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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE HIV ANTITRUST LITIGATION.

Case No. 19-cv-02573-EMC

ORDER RE VERDICT FORM

Docket Nos. 1890-91

The Court has received and reviewed the parties’ comments regarding the verdict form.

The Court rejects Defendants’ proposal that the Court include an interrogatory asking the jury to specify the dates when generic versions of Truvada and Atripla would have launched.

The Court also rejects Plaintiffs’ proposal that the Court should revert back to just one question on an antitrust violation.

Plaintiffs’ argument that the Court should have only one question for the first step of the rule of reason arguably presents a closer call. However, the first step of the rule of reason has the most instructions, and it will likely help the jury to call its attention back to the component parts of the first step. That there may be some overlap between market power and reverse payment does not mean that there should not be separate questions. The Court also keeps the market power question first and the reverse payment question second. In addition, the Court continues to use “within the relevant market(s)” for the market power question because, as the Court has held, the issue is whether there are significant anticompetitive effects within the relevant market.

As to Plaintiffs’ proposal that the question on step three of the rule of reason be modified – *i.e.*, that the procompetitive effects claimed by defendants were pretextual *or otherwise*

1 *insufficient, see Epic Games, Inc. v. Apple, Inc.*, Nos. 21-16506, 21-16695, 2023 U.S. App. LEXIS
2 9775, at *58 (9th Cir. Apr. 24, 2023) (stating that “[a] procompetitive rationale is ‘a [1]
3 nonpretextual claim that [the defendant's] conduct is [2] indeed a form of competition on the
4 merits because it involves, for example, greater efficiency or enhanced consumer appeal”)
5 (brackets in original), the Court agrees in principle that there should be a modification. However,
6 the Court shall reframe the question so that it hews to the language used in the jury instructions
7 (*i.e.*, using the term “rebut”). The Court shall revise Question 4 so that it reads as follows:


- 8 4. At step three of the rule of reason, did the plaintiffs do at least one of the following:
9 (a) rebut the procompetitive effects claimed by the defendants;
10 (b) prove that the procompetitive effects claimed by the defendants could have
11 been reasonably achieved in a substantially less restrictive manner; or
12 (c) prove that the anticompetitive effects of the defendants’ conduct
13 substantially outweighed the procompetitive benefits claimed by the
14 defendants.

15 Finally, the Court rejects Plaintiffs’ suggestion that Question 5 be modified because the
16 language of “causation” should be incorporated.

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18 **IT IS SO ORDERED.**

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20 Dated: May 24, 2023

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EDWARD M. CHEN
United States District Judge

COURT’S PROPOSED VERDICT FORM

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Element (1): Anticompetitive Conduct

1. At step one of the rule of reason, did the plaintiffs prove that Gilead had market power within the relevant market(s) that included Truvada and/or Atripla?

a. Truvada Yes _____ No _____

b. Atripla Yes _____ No _____

If you answered “yes” to either of the above, proceed to Question 2. If you answered “no” to both of the above, skip the remaining questions, and sign and date the form.

2. At step one of the rule of reason, did the plaintiffs prove that the April 25, 2014, patent settlement agreement between Gilead and Teva included a “reverse payment” from Gilead to Teva so that Teva would delay its entry into the market and Gilead could thereby avoid the risk of generic competition?

Yes _____ No _____

If you answered “yes” to the above, proceed to Question 3. If you answered “no,” skip the remaining questions, and sign and date the form.

3. At step two of the rule of reason, did the defendants come forward with evidence that their conduct had procompetitive effects?

Yes _____ No _____

If you answered “yes” to the above, proceed to Question 4. If you answered “no,” skip Question 4 and proceed to Question 5.

4. At step three of the rule of reason, did the plaintiffs do at least one of the following:

- (a) rebut the procompetitive effects claimed by the defendants;
- (b) prove that the procompetitive effects claimed by the defendants could have been reasonably achieved in a substantially less restrictive manner; or

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(c) prove that the anticompetitive effects of the defendants' conduct substantially outweighed the procompetitive benefits claimed by the defendants.

Yes _____ No _____

If you answered "yes" to the above, proceed to Question 5. If you answered "no," skip the remaining questions, and sign and date the form.

Element (2): Antitrust Injury

5. Did the plaintiffs prove that the defendants' conduct caused entry of generic Truvada or generic Atripla to be delayed, thereby causing any one or more of the below plaintiffs to pay some amount more for the drug than they would have paid if generic entry had not been delayed?

a. Direct Purchaser Classes (DPPs)

Truvada Yes _____ No _____

Atripla Yes _____ No _____

b. Walgreen (Retailer)

Truvada Yes _____ No _____

Atripla Yes _____ No _____

c. Kroger (Retailer)

Truvada Yes _____ No _____

Atripla Yes _____ No _____

d. HEB (Retailer)

Truvada Yes _____ No _____

Atripla Yes _____ No _____

e. Albertsons (Retailer)

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Truvada Yes _____ No _____

Atripla Yes _____ No _____

f. CVS Pharmacy (Retailer)

Truvada Yes _____ No _____

Atripla Yes _____ No _____

g. Rite Aid (Retailer)

Truvada Yes _____ No _____

Atripla Yes _____ No _____

h. United

Truvada Yes _____ No _____

Atripla Yes _____ No _____

i. End-Payor Purchaser Classes (EPPs)

Truvada Yes _____ No _____

Atripla Yes _____ No _____

j. Florida Blue (IHPP)

Truvada Yes _____ No _____

Atripla Yes _____ No _____

k. Centene (IHPP)

Truvada Yes _____ No _____

Atripla Yes _____ No _____

l. HCSC (IHPP)

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Truvada Yes _____ No _____

Atripla Yes _____ No _____

m. Triple-S Salud (IHPP)

Truvada Yes _____ No _____

Atripla Yes _____ No _____

n. Kaiser (IHPP)

Truvada Yes _____ No _____

Atripla Yes _____ No _____

o. Blue KC (IHPP)

Truvada Yes _____ No _____

Atripla Yes _____ No _____

p. Humana (IHPP)

Truvada Yes _____ No _____

Atripla Yes _____ No _____

If you answered “yes” to one or more of the above, then for those plaintiffs/drugs for which you answered “yes” proceed to Question 6 below. If you answered “no” for all the plaintiffs and all the drugs above, skip the remaining questions, and sign and date the form.

6. Please indicate the amount of overcharges for those plaintiffs/drugs for which you answered “yes” above. Do not fill in the below for any plaintiffs/drugs that you answered “no” to above.

a. Direct Purchaser Classes (DPPs)

Truvada \$_____

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Atripla \$ _____

b. Walgreen (Retailer)

Truvada \$ _____

Atripla \$ _____

c. Kroger (Retailer)

Truvada \$ _____

Atripla \$ _____

d. HEB (Retailer)

Truvada \$ _____

Atripla \$ _____

e. Albertsons (Retailer)

Truvada \$ _____

Atripla \$ _____

f. CVS Pharmacy (Retailer)

Truvada \$ _____

Atripla \$ _____

g. Rite Aid (Retailer)

Truvada \$ _____

Atripla \$ _____

h. United

Truvada \$ _____

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Atripla \$_____

i. End-Payor Purchaser Classes (EPPs)

	Truvada	Atripla
Alabama	\$_____	\$_____
Arizona	\$_____	\$_____
California	\$_____	\$_____
Connecticut	\$_____	\$_____
District of Columbia	\$_____	\$_____
Florida	\$_____	\$_____
Hawaii	\$_____	\$_____
Iowa	\$_____	\$_____
Kansas	\$_____	\$_____
Maine	\$_____	\$_____
Maryland	\$_____	\$_____
Massachusetts	\$_____	\$_____
Michigan	\$_____	\$_____
Minnesota	\$_____	\$_____
Mississippi	\$_____	\$_____
Missouri	\$_____	\$_____
Nebraska	\$_____	\$_____
Nevada	\$_____	\$_____
New Hampshire	\$_____	\$_____
New Mexico	\$_____	\$_____
New York	\$_____	\$_____
North Carolina	\$_____	\$_____
North Dakota	\$_____	\$_____
Oregon	\$_____	\$_____

1	Rhode Island	\$ _____	\$ _____
2	South Dakota	\$ _____	\$ _____
3	Tennessee	\$ _____	\$ _____
4	Utah	\$ _____	\$ _____
5	Vermont	\$ _____	\$ _____
6	West Virginia	\$ _____	\$ _____
7	Wisconsin	\$ _____	\$ _____
8	TOTAL:	\$ _____	\$ _____

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10 **j. Florida Blue (IHPP)**

		Truvada	Atripla
12	Alabama	\$ _____	\$ _____
13	Arizona	\$ _____	\$ _____
14	California	\$ _____	\$ _____
15	Connecticut	\$ _____	\$ _____
16	District of Columbia	\$ _____	N/A
17	Florida	\$ _____	\$ _____
18	Hawaii	\$ _____	N/A
19	Illinois	\$ _____	\$ _____
20	Iowa	\$ _____	\$ _____
21	Kansas	\$ _____	N/A
22	Louisiana	\$ _____	\$ _____
23	Maine	\$ _____	\$ _____
24	Maryland	\$ _____	N/A
25	Massachusetts	\$ _____	N/A
26	Michigan	\$ _____	\$ _____
27	Minnesota	\$ _____	N/A
28	Mississippi	\$ _____	N/A

1	Missouri	\$ _____	N/A
2	Montana	N/A	\$ _____
3	Nebraska	\$ _____	\$ _____
4	Nevada	\$ _____	\$ _____
5	New Hampshire	\$ _____	N/A
6	New Mexico	\$ _____	N/A
7	New York	\$ _____	\$ _____
8	North Carolina	\$ _____	\$ _____
9	Oregon	\$ _____	N/A
10	Rhode Island	\$ _____	N/A
11	South Carolina	\$ _____	\$ _____
12	South Dakota	\$ _____	N/A
13	Tennessee	\$ _____	\$ _____
14	Utah	\$ _____	N/A
15	Vermont	\$ _____	N/A
16	Wisconsin	\$ _____	\$ _____
17	TOTAL:	\$ _____	\$ _____
18			
19	k. Centene (IHPP)		
20		Truvada	Atripla
21	Alabama	\$ _____	\$ _____
22	Arizona	\$ _____	\$ _____
23	California	\$ _____	\$ _____
24	Connecticut	\$ _____	\$ _____
25	District of Columbia	\$ _____	\$ _____
26	Florida	\$ _____	\$ _____
27	Hawaii	\$ _____	\$ _____
28	Illinois	\$ _____	\$ _____

United States District Court
Northern District of California

1	Iowa	\$ _____	\$ _____
2	Kansas	\$ _____	\$ _____
3	Louisiana	\$ _____	\$ _____
4	Maine	\$ _____	\$ _____
5	Maryland	\$ _____	\$ _____
6	Michigan	\$ _____	\$ _____
7	Minnesota	\$ _____	\$ _____
8	Mississippi	\$ _____	\$ _____
9	Missouri	\$ _____	\$ _____
10	Montana	\$ _____	\$ _____
11	Nebraska	\$ _____	\$ _____
12	Nevada	\$ _____	\$ _____
13	New Hampshire	\$ _____	\$ _____
14	New Mexico	\$ _____	\$ _____
15	New York	\$ _____	\$ _____
16	North Carolina	\$ _____	\$ _____
17	North Dakota	\$ _____	\$ _____
18	Oregon	\$ _____	\$ _____
19	Rhode Island	\$ _____	\$ _____
20	South Carolina	\$ _____	\$ _____
21	South Dakota	\$ _____	N/A
22	Tennessee	\$ _____	\$ _____
23	Utah	\$ _____	\$ _____
24	Vermont	\$ _____	\$ _____
25	West Virginia	\$ _____	\$ _____
26	Wisconsin	\$ _____	\$ _____
27	TOTAL:	\$ _____	\$ _____

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I. HCSC (IHPP)

	Truvada	Atripla
Alabama	\$ _____	\$ _____
Arizona	\$ _____	\$ _____
California	\$ _____	\$ _____
Connecticut	\$ _____	N/A
District of Columbia	\$ _____	\$ _____
Florida	\$ _____	\$ _____
Hawaii	\$ _____	\$ _____
Illinois	\$ _____	\$ _____
Iowa	\$ _____	\$ _____
Kansas	\$ _____	\$ _____
Louisiana	\$ _____	\$ _____
Maine	\$ _____	\$ _____
Maryland	\$ _____	\$ _____
Massachusetts	\$ _____	N/A
Michigan	\$ _____	\$ _____
Minnesota	\$ _____	\$ _____
Mississippi	\$ _____	\$ _____
Missouri	\$ _____	\$ _____
Montana	\$ _____	\$ _____
Nebraska	\$ _____	\$ _____
Nevada	\$ _____	\$ _____
New Hampshire	\$ _____	N/A
New Mexico	\$ _____	\$ _____
New York	\$ _____	\$ _____
North Carolina	\$ _____	\$ _____
North Dakota	\$ _____	N/A

1	Oregon	\$ _____	\$ _____
2	Rhode Island	\$ _____	\$ _____
3	South Carolina	\$ _____	\$ _____
4	South Dakota	\$ _____	\$ _____
5	Tennessee	\$ _____	\$ _____
6	Utah	\$ _____	\$ _____
7	Vermont	\$ _____	N/A
8	West Virginia	\$ _____	\$ _____
9	Wisconsin	\$ _____	\$ _____
10	TOTAL:	\$ _____	\$ _____
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12	m. Triple-S Salud (IHPP)		
13		Truvada	Atripla
14	Connecticut	\$ _____	N/A
15	Illinois	\$ _____	N/A
16	New York	\$ _____	N/A
17	North Carolina	\$ _____	N/A
18	TOTAL:	\$ _____	N/A
19			
20	n. Kaiser (IHPP)		
21		Truvada	Atripla
22	California	\$ _____	\$ _____
23	District of Columbia	\$ _____	\$ _____
24	Hawaii	\$ _____	\$ _____
25	Maryland	\$ _____	\$ _____
26	Oregon	\$ _____	\$ _____
27	TOTAL:	\$ _____	\$ _____
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o. Blue KC (IHPP)

	Truvada	Atripla
Alabama	\$ _____	\$ _____
Arizona	\$ _____	\$ _____
California	\$ _____	\$ _____
Connecticut	\$ _____	N/A
District of Columbia	\$ _____	N/A
Florida	\$ _____	\$ _____
Hawaii	\$ _____	N/A
Illinois	\$ _____	\$ _____
Iowa	\$ _____	N/A
Kansas	\$ _____	\$ _____
Louisiana	\$ _____	N/A
Maryland	\$ _____	N/A
Massachusetts	\$ _____	N/A
Michigan	\$ _____	N/A
Minnesota	\$ _____	N/A
Missouri	\$ _____	\$ _____
Nebraska	\$ _____	N/A
Nevada	\$ _____	\$ _____
New York	\$ _____	N/A
North Carolina	\$ _____	N/A
Oregon	\$ _____	N/A
South Carolina	\$ _____	N/A
Tennessee	\$ _____	\$ _____
Utah	\$ _____	N/A
Wisconsin	\$ _____	N/A
TOTAL:	\$ _____	\$ _____

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p. Humana (IHPP)

Truvada

Atripla

Alabama	\$ _____	\$ _____
Arizona	\$ _____	\$ _____
California	\$ _____	\$ _____
Connecticut	\$ _____	\$ _____
District of Columbia	\$ _____	\$ _____
Florida	\$ _____	\$ _____
Hawaii	\$ _____	\$ _____
Illinois	\$ _____	\$ _____
Iowa	\$ _____	\$ _____
Kansas	\$ _____	\$ _____
Louisiana	\$ _____	\$ _____
Maine	\$ _____	\$ _____
Maryland	\$ _____	\$ _____
Michigan	\$ _____	\$ _____
Minnesota	\$ _____	\$ _____
Mississippi	\$ _____	\$ _____
Missouri	\$ _____	\$ _____
Montana	\$ _____	\$ _____
Nebraska	\$ _____	\$ _____
Nevada	\$ _____	\$ _____
New Hampshire	\$ _____	\$ _____
New Mexico	\$ _____	\$ _____
New York	\$ _____	\$ _____
North Carolina	\$ _____	\$ _____
North Dakota	\$ _____	\$ _____

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Oregon	\$ _____	\$ _____
Rhode Island	\$ _____	\$ _____
South Carolina	\$ _____	\$ _____
South Dakota	\$ _____	\$ _____
Tennessee	\$ _____	\$ _____
Utah	\$ _____	\$ _____
Vermont	\$ _____	\$ _____
West Virginia	\$ _____	\$ _____
Wisconsin	\$ _____	\$ _____
TOTAL:	\$ _____	\$ _____

Proceed to Question 7 below.

7. Was the defendants' antitrust violation(s) that you found flagrant?

Yes _____ No _____

Proceed to Question 8 below.

8. Was the defendants' antitrust violation(s) that you found willful?

Yes _____ No _____

Please sign and date the form.

Presiding Juror

Date