

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

3
4 SMITHKLINE BEECHAM CORPORATION,
5 doing business as
6 GLAXOSMITHKLINE,

7 Plaintiff,

8 v.

9 ABBOTT LABORATORIES,

10 Defendant.
11 _____/

No. C 07-05702 CW

ORDER DENYING
ABBOTT'S RENEWED
MOTION FOR
JUDGMENT AS A
MATTER OF LAW AND
GRANTING AS
UNOPPOSED GSK'S
MOTION TO AMEND
THE JUDGMENT
(Docket Nos. 524
and 525)

12 Defendant Abbott Laboratories renews its motion for judgment
13 as a matter of law. Plaintiff Smithkline Beecham Corporation,
14 doing business as GlaxoSmithKline (GSK), opposes the motion and
15 moves to amend the judgment to include post-verdict interest, as
16 provided by New York law. Abbott does not oppose GSK's motion to
17 amend. The motions were taken under submission on the papers.
18 Having considered the papers submitted by the parties, the Court
19 DENIES Abbott's motion and GRANTS as unopposed GSK's motion.

20 BACKGROUND

21 Because the parties are intimately familiar with the facts of
22 this case, the Court provides only the background necessary to
23 resolve their motions.

24 I. Factual Background

25 Abbott and GSK manufacture and sell protease inhibitors
26 (PIs), which are drugs used to treat human immunodeficiency
27 virus (HIV) infection.
28

1 In 1996, Abbott introduced Norvir, which contained the active
2 ingredient ritonavir, as a stand-alone PI. After Norvir's
3 release, it was discovered that, when used in small quantities
4 with another PI, Norvir would "boost" the anti-viral properties of
5 that PI.

6 GSK desired to obtain a license from Abbott, "to promote and
7 market certain of GSK's HIV products with Ritonavir for the
8 purpose of co-prescription/co-administration" GSK's Trial
9 Ex. 5, License Agreement, at 0001. On December 13, 2002, Abbott
10 and GSK executed a "Non-Exclusive License Agreement," under which
11 Abbott granted GSK a license to "recommend, label, market, use,
12 sell, have sold and offer to sell one or more of the GSK Products,
13 but no other product, in co-prescription and/or co-administration
14 with Ritonavir" Id. at 0001 and 0005. Article X of the
15 agreement limited the parties' liability under the contract,
16 stating that "EXCEPT AS OTHERWISE PROVIDED, NEITHER PARTY SHALL BE
17 LIABLE FOR ANY SPECIAL, INCIDENTAL, INDIRECT OR CONSEQUENTIAL
18 LOSSES ARISING OUT OF OR RELATING TO THIS AGREEMENT" Id.
19 at 0015 (upper case in original).

20 In 2003, GSK introduced Lexiva to the market. Although the
21 drug could be prescribed as a stand-alone PI, its daily dose was
22 less if it was administered along with Norvir. Abbott was aware
23 of studies that showed Norvir-boosted doses of Lexiva had efficacy
24 similar to Kaletra, another Abbott PI.

25 On December 3, 2003, Abbott raised the price of 100
26 milligrams of Norvir from \$1.71 to \$8.57, which amounted to a 400-
27 percent increase. This price hike commensurately increased the
28 cost of a boosted Lexiva therapy to some consumers.

1 II. Procedural and Trial History

2 GSK brought a claim against Abbott for allegedly breaching
3 the implied covenant of good faith and fair dealing associated
4 with the parties' December 2002 agreement. Under the agreement,
5 New York law applied to this claim.

6 In its motion for summary judgment, Abbott argued, among
7 other things, that Article X barred GSK from recovering lost
8 profits arising from a breach of the implied covenant. GSK
9 responded that Article X did not apply because the lost profits it
10 sought were general, not consequential, damages. GSK also argued
11 that, even if its lost profits were consequential damages,
12 Kalisch-Jarcho, Inc. v. City of New York, 58 N.Y.2d 377 (1983),
13 provided that Article X could be rendered unenforceable based on
14 Abbott's bad faith. This Court held GSK's alleged lost profits to
15 be consequential damages but denied Abbott's motion as to GSK's
16 implied covenant claim because there was a triable issue as to
17 whether GSK could recover such damages notwithstanding Article X.
18 See Safeway Inc. v. Abbott Laboratories, 761 F. Supp. 2d 874, 899-
19 901 (N.D. Cal. 2011).

20 GSK's implied covenant claim and its claims under the Sherman
21 Act and North Carolina's Unfair and Deceptive Trade Practices Act
22 (UDTPA) were tried before a jury. At the close of evidence,
23 Abbott moved for judgment as a matter of law. Abbott argued that
24 it was entitled to judgment on GSK's implied covenant claim
25 because the trial record did not support a conclusion that it
26 breached the implied covenant. Abbott also asserted that, even if
27 GSK proved a breach, it could not recover lost profits, reasoning,
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1 The license precludes "special, incidental, indirect or
2 consequential losses arising out of or relating to this
3 agreement." Under New York law, a contractual
4 limitation of liability clause precludes lost profits
5 damages absent proof of a "breach of a fundamental,
6 affirmative obligation the agreement expressly imposes
7 on the contractee." GSK has not alleged or presented
8 sufficient evidence of breach of an "affirmative
9 obligation" of the license. This Court held that the
10 license's consequential damage limitation could be
11 overcome, and lost profits awarded, if GSK proved that
12 the alleged breach resulted from "intentional
13 misrepresentations, . . . willful acts or gross
14 negligence." GSK has not met its burden. Mere
15 "intentional nonperformance of [an] Agreement motivated
16 by financial self-interest" would not be enough.

17 Abbott's Rule 50(a) Mot. for J. as a Matter of Law (Docket No.
18 482) at 19-20 (citations omitted). Abbott incorporated into its
19 Rule 50(a) motion all arguments it had made in its motions to
20 dismiss, motion for summary judgment, motions in limine and
21 objections to jury instructions. The Court did not grant Abbott's
22 Rule 50(a) motion and submitted the case to the jury.

23 The Court incorporated into the jury's instructions on GSK's
24 implied covenant claim an element accounting for the level of
25 culpable conduct necessary for Article X to be negated. The jury
26 was instructed that, to prevail on its implied covenant claim for
27 lost profits, GSK was required to prove that (1) "Abbott's conduct
28 directly destroyed or injured GSK's alleged right to receive
benefits under the license agreement that a reasonable party in
GSK's position would have understood the license agreement to have
included;" (2) "Abbott engaged in grossly negligent conduct;" and
(3) "Abbott's conduct constituting a breach of the implied
covenant of good faith and fair dealing was a proximate cause of
the injury to GSK's business." Final Jury Instructions (Doc. No.
485) at 26. The instructions defined "grossly negligent conduct"

1 to involve "intentional wrongdoing or a reckless indifference to
2 the rights of others." Id.

3 With respect to GSK's implied covenant claim, the jury found
4 that Abbott "committed an act that showed a lack of good faith and
5 fair dealing, injuring GSK's right to receive the benefits that a
6 reasonable party would have been justified in understanding were
7 included in the license agreement." Verdict Form (Docket No. 487)
8 at 4. The jury also found that Abbott engaged "in grossly
9 negligent conduct when it breached the implied covenant of good
10 faith and fair dealing." Id.

11 In connection with GSK's claim under the UDTPA, the jury was
12 posed special interrogatories. In response, the jury found that
13 "[d]uring the negotiation of the Norvir Boosting License, Abbott
14 was considering how to use its control over Norvir to limit
15 competition with Kaletra and deliberately withheld this from GSK."
16 Verdict Form at 5. However, according to the jury, GSK did not
17 show that this conduct caused it harm. Id. at 6. Nor did GSK
18 show that "Abbott inequitably asserted its power over Norvir by
19 increasing Norvir's price by 400 percent to undermine and disrupt
20 Lexiva's launch and future sales." Id. at 5. GSK also failed to
21 persuade the jury that "Abbott manipulated the timing of the 400-
22 percent Norvir price increase in order to disrupt Lexiva's launch
23 and undermine Lexiva's future sales." Id.

24 In accordance with the jury's verdict, judgment was entered
25 in favor of GSK on its implied covenant claim and in favor of
26 Abbott on GSK's other claims. GSK was awarded \$4,549,590.96,
27 which was the sum of \$3,486,240.00 and interest provided under New
28 York law.

1 LEGAL STANDARD

2 A motion for judgment as a matter of law after the verdict
3 renews the moving party's prior Rule 50(a) motion for judgment as
4 a matter of law at the close of all the evidence. Fed. R. Civ.
5 P. 50(b). Judgment as a matter of law after the verdict may be
6 granted only when the evidence and its inferences, construed in
7 the light most favorable to the non-moving party, permits only one
8 reasonable conclusion as to the verdict. Josephs v. Pac. Bell,
9 443 F.3d 1050, 1062 (9th Cir. 2006). Where there is sufficient
10 conflicting evidence, or if reasonable minds could differ over the
11 verdict, judgment as a matter of law after the verdict is
12 improper. See, e.g., Kern v. Levolor Lorentzen, Inc., 899 F.2d
13 772, 775 (9th Cir. 1990); Air-Sea Forwarders, Inc. v. Air Asia
14 Co., 880 F.2d 176, 181 (9th Cir. 1989).

15 DISCUSSION

16 Abbott argues that insufficient evidence supports the jury's
17 verdict that it breached the implied covenant. Abbott also
18 contends that, based on the trial record and the jury's findings,
19 Article X is enforceable against GSK's claim for lost profits.

20 I. Breach of the Implied Covenant

21 "The implied covenant of good faith and fair dealing between
22 parties to a contract embraces a pledge that 'neither party shall
23 do anything which will have the effect of destroying or injuring
24 the right of the other party to receive the fruits of the
25 contract.'" Moran v. Erk, 11 N.Y.3d 452, 456 (2008) (quoting 511
26 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 153
27 (2002)). The implied covenant encompasses "any promises which a
28 reasonable person in the position of the promisee would be

1 justified in understanding were included.'" Jennifer Realty, 98
2 N.Y.2d at 153 (quoting Rowe v. Great Atl. & Pac. Tea Co., 46
3 N.Y.2d 62, 69 (1978)); accord M/A-COM Sec. Corp. v. Galesi, 904
4 F.2d 134, 136 (2d Cir. 1990) (stating that the implied covenant
5 doctrine is used to "effectuate the intentions of the parties, or
6 to protect their reasonable expectations") (citation omitted).

7 The trial record supports the jury's verdict that Abbott
8 breached the implied covenant of good faith and fair dealing
9 associated with the parties' December 2002 agreement. As noted
10 above, under the agreement, Abbott granted GSK the right to
11 "recommend, label, market, use, sell, have sold and offer to sell
12 one or more of the GSK Products, but no other product, in co-
13 prescription and/or co-administration with Ritonavir"
14 License Agreement at 0005. The theory of GSK's case was that this
15 right included an implied promise that Abbott would not use "its
16 control over Norvir to interfere with GSK's ability to promote and
17 market boosted Lexiva." GSK's Opp'n at 17 n.6. The evidence
18 presented at trial supports this theory. Abbott was aware that,
19 in seeking an agreement, GSK desired to promote its products with
20 Norvir. Consistent with this awareness, Abbott's head negotiator
21 John Poulos indicated at trial that, during negotiations, he
22 assured GSK representatives that Abbott would not cease
23 manufacturing Norvir. Poulos also represented that he told GSK
24 negotiators that Abbott had no interest in diminishing its
25 reputation with HIV patients. Further, evidence showed that
26 Abbott understood that its licensing program enabled Abbott's
27 competitors to compete with Kaletra.

28

1 Evidence likewise supports the conclusion that the Norvir
2 price increase interfered with GSK's ability to market and sell
3 Lexiva. Witnesses testified to the medical community's inability
4 to discern GSK's marketing message concerning Lexiva because of
5 the Norvir price hike. Witnesses also testified to the negative
6 effect the price increase had on doctors' perception of Lexiva.
7 Thus, the record presented to the jury supports its finding that
8 Abbott injured GSK's right to receive the benefits GSK reasonably
9 believed it was entitled to under the parties' agreement.

10 Abbott cites Silvester v. Time Warner, Inc., 763 N.Y.S.2d 912
11 (2003),¹ which is distinguishable and does not support its
12 position. In that case, the plaintiffs, who were individual
13 recording artists, alleged that the defendant music labels
14 breached the implied covenant by "digitalizing recordings and
15 allowing or facilitating distribution of recordings over the
16 internet, without protecting plaintiffs' rights to royalties and
17 licensing fees." Id. at 915. The parties' contracts provided the
18 defendants with "the unrestricted right to manufacture, use,
19 distribute and sell sound productions of the performances recorded
20 hereunder made by any method now known, or hereafter to become
21 known." Id. at 916. In exchange, the plaintiffs received
22 royalties. Id. The court dismissed the plaintiffs' implied
23 covenant claims because there was no allegation "that defendants
24 intentionally interfered with plaintiffs' rights to obtain
25 royalties under their contracts." Id. at 258. Here, in contrast,
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27 ¹ Abbott represents that the New York Court of Appeals, the
28 state's high court, rendered this decision. This is incorrect. A
state trial court made the decision.

1 the trial record shows that Abbott interfered with GSK's right to
2 market and sell Lexiva with Norvir, a right was expressed in the
3 December 2002 agreement.

4 Abbott also points to various contractual disclaimers
5 indicating that it did not have a duty to promote Lexiva with
6 Norvir or a partnership, joint venture or agency relationship with
7 GSK. These provisions, however, do not negate the implied promise
8 that Abbott would not interfere with GSK's right to market and
9 sell Lexiva with Norvir. GSK does not argue that Abbott had an
10 affirmative duty to market Lexiva.

11 Finally, Abbott contends that New York does not permit a
12 plaintiff to bring an implied covenant claim if a breach of
13 contract claim is not also asserted. The Court rejected this
14 argument in its order denying Abbott's motion to dismiss GSK's
15 implied covenant claim. Meijer, Inc. v. Abbott Laboratories, 544
16 F. Supp. 2d 995, 1007 (N.D. Cal. 2008).

17 Consequently, the Court concludes that sufficient evidence
18 supports the jury's verdict that Abbott engaged in conduct
19 constituting a breach of the implied covenant of good faith and
20 fair dealing.

21 II. Enforceability of Article X

22 As explained above, to recover lost profits for a breach of
23 the implied covenant, GSK was required to prove that Abbott
24 engaged in conduct sufficiently culpable to override Article X's
25 limitation on liability.² Abbott contends the trial record and

26 ² GSK insists that Article X is inapplicable because its lost
27 profits were direct, not circumstantial, damages. This argument
28 was rejected in the Court's Order on Abbott's motion for summary
judgment. Safeway Inc., 761 F. Supp. 2d at 899-900.

1 the jury's responses to specific interrogatories show that GSK
2 failed to do so.

3 New York law provides that exculpatory clauses, like Article
4 X, are contrary to public policy in that State to the extent that
5 they exempt "willful or grossly negligent acts." Kalisch-Jarcho,
6 Inc., 58 N.Y.2d at 385. In Kalisch-Jarcho, Inc., the New York
7 Court of Appeals concluded that a trial court's jury charge did
8 not encapsulate the conduct necessary to nullify an exculpatory
9 clause. Id. at 386. In that case, a plaintiff contractor brought
10 a breach of contract claim against a city, alleging that it
11 suffered damages because the city's conduct delayed the completion
12 of a construction project. Id. at 380-81. The contractor had
13 agreed with the city, however, "to make no claims for delay
14 damages caused by any act or omission to act by the city." Id. at
15 384. Based on the instruction that it "would have to find no more
16 than that 'the delay was caused by conduct constituting active
17 interference,'" the jury found for the contractor. Id. at 382.
18 The New York Court of Appeals found this instruction to be in
19 error. Recapitulating "announced public policy," the high court
20 first explained,

21 [A]n exculpatory clause is unenforceable when, in
22 contravention of acceptable notions of morality, the
23 misconduct for which it would grant immunity smacks of
24 intentional wrongdoing. This can be explicit, as when
25 it is fraudulent, malicious or prompted by the sinister
intention of one acting in bad faith. Or, when, as in
gross negligence, it betokens a reckless indifference to
the rights of others, it may be implicit.

26 Id. at 385 (citations omitted). Applying this policy to the case,
27 the court explained,

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1 It was against the background of these policies and
2 principles that, as summarized above, the claim against
3 the city centered on the extraordinarily long delay, the
4 immense number of drawing revisions with which Kalisch
5 was confronted and the failure to co-ordinate the
6 contractors. By attributing all of this to the
7 misconduct of the city, even absent any evidence of
8 malice, Kalisch's proof, if credited, would have to
9 establish that the city's conduct amounted to gross
10 negligence.

11 To support such a conclusion, however, the jury would
12 have to find more than "active interference", which,
13 incidentally, was not a contract term. For whether
14 conduct is "active" or "passive" does not determine
15 wrongdoing, and "interference", which most commonly
16 translates as "intervention", does not connote
17 willfulness, maliciousness, abandonment, bad faith or
18 other theories through which runs the common thread of
19 intent. So, taken at face value by the jury, the charge
20 was calculated to expose the city to liability for
21 conduct within the umbrella of the exculpatory clause.
22 Accordingly, although the request to charge perhaps
23 could have been more precisely put, the city, at the
24 very least, was entitled to the amplifying instruction
25 that unless Kalisch-Jarcho proved that "the City acted
26 in bad faith and with deliberate intent delayed the
27 plaintiff in the performance of its obligation", the
28 plaintiff could not recover.

16 Id. at 386.

17 In Sommer, the New York high court again addressed the gross
18 negligence necessary to negate an exculpatory clause. There, a
19 building owner sought to recover contract damages from an alarm
20 company that failed to notify the fire department of a signal from
21 the building indicating it was on fire. 79 N.Y.2d at 548-49. The
22 parties' contract imposed on the alarm company a "duty to make
23 timely reports to the fire department." Id. at 551. However, the
24 contract precluded liability against the alarm company for "losses
25 or damages . . . caused by performance or nonperformance of
26 obligations imposed by this contract or by negligent acts or
27 omissions." Id. at 549 (internal quotation marks omitted). The
28 trial court granted summary judgment in the alarm company's favor,

1 concluding that the exculpatory clause precluded relief because a
2 jury could not conclude that the alarm company committed gross
3 negligence. Id. at 549-50. The high court reversed. First, it
4 reiterated,

5 It is the public policy of this State . . . that a party
6 may not insulate itself from damages caused by grossly
7 negligent conduct. This applies equally to contract
8 clauses purporting to exonerate a party from liability
9 and clauses limiting damages to a nominal sum.

10 Gross negligence, when invoked to pierce an agreed-upon
11 limitation of liability in a commercial contract, must
12 "smack[] of intentional wrongdoing." It is conduct that
13 evinces a reckless indifference to the rights of others.

14 Id. at 554 (citations omitted). The building owner adduced
15 evidence suggesting that the alarm company's dispatcher, "without
16 verification or investigation," reached an erroneous conclusion,
17 "recklessly indifferent to the consequences that might flow from a
18 misperception." Id. at 555. As a result, there was a triable
19 issue as to whether the alarm company was grossly negligent. Id.

20 Here, the trial record supports a conclusion that Abbott, at
21 the least, acted with reckless indifference to GSK's rights under
22 the contract. GSK presented evidence that Abbott, while
23 negotiating for the December 2002 agreement, was considering how
24 to limit competition with Kaletra and did not disclose this to
25 GSK. Based on its investigations of options, Abbott understood it
26 was highly likely that GSK's right to market and sell Lexiva with
27 Norvir, in accordance with their agreement, would be harmed by an
28 unprecedented Norvir price increase. Despite this risk, Abbott
raised Norvir's price by 400 percent, which evinced a reckless
indifference to GSK's rights under the agreement. Both Kalisch-

1 Jarcho, Inc. and Sommer provide that, under New York law, reckless
2 indifference is sufficient.

3 Abbott insists that New York law requires intentional,
4 willful conduct. Kalisch-Jarcho, Inc. teaches otherwise, stating
5 that avoidance of an exculpatory clause requires proof of "willful
6 or grossly negligent acts." 58 N.Y.2d at 385 (emphasis added).
7 Indeed, the court stated that the requisite misconduct "smacks of
8 intentional wrongdoing." "Smacks" is defined to mean "to have a
9 trace, vestige, or suggestion." Webster's 3d New Int'l Dictionary
10 2149 (1993). The court did not require intentional wrongdoing.

11 Metropolitan Life Insurance Co. v. Noble Lowndes Int'l Inc.,
12 84 N.Y.2d 430 (1994), does not require a contrary conclusion. In
13 that case, the New York Court of Appeals was required to interpret
14 an exculpatory clause that permitted liability for damages arising
15 out of "willful acts or gross negligence." Id. at 433. At trial,
16 the plaintiff proceeded on a theory that the defendant committed
17 willful acts for which liability was not precluded by the
18 exculpatory clause. Here, Abbott's gross negligence is at issue.

19 Abbott also points to the special interrogatories related to
20 GSK's UDTPA claim. However, those answers do not negate the
21 jury's finding on GSK's implied covenant claim that Abbott
22 committed, at least, acts of reckless indifference.

23 Finally, for the first time in this action, Abbott argues
24 that Kalisch-Jarcho, Inc.'s and Sommer's holdings that grossly
25 negligent conduct can pierce an exculpatory clause pertain only to
26 cases in which there are "separate tort claims -- not where, as
27 here, the sole surviving trial claim sounds only in contract."
28 Renewed Mot. for J. as a Matter of Law at 7:6-7. It points to

1 language in Kalisch-Jarcho, Inc., in which the court stated that
2 the city was entitled to a jury instruction that, for the
3 contractor to prevail, it would need to prove the city "acted in
4 bad faith and with deliberate intent." 58 N.Y.2d at 386. But
5 that instruction was pertinent to the circumstances of that case,
6 in which the trial court gave the erroneous "affirmative
7 interference" explained above. In the paragraph preceding this
8 statement, the court noted that the contractor "would have to
9 establish that the city's conduct amounted to gross negligence" to
10 prevail and that the trial court's "affirmative interference"
11 instruction did not reflect this requirement. Id. at 386. Both
12 Kalisch-Jarcho, Inc. and Sommer state that a breaching party's
13 reckless indifference can warrant an award of damages
14 notwithstanding an exculpatory clause.

15 Accordingly, because evidence supports a conclusion that
16 Abbott acted with at least reckless indifference when it raised
17 Norvir's price, judgment is not warranted in Abbott's favor on
18 GSK's implied covenant claim for lost profits.

19 CONCLUSION

20 For the foregoing reasons, the Court DENIES Abbott's renewed
21 motion for judgment as a matter of law and GRANTS as unopposed
22 GSK's motion to amend the judgment. The Clerk shall amend the
23 judgment to include \$112,181.69 in post-verdict, pre-judgment
24 interest, as provided under New York law. An amended judgment
25 shall issue forthwith.

26 IT IS SO ORDERED.

27 Dated: 9/6/2011

28 
CLAUDIA WILKEN
United States District Judge