

1                                    IN THE UNITED STATES DISTRICT COURT  
2                                    FOR THE NORTHERN DISTRICT OF CALIFORNIA

3  
4 SMITHKLINE BEECHAM CORPORATION, doing  
business as GLAXOSMITHKLINE,

5                                    Plaintiff,

6                                    v.

7  
8 ABBOTT LABORATORIES,  
9                                    Defendant.

No. C 07-5702 CW

ORDER GRANTING  
IN PART AND  
DENYING IN PART  
PLAINTIFF'S  
MOTION FOR ENTRY  
OF JUDGMENT  
(Docket No. 489)

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11                                    Plaintiff Smithkline Beecham Corporation, doing business as  
12 GlaxoSmithKline (GSK), moves for entry of judgment. Defendant  
13 Abbott Laboratories opposes the motion in part. The motion was  
14 taken under submission on the papers. Having considered the papers  
15 submitted by the parties, the Court GRANTS GSK's motion in part and  
16 DENIES it in part.

17                                    BACKGROUND

18                                    Because the Court's January 14, 2011 Order Denying Abbott's  
19 Motions for Summary Judgment amply recites the background of this  
20 case, the Court offers a truncated discussion below.

21                                    GSK brought four claims against Abbott: (1) violation of the  
22 Sherman Act, 15 U.S.C. § 2; (2) breach of the covenant of good  
23 faith and fair dealing; (3) violation of the North Carolina Unfair  
24 and Deceptive Trade Practices Act (UDTPA), N.C. Gen. Stat. § 75-  
25 1.1; and (4) violation of North Carolina's prohibition on  
26 monopolization, N.C. Gen. Stat. § 75-2.1.

27                                    A jury trial in this action began on February 28, 2011. On  
28 March 24, 2011, before the case was submitted to the jury, Abbott

1 moved for judgment as a matter of law. See Fed. R. Civ. P. 50(a).  
2 The Court did not grant the motion and submitted the case to the  
3 jury.

4 On March 30, 2011, the jury rendered its verdict. The jury  
5 found for Abbott on GSK's § 2 claim, but for GSK on its claim for  
6 breach of the implied covenant. The jury concluded that Abbott  
7 breached the implied covenant that inhered to the parties' Norvir  
8 license agreement and did so through "grossly negligent conduct."  
9 For this, the jury awarded GSK \$3,486,240.00 in damages.

10 For GSK's UDTPA claim, the jury was asked whether Abbott  
11 committed any of the three following acts:<sup>1</sup>

- 12 a. During the negotiation of the Norvir Boosting License,  
13 Abbott was considering how to use its control over Norvir  
14 to limit competition with Kaletra and deliberately  
15 withheld this from GSK.
- 16 b. Abbott inequitably asserted its power over Norvir by  
17 increasing Norvir's price by 400 percent to undermine and  
18 disrupt Lexiva's launch and future sales.
- 19 c. Abbott manipulated the timing of the 400-percent Norvir  
20 price increase in order to disrupt Lexiva's launch and  
21 undermine Lexiva's future sales.

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25 <sup>1</sup> A fourth question, regarding whether Abbott monopolized or  
26 attempted to monopolize the market in which Kaletra competes, was  
27 included in the preliminary jury instructions. The Court did not  
submit this question to the jury because the parties agreed it was  
redundant.

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1 These questions were based on GSK's proposed jury instructions.<sup>2</sup>  
2 The jury concluded that GSK did not meet its burden to prove that  
3 Abbott committed the second or third acts. The jury found that  
4 Abbott committed the first act, but that this conduct was not the  
5 proximate cause of injury to GSK.

6 DISCUSSION

7 GSK asks the Court to enter judgment as follows: (1) for  
8 Abbott on GSK's § 2 claim; (2) for GSK, in the amount of  
9 \$4,549,590.96, on its claim for breach of the implied covenant;  
10 (3) for GSK, in the amount of \$11,522,070.96, on its UDTPA claim;  
11 and (4) for Abbott on GSK's claim under N.C. Gen. Stat. § 75-2.1.  
12 The amount sought by GSK on its breach of the implied covenant  
13 claim includes pre-judgment interest. Abbott does not oppose GSK's  
14 motion, except to the extent that GSK seeks judgment in its favor  
15 on its UDTPA claim.

16 To prevail on a UDTPA claim, "a plaintiff must show: (1) an  
17 unfair or deceptive act or practice, (2) in or affecting commerce,  
18 and (3) which proximately caused injury." Walker v. Fleetwood  
19 Homes of N.C., Inc., 362 N.C. 63, 72 (2007). "Whether a trade  
20 practice is unfair or deceptive usually depends upon the facts of  
21 each case and the impact the practice has in the marketplace."  
22 Marshall v. Miller, 302 N.C. 539, 548 (1981) (citation omitted).

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24 <sup>2</sup> GSK explicitly stated that the factual questions posed to  
25 the jury reflected the bases of its UDTPA claim. During a  
26 discussion about the jury instructions at the final pretrial  
27 conference, GSK's counsel stated, "We believe the . . . questions  
28 that were in the proposed . . . jury instructions that your Honor  
passed out are the right ones, because those are the things that we  
contend violate the North Carolina unfair competition statute."  
Feb. 8, 2011 Tr. at 26:19-22.

1 "A practice is unfair when it offends established public policy as  
2 well as when the practice is immoral, unethical, oppressive,  
3 unscrupulous, or substantially injurious to consumers." Id.  
4 (citation omitted). Whether an act is unfair or deceptive is a  
5 question of law for a court. Walker, 362 N.C. at 71. However, a  
6 "jury determines in what amount, if any, the complaining party is  
7 injured and whether the occurrence was the proximate cause of those  
8 injuries." Ausley v. Bishop, 133 N.C. App. 210, 217 (1999) (citing  
9 Barbee v. Atl. Marine Sales & Serv., 115 N.C. App. 641, 647  
10 (1994)); see also G.P. Publ'ns, Inc. v. Quebecor Printing-St. Paul,  
11 Inc., 125 N.C. App. 424, 442 (1997) (affirming denial of JNOV  
12 motion on UDTPA claim for which jury found that defendant committed  
13 the alleged unfair act but that the act did not proximately cause  
14 harm to plaintiff).

15 As noted above, GSK provided factual questions that reflected  
16 the bases of its UDTPA claim. Based on those questions, the jury  
17 concluded that GSK did not prove that Abbott increased Norvir's  
18 price by 400 percent to undermine and disrupt Lexiva's launch. Nor  
19 did GSK prove that Abbott manipulated the timing of the Norvir  
20 price increase to disrupt GSK's launch of Lexiva. The jury only  
21 found that Abbott deliberately withheld its intent to use its  
22 control over Norvir to limit competition. However, the jury found  
23 that this act was not the proximate cause of injury to GSK. Thus,  
24 the Court need not decide whether this act constituted an unfair or  
25 deceptive practice under the UDTPA.

26 Nevertheless, GSK insists that the jury's finding that Abbott  
27 engaged in grossly negligent conduct when it breached the implied  
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1 covenant of good faith and fair dealing warrants judgment in GSK's  
2 favor on its UDTPA claim. However, this finding does not support  
3 GSK's UDTPA claim. This finding alone does not show that Abbott  
4 committed an unfair or deceptive act, as defined by the UDTPA,  
5 because it does not speak to the breach's impact on the  
6 marketplace, which is a factor to be considered. Additionally, as  
7 explained above, GSK committed to rest its UDTPA claim on the acts  
8 reflected on the verdict form.

9 GSK points to the jury's finding that "Abbott deliberately  
10 withheld that it was considering ways to use Norvir to harm GSK and  
11 competitors . . . ." GSK's Opp'n to Abbott's JMOL Mot. 9:8-11.  
12 This finding cannot support GSK's UDTPA claim; the jury concluded  
13 that this act did not proximately cause GSK injury.

14 Finally, GSK argues that the "evidence, viewed in the light  
15 most favorable to GSK, could support a finding that Abbott  
16 violated" the UDTPA. GSK's Opp'n to Abbott's JMOL Mot. 8:1-2.  
17 That the evidence could support such a finding warranted denying  
18 Abbott's motion for summary judgment; it does not, however, justify  
19 entering judgment in GSK's favor.

20 CONCLUSION

21 For the foregoing reasons, the Court GRANTS GSK's motion in  
22 part and DENIES it in part. (Docket No. 489.) The Clerk shall  
23 enter judgment for Abbott on GSK's claims under the Sherman Act,  
24 the UDTPA and N.C. Gen. Stat. § 75-2.1. The Clerk shall enter  
25 judgment for GSK, in the amount of \$4,549,590.96, on its claim for  
26 breach of the implied covenant of good faith and fair dealing.  
27 This amount includes pre-judgment interest, as provided under New  
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1 York law. Each party shall bear its own costs. The Clerk shall  
2 enter judgment forthwith.

3 As noted above, Abbott moved for judgment as a matter of law,  
4 pursuant to Federal Rule of Civil Procedure 50(a), before this case  
5 was submitted to the jury. To the extent that this motion was  
6 directed at GSK's Sherman Act, UDTPA and N.C. Gen. Stat. § 75-2.1  
7 claims, the motion is moot. Abbott may renew its motion, pursuant  
8 to Rule 50(b), with respect to GSK's claim for breach of the  
9 implied covenant. In accordance with that rule, Abbott's motion  
10 shall be due within "28 days after the entry of judgment." Fed. R.  
11 Civ. P. 50(b). If one is filed, GSK's opposition shall be due  
12 fourteen days thereafter, and Abbott's reply shall be due seven  
13 days after that. Any renewed motion for judgment as a matter of  
14 law will be taken under submission on the papers.

15 IT IS SO ORDERED.

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17 Dated: 7/8/2011



CLAUDIA WILKEN  
United States District Judge