MUSTHAVEDNESS

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musthavedness \məst·'hav·əd·nəs\ *n*: the state of being needed and having no adequate substitute

No, it's not a real word but it is a real concept. All "conditional pricing" cases, whether they involve bundled discounts, loyalty discounts, or tying by means of differential pricing, rest on evidence that the seller markets a "must have" product or service, which confers market power.

In many of the decided cases, courts have applied this concept without specifically recognizing it. In other cases, courts have begun addressing more explicitly the issue of whether or not a product qualifies as a "must have" purchase, sometimes using the term "indispensable" or distinguishing between "contestable" and "incontestable" purchases.[1]

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[1] *See* McWane, Inc. v. FTC, 783 F.3d 814, 834, 838 (11th Cir. 2015) ("economically infeasible" for distributors to drop McWane products (citation omitted)); ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 277 (3d Cir. 2012) (characterizing Eaton transmissions as "necessary products" for truck makers); LePage's Inc. v. 3M, 324 F.3d 141, 156 (3d Cir. 2003) (characterizing Scotch-brand tape as "indispensable" to retailers); Insight Equity A.P. X, LP v. Transitions Optical, Inc., 2016-1 Trade Cas. (CCH) ¶ 79,684 (D. Del. 2016) (noting that plaintiff contended that "[t]ransitions lenses were a 'must-carry product' for U.S. lens casters"); *cf.* PNY Techs., Inc. v. SanDisk Corp., 2014-2 Trade Cas. (CCH) ¶ 78,834, at *6 (N.D. Cal. 2014) (exclusive dealing arrangement between manufacturer of allegedly "must-have" products and retailers not unlawful where terminable on short notice and other channels of distribution, including direct sales through e-commerce, were available). In its 2009 complaint against Intel, the Federal Trade Commission characterized Intel as "a 'must have' or essential supplier" to computer makers. Complaint ¶ 50, Intel Corp., FTC Docket No. 9341 (Dec. 16, 2009), www.ftc.gov/sites/default/files/documents/cases/091216intelcmpt.pdf; *see also* Complaint ¶ 28, United States v. United Reg'l Health Care Sys., No. 7:11-cv-00030 (N.D. Tex. filed Feb. 25, 2011) ("insurers . . . consider United Regional a 'must-have' hospital") (final judgment filed Feb. 29, 2011).

"Contestable" purchases, in the simplest terms, are those for which the purchaser is willing and able to substitute an alternative product, while "incontestable" purchases are those for which the purchaser is unable or unwilling to accept a substitute.

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Either way, the standard employed for determining "musthavedness" sometimes is not much more exacting than the "I know it when I see it" test.[2] Yet, with so much riding on the assessment of "musthavedness," a deeper understanding and a more nuanced approach is in order.

I. HIDING IN PLAIN SIGHT

Assessments of "musthavedness" have been made in every type of conditional pricing decision, even if the term "must have" never appears.

In bundled discount cases, the issue is whether one or more of the products in the bundle is a "must-have" product. For example, in the seminal case of *SmithKline Corp. v. Eli Lilly & Co.*,[3] a pharmaceutical manufacturer sold hospitals a bundle of products that included the two leading antibiotics in their category, for which hospitals demonstrated heavy (and decidedly inelastic) demand, as well as a third antibiotic that was the therapeutic equivalent of one of the other two but faced competition from a rival manufacturer. The more the hospitals spent on any of the antibiotics in the bundle, the greater the discount they earned on the entire bundle, including the two antibiotics they needed to buy from that manufacturer in any event. The rival manufacturer, with only an antibiotic that was competitive with the third antibiotic in the bundle, found it hard to compete.[4]

In loyalty discount cases, where there is only one type of product, "musthavedness" can be present when, for some *portion* of the customer's purchases of that product, the customer "must have" the products of a particular manufacturer. For example, in *ZF Meritor, LLC v. Eaton Corp.*,[5] Eaton, a manufacturer of heavy-duty truck transmissions, provided loyalty rebates to truck makers whose purchases met certain targets. The court found that Eaton was the "dominant manufacturer" of these transmissions and consequently no truck maker could satisfy its own customers' demands "without at least some Eaton products," making that portion a must-have purchase. A competing transmission manufacturer found it impossible to compete and exited the market.

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[2] *Cf.*, Bon-Ton Stores, Inc. v. New York, 881 F. Supp. 860, 869–70 & n.5 (W.D.N.Y. 1994) ("customers know a department store when they see it," paraphrasing Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

[3] 575 F.2d 1056 (3d Cir. 1978).

[4] The rival, SmithKline, could match the 3% rebate offered on the entire bundle by the first manufacturer, Lilly, only by offering rebates on its one antibiotic of between 16% and 35%, depending upon each customer's volume. *Id.* at 1061–62; *cf.* Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 406 (3d Cir. 2016) (plaintiff failed to demonstrate what percentage of alleged "incontestable demand" for a particular drug "was based on its unique cardiology indication as opposed to . . . other factors").

[5] 696 F.3d 254 (3d Cir. 2012).

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In differential pricing tying cases, the issue is whether the tying product confers economic power because customers have to have it. For example, in *Collins Inkjet Corp. v. Eastman Kodak Co.*,[6] owners of Kodak printers needed to purchase replacement "printheads" from time to time but Kodak was the sole source of replacement printheads fit for Kodak printers. To get a favorable price on those printheads, customers also had to buy Kodak ink. A customer did not have to buy a Kodak printer, of course, but once it did, it had to buy Kodak printheads, and although suitable ink was available elsewhere, a customer could not buy ink from another source unless it was willing to pay more for the printheads. A competing ink supplier found its business drying up.

The courts did not use the term "must have" in any of these cases, but hospitals had to have that unique antibiotic, truck makers had to have at least some Eaton transmissions, and owners of Kodak printers had to have Kodak printheads. In each context, one of these products was a textbook example of musthavedness.

Of course, not every bundled discount program includes a must-have product. Not every loyalty discount program involves a product that is a must-have, even for a portion of a customer's purchases. And not every tying arrangement predicated on a discount includes a must-have product in the package. Sometimes, the discounts themselves are sufficiently attractive to make it worthwhile for suppliers to offer them and for customers to take advantage of them, even if plenty of alternative products are available in the market. In that event, competing suppliers may choose to match those discounts (if they can do so profitably) or elect to employ some other competitive strategy instead.

Bundled discounts, loyalty discounts, tying, and other conditional pricing programs are not illegal if they do not result in undue foreclosure of competition on the merits.[7] Like straightforward exclusive dealing and tying arrangements, conditional pricing programs do not violate the antitrust laws unless they unreasonably impede competition. Understanding the variables behind musthavedness and how to measure them provides a framework for assessing the strength of a conditional pricing offer and determining whether competi-

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[6] 781 F.3d 264 (6th Cir. 2015). The parties subsequently entered into a conditional settlement. Collins Inkjet Corp. v. Eastman Kodak Co., No. 1:13-cv-00664-MRB (S.D. Ohio Oct. 22, 2015).

[7] *See, e.g.*, Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp., L.P., 592 F.3d 991 (9th Cir. 2010); Eisai Inc. v. Sanofi-Aventis U.S., LLC, No. 08-4168, 2014 WL 1343254, at *26 (D.N.J. Mar. 28, 2014), *aff'd*, 821 F.3d 394, 407 (3d Cir. 2016) ("Eisai fails to demonstrate that hospitals were foreclosed from purchasing competing drugs as a result of Sanofi's conduct"); *cf.* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 7 (1958) ("[I]f one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition if its competitors were ready and able to sell flour by itself," *quoted in* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984)).

tion has been unduly foreclosed. Where musthavedness exists, the degree of foreclosure resulting from conditional pricing is a function of the variables described in this article.

II. THE ORIGINS OF MUSTHAVEDNESS

The concept of musthavedness appears prominently in the law of tying, which applies not only to conditioning the sale of one product on the purchase of another, but also conditioning a discount on one product on the purchase of another. Section 3 of the Clayton Act[8] explicitly makes it unlawful, in the sale of commodities, to "fix a . . . discount from, or rebate upon, [a] price, on the condition . . . that the . . . purchaser . . . shall not use or deal in the goods . . . of a competitor . . . of the . . . seller, where the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce."[9] Sections 1 and 2 of the Sherman Act[10] also apply to tying, and to the conditioning of discounts.

In *Jefferson Parish Hospital District No. 2 v. Hyde*,[11] the Supreme Court surveyed its earlier decisions and distilled a standard, explaining, "[W]e have condemned tying arrangements when the seller has some special ability—usually called 'market power'—to force a purchaser to do something that he would not do in a competitive market."[12] Such market power may be inferred from the fact that a seller has a large market share[13] or from the fact that it

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[8] 15 U.S.C. § 14.

[9] What, one might ask, has become of the incipiency doctrine? Some courts have indicated that the test under the Sherman Act and the Clayton Act is the same, requiring proof of actual anticompetitive effects, notwithstanding the words "may be" to substantially lessen competition or tend to create a monopoly. *See* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 199–200, 214 (7th ed. 2012) [hereinafter ALD 7th]. To the extent that the incipiency doctrine has fallen into disuse for tying and exclusive dealing, a conditional pricing arrangement could be subject to the same test regardless of whether it is examined under Section 1 of the Sherman Act as an agreement in restraint of competition, under Section 2 of the Sherman Act as monopolization or attempted monopolization, under Section 3 of the Clayton Act as conditioning a discount on refraining from purchasing from another supplier, or under Section 5 of the FTC Act, as an unfair method of competition.

[10] 15 U.S.C. §§ 1, 2. Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, also can apply to tying.

[11] 466 U.S. 2 (1984).

[12] *Id.* at 13–14.

[13] *Id.* at 17 (citing Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 611–13 (1953)).

offers a "unique product," which competitors cannot offer.[14] In other words, "musthavedness."[15]

In *Eastman Kodak Co. v. Image Technical Services, Inc.*,[16] the Court added that the necessary market power may exist even if limited to a discrete universe of "locked-in" purchasers, and in *Illinois Tool Works Inc. v. Independent Ink, Inc.*,[17] the Court eliminated the then-existing presumption that patented products always confer market power, holding that there must be "proof of power in the relevant market rather than . . . a mere presumption thereof."[18]

That proof can consist of evidence of a high market share, but market share is only a surrogate for market power. Consequently, the inference of market power from a high market share can be rebutted with evidence that, despite a product's current high share of the market, competitors offer acceptable alternatives and customers are willing to substitute those alternatives.[19] More directly, proof of market power can consist of evidence that, based on a product's characteristics, the product is "desirab[le] to consumers" or "unique[ ] in its attributes,"[20] in ways that competitors "are not able to offer."[21]

This concept of musthavedness has migrated to the case law addressing bundled discounts. Such discounts are closely related to tying through differential pricing but, unlike a tie-in, the customer is not required to buy a particu-

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[14] *Id.* (citing Fortner Enters., Inc. v. U.S. Steel Corp., 394 U.S. 495, 504–06 & n.2 (1969)); *see also* United States v. Loew's Inc., 371 U.S. 38, 45 (1962) ("Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes."), *overruled on other grounds by* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006).

[15] "Musthavedness" is a function of uniqueness, including attributes that no other product matches, and customer preference, based on those unique attributes and/or loyalty to a particular brand. These will be reflected in the product's share of an economically significant relevant market. At the same time, exclusive dealing agreements for non-must-have products (even commodities) can violate the antitrust laws if they result in excessive foreclosure of competitors.

[16] 504 U.S. 451 (1992).

[17] 547 U.S. 28 (2006).

[18] *Id.* at 43.

[19] *See* Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1059 (8th Cir. 2000); Castro v. Sanofi Pasteur Inc., No. 11-7178, 2015 WL 5770381 (D.N.J. Sept. 30, 2015); *cf., e.g.*, United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974) (past market shares may not presage future market shares); United States v. Microsoft Corp., 147 F.3d 935 (D.C. Cir. 1998) (where Netscape had 90% of the browser market but Microsoft had a dangerous probability of monopolizing the market); Reazin v. Blue Cross & Blue Shield of Kansas, Inc., 899 F.2d 951, 967 (10th Cir. 1990) ("Market share is relevant to the determination of the existence of market or monopoly power, but market share alone is insufficient to establish market power." (quotation and citation omitted)); Ortho Diagnostic Sys., Inc. v. Abbott Labs., Inc., 920 F. Supp. 455, 464 (S.D.N.Y. 1996).

[20] United States v. Loew's Inc., 371 U.S. 38, 45 (1962).

[21] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 17 (1984).

lar second product (or to promise not to buy it from anyone else) to qualify for a discount on the first product. Rather, as ordinarily structured, purchases of every product in the bundle count towards earning a discount on all of the products in the bundle, and the customer is not necessarily obligated to purchase its requirements of every product that is included in the program.[22]

The cases addressing bundled discounts have incorporated essentially the same test as tying cases in determining whether any of the products in a bundle confer market power. If a product within a bundle enjoys a high market share, this can qualify as evidence of market power.[23] If a product within the bundle has unique attributes that competitors cannot match—i.e., musthavedness—this too can qualify as evidence of market power.[24]

The concept of musthavedness also has found its way into cases addressing loyalty discounts. Loyalty discounts are conditioned on a customer buying all or most of its requirements of a single product or category of products from one supplier, and typically apply back to "dollar one" of the customer's purchases of that product during the applicable time period, making it particularly costly for a customer to forgo the discount.[25] Of course, if a product already commands 100 percent of a relevant market, or is genuinely unique, there should be little need to offer loyalty discounts (other than to deter entry) since no opportunity exists for customers to be disloyal.

In reality, most products subject to loyalty discounts are not "must-have" products, or are "must-have" products for only a portion of a customer's requirements. Where a customer has no choice but to purchase some portion of its requirements for a product from a particular supplier, the quantity that the customer needs to buy from that supplier becomes the equivalent of a must-have product while the remaining ("contestable") quantity does not.[26] As with

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[22] There can, of course, be variations that include elements of both tying and bundled discounts.

[23] *See, e.g.*, SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1060–61 (3d Cir. 1978); Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 891 (9th Cir. 2008), *amending* 502 F.3d 895 (9th Cir. 2007); LePage's Inc. v. 3M, 324 F.3d 141, 144 (3d Cir. 2003); Ortho Diagnostic Sys., Inc. v. Abbott Labs., Inc., 920 F. Supp. 455, 463–65 (S.D.N.Y. 1996).

[24] *See, e.g.*, Masimo Corp. v. Tyco Health Care Grp., L.P., 350 F. App'x 95 (9th Cir. 2009); SmithKline Beecham Corp. v. Abbott Labs., 2014-2 Trade Cas. (CCH) ¶ 78,982 (N.D. Cal. 2014); Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l Ltd., 2009-2 Trade Cas. (CCH) ¶ 76,815 (D. Mass. 2009).

[25] The alternative, which is less common, is to apply the loyalty discount only to purchases made after the customer reached the purchasing threshold required to qualify. Bundled discounts similarly can apply to "dollar one" or kick in only after the customer meets a threshold volume of purchases.

[26] *See* McWane, Inc. v. FTC, 783 F.3d 814, 820 (11th Cir. 2015); ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 283 (3d Cir. 2012); Allied Orthopedic Appliances, Inc. v. Tyco Health Care Grp., LP, 592 F.3d 991, 997 n.2 (9th Cir. 2010); Eisai Inc. v. Sanofi-Aventis U.S., LLC, No. 08-4168, 2014 WL 1343254, at *26–28 (D.N.J. Mar. 28, 2014), *aff'd*, 821 F.3d 394 (3d Cir. 2016);

tying and bundled discounts, the test is whether the product confers market power by virtue of its "special desirability," as reflected in the share of the market it commands or by virtue of its unique attributes—i.e., musthavedness.

III. VARIABLES—NO SIZE FITS ALL

The *Jefferson Parish* test sounds simple—does the product possess special appeal because it is demonstrably unique or as reflected in its high market share. As applied, however, the test is not as simple as it appears.

Context matters. The market power of a product that serves as an anchor product within a bundle, the centerpiece of a loyalty discount, or a "tying product," can manifest itself in different ways in different circumstances. Although the Supreme Court boiled this down to the shorthand of "uniqueness," the reality is that there is considerable variability for assessing the true musthavedness of a product, depending upon the circumstances. To measure musthavedness, the effects of certain variables need to be taken into account. The principal variables are these:

- Is the customer an end user or a reseller?
- Who is imposing the conditional pricing; is it a source of supply (e.g., a manufacturer or other brand owner) or an intermediary (e.g., a retailer or wholesaler)?
- Is demand based on customer taste and preference or on inescapable necessity?
- Is the product always a "must-have" or only partially a "must-have"—and if partial, how much?
- How difficult would it be to replicate the "must-have" product or bundle? Is it possible for competitors to match a bundle, a tie-in, or a loyalty discount on a putative must-have product by partnering with others or by expanding their own lines?
- Who instigated conditional pricing—the supplier or the customer?

Each of these variables is explored below, followed by observations on the use of these variables to evaluate musthavedness.

Masimo Corp v. Tyco Health Care Grp., L.P., No. 02-4770, 2006 WL 1236666 (C.D. Cal. Mar. 22, 2006); Canada (Dir. of Investigation & Res.) v. The NutraSweet Co., 32 C.P.R. (3d) 1, 1990 CarswellNat 1368 (Can. Competition Trib. 1990); *cf.* Case C-23/14, Post Danmark A/S v. Konkurrencerådet, ECLI:EU:C:2015:651, ¶ 35 (CJ Oct. 6, 2015), curia.europa.eu/juris/celex.jsf?celex=62014CJ0023&lang1=en&type=TXT&ancre= (demand for delivery of bulk mail under 50 grams non-contestable due to government-granted monopoly).

A. IS THE CUSTOMER AN END USER OR A RESELLER?

The nature of the customer—whether it is an end use or a reseller—is important to determining whether a product legitimately should be considered a "must-have" product with respect to that customer. For example, Heinz ketchup may not be a must-have product for an end user, such as a prison, a hospital, a school cafeteria, or a summer camp, but it may be a must-have product for most supermarkets. When alternatives are available, end users can select products based on their own preferences for price and quality, but most resellers need to select products based on their customers' preferences if they want to stay in business.

This is not to say that end users always have a choice. For example, the hospitals in *SmithKline* had little choice but to purchase at least one of the antibiotics that were included in the bundled discount program because no other drug was equally effective. The truck makers in *ZF Meritor* had no choice but to purchase at least some portion of the heavy duty transmissions they needed from Eaton because their customers demanded it. In the *Intel* case brought by the Federal Trade Commission, computer makers allegedly had no choice but to purchase most of the central processing units (CPUs) they needed from Intel because Intel was the only supplier capable of meeting all their requirements.[27] Other cases similarly have addressed purchases by end users of products that they had to have, for which no suitable alternatives existed.[28]

Still other cases have addressed end users that find themselves "locked in." In *Eastman Kodak Co. v. Image Technical Services,* owners of Kodak photocopiers had no choice but to use Kodak's maintenance services in order to have needed access to Kodak's unique replacement parts, and they had no warning that they would find themselves in this predicament prior to purchasing their machines. The printer owners in the *Collins Inkjet* case had little choice but to buy Kodak ink to obtain favorable pricing for the Kodak

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[27] Complaint ¶ 50, Intel Corp., FTC Docket No. 9341 (Dec. 16, 2009), www.ftc.gov/sites/default/files/documents/cases/091216intelcmpt.pdf.

[28] Compare *Masimo*, *Xerox*, and *Vitrex* (where the customer either had no, or alledgedly had no, choice), with *Eisai* and *Allied Orthopedic* (where the customer did have a choice). *Masimo*, 350 F. App'x 95 (no suitable alternatives); Xerox Corp. v. Media Sci. Int'l, Inc., 2007-2 Trade Cas. (CCH) ¶ 75,965 (S.D.N.Y. 2007) (same); Complaint at 4, ¶ 7, Vitrex plc, FTC Docket No. C-4586 (July 14, 2016), www.ftc.gov/system/files/documents/cases/160714victrexcmpt.pdf (because customers "could not quickly obtain regulatory clearance to use a new source," they "generally had no choice but to sign an exclusive contract."); *Eisai*, 2014 WL 1343254, at *26–28 (Despite market share between 81% and 92%, "customers could walk away from the . . . discounts when they so desired, and they did."); Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp., L.P., 592 F.3d 991, 997 n.2 (9th Cir. 2010).

printheads they needed. Other cases similarly have addressed purchases by locked-in end users of products that—at least for them—had no substitutes.[29]

Resellers, who generally have greater constraints on choice than end users, face different priorities, depending in large part on the customer base they target. Can a supermarket succeed without carrying Heinz ketchup? What about an organic foods market or gourmet shop? What about a convenience store? Does the "musthavedness" of a product depend upon the nature of the reseller's business? The answer is not always obvious but in some instances the answer is plainly yes, which can provide a useful guidepost. Can an office supply store survive without 3M's Scotch tape? That was an issue in the *LePage's* case,[30] where the court used the term "indispensable" rather than "must have." The court held that "the evidence in this case shows that Scotch-brand tape is indispensable to any retailer in the transparent tape market."[31]

Can a ductile iron pipe fitting distributor survive without a full line of domestically produced fittings at the same discounted prices that competing distributors pay? That was an issue in the *McWane* case.[32] In that industry, certain projects specified that only domestic fittings could be used, and the court accepted the FTC's conclusion that "various laws and end-user preferences requiring projects to use domestic fittings precluded imported fittings from being 'reasonable substitutes' for those projects, even though the fittings themselves are functionally identical."[33]

Can a service station survive without Carter carburetors? That was the issue in *Carter Carburetor Corp. v. FTC*,[34] which also illustrates that musthavedness may not be permanent. In their day, Carter carburetors were standard equipment on 60 percent of the new cars and trucks sold in America, including Chevrolets and Dodge trucks, as well as Pontiacs, Oldsmobiles, Plymouths, Studebakers, Hudsons, LaSalles, Reos, and Terraplanes. The court found that "no service station assuming to give a complete carburetor service . . . could successfully carry on its business . . . without carrying a stock of carburetors, parts and replacements from [Carter's] products."[35]

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[29] *E.g.*, *Masimo*, 2006 WL 1236666; UniStrip Techs., LLC v. LifeScan, Inc., 2016-1 Trade Cas. (CCH) ¶ 79,446 (E.D. Pa. 2015); *cf.* Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 4 F. Supp. 3d 1123, 1134–35 (D. Ariz. 2014) (no coercion).

[30] LePage's, Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003).

[31] *Id. at* 156 (rival tape manufacturer was being foreclosed from retailers).

[32] McWane, Inc. v. FTC, 783 F.3d 814 (11th Cir. 2015).

[33] *Id.* at 829.

[34] 112 F.2d 722 (8th Cir. 1940).

[35] *Id.* at 733. *Cf.* United States v. Linde Air Prods. Co., 83 F. Supp. 978 (N.D. Ill. 1949).

Can an auto parts retailer survive without 3M's automotive sandpaper? That was an issue in the *NicSand* case.[36] There, customers (retailers) insisted on carrying only one brand and the court found that NicSand could have competed successfully against 3M if only it had been willing to compete more aggressively on price. The 3M sandpaper was acceptable to consumers, but was not a "must-have" product for retailers.

Can a boat dealer survive without Brunswick engines? That was an issue in the *Concord Boat* case.[37] The court found that boat builders

> were free to walk away from [Brunswick's] discounts at any time, and they in fact switched to OMC [Outboard Marine Corporation] engines at various points when that manufacturer offered superior discounts. One of the boat builders' witnesses testified, for example, that he had switched from 80% Brunswick engines to 70–80% OMC engines between 1988 and 1991 because OMC was offering better prices. Another witness testified at his deposition that his boat building employer had switched from 90 percent Brunswick to 80 percent OMC in 1993 because of OMC's favorable pricing.[38]

In each case involving resellers, the court must make a determination as to whether a particular brand of a particular product or product category is so important to the success of the reseller that the manufacturer of the product is employing conditional pricing to force resellers to forgo competing products that they otherwise would prefer to buy.

To that end, market share is a more reliable indicator of musthavedness in the case of resellers than end-user customers because resellers generally must be responsive to the preferences of their customers. A supermarket needs to carry Heinz ketchup not because there are no other brands that can serve the same purpose, but because consumers demand Heinz ketchup, as reflected in its share of the market. Retailers may try to influence consumer demand by featuring, advertising, or discounting less popular brands, but in many instances customer demand is built by the manufacturer's "push" advertising, limiting retailers' ability to shift consumer demand to another product. Retailers with strong "quality certification" clout (e.g., Tiffany) or a relatively large presence (e.g., Home Depot) sometimes might succeed in shifting consumer preferences, but most resellers need to stock what their customers already want to buy. Accordingly, a bundled discount, loyalty discount, or tie-in that includes a highly popular product with a large market share may be more likely to foreclose competition to an unreasonable degree when offered to a reseller than to an end user.

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[36] NicSand, Inc. v. 3M Co., 507 F.3d 442 (6th Cir. 2007).

[37] Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000).

[38] *Id.* at 1059 (internal citation omitted).

Of course, with resellers, even if musthavedness is established through evidence of a high market share, there is more to measuring foreclosure—and whether it rises to the level of being unduly anticompetitive—than determining the percentage of retailers or wholesalers (or the percentage of their shelf space) that is foreclosed to competing manufacturers. Even if all or most resellers in a category are foreclosed to rival brands by bundled discounts, loyalty discounts, or tie-ins, those brands still might be able to achieve satisfactory distribution through direct sales, through agents, or through the Internet. That might not work for ketchup yet, but it might be effective for other products.[39]

Thus, in assessing how anticompetitive a conditional pricing program may be, it is important to recognize that end users and intermediaries are not subject to the same priorities in choosing their suppliers. A "must-have" product for a retailer may not be a "must-have" product for every consumer (i.e., end user) that shops there, and a "must-have" product for a locked-in end user may not be a "must-have" product for its distributor. Also, while foreclosure of an end user forecloses that portion of sales from competitors, foreclosure of a reseller may not foreclose a manufacturer's access, through other means, to the targeted universe of end users.

B. At What Level Is Conditional Pricing Being Imposed?

Another important variable is the nature of the seller that is offering a bundled discount, loyalty discount, or discount predicated on a tie-in. Is the conditional pricing being offered by a source of supply (e.g., a manufacturer or other brand owner) or by an intermediary (e.g., a retailer or wholesaler)?

When a manufacturer, importer, or other brand owner offers conditional pricing, it usually is including only its own products in the program. For example, the program in *SmithKline* included only SmithKline drugs, the program in *ZF Meritor* included only Eaton transmissions, and the program in *Collins Inkjet* included only Kodak printheads and ink. Manufacturers could partner with one another to offer a bundled discount or a discount predicated

[39] *See, e.g.*, Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157 (9th Cir. 1997) (no foreclosure if alternate means of distribution exist); Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215 (8th Cir. 1987); Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380 (7th Cir. 1984); PNY Techs., Inc. v. SanDisk Corp., 2014-2 Trade Cas. (CCH) ¶ 78,834 (N.D. Cal. 2014) (exclusive dealing arrangement between manufacturer of allegedly "must-have" products and retailers not unlawful where other channels of distribution, including direct sales through e-commerce, were available); *cf.* Xerox Corp. v. Media Sci. Int'l, Inc., 2007-2 Trade Cas. (CCH) ¶ 75,965 (S.D.N.Y. 2007) (plaintiff claimed that loyalty discounts provided to resellers foreclosed it from much of the market; motion to dismiss denied). *See generally* Richard M. Steuer, *Exclusive Dealing in Distribution*, 69 CORNELL L. REV. 101 (1983).

on a tie-in[40]—which could include one or more must-have products—but that is far less common.

In contrast, when a retailer or other reseller offers conditional pricing, it commonly includes a variety of brands in the program.[41] For example, a loyalty rewards program offered by a department store, office superstore, or hardware store chain typically will include all or most of the merchandise in the chain's stores or on its website. The same can be true of a business-to-business (B2B) distributor of industrial goods. Of course, loyalty rewards programs offered by retail outlets or distributors of a single brand (such as gasoline stations, coffee chains, etc.) offer rewards only for the purchase of that brand, and the discounts earned may be applied only to additional purchases of that brand.

Including a must-have product in a program offered by a reseller creates little or no foreclosure if competing resellers are able to offer that product as well. For example, Heinz ketchup may be a must-have product for supermarkets, but if one supermarket offers it to consumers as part of a bundled discount program or loyalty program, or ties it into hamburger buns, other supermarkets presumably could offer it in discount packages of their own. If, however, a must-have product is available only to a limited number of resellers, there may be instances in which the resellers that have access to that product can foreclose rival resellers from competing. For example, if a purchaser's request for bids specifies a particular brand or a narrow set of specifications for a certain component, only a reseller with access to that component will be in a position to submit a qualified bid. In that case, such a reseller would have the ability to employ a bundled discount, loyalty discount, or discount predicated on a tie-in to foreclose competition for other products as well. In *McWane*, only distributors with access to a full line of domestic pipe fittings could satisfy municipal contracts specifying domestic content and other distributors were not qualified.

Moreover, if a reseller has the exclusive right to distribute a must-have product, it essentially steps into the shoes of the manufacturer because it would face no intrabrand competition from resellers of the same brand. For example, if McWane had granted one of its distributors an exclusive distribu-

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[40] *See, e.g.*, FTC v. Texaco Inc., 393 U.S. 223, 229–31 (1968) (upholding FTC decision against petroleum refiner's inducement of dealers to purchase tires, batteries, and accessories (TBA) from a third party in return for payment of commissions by the third party to the refiner); Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1216 (9th Cir. 1977) (conditioning purchase of cemetery plots on the purchase of monuments, with a commission paid to the cemetery).

[41] *See, e.g.*, Suture Express, Inc. v. Owens & Minor Distribution, Inc., 2016-1 Trade Cas. (CCH) ¶ 79,602 at 136,744 (D. Kan. 2016) (distributor carried 30 product categories), *aff'd*, 851 F.3d 1029 (10th Cir. 2017); Suture Express, Inc. v. Cardinal Health 200, LLC, 963 F. Supp. 2d 1212 (D. Kan. 2013) (same).

torship for some part of the country, and there was no other source of a full line of domestic pipe fittings, that exclusive distributor would have had ability to foreclose any other seller.

What if the reseller itself has its own market power?[42] If there were only one cable company or only one telephone company in a town—as used to be more common—and it assembled a bundle of programming or tied handsets to service plans, such a company would have been in a position either to include or exclude input providers and thereby exercise market power over both its customers and its suppliers. If the only cable company in town offered a bundle of cable sports networks, for example, every sports network would have needed access to that cable provider to reach viewers in the area. At the same time, if one of those networks were immensely popular, the cable company would have needed to include it in the bundle or risk persuading fewer subscribers to pay for the bundle.[43]

Likewise, where there is only one acute-care hospital providing cardiac surgery, obstetrics, and high-level trauma care in a region—bundling together and reselling the goods and services of a variety of manufacturers and professionals—and the operator of that hospital offers insurers better rates if they do more business with that hospital and less business with smaller hospitals that compete against it for only a portion of the services it provides, the insurers must have the acute care hospital in their network and can lower their costs by doing more business with it.[44]

Of course, resellers without market power of their own may stimulate greater sales by offering bundles, loyalty discounts and tie-ins, but they would pose little threat of excluding either manufacturers or rival resellers. "Two slices of pizza and a soft drink for $5.00" is easy to match. So is, "Every tenth latte for free." And every service station can bring back offers of a "free drinking glass (or sports bottle) with fill-up."[45]

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[42] *See, e.g.*, Strobel v. Fitness Expo, 1997-2 Trade Cas. (CCH) ¶ 71,901 (E.D. La. 1997) (sole retailer of exercise equipment in the area); United States v. Topa Equities (V.I.), Ltd., 59 Fed. Reg. 67,728 (1994) (consent judgment) (sole liquor wholesaler on the island of St. Thomas).

[43] *See* Joe Flint, *Why Does the Cable-TV Bundle Exist Anyway?*, WALL ST. J., June 8, 2015, www.wsj.com/articles/why-does-the-cable-tv-bundle-exist-anyway-1433807825.

[44] Complaint ¶ 28, United States v. United Reg'l Health Care Sys., No. 7:11-cv-00030 (N.D. Tex. Feb. 25, 2011) ("[I]nsurers . . . consider United Regional a 'must-have' hospital.") (final judgment filed Feb. 29, 2011); *see also* Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 897 (9th Cir. 2008) ("McKenzie . . . does not provide the same array of services as PeaceHealth and therefore could possibly not be able to match the discount PeaceHealth offers insurers.").

[45] As the court recognized in *PeaceHealth*, 515 F.3d at 894, "[b]undled discounts are pervasive, and examples abound. Season tickets, fast food value meals, all-in-one home theater systems—all are bundled discounts."

In short, conditional pricing can be offered by either producers or intermediaries, but the dynamics are not the same for both and neither is the antitrust analysis. Resellers are more likely able to "mix and match" different brands in their programs but less likely to have exclusive rights to "must-have" products.

C. Is Demand Based on Customer Taste and Preference or on Indisputable Necessity?

Still another variable is whether "musthavedness" is the product of fondness for a particular brand or inescapable necessity. Some purchasers strongly prefer Heinz ketchup, or Scotch tape, even though other products serve the same purpose. Some hospital staff members prefer certain medical devices or pharmaceuticals, even though other products can be substituted to treat the very same conditions.

At the other end of the spectrum, some patients can be cured with a particular antibiotic. Some machines can be repaired with a unique part. If a municipality's RFP specifies domestic pipe fittings only, no other pipe fittings may be substituted.

If demand is based on bona fide necessity, the "musthavedness," market power, or "incontestability of demand" is manifest. The analysis quickly can proceed to measuring the magnitude and impact of the discount being offered, applying the applicable test, such as the "discount attribution" test in the case of a bundled discount,[46] to assess whether there is undue foreclosure.

If demand is based on preference, however, the strength of that preference must first be assessed. If Heinz ketchup commands a 95 percent market share in one region but only a 25 percent market share in another region, where does it stop being a product that a supermarket "must have?" If a particular medical device commands a 95 percent market share but other devices perform the same function, at what point can a hospital switch to one of the other devices to save money, even if that makes some members of its staff grumpy? After all, consumers in supermarkets are free to shop elsewhere if they do not find the products they prefer. Members of hospital staffs would find it harder to switch hospitals, although unhappy surgeons can raise a fuss if they are opposed to their hospital's choice of products, and some might even decamp to other hospitals if the disagreement is sufficiently serious.

Preference is notoriously difficult to measure and often very fickle. In *Jefferson Parish*, the Supreme Court observed that a preference, such as the

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[46] The discount attribution test requires that the entire bundled discount or loyalty discount be attributed to sales of contestable products, for which rivals can compete. *See infra* text accompanying note 78.

"preference of persons . . . to go to . . . the closest hospital" is "not necessarily probative of significant market power."[47] Rather, tying arrangements "need only be condemned if they restrain competition on the merits by forcing purchases that would not otherwise be made."[48] The Court made clear that a preference resulting in a 30 percent market share is not enough musthavedness to qualify as market power.

In contrast, courts in other cases have recognized that higher market shares can provide evidence that consumer preference for a product has conferred market power.[49] In this connection, as described above, market share often is more influential for retailers than end users, since it is easier for an end user to try switching to a substitute product if that end user can be convinced that the substitute is demonstrably better, faster, and/or less expensive.[50] Accordingly, a determination needs to be made in each case as to the reliability of market share data as an indicator of musthavedness. If preferences are changing, share is eroding, or innovation threatens to change the competitive landscape, today's market share may not be a reliable indicator of market power. If the decision-makers are able to ignore individual preferences, today's market shares similarly may be tenuous.

Furthermore, measuring the strength of customer preference can be particularly fact-intensive. Each case is different. Sometimes, natural experiments may be available to study, using scanner data or other sources of information. Survey evidence may be worthwhile in some contexts, although surveys of actual behavior naturally can be more valuable than surveys of anticipated behavior. Customers can only speculate as to how they would behave in hypothetical situations. Asking "What would you do?" will not necessarily lead to the same conclusion as "What did you do?"

D. Is the Product Always a "Must Have" or Only Partially a "Must Have"—and If Partial, How Much and How Strong?

Sometimes, a product is a "must-have" product for only a portion of total demand. For example, in *McWane*, domestic pipe fittings were must-have

[47] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 26 (1984); Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 408 (3d Cir. 2016) ("Unlike in *LePages*, *Dentsply*, and *ZF Meritor*, Lovenox customers had the ability to switch to competing products. They simply chose not to do so.").

[48] *Id.* at 27.

[49] *See, e.g.*, *PeaceHealth*, 515 F.3d 883. *But see* J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc., Nos. 01-704, 03-781, 2005 WL 1396940 (S.D. Ohio June 13, 2005) (even a 74% share may not evidence market power if a competitor's share is growing), *aff'd*, 485 F.3d 880 (6th Cir. 2007).

[50] Of course, even at the end-user level, brand loyalty may be influenced by market share. For example, a longtime axiom in business was that "Nobody ever got fired for buying IBM."

products for municipal projects requiring domestic content, but the vast majority of projects in the United States had no such requirement, and most of the fittings sold in the United States were not domestic. In *ZF Meritor*, a portion of the transmissions that truck makers used had to be Eaton transmissions to satisfy the demands of truck buyers but, in other instances, either an Eaton or a competing transmission could be used.

If no portion of demand is "incontestable" (as with demand for a true commodity, for example), a loyalty discount is simply a discount premised upon a customer purchasing all of its requirements, or some percentage of its requirements, from the same source. The effect will be to induce exclusive dealing, or semi-exclusive dealing, and will be assessed under the rules applicable to exclusive dealing, monopolization, attempted monopolization, and predatory pricing.[51] Notwithstanding disagreement over whether above-cost pricing ever should amount to an antitrust violation in these circumstances,[52] there is no issue as to how to measure musthavedness where the product is not a "must-have" product. Instead, the issue in cases where no portion of demand is incontestable typically is whether a seller that already commands a very large market share should be allowed to utilize conditional discounts that encourage exclusivity.

In contrast, where some portion of the customer's purchases is "incontestable" because no other brand will do, the analysis becomes comparable to the analysis performed in bundled discount cases. The only difference is that the identical product can constitute both a "must have" product and a "contestable" product, depending upon how much of the ultimate demand for the product is subject to substitution by other products. The larger the incontestable portion is, the stronger the foreclosure effect will be.

Measuring musthavedness in this context presents special issues. How do we know, for example, what percentage of Eaton transmissions were "necessary" to truck manufacturers or how "indispensible" Scotch tape was to retailers? If a particular brand or type of product is "spec-ed in," can the specifications be changed?[53] How hard would it be to change them and how

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[51] Dean Milk Co., 68 F.T.C. 710 (1965) (loyalty discount on milk).

[52] *See* ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 268–81 (3d Cir. 2012); Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l (US) Inc., 2009-2 Trade Cas. (CCH) ¶ 76,815 (D. Mass. 2009); *see generally* Benjamin Klein & Andres V. Lerner, *Price-Cost Tests in Antitrust Analysis of Single Product Loyalty Contracts*, 80 ANTITRUST L.J. 631 (2016); Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Remarks at the Bates White 10th Annual Antitrust Conference: Simple but Wrong or Complex but More Accurate? The Case for an Exclusive Dealing-Based Approach to Evaluating Loyalty Discounts (June 3, 2013), www.ftc.gov/sites/default/files/documents/public_statements/simple-wrong-or-complex-more-accurate-case-exclusive-dealing-based-approach-evaluating-loyalty/130603bateswhite.pdf.

[53] *Cf.* McWane, Inc. v. FTC, 783 F.3d 814 (11th Cir. 2015) (specifications for government contracts); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983) (specifica-

long would it take? If the "must-have" portion is a function of downstream preferences, how hard have the owners of competing brands tried to change those preferences? Often, a competing supplier will endeavor to prove the strength of the purported "must-have" product by showing how little success it has had in trying to compete against it, but courts will test whether the rival has tried hard enough to compete.[54] There sometimes is a fine line between musthavedness and laziness.

The bottom line is that determining what percentage of a customer's purchases under a loyalty discount program should be considered "must have" and what percentage is contestable may be relatively straightforward in some circumstances and far more difficult in other circumstances, but it must be determined in order to analyze competitive effects.

E. Is It Possible for Competitors to Match a Bundle, a Tie-In, or a Loyalty Discount?

Sometimes, a competitor is unable or unwilling on its own to match the products in a bundle, or to match the "must-have" portion of a loyalty discount program, or to match the tying product in a differential pricing tie in, but in combination with other competitors, or by launching a new product, it can. A competitor should not be able to challenge a conditional pricing program successfully if it could have competed effectively by partnering with others to offer a competitive alternative or by readily developing a competing product of its own.

Naturally, this issue can require some speculation, as there may be questions over whether competitors successfully can work together (both as a practical matter and under the law) to assemble competing combinations of products. Nevertheless, the law frequently permits competitors to pool their resources to provide a competitive package that otherwise would not exist.[55]

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tions for industrial parts); Complaint at 4, ¶ 7, Victrex plc, FTC Docket No. C-4586 (July 14, 2016) (time required to obtain regulatory clearance posed a barrier to rival suppliers). In *Eisai, Inc. v. Sanofi Aventis U.S., LLC*, 821 F.3d 394, 406 (3d Cir. 2016), the court noted that the alleged must-have anticoagulant drug at issue was FDA approved for seven indications, one of which was unique, but the court queried whether competitors could obtain FDA approval for that indication for their own drugs.

[54] *See* NicSand, Inc. v. 3M Co., 507 F.3d 442 (6th Cir. 2007); Suture Express, Inc. v. Cardinal Health 200, LLC, 963 F. Supp. 2d 1212 (D. Kan. 2013).

[55] *See* U.S. Dep't of Justice, Antitrust Div., Bus. Rev. Letter 06-03 from Thomas O. Barnett, Ass't Att'y Gen., to Steven John Fellman, Counsel for Linen Systems for Healthcare, LLC (Aug. 8, 2006) (approving proposed joint venture of regional textile maintenance companies to market textile rental and laundry services to specialized health care client); U.S. Dep't of Justice, Antitrust Div., Bus. Rev. Letter 00-05 from Joel I. Klein, Ass't Att'y Gen., to Garret G. Rasmussen, Counsel for Containers America LLC (Mar. 8, 2000) (approving proposed creation and operation of joint selling and purchasing vehicle for five regional manufacturers of steel drums); *see gener-*

Sometimes, the customer itself can assemble a package from the products of more than one supplier.

A purported "must-have" product may not really be a must-have product if competitors can team with one another to provide acceptable alternatives. Labeling a product "must have" simply because no competitor can match that product on its own would give those competitors a free pass if they could match it together.[56]

Similarly, where one competitor offers a "must-have" product and a rival chooses to omit that product, even though it could introduce a comparable product with reasonable effort, the foreclosure that may result in the immediate term must be viewed against the fact that the rival has elected not to offer the same range of products.[57]

The effect on competition—whether characterized as measuring foreclosure or otherwise measuring the strength of competition[58]—is not the same where

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ally Fed. Trade Comm'n & U.S. Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors (2000).

[56] *See, e.g.*, Applied Med. Res. Corp. v. Ethicon, Inc., 2006-1 Trade Cas. (CCH) ¶ 75,202 n.11 (C.D. Cal. 2006) (bundles may include a diverse assortment of products; bundle at issue included endo products and sutures, which "are not complementary products, and there is no inherent reason for offering them together"). *But see* Castro v. Sanofi Pasteur Inc., No. 11-cv-7178, 2012 WL 12516572, at *2, *8–9 (D.N.J. Aug. 6, 2012) (denying motion to dismiss on ground that, allegedly, "no single competitor" could match all the vaccines in the bundle, although each vaccine faced competition from at least one competitor); *see also* Castro v. Sanofi Pasteur Inc., No. 11-cv-7178, 2015 WL 5770381 (D.N.J. Sept. 30, 2015) (certifying class of purchasers of the vaccines).

A competitor also might have its own, different, must-have product, around which it could assemble an attractive bundle of its own. *Cf.* Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 406 (3d Cir. 2016) (plaintiff "has its own unique cancer indication, which it presumably obtained because of its calculated decision to focus on that area.").

Also, even where a competitor cannot match the must-have product, sellers of a bundle can ameliorate the foreclosure by "carving out" purchases from that competitor. *See Applied Medical*, 2006-1 Trade Cas. (CCH) ¶ 75,202; *see also* Se. Mo. Hosp. v. C.R. Bard, Inc., 616 F.3d 888, 893 (8th Cir. 2010) ("at least three . . . competitors sell the full line of products" and the applicable "contracts exempt suppliers who do not offer a full line"), *vacated on other grounds*, 642 F.3d 608 (8th Cir. 2011).

[57] *See* Suture Express, Inc. v. Owens & Minor Distribution, Inc., 2016-1 Trade Cas. (CCH) ¶ 79,602 at 136,759 (D. Kan. 2016) (plaintiff "cannot match the bundle . . . because of a decision it and it alone has made"), *aff'd*, 851 F.3d 1029 (10th Cir. 2017); *Suture Express*, 963 F. Supp. 2d 1212; *McWane*, 783 F.3d 814; *Eisai,* 821 F.3d at 406 (Although "obtaining an FDA indication requires investing a significant amount of time and resources in clinical trials," there was no evidence "demonstrating that fixed costs were so high that competitors entering the market were unable to obtain a cardiology indication.").

[58] *See* Dissenting Statement of Comm'r Joshua D. Wright at 33, 36–37, McWane, Inc., FTC Docket No. 9351 (Feb. 6, 2014), www.ftc.gov/system/files/documents/public_statements/202211/140206mcwanestatement.pdf ("[F]oreclosure . . . is not itself the end of any complete analysis but rather a starting point for understanding whether the exclusive arrangements at issue are capable of harming competition" and "foreclosure rates are relevant only as a proxy for better understanding competitive effects"); McWane, Inc. v. FTC, 783 F.3d 814 (11th Cir. 2015) (affirming the FTC majority opinion).

the "must have" product is reasonably available to rivals that simply choose not to offer it.

F. Who Instigated Conditional Pricing?

Loyalty discounts, bundled discounts, and other conditional pricing arrangements are as likely to be instigated by customers as suppliers. Customers commonly ask for better prices in return for committing to buy more from the same supplier, or at least committing not to deal with another supplier.[59] Is the test for musthavedness the same if the customer proposed the arrangement?

Sometimes, determining which party instigated conditional pricing is difficult.[60] Sometimes, both parties want it. Where the customer clearly is asking for conditional pricing and has no demonstrable reason to eliminate competition at the supplier level, a rule of reason analysis should require especially persuasive evidence of an anticompetitive effect before condemning a discount that the customer itself proposed. A court should hesitate to substitute its judgment for that of the customer where the customer is trying to sharpen competition among potential suppliers and it is not clear that competition at the supplier level will be harmed.[61]

Indeed, if it is the customer that demands conditional pricing, can any of the products involved genuinely be considered "must-have?" The answer is "sometimes." The customer may need a variety of products, some of which are available only from a single supplier or a handful of suppliers. In such circumstances, the customer may ask for a bundled discount and the supplier having access to the "must-have" products can structure the pricing it offers to foreclose rivals that lack such access.

What if the customer is negotiating with more than one supplier that can provide the "must-have" product? Is the product still a "must-have" in these circumstances? It is, but the impact on competition will depend upon whether this forecloses too many rival suppliers from bidding for too much business.[62]

Can there be a "must-have" *customer?* What if the customer demanding conditional pricing is a "trophy" customer that can provide so much exposure and publicity for a product that rival suppliers compete for the opportunity to

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[59] *See, e.g.*, *NicSand*, 507 F.3d at 457 ("[I]t was . . . retailers . . . who initially demanded exclusivity" and their demand for better prices "shows the retailers' bargaining authority at work").

[60] *See, e.g.*, *Applied Medical*, 2006-1 Trade Cas. (CCH) ¶ 75,202 (customers "may be offered or solicit" discounts).

[61] *See* Richard M. Steuer, *Customer-Instigated Exclusive Dealing*, 68 ANTITRUST L.J. 239 (2000); *see also Suture Express*, 2016-1 Trade Cas. (CCH) ¶ 79,602 at 136,751 ("A customer who purchases higher volumes from a distributor has greater leverage to obtain lower prices.").

[62] *See Applied Medical*, 2006-1 Trade Cas. (CCH) ¶ 75,202.

supply it, even at cost or at a loss? Can a customer with multiple properties offer to buy a product for its trophy property on the condition that the supplier agrees to offer the same deal for the customer's less desirable properties? It could happen, although the prospects for harming competition between the customer and the customer's rivals are limited, and it would be a rare case in which an anticompetitive effect could be demonstrated.[63]

IV. SHOULD THE SAME DEFINITION OF MUSTHAVEDNESS APPLY TO BUNDLING, LOYALTY DISCOUNTS, AND TYING?

Achieving a better understanding of the variables affecting musthavedness is only one step toward actually measuring musthavedness. Another issue is whether the same test for measuring musthavedness should be applied to all conditional pricing programs, including bundled discounts, loyalty discounts, and differential pricing tie-ins.

In bundled discount and loyalty discount cases, the issue is whether competitors have been foreclosed because they cannot offer the "must-have" product, or the "must-have" portion of the customer's purchases of the product, and because the cost that the customer would incur if it were to lose the discount is too great for the competitors to overcome. In a differential pricing tie-in case, the issue traditionally has been whether customers have been forced to forgo buying the tied product from competitors because the discount on the tying product is too great for the customer to lose and too great for the competitors to overcome. Under either analysis, the criteria for determining whether one of the products is a "must have," "unique," and "incontestable" product should be the same, although the case law on tying has been largely distinct from the case law on bundled discounts and loyalty discounts, and the standards applied by the courts have not always been consistent.[64]

As with bundled discounts, there always is more than one product involved in differential pricing tying. In a bundled discount, the customer typically earns a discount on all the products in the bundle, including the "must-have" product, if it meets a volume requirement of some kind, expressed in units, dollars, or percentage of purchases. In a differential pricing tie-in, a customer typically earns a discount on the "must-have" product by purchasing a second product from the same supplier, or promising not to buy it from anyone else. This is not quite the same thing because the typical bundled discount discourages customers from purchasing the "contestable" products in the bundle from

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[63] Discriminating between rival customers also might be checked by the Robinson-Patman Act, 15 U.S.C. § 13, if no defenses or exceptions apply.

[64] Of course, for conditional discounts in which none of the products is "must-have," there is no musthavedness and nothing to measure except whether sales are being made below cost.

another source while the differential price tie-in actually forbids customers from purchasing the tied product from another source as a condition to earning the discount. Only if a bundled discount requires the customer to purchase *all* of its requirements of each of the products in the bundle, including the "must-have" product as well as the other products, are a bundled discount and differential pricing tie-in essentially the same. In all events, however, the customer is encouraged—if not forced—to buy more than just the "must-have" product from the seller and competitors are impeded—if not foreclosed—from selling the other products to that customer. For this reason, it makes sense to apply the same standard for measuring musthavedness (regardless of whether it is termed uniqueness, incontestability, or indispensability) to all forms of conditional pricing.

The complication is that the law on bundled discounts and loyalty discounts has developed largely from the law on exclusive dealing,[65] while the law on differential pricing tie-ins has evolved from the law on tying.[66] Reconciling these two lines of cases is not always easy, although courts have begun trying.[67]

Exclusive dealing law focuses on foreclosure of competitors and whether there is enough foreclosure to result in higher prices, lower output, or monopolization. As Justice O'Connor stated in *Jefferson Parish*, "[e]xclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal."[68] The threshold that emerged from the case law has been somewhere between at least 30 and 40 percent, with the understanding that foreclosure of end users usually results in greater foreclosure than foreclosure of distributors and other intermediaries.[69]

Tying law, in contrast, traditionally has focused on the "forcing" of customers to make purchases they would prefer not to make, requiring only foreclosure (in the tied product market) of "a 'not insubstantial' amount" of commerce.[70] As the Supreme Court observed in *Jefferson Parish,* the evil of tying is "the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want

[65] *See* ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 269–72 (3d Cir. 2012).

[66] *See* Virtual Maint., Inc. v. Prime Comput., Inc., 957 F.2d 1318 (6th Cir. 1992), *vacated and remanded*, 506 U.S. 910 (1992).

[67] *See* Collins Inkjet Corp. v. Eastman Kodak Co., 781 F.3d 264, 270–77 (6th Cir. 2015); *see generally* ALD 7th, *supra* note 9, at 188–89.

[68] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring).

[69] *See* ALD 7th, *supra* note 9, at 216; Steuer, *supra* note 39, at 118–21.

[70] *See* N. Pac. Ry. v. United States, 356 U.S. 1, 11 (1958); *see also Jefferson Parish*, 466 U.S. at 16.

at all, or might have preferred to purchase elsewhere on different terms," and "from the standpoint of the consumer—whose interests the statute was especially intended to serve—the freedom to select the best bargain in the second market is impaired by his *need* to purchase the tying product."[71] Is there any difference between the degree of "musthavedness" required to foreclose competitors and the degree of "musthavedness" required to force customers to commit to the tied product?

The answer should be no, because although tying law purports to protect consumers from being stuck with goods they don't want, it also is based on preventing competitors from being foreclosed from the tied-product market, whether or not the same degree of foreclosure is necessary to establish a tying claim as it is to establish an exclusive dealing claim.[72] The ultimate issue, as the Court noted in *Jefferson Parish*, is whether a seller has "foreclosed competition on the merits in a product market distinct from the market for the tying item."[73]

The rule in tying cases based on differential pricing is that the arrangement is not anticompetitive, even if the seller possesses market power by virtue of its control over the tying product and offers a discount on the tying product conditioned on also purchasing the tied product (or not buying the tied product from anyone else), *if* it also offers the tying and tied products separately and if the price for purchasing the tying product separately is not so much greater that it makes no economic sense for customers to buy the tying product without promising to buy the tied product (or promising not to buy it from anyone else). In other words, if the cost of buying the tying product alone is not so much higher as to amount to "forcing," and does not foreclose competitors from selling the tied product alone, the arrangement is not unlawful.[74] In

[71] *Jefferson Parish*, 466 U.S. at 12, 15 (emphasis added).

[72] *See* ALD 7th, *supra* note 9, at 200.

[73] *Jefferson Parish*, 466 U.S. at 21.

[74] *Id.* at 11–12; United States v. Loew's Inc., 371 U.S. 38, 52, 54–55 (1962); Shamrock Mktg., Inc. v. Bridgestone Bandag LLC, 775 F. Supp. 2d 972, 980 (W.D. Ky. 2011) (issue is whether the incentives would induce "all rational buyers" to accept the tie (citation omitted)); Synergetics USA, Inc. v. Alcon Labs., Inc., 2009-1 Trade Cas. (CCH) ¶ 76,534 at 113,671 (S.D.N.Y. 2009) (if "the individual products are priced such that the buyer is coerced to accept both products in a discounted package, then a tying arrangement may result"); Ortho Diagnostic Sys., Inc. v. Abbott Labs., Inc., 920 F. Supp. 455, 471 (S.D.N.Y. 1996) ("Ortho may prevail only if it establishes . . . that Abbott's pricing structure makes purchase of the tying and tied products together the only viable economic option"); Ways & Means, Inc. v. IVAC Corp., 506 F. Supp. 697, 701 (N.D. Cal. 1979) ("[S]eparate availability will not preclude antitrust liability where defendant has established its pricing policy in such a way that the only viable economic option is to purchase the tying and tied products in a single package."), *aff'd*, 638 F.2d 143 (9th Cir. 1981). *See* ALD 7th, *supra* note 9, at 188–89 (coercion present when acceptance of the tie-in discount is the only realistic, viable option for purchasers).

contrast, if the discounted price of the package is an "offer you can't refuse," with no viable option, forcing will be found to exist.

In *Collins*, the court borrowed the discount attribution test from bundling cases and held that in the case of "a tie enforced solely through differential pricing, the tie is not unlawful unless the differential pricing is the economic equivalent of selling the tied product below the defendant's cost."[75] The court pointed out that, in such a case, "buyers are only 'forced' to buy the tied good from the defendant if they cannot purchase the tied good elsewhere at a price low enough to offset the forgone discount for the tying product" and "shift[ing] the discount from the tied good to the tying good . . . in itself does not 'force' buyers to purchase the tied product any more than a discount on the tied product would."[76] The court held that such a discount therefore is anticompetitive "only if the defendant is selling below cost," but it also found that in this case there was evidence demonstrating that Kodak "was in effect selling ink below its incremental cost."[77]

In bundling and loyalty discounts, the same dynamic applies. In these cases, the "discount attribution" rule requires that the entire discount be attributed to the "contestable" products in the bundle, or the contestable portion, and the issue is whether competitors that are unable to match the "must-have" product or "must-have" portion can successfully compete by offering an equivalent discount on the contestable products or portion only, without having to sell below cost (with the defendant's costs serving as a surrogate for the competitor's costs).[78] If the discount is modest enough that competitors can match it without selling below cost, then even if the "must have" product is an absolute necessity for customers, courts applying the discount attribution test would find that competitors offering the other products in the bundle could compete successfully by compensating customers for the loss of the discount on the "must-have" product.[79]

Does it make sense to measure musthavedness differently in these cases? If there are only two products in a bundle, should the analysis be any different whether the arrangement is viewed as a tie-in or a bundle? Under a bundling

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[75] Collins Inkjet Corp. v. Eastman Kodak Co., 781 F.3d 264, 272 (6th Cir. 2015), *accord*, Valassis Commc'ns, Inc. v. News Am. Inc., No. 06-10240, 2011 WL 2413471 (E.D. Mich. June 15, 2011). *See also* Suture Express, Inc. v. Owens & Minor Distrib., Inc., 2016-1 Trade Cas. (CCH) ¶ 79,602 at 136,759 (D. Kan. 2016) ("[N]o court has applied the discount attribution test to a non-monopolist."), *aff'd*, 851 F.3d 1029 (10th Cir. 2017).

[76] *Collins Inkjet*, 781 F.3d at 272.

[77] *Id.* at 272, 275.

[78] Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 903–11 (9th Cir. 2008). The analysis may be broader if exclusivity is brought about by factors other than a discount. *See supra* note 52.

[79] *See, e.g.*, Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1059 (8th Cir. 2000); Aerotec Int'l v. Honeywell Int'l, 4 F. Supp. 3d 1123, 1134–35 (D. Ariz. 2014).

analysis, the question is whether a competing seller that lacks one of the products can match the forgone discount the customer incurs and thereby make the customer whole, without having to sell below cost. Under a tying analysis, the question is whether the customer has a realistic or viable option to forgo the discount on the tying product by buying the tied product from another source. One test examines the dynamics from the viewpoint of competing sellers, while the other test examines the dynamics from the viewpoint of customers. Either way, the calculus should be the same. Indeed, at least some of the parties and courts confronting these issues have hedged their bets and applied both an exclusive dealing analysis and a tying analysis.[80]

So, is the measure of musthavedness the same for bundled discounts, loyalty discounts, and differential pricing tie-ins? Is assessment of whether a product subject to a bundled discount or loyalty discount is a "must-have" (or "incontestable") product for purposes of assessing whether a competitor is foreclosed from competing exactly the same as assessment of whether a tying product is a "must have" product for purposes of assessing whether it possesses sufficient uniqueness to confer market power and enable the reseller to "force" the buyer to purchaser a second, tied product, or not buy it elsewhere? As shown above, the answer should be affirmative. The law on all three types of discounts is converging, and the calculation of musthavedness should be the same in each case.[81]

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[80] *PeaceHealth*, 515 F.3d at 900 ("The package discount . . . does not constrain the buyer's choice as much as the traditional tie" because "traditional" tying typically forces the buyer to take both the tying products and the tied product); Ortho Diagnostic Sys., Inc. v. Abbott Labs., Inc., 920 F. Supp. 455 (S.D.N.Y. 1996); *see also Collins Inkjet*, 781 F.3d at 272 (applying the discount attribution test to "the special case of a tie enforced solely through differential pricing").

[81] Note, moreover, that whether the claim is for bundling, loyalty discounts, or tying, it can be difficult for a customer—as distinguished from competitors—to prove that it has been injured. In the case of bundling, the customer may complain that it bought more products in the bundle from the same seller than it would have if it had not been trying to get a lower price on the "must-have" product, but it is difficult to demonstrate economic injury if the other products in the bundle are usable or saleable. *See* Applied Med. Res. Corp. v. Ethicon, Inc., 2006-1 Trade Cas. (CCH) ¶ 75,202 n.11 (C.D. Cal. 2006). *But see* Dial Corp. v. News Corp., 2016-1 Trade Cas. (CCH) ¶ 79,467 (S.D.N.Y. 2016) (defendants' motion for summary judgment denied); Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l, Ltd., 2009-2 Trade Cas. (CCH) ¶ 76,815 (D. Mass. 2009). *See also* Castro v. Sanofi Pasteur Inc., No. 11-7178, 2015 WL 5770381 (D.N.J. Sept. 30, 2015) (certifying class of purchasers of vaccines alleging that defendant's bundling resulted in inflated prices from both defendant and its competitor). In the case of tying the customer may complain that it bought more of the tied products than it would have if it were not trying to get a discount on the tying product, but it still would have to demonstrate that this resulted in economic injury. *See* Barber & Ross Co. v. Lifetime Doors, Inc., 810 F.2d 1276, 1279 (4th Cir. 1987) (judgment for plaintiff after jury trial affirmed) ("A consumer in the tied product market who is forced to purchase unwanted supplies of the tied product . . . is unquestionably the victim of an antitrust injury.").

V. HOW TO EVALUATE MUSTHAVEDNESS

What then is the recipe that courts can follow for measuring musthavedness? On a scale of 1-to-10, is Scotch Tape more "must-have" (i.e., less contestable) than Eaton truck transmissions, or Heinz ketchup? In a textbook hypothetical, a musthavedness score simply can be assigned to Product A, Product B, and Product C. In court, this is not as easy. There is no Geiger counter for finding musthavedness, and courts have relied on a number of the indicators discussed above:

Uniqueness. The simplest and strongest indicator of musthavedness, of course, is genuine uniqueness, as in the case of a patented replacement part or a spec-ed in component.[82] If a product is needed by some group of buyers and there are no reasonable substitutes, then for those buyers that product is a "must have." On a scale of 1-to-10, that product is a "10."

Market Share. As discussed earlier, market share is the handiest surrogate for musthavedness. If a product commands an appreciable share of a relevant market, this can be interpreted as evidence of its popularity and, by inference, consumer preference.[83] Of course, this presumption is rebuttable, since a high market share might be the result of first-to-market advantage, shortage of the brand that consumers prefer, or a variety of other factors. Nevertheless, in the absence of other evidence, courts routinely cite high market share as a positive indicator of musthavedness, incontestability, uniqueness, market power, or whatever competitive effect plugs into the test they are applying. And the higher market share/higher musthavedness score means that conditional pricing is more likely to lead to undue foreclosure. Of course, a low share of the relevant market should diminish a product's musthavedness score, and thus reduce the likelihood that conditional pricing is anticompetitive.

Success of Alternatives. In several cases, courts have found that despite a conditional pricing strategy employed by the product with the highest market share, evidence that rival products have achieved more than marginal success is evidence that the first product is not a "must have" after all.[84] Certainly, where the product with the leading market share is offering attractive loyalty discounts, bundled discounts, or discounts conditioned on tie-ins, and customers are foregoing those discounts in favor of buying alternative products, this

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[82] *Compare* Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp., L.P., 592 F.3d 991, 997 n.2 (9th Cir. 2010) (product off patent), *with* Masimo Corp. v. Tyco Health Care Grp., L.P., 350 F. App'x 95 (9th Cir. 2009) (same product still on patent).

[83] *See supra* notes 13 and 19.

[84] *E.g.*, *Concord Boat*, 207 F.2d 1039; *Aerotec International*, 4 F. Supp. 3d at 1134–35 ("That relatively high [46%] percentage of separate sales prevents the court from presuming coercion based on the bundled discount."); J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc., Nos. 01-704, 03-781, 2005 WL 1396940 (S.D. Ohio June 13, 2005) (74% share insufficient where competitor's share was growing), *aff'd*, 485 F.3d 880 (6th Cir. 2007).

is persuasive evidence that the first product is not the cat's meow in the eyes of every customer and that the musthavedness score should drop—together with concerns about foreclosure. If the data is robust and there is a history of natural experiments, it may be possible to estimate elasticity with reasonable confidence.

Level and Influence of the Customer. As described earlier, retailers need to be responsive to the preferences of their shoppers, but some retailers also have more ability than others to influence those preferences. Heinz ketchup may be a "must have" for a supermarket but not for a cafeteria, yet it also may not be a "must have" for a gourmet grocer that can shape the preferences of its shoppers. Courts have treated retailers differently than industrial end users where the end users have greater discretion to make their own purchasing decisions without the need to satisfy the preferences of customers.[85] Thus, even if a product scores high on market share, the customer's distribution level and degree of influence may dictate lowering the product's "musthavedness" score, which should lower concerns about undue foreclosure.

Strength of and Direction of Tastes. This is the hardest factor to measure and even harder to predict. Sometimes, demand builds even before a product is introduced, based on consumer anticipation, and retailers order large inventories long before the first sale to a consumer is made. In that case, the product may have a high musthavedness score with no sales at all. Sometimes, demand for a new generation of products can be manipulated, as allegedly happened in instances of "product hopping."[86] Also, if there is clear evidence that consumer preference today does not accurately reflect what consumer preference is going to be in the years ahead, the musthavedness score should be adjusted accordingly, recognizing that predictions are tough to make, especially about the future.[87]

Who Instigated? A potentially revealing clue to whether a product is a "must have" is whether the seller insists on conditional pricing with all of its customers or whether large-volume buyers themselves demand bundles, loyalty discounts, or ties to leverage their buying power. As described above, this indicator is not foolproof, because sometimes it is hard to tell which party instigated the discount and both parties may come to embrace it. Nevertheless,

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[85] *Compare* LePage's, Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003), *with Applied Medical*, 2006-1 Trade Cas. (CCH) ¶ 75,202. *But see* ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254 (3d Cir. 2012).

[86] New York *ex rel.* Schneiderman v. Actavis PLC, 787 F.3d 638 (2d Cir. 2015) (affirming issuance of preliminary injunction).

[87] This observation has been attributed to several figures, including Yogi Berra, Niels Bohr, and Mark Twain. Predictive evidence could include, for example, evidence that a first-mover's advantage is only temporary, that there is pent-up demand for a yet-to-be-released rival product, or that technological obsolescence is looming for incumbent products.

a discount devised and demanded by a customer may be a poor indicator that the customer actually must have—or even strongly prefers—one of the products in the program. If the customer instigated conditional pricing, the musthavedness score should go down, and the likelihood of finding undue foreclosure should fall with it.

Can It Be Matched by New Entry or Partnering? Even when demand dictates that a product is a "must-have" in the eyes of customers, elasticity of supply may temper the degree of musthavedness, or incontestability. Although a customer that is forced to take a tied product normally is powerless to initiate the creation of substitutes, a competitor that is foreclosed sometimes has the ability to begin making a substitute or to partner with a supplier that can provide what is missing. Consequently, a competitor that voluntarily chooses to limit the products it offers, or chooses not to team with available allies, should not be allowed to portray as "incontestable" a product that it has elected not to contest. The same should not apply, however, to a customer that legitimately can demonstrate harm from conditional pricing unless that customer readily could piece together its own bundle from different suppliers. Moreover, different customers may have different degrees of preference and need, meaning that musthavedness may not be the same for every customer. If a putative must-have product can be matched by either a supplier or customer with a combination of sources, the musthavedness score should plummet.

Tallying the Score. Would that it were so easy that courts could assign a score—positive or negative—to each of the factors described above and simply tally up whether a product is a must-have product or not. What works in modeling does not always work as easily in factfinding. Nevertheless, by applying this checklist, courts should be able to structure a more comprehensive framework for conducting an analysis of conditional pricing, building on the experience of the growing body of cases that already have been decided.[88] This approach lacks the mathematical precision of a tool like the discount attribution rule, but it is more exacting than "I know it when I see it." The result of applying this approach should be greater certainty and predictability, resulting in fewer errors and making compliance easier to achieve.

VI. CONCLUSION

Conditional pricing cases vary considerably, both in the nature of the programs themselves and the legal tests that have been applied. Properly understood, however, they all need to address the issue of whether one or more of

[88] This framework also should apply to pleading and motions to dismiss, providing plaintiffs a list of the kinds of elements that need to be pleaded in order adequately to allege musthavedness, recognizing that shorthand terms like must-have, incontestability, and forcing amount to legal conclusions rather than factual allegations.

the products in the program is a "must-have" product. As explained above, the measure of "musthavedness" should be the same in all conditional pricing cases. The challenge is drawing the line between merely popular products and incontestable, "must-have" products, and measuring just how much musthavedness each product truly possesses. There is no easy-to-read litmus test or precise recipe for conducting the analysis, but at least there is a list of ingredients.