IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Eisai Inc., Plaintiff, v. sanofi-aventis U.S. LLC, and sanofi-aventis U.S. Inc., Defendants.	Civil Action No. 08-04168 (MLC/DEA) **REDACTED** Return Date: September 3, 2013

REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON LIABILITY ISSUES

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PRELIMINARY STATEMENT

Under the Third Circuit's recent holding in *ZF Meritor, LLC v. Eaton Corp.*, "the price-cost test applies to market-share or volume rebates offered by suppliers within a single-product market." 696 F.3d 254, 274-275 & n.11 (3d Cir. 2012). This is extremely clear guidance. There is no dispute that Eisai challenges a market share discount offered in a single product market here. Thus, under the clear terms of *ZF Meritor*, the price-cost test applies.

Eisai's opposition attempts unsuccessfully to avoid the straightforward rule of *ZF Meritor*. But Eisai cannot change the fundamental nature of its claims. Its case is and always has been focused on Lovenox's pricing as the alleged exclusionary tool. [redacted] Sanofi US is entitled to summary judgment on liability.

Even if the Court were to set aside the price-cost test established in *ZF Meritor*, and instead apply a rule of reason analysis, summary judgment is still appropriate because Eisai cannot prove exclusionary conduct, antitrust injury, or substantial foreclosure, all of which are necessary elements of a rule of reason claim. [redacted]

Without either the law or the facts on its side, Eisai takes two approaches: [redacted] Second, Eisai argues that the Court has already decided these liability issues as a matter of law on an incomplete record and before *ZF Meritor* changed the Third Circuit landscape. Neither line of argument can salvage Eisai's claims.

ARGUMENT

[redacted]

ZF Meritor clarified that the price-cost test applies where "price is the clearly predominant mechanism of exclusion," such as with "market-share or volume rebates offered by suppliers within a single-product market." *ZF Meritor*, 696 F.3d at 274-75 & n. 11. In adopting this rule, the Third Circuit followed the unwavering line of Supreme Court cases that have resisted attempts by plaintiffs to turn above-cost pricing practices into an antitrust violation.[1] The Third Circuit's *ZF Meritor* decision also joined an extensive body of decisions from sister circuits that have uniformly applied the price-cost to the kind of single-product loyalty discount challenged by Eisai here.[2] *Id.* at 274-75 & n.11.

[redacted]

- [redacted]
- [redacted]

[1] *See Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 451-52 (2009); *Weyerhauser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 319 (2007); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993); *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339-40 (1990); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104,117-18 & n.12 (1986).

[2] *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 447-48, 455 (6th Cir. 2007); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1062 (8th Cir. 2000); *Virgin Atl. Airways Ltd. v. British Airways Plc*, 257 F.3d 256, 265-69 (2d Cir. 2001); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 235-36 (1st Cir. 1983); *cf. Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 909 (9th Cir. 2008).

[redacted]

[redacted]

(*See* Sanofi US Opp'n Partial Summ. J. at 12-14 (ECF No. 289).)

[redacted] Eisai misconstrues the court's analysis. In *ZF Meritor*, the court determined that there were numerous *non-pricing* aspects of the defendant's contracts and conduct and the loyalty discount (*i.e.*, pricing) provisions did not predominate. *ZF Meritor*, 696 F.3d at 277 ("Plaintiffs did not rely solely on the exclusionary effect of Eaton's prices, and instead highlighted a number of anticompetitive provisions in the [contracts there at issue]").

For example, *ZF Meritor* focused on the fact that Eaton could cut off the only four purchasers in the market from necessary supply if they did not comply with market penetration targets or refused to remove competitive products from their respective "data books." *Id.* at 265, 277-78, 286-88. [redacted]

[4] Sanofi US Exs. 1-132 and 212-22 are attached to the Walsh Declarations in Support of Defendants' Reply Motions in Further Support of Motions for Summary Judgment on Liability and Damages Issues and Rule 56.1 Statement (June 3, 2013 (ECF No. 250) and Aug. 2, 2013 (ECF No.__)).

[redacted]

[redacted] In *Concord Boat Corp. v. Brunswick Corp.*, however, plaintiff alleged that Brunswick's market share discount program effectively required its competitors to charge substantially lower prices than Brunswick's in order to convince customers to purchase from them and forgo the discount offered by Brunswick. 207 F.3d 1039, 1046-47, 1062-63 (8th Cir. 2000) (applying price-cost test in reversing judgment for plaintiffs)*; cf. Se. Mo. Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 615-16 (8th Cir. 2011) (noting that defendant's competitors offered "catheters that were cheaper than the Bard-GPO catheters").[5]

[redacted]

[redacted] Eisai ignores that the Court's prior rulings pre-dated *ZF Meritor* and relied upon the much criticized *LePage's* opinion as controlling authority. (Aug. 2010 Mem. Op. at 24 (ECF No. 119); Hr'g Tr. 26:15-21, June 12, 2009 (ECF No. 61).) As discussed above, *ZF Meritor* clarified the law of this Circuit by expressly limiting the reach of *LePage's* and by joining its "sister circuits in holding that the price-cost test applies to market-share or volume rebates offered by suppliers within a single product market." *ZF Meritor*, 696 F.3d at 274-75 & n.11. It is well-settled that "[t]his court has a duty to apply a supervening rule of law despite its prior decisions to the contrary when the new legal rule is valid and applicable to the issue of the case." *Zichy v. City of Phila.*, 590 F.2d 504, 508 (3d Cir. 1979); *Pub. Interest Res. Grp. of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 116-17 (3d Cir. 1997).

[redacted]

[6] Eisai's citation to the amicus brief submitted by Professor Hausman is equally unavailing. (Opp'n Br. at 7.) Professor Hausman joined a number of antitrust scholars in an *amici curiae* brief urging the Supreme Court to review *ZF Meritor's* decision, which found that price was not the primary "exclusionary tool" and therefore did not apply the price-cost test in analyzing the supply contracts there at issue. (Br. for Eighteen Scholars as Amici Curiae in Supp. of Pet'r at 8, *Eaton Corp. v. ZF Meritor LLC*, No. 12-1045 (U.S.) (Mar. 28, 2013).) The brief most notably cautioned that the "predominant mechanism of exclusion" language adopted by the Third Circuit created the potential for uncertainty about when various practices are protected by the price-cost safe harbor, a concern illustrated by Eisai's baseless arguments here. *Id.* at 14-15.

cost test applies to market share or volume rebates offered by supplier within a single product market." *ZF Meritor*, 696 F.3d at 274-75 & n.11.[7]

In sum, *ZF Meritor* mandates the use of a price-cost test to evaluate market share discounts like those at issue here where pricing is the main alleged method of exclusion. [redacted] Sanofi US is entitled to summary judgment.

II. [redacted]

To prevail under a rule of reason analysis, Eisai must prove that the challenged discount contracts actually foreclosed competition in a substantial share of the relevant market. *See Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 328 (1961); *Church & Dwight Co. v. Mayer Labs., Inc.*, 868 F. Supp. 2d 876, 901 (N.D. Cal. 2012). Yet, [redacted] *See Church & Dwight*, 868 F. Supp. 2d at 884, 911 (granting summary judgment where, among other things, plaintiff failed to develop direct evidence that customers were

[7] [redacted]

denied choice).

See, e.g., *LePage's Inc. v. 3M Co.*, 324 F.3d 141, 158 (3d Cir. 2003) (plaintiff introduced evidence from large customers like Staples, Kmart, Sam's Club, and National Office Buyers that they were prevented from carrying LePage's products); *ZF Meritor*, 696 F.3d at 277-78 (plaintiff introduced "considerable testimony" from customer witnesses that they did not want to remove plaintiff's transmissions from their databooks but were forced to do so in order to avoid being cut off from supply of the portions of defendant's transmissions they would continue to need).

In short, Eisai has not shown that it was foreclosed from competing.

See, e.g., *Concord Boat*, 207 F.3d at 1059 (rejecting antitrust claims where two customer witnesses testified they were able to switch

60-70% of their purchases from defendant's product to a competitor's despite defendant's market share discount program); *SMS Sys. Maint. Servs., Inc. v. Digital Equip. Corp.*, 188 F.3d 11, 19-20 (1st Cir. 1999) (rejecting claim that defendant used generous warranty contracts to lock in customers where the customers' actual behavior indicated they were able to switch to other suppliers); *Church & Dwight*, 868 F. Supp. 2d at 908 (finding plaintiff failed to raise a genuine issue of material fact as to whether manufacturer's market share rebates foreclosed competition where evidence showed examples of customers that reduced or eliminated their participation levels in the program).

[redacted]

"Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them." *Concord Boat*, 207 F.3d at 1057, 1062; *C.R. Bard*, 642 F.3d at 616. [redacted]

[redacted] Eisai disregards more recent precedent, beginning with the Supreme Court's *Tampa Electric* opinion, which holds that foreclosure occurs only when "the opportunities for other traders to enter into or remain in [the] market" are "significantly limited." *Tampa Elec.*, 365 U.S. at 328-29. [redacted] *See, e.g.*, *ZF Meritor*, 696 F.3d at 286 ("[F]or the contract to have an adverse effect upon competition, 'the opportunities for other[s] . . . to enter into or remain in that market must be significantly limited.'"); *Jame Fine Chems., Inc. v. Hi-Tech Pharm. Co.*, No. CIV.00-3545AET, 2007 WL 927976 at *5 (D.N.J. Mar. 27, 2007) (granting summary judgment because plaintiff failed to show that "opportunities for other [competitors] to enter into or remain in that market [were] *significantly* limited.") (emphasis in original).

[redacted] This evidence demonstrates [redacted] Eisai's failure of proof on the essential element of substantial foreclosure is fatal to all of its antitrust claims.

[redacted]

[redacted]

As discussed in Sanofi US's opposition to Eisai's motion for partial summary judgment, the law is clear that [redacted]

[10] Eisai also ignores the portions of [redacted]

Moreover, Eisai's erroneous contention that [redacted]

Eisai's opposition ignores [redacted]

In addition to ignoring the factual record, Eisai's response misstates the law: Eisai incorrectly argues that the Third Circuit in *West Penn Allegheny Health System, Inc. v. UPMC*, rejected the presumption that deceptive speech has a *de minimis* effect on competition. 627 F.3d 85, 109 n.14 (3d Cir. 2010); Opp'n Br. at 22-23. In fact, *West Penn* simply elaborated on the Third Circuit's prior ruling that "deception, reprehensible as it is, ***can be of no consequence*** so far as the Sherman Act is

concerned." *Santana Prods., Inc. v. Bobrick Washroom Equip., Inc.*, 401 F.3d 123, 132-35 (3d Cir. 2005) (emphasis added). The *West Penn* Court clarified that, in certain limited circumstances, deceptive conduct "can give rise to antitrust liability." 627 F.3d at 109 n. 14. But it did nothing to change the presumption that deception generally has a *de minimis* effect on competition. The alternative standard and language that Eisai quotes regarding deceit that "appears capable of making a significant contribution to maintaining or attaining monopoly power," does not appear anywhere in *West Penn*. Nor do the other cases cited by Eisai endorse the new standard Eisai proposes.[11]

[redacted] fail as a matter of law [redacted]

[redacted]

[redacted]

V. EISAI FAILS TO OFFER EVIDENCE OF ANTITRUST INJURY

As explained in Sanofi US's opening brief, Eisai cannot meet its burden to show that it suffered antitrust injury as a result of Sanofi US's contracting or marketing. In an effort to evade this burden and survive summary judgment, Eisai again improperly invokes a "law of the case" argument and claims the Court already has ruled as a matter of law that Eisai has suffered antitrust injury. (Opp'n Br. at 24-25.) The Court's earlier opinion, however, simply made the determination that as [redacted] Plainly the Court did not decide as a matter of law and without regard to any further evidence that might be developed in the case that Eisai suffered antitrust injury. (*See also id.* at 30 ("We find *at this juncture* that the AGC factors favor standing . . . .") (emphasis added). [redacted] *See, e.g., Tse v. Ventana Med. Sys., Inc.*, 123 F.

Supp. 2d 213, 222 (D. Del. 2000) (court "must now take into consideration evidence that has been developed through discovery"); *Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, 759 F. Supp. 2d 417, 424 (S.D.N.Y. 2010) ("For purposes of applying the law of the case doctrine, courts have long recognized the distinction between pre-discovery motions, based on an undeveloped record, and post-discovery motions for summary judgment.").

Moreover, the intervening *ZF Meritor* precedent discussed above clarified the law in this Circuit regarding the test used to analyze antitrust challenges to single product loyalty discounts and must now be applied in this case. *Zichy*, 590 F.2d at 508. In short, the overwhelming evidence in the record and the law governing single-product loyalty discount claims as clarified in *ZF Meritor* demonstrate that Eisai has not established antitrust injury here.

Eisai also suggests that "[c]ompetitor plaintiffs *automatically* satisfy the 'antitrust injury'" requirement in exclusionary contracting cases and therefore there is no need for Eisai to put forward proof that its alleged losses resulted from acts by Sanofi US that actually reduced output or raised prices to consumers. (Opp'n Br. at 25 (emphasis added).) Eisai misstates the law. *See Sterling Merch. v. Nestle, S.A.*, 656 F.3d 112, 121-22 (1st Cir. 2011); *see also Church & Dwight*, 868 F. Supp. 2d at 907-09 (holding that evidence showing one rival maintained its market share and another rival both dropped and increased during the same period precluded a finding of substantial foreclosure); *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.2d 1157, 1164 (9th Cir. 1997) (increased market share and substantial industry expansion "precludes a finding that exclusive dealing is an entry barrier of any significance"). Even in *ZF Meritor* and *LePage's* – the only two cases cited by Eisai for this proposition – the plaintiffs presented evidence that they had exited the business and closed one of two plants, respectively, as a result of the defendants' conduct, and that this in turn adversely affected pricing or output to the detriment of the ultimate consumer. *ZF Meritor*, 696 F.3d at 267, 286 n.18, 289 (plaintiff dissolved its joint venture, exited the market, and stopped making manual

transmissions, including the only two-pedal automated mechanical transmission product available in the United States, due to the "Long Term Agreements" there at issue); *LePage's*, 324 F.3d at 162-63 (noting that "powerful evidence" was presented that 3M intended to abandon the lower priced store brand tape to sell only higher-priced Scotch tape after driving LePage's, the only other supplier of the private label tape segment, out of the market).

The only "evidence" Eisai cites of the adverse effects on price and output in this case are its claims that: (

[redacted]

In fact, the Supreme Court rejected just such a theory of antitrust injury in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 114 (1986). There, plaintiff alleged that it faced a threat of lost profits stemming from the possibility that the defendant would lower its prices to a level at or above costs. The plaintiff claimed that it would have to respond by lowering its prices, which would cause it to suffer a loss in profitability. *Id.* at 115. The Supreme Court held that such a theory did not present a cognizable antitrust injury, reasoning that "the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition." *Id.* at 116; *see also ZF Meritor*, 696 F.3d at 275 (summarizing same).

[redacted]

[13] The only situation in which courts ever have found price *competition* to be of concern under the antitrust laws is when low prices are used to drive competitors out of business *and* the defendant thereby gains power to raise prices and more than recoup the losses it sustained during the competitive battle. *See Ortho Diagnostic Sys., Inc. v. Abbott Labs., Inc.*, 920 F. Supp. 455, 465-66 (S.D.N.Y. 1996); *LePage's*, 324 F.3d at 162-63. [redacted]

[redacted] In sum, Eisai has failed to raise a genuine issue of material fact as to the existence of antitrust injury.

CONCLUSION

For the foregoing reasons and those set forth in Sanofi US's opening brief, Sanofi US respectfully requests that this Court grant its motion for summary judgment and enter judgment in its favor as to all of Eisai's claims.

Respectfully Submitted,

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DATED: August 2, 2013

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