert a claim for price fixing of both Clozaril and CPMS.

With respect to the sale of Clozaril there is undeniably a vertical relationship between Sandoz, the manufacturer, and Caremark, the distribution/seller. Complaint, ¶¶7, 12, 39, 41, 43 and 45. Sandoz's claim that a vertical relationship does not exist is puzzling and incorrect.

Further, the Complaint alleges that Caremark has agreed to charge a price set by Sandoz for the sale of Clozaril.

¹⁴ Paragraph 45 of the Complaint alleges that the cost of obtaining Clozaril has been maintained at levels which are artificially and prohibitively high and non-competitive; the distribution of Clozaril has been restrained and class members who have purchased clozaril have had to pay artificially inflated and non-competitive prices.

Complaint ¶¶41, 43 and 45. This is not a case where it is alleged that the manufacturer has suggested a retail price and simply encourages its dealers to conform to such price. In the instant case, it is alleged that there was an "agreement" regarding the price of Clozaril. This vertical price fixing agreement states a Section 1 claim. See Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 766 (1984).

In addition, the Complaint alleges a price fix of CPMS. Complaint, ¶¶41, 42 and 45. Whether or not Sandoz and Caremark have a vertical or horizontal relationship with respect to the collection of blood and laboratory services does not need to be determined at this juncture. The alleged agreement between Sandoz and Caremark setting the price for these other services also states a claim under Section 1 of the Sherman Act.

Caremark's argument practically requires Newell to produce a "smoking gun" at the pleading stage. However, Newell has no obligation to plead evidence. See Alco Standard Corp. v. Schmid Brothers, Inc., 647 F.Supp. 4 (S.D.N.Y. 1986), where Judge Leisure, in an antitrust case, rejected an argument similar to Caremark's:

It is not necessary to plead either the evidence or the facts upon which antitrust conspiracy claims are based in order for a complaint to withstand a motion to dismiss pursuant to Rule 12(b)(6). Eye Encounter, Inc. v. Contour Art, Ltd., 81 F.R.D. 683, 686 (E.D.N.Y. 1986). Plaintiff has identified the co-conspirators and described the nature and effect of the alleged conspiracy. This is sufficient to state a claim.

Id. at 6. So too here, Newell has "identified the co-conspirators and described the effect of the alleged conspiracy." No more is required. Even Dupont Glove Forgan Inc. v. American Telephone & Telegraph Co., 437 F.Supp. 1104 (S.D.N.Y. 1977), aff'd without opinion, 578 F.2d 1366 (2d Cir.), cert. denied, 439 U.S. 970 (1978), a case relied on by Caremark, recognized that "it is Hornbook law that conspiracies are rarely proved by direct evidence" and must be determined by inferences. Id. at 1112. To require Newell to plead the precise price-fixing agreement goes beyond conspiracy pleading or proof requirements. See Theatre Entertainers, Inc. v. Paramount Film Distribution Corp., 346 U.S. 537, 540 (1954); Nurse Midwifery Associates v. Hibbett, 918 F.2d 605, 616 (6th Cir. 1990).

Newell has therefore stated a claim. Caremark's motion to dismiss should be denied.

D. NEWELL SUFFICIENTLY PLEADED A CLAIM FOR AN UNLAWFUL RESTRAINT OF TRADE

Caremark contends that Newell failed to allege "any supporting facts" for a Section 1 claim based on an unlawful restraint of trade. Caremark Brf. at 24. Newell disagrees.

Caremark repeatedly fails to read Newell's Complaint correctly. As a result, Caremark continues to make unfounded arguments regarding Newell's pleading. The Complaint (Section VI - - Offenses Charged) incorporates in Paragraph 34 all the same facts alleged regarding claims of illegal tying and price-fixing. As discussed above, these allegations sufficiently stated claims for

those offenses.

There is nothing "bare bones" about the allegations of the Complaint, as there was in Heart Disease Research Foundation v. General Motors Corp., 463 F.2d 98 (2d Cir. 1972), a case relied on by Caremark. In Heart Disease, the plaintiffs' antitrust claims even after amendment were found wanting. Plaintiffs sought to represent a class of 125,000,000 persons for defendants' alleged conspiracy to suppress the development of motor vehicles pollution control devices. The court found plaintiffs' complaint insufficient and frivolous. Caremark's comparison between Newell's claims and those of the Heart Disease Research Foundation is similarly frivolous. Newell has set forth a short and plain statement of the claim with respect to Clozaril and CPMS entitling him and class members to relief. That is all that is necessary under the federal rules. Fed.R.Civ.P. 8(a).

Newell's allegations simply, concisely and directly support a claim for an unreasonable restraint of trade under both a "per se" or "rule of reason" analysis. See Wilk v. American Medical Ass'n, 895 F.2d 352 (7th Cir. 1990); Apex Oil Co. v. DiMauro, 713 F.Supp. 587 (S.D.N.Y. 1990)(General discussions on differences between the two types of analyses). Because both tying arrangements and price-fixing claims are analyzed under the per se analysis, Gonzalez, 880 F.2d at 1519; Apex Oil Co., 713 F.Supp. at 596, the above discussion suffices to prove that Newell's complaint stated a per se unreasonable restraint of trade.

In order to state a claim for unreasonable restraint of

trade under the "rule of reason" analysis, several elements must be alleged. As the court in Unibrand Tire & Product Co. v. Armstrong Rubber Co., 429 F.Supp. 470 (W.D.N.Y. 1977), explained:

Pursuant to Section 1, every contract, combination or conspiracy which unreasonably restrains interstate or foreign trade or commerce is illegal. In order to establish a violation of this section, a plaintiff must allege and prove as elements interstate or foreign commerce, two or more parties, an agreement, a restraint of trade, and the unreasonability of such restraint. In private suits for injuries, it must be alleged additionally that a plaintiff's injury arises by reason of the violation of the antitrust laws.

Id. at 474. Thus, the elements that need to be alleged include: 1.) an affect upon interstate commerce; 2.) two or more parties; 3.) an agreement; 4.) unreasonable restraint of trade; and 5.) antitrust injury.

Newell made these allegations and more. See Complaint ¶¶34-47. Thus, he has stated a cause of action for unreasonable restraint of trade.

Dismissal of Newell's Complaint is not even remotely appropriate under the liberal pleading standards adhered to by this Court. Caremark's argument lacks merit and should be rejected.

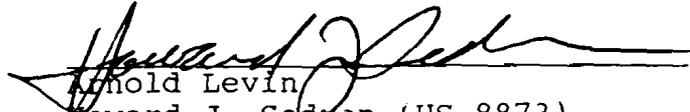
IV. CONCLUSION

For the reasons set forth above, Caremark's motion to dismiss should be denied.¹⁵

¹⁵ Newell believes that Caremark's motion to dismiss should be denied in all respects. However, to the extent the Court is of the view that the Complaint is technically deficient, Newell should
(continued...)

Dated: March 26, 1991

Respectfully submitted,


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¹⁵(...continued)
be granted leave to amend such deficiencies. See, Iacobucci,
supra; Friedlander, supra.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiff's Memorandum of Points and Authorities in Opposition to Caremark Inc.'s Motion to Dismiss Action has been served this date by placing the same in the United States Mail, first class, postage prepaid upon the following:

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