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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

EISAI INC.) No. 14-2017
)
vs.) Philadelphia, PA
) January 13, 2015
SANOFI AVENTIS U.S., LLC,) 11:17 a.m.-12:12 p.m.
SANOFI US. SERVICES, INC.)

HEARING
BEFORE THE HONORABLES THOMAS L. AMBRO, JULIO M.
FUENTES, AND JANE R. ROTH

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1 P R O C E E D I N G S

2 (Call to Court)

3 JUDGE AMBRO: This morning it's -- how do I
4 -- E-I-S-A --

5 MR. FASTOW: Eisai.

6 JUDGE AMBRO: Eisai. Okay, I just -- v.
7 sanofi aventis U.S., et al. Mr. Fastow and Mr. Cary.

8 MR. FASTOW: Thank you.

9 JUDGE AMBRO: Is it Fastow or Fastow?

10 MR. FASTOW: Fastow.

11 JUDGE AMBRO: Fastow. Okay. I put the
12 emphasis in the wrong syllable. Thank you.

13 MR. FASTOW: Thank you. Jay Fastow for
14 the plaintiff, Eisai, and might I reserve three
15 minutes for rebuttal?

16 JUDGE AMBRO: Yes, sir.

17 MR. FASTOW: Thank you.

18 The position of the defendant in this
19 case, sanofi, is a lonely one. In the series of three
20 cases, LePage's, En Banc, Dentsply, which
21 sanofi doesn't even mention, and then ZF Meritor, this
22 Court has rejected sanofi's positions. In fact even
23 the dissent in ZF Meritor rejected the argument that
24 the safe harbor applied there saying that the market
25 share targets and databook placement provisions there

1 were quote, "non-price."

2 And the facts of this case are a fortiori
3 from plaintiff's perspective -- plaintiff's -- core
4 plaintiffs compared to even those three cases that
5 held for plaintiffs in at least three major ways.

6 First high price versus lower price.
7 Second even broader extent of anticompetitive conduct.
8 And third, lack of even any proffered pro-competitive
9 justification.

10 JUDGE AMBRO: At this point can you point
11 to any evidence other than Professor Elhaug's
12 report and the Fragmin's lower price that sanofi's
13 price structure actually suppressed competition?

14 MR. FASTOW: That --

15 JUDGE AMBRO: What evidence would you
16 point to besides what I just noted?

17 MR. FASTOW: We would point to the
18 evidence of the data of what happened to price. And
19 let's keep in mind to start with Professor Rosenblatt.
20 Rosenblatt explains that as in normal economics
21 in a pharmaceutical market where you have a monopoly
22 and then you have competitors of quality products at
23 lower prices you expect prices to go down. But that's
24 not what happened here. Sanofi's prices were
25 generally speaking, wary of the protective order,

1 substantially higher -- substantially the highest in
2 the market.

3 JUDGE ROTH: Are you calculating that
4 before or after the discount?

5 MR. FASTOW: Your Honor, the price trend
6 goes either way. If you look at Elhauge's figure 3 and
7 figure 6. Figure 3 compares the average price of
8 sanofi compared to the average price of Fragmin,
9 Eisai's product --

10 JUDGE AMBRO: Just give -- professor, how
11 do you pronounce his last name again?

12 MR. FASTOW: Elhauge.

13 JUDGE AMBRO: Elhauge. Okay.

14 MR. FASTOW: And then figure 6 breaks
15 down the sanofi price.

16 JUDGE FUENTES: Fragmin's prices remain
17 stable?

18 MR. FASTOW: Fragmin's prices over the
19 relevant time went up.

20 JUDGE FUENTES: Increased also.

21 MR. FASTOW: They went up. And let me
22 make one point on that, is that that's like the case
23 in Dentsply. In Dentsply there was an argument that
24 the competitors of Dentsply weren't very aggressive,
25 and this court said, no, it wasn't apathy, what it is

1 was the result of Dentsply's anti-competitive
2 policies.

3 Here what sanofi did -- for example,
4 the formulary access clause. It says, we would take
5 away from you any benefit from lowering your price
6 further. The price already was substantially lower,
7 and that's in comparison to ZF Meritor where the court
8 said that defendant's price was lower.

9 JUDGE FUENTES: I'm sorry, I don't know if
10 you were answering Judge Ambro's question, which I'm
11 still thinking about, which is evidence of suppression
12 of competition.

13 MR. FASTOW: The evidence of
14 suppression of competition -- I'll go back to that one
15 -- is that you would expect when you have comparable
16 products, competitive products at lower prices the
17 prices would go down. Here instead sanofi both
18 maintained its monopoly share and continued to raise
19 its price, and that's what's a fortiori in this case from
20 any of the three cases that held for plaintiffs.

21 JUDGE FUENTES: In the same period Eisai's
22 market share doubled.

23 MR. FASTOW: Sorry?

24 JUDGE FUENTES: In the same period Eisai's
25 market share doubled.

1 MR. FASTOW: It went from four to eight
2 percent, but that's not the issue. The issue is
3 whether it would have been higher but for sanofi's
4 anticompetitive conduct. And what we see is that, for
5 example, Professor Elhauge explains that 68 to 84
6 percent of the market was foreclosed to the rivals of
7 sanofi.

8 JUDGE AMBRO: Well he's saying that there
9 in effect is a dead zone. I mean is it fair to say
10 that what he's -- his theory is that the overlapping
11 functions of the drug are the contestable part and
12 that what one drug can only do that no other drug can
13 in terms of treatment is the incontestable part?

14 MR. FASTOW: What he's saying I think a
15 little bit more technically --

16 JUDGE AMBRO: Okay.

17 MR. FASTOW: -- is that whether or not
18 the other drug could also provide the same function
19 under FDA regulations you're not allowed to market or
20 promote that other drug unless you have FDA approval
21 for that particular indication.

22 So what he's talking about is you had
23 incontestable demand, which is a lot like in ZF
24 Meritor the performance transmissions that Eaton
25 had and that the plaintiffs didn't have. But here

1 again a fortiori to those cases what sanofi did was
2 expand that incontestable demand. It wasn't just, for
3 example, the unique cardiology indication that it had
4 that gave it a head start over its competitors. But
5 through the FUD conduct, the bleed game, the unlawful
6 marketing conduct of false -- unlawful claims of
7 product superiority, they expanded that dead zone --

8 JUDGE AMBRO: Well just look at the --
9 the fear, uncertainty and doubt I guess is what it
10 stands for.

11 MR. FASTOW: Yes.

12 JUDGE AMBRO: What's the evidence that
13 that actually caused people not to go and use a
14 competitor's product --

15 MR. FASTOW: Well we have actually --

16 JUDGE AMBRO: -- that suppressed the
17 market?

18 MR. FASTOW: -- in our briefs a couple
19 of hospitals where we have specific evidence, it's
20 Citrus Memorial and University of Pittsburgh, we have
21 an appendix of examples, and then we have the
22 statistical evidence --

23 JUDGE AMBRO: And what -- so let's take
24 UPMC. What was the evidence with regard to UPMC?

25 MR. FASTOW: There was in evidence the

1 brief, Your Honor, that it realized that it could save
2 money on Fragmin but was afraid of the FUD, the claims
3 of well you may have product liability claims, you may
4 lose your license, and that's described in our brief.

5 But I'd emphasize that here it's a
6 total picture, and that's what Continental Ore
7 talks about, LePage's talks about, En Banc, is you look
8 at all the conduct together, and what we know is that
9 the market share requirements together with the
10 formulary access clause restrictions, together with
11 the FUD and other illegal marketing, all together
12 allowed a monopolist with already a supracompetitive
13 price to continue to raise its price. And what
14 happened --

15 JUDGE AMBRO: Is the loyalty -- sorry --
16 is the discount in effect like a loyalty price plan,
17 if you will? Could you call it that colloquially?

18 MR. FASTOW: What we would call it,
19 Your Honor, is paying for exclusivity. And what's
20 happening here, as we explained in our briefs, is that
21 they're not paying this money to sell more product
22 very much.

23 JUDGE AMBRO: So that's why you're making
24 this not a predatory pricing claim, but rather an
25 exclusive dealing claim; is that correct?

1 MR. FASTOW: Yes, Your Honor.

2 JUDGE FUENTES: Isn't Eisai's program -- I
3 think it was called a loyalty --

4 MR. FASTOW: Exclusive dealing plus.
5 Plus all the other conduct, and that's very important
6 here is it goes even beyond the conduct in ZF Meritor.

7 JUDGE FUENTES: The -- Eisai's loyalty price
8 plan, isn't that a similar program?

9 MR. FASTOW: It's -- number one it's
10 not similar. You look at the brief and you see that
11 the thresholds are substantially, substantially lower,
12 number one.

13 Number --

14 JUDGE FUENTES: But it was designed to
15 encourage the same thing, it's --

16 MR. FASTOW: It was designed by an
17 eight percent -- or four percent participant, not by
18 somebody with 92 percent, and that is we see from the
19 Supreme Court and this court is all the difference in
20 the world that what might be considered very competitive for a
21 small entrant, and we can say we'll give you the
22 following deal if you get 50 percent from us, but it
23 doesn't happen, we got 8 percent. But you had
24 somebody with 92 percent imposing that dead zone and
25 basically putting -- you know, what sanofi itself

1 called market share handcuffs, and that's what they
2 did.

3 JUDGE AMBRO: What's your argument --

4 JUDGE ROTH: Well just calling it that
5 doesn't necessarily mean that that's an antitrust
6 violation.

7 MR. FASTOW: But we have a whole set of
8 examples in our appendix, we have Omnicare and White
9 County, for example, where those handcuffs worked,
10 where even though Fragmin was charging less hospitals
11 felt they couldn't leave sanofi. And then you had the
12 formulary access --

13 JUDGE ROTH: But this was by price
14 discount rather than by exclusive contracts or other
15 antitrust shenanigans.

16 MR. FASTOW: No, Your Honor, certainly
17 not any more than in ZF Meritor and Dentsply and
18 LePage's.

19 JUDGE AMBRO: Well the contract --

20 JUDGE ROTH: Well we have only one
21 product here and we don't have a restriction of the
22 availability of the product if you violate the so-
23 called contractual obligations.

24 MR. FASTOW: ZF Meritor only had one
25 product.

1 JUDGE ROTH: And you couldn't get
2 transmissions if you didn't go along with the scheme.

3 MR. FASTOW: Your Honor, there's -- as
4 we said in our brief sanofi says, well, there were
5 threats of termination, but there were no threats
6 discussed in that case.

7 And getting back to the general point
8 of the difference between --

9 JUDGE AMBRO: Well the contracts -- can I just
10 pick up on one question.

11 MR. FASTOW: Yes.

12 JUDGE AMBRO: That really is an outgrowth
13 of what Judge Roth just asked. These contracts here
14 were not long term, they were very short term were
15 they not?

16 MR. FASTOW: No, the period that we're
17 addressing is roughly five years.

18 JUDGE AMBRO: No, no, the contracts, the
19 -- I mean --

20 MR. FASTOW: Oh, the contracts. In
21 Dentsply the contracts were not even really contracts,
22 they were purchase orders that the court -- this court
23 said could be terminated at will at any time. And
24 what this court has emphasized in all those cases --

25 JUDGE AMBRO: Well the Dentsply was a

1 bundling of a lot of -- a lot of products, correct?

2 MR. FASTOW: Well Dentsply was mostly

3 --

4 JUDGE AMBRO: In order -- in order to get

5 teeth Dentsply was the major market maker or had a

6 huge portion of the false teeth business in this

7 country and they were tying it in with other products

8 were they not, bundling them?

9 MR. FASTOW: Dentsply was mostly about

10 the exclusivity with the dealers. They did sell some

11 other products, but a key in Dentsply was the teeth.

12 It is a little different I think from LePage's where 3M

13 had a much broader product line.

14 What I'd like to emphasize --

15 JUDGE AMBRO: But here you've got, you

16 know, one prescription, Lovenox.

17 MR. FASTOW: One product as in ZF

18 Meritor. The market there was heavy duty truck

19 transmissions.

20 But the difference between, for

21 example, Brooke Group where you have --

22 JUDGE AMBRO: Yeah, but one of the

23 factors -- I mean what I'm picking up on --

24 MR. FASTOW: Yes.

25 JUDGE AMBRO: -- is one of the factors

1 that ZF Meritor talked about is the duration of the
2 attempts to decrease competition, and there you had
3 seemingly much lengthier contracts. Well here these
4 contracts were short term and, as I understand it,
5 could be either not re-upped or terminated very
6 quickly.

7 MR. FASTOW: But again in Dentsply they
8 were extraordinarily short term and the emphasis in
9 both Dentsply, LePage's, and --

10 JUDGE AMBRO: Well, as I said, that's why
11 I hear you --

12 MR. FASTOW: -- ZF Meritor --

13 JUDGE AMBRO: -- you do have --

14 MR. FASTOW: -- is why --

15 JUDGE AMBRO: -- you do have a single
16 product here.

17 MR. FASTOW: Is what actually happened.
18 And what we know actually happened here is that even
19 if hospitals were theoretically free to quote "walk
20 away," they didn't. That sanofi used its monopoly
21 power and it's --

22 JUDGE AMBRO: But isn't -- if you were
23 going to apply Professor Elhauge's analysis here don't
24 you have to take -- if you want to apply Dentsply
25 don't you have to say, well this is a single product

1 unlike what you had in Dentsply?

2 The fact that you have or the theory
3 that you have contestable and incontestable elements in
4 effect gives you the same leverage that you would have
5 if you had other products that -- that such as you had
6 in Dentsply or LePage's.

7 MR. FASTOW: Yes, it's the
8 incontestable demand combined with sanofi's expansion
9 of that incontestable demand through the disparaging
10 and unlawful conduct.

11 But unlike ZF Meritor where you had the
12 incontestable demand, the performance transmissions,
13 here they actually went beyond that and through their
14 FUD, their bleed game tried to lead the hospitals to
15 believe, at least to fear, that the cost of using
16 rival products was higher than it actually was, which
17 expanded that incontestable demand.

18 JUDGE FUENTES: Can I ask you about the
19 price cost test that seems to have been applied by the
20 District Court in this case in its opinion, and you
21 were referring to ZF Meritor. In that case there was
22 a footnote that I found somewhat interesting, footnote
23 11, in which the court held that the price cost test
24 applies to market share or volume rebates offered by
25 suppliers within the single product market. That's

1 your circumstance. And so in that case there is a
2 holding that the price cost test applies to your
3 circumstance.

4 MR. FASTOW: Okay. Let me --

5 JUDGE FUENTES: Can I ask your comment on
6 that?

7 MR. FASTOW: The answer is no, it
8 doesn't.

9 First of all in our circumstances we
10 have far broader anti-competitive --

11 JUDGE FUENTES: You don't think we have to
12 pay attention to that holding?

13 MR. FASTOW: No, and let me explain to
14 you why.

15 First we have far broader anti-
16 competitive conduct, the formulary access clause and
17 all the illegal marketing.

18 On the particular issue of the market
19 share referenced in footnote 11, number one, it's not
20 binding because it's dicta, it doesn't deal with
21 the --

22 JUDGE ROTH: Dictum.

23 MR. FASTOW: Dictum, okay. It doesn't
24 deal with the holding at all, in fact it specifically
25 says it's dictum because it starts off the footnote

1 saying we're responding to an argument by
2 an amicus, the American Antitrust Institute, not
3 to the parties, and of course it's dictum with respect
4 to LePage's, which was an En Banc decision. So in a
5 way it's treble not binding, but it's also not
6 persuasive, and let me take you through that.

7 Most of the discussion says, well
8 LePage's was different because there was a multiple
9 product market and the court there En Banc analogized the
10 situation to tying rather than to Brooke Group,
11 proconsumer low cost pricing.

12 But that's a difference without a
13 distinction, because when you're looking at it the
14 question is, is this within Brooke Group or is it
15 something else because? And whether it's something because
16 it's like tying or as the court in ZF Meritor actually
17 held it was de facto exclusive dealing, it's still not
18 in the safe harbor. But it's actually a fortiori for us,
19 because when you go to LePage's, which is what this
20 footnote is distinguishing, LePage's deals with
21 bundling, with multiple product bundling, and the
22 court En Banc there said, no, that's not within the
23 scope of -- of Brooke Group, and it said that even
24 though the defendant there was able to argue, well
25 what we're trying to do is make our product offering

1 more attractive across multiple products which is what
2 caused the issue, but they were trying to make their
3 product offering more attractive. That's not what's
4 happening here.

5 Sanofi isn't trying to make its product
6 more attractive to consumers, sanofi is making its
7 product less attractive to consumers by continually
8 raising its price. What sanofi is doing is trying to
9 get away with raising its price from already the top
10 in the market while maintaining its monopoly market
11 share by making rival products artificially even worse
12 through its formulary access clauses, its market share
13 requirements, its illegal marketing. That's the key
14 difference I would ask the court to focus on is it's
15 not as in Brooke Group. What the Supreme Court is
16 saying in Brooke Group is, if you're going to make your
17 product more attractive to consumers by lowering your
18 price that's good, but sanofi didn't want to do that.
19 It couldn't have offered volume discounts Brooke Group
20 explained exactly how you do that, but it didn't because it
21 wanted to have it both ways. It wanted to maintain
22 its monopoly market share and continually raise its
23 price, and the way it did that was not by making its
24 product more attractive, which it didn't, but by
25 making ours less attractive.

1 JUDGE ROTH: Are you saying that a
2 discount that is based in part on the use of
3 competitors products is an antitrust violation?

4 MR. FASTOW: I'm saying that number one
5 it's not a discount.

6 JUDGE ROTH: Well, I'm calling it a
7 discount --

8 MR. FASTOW: Okay.

9 JUDGE ROTH: -- so --

10 MR. FASTOW: A payment of money --

11 JUDGE ROTH: -- you can take my
12 questions the way I word it.

13 MR. FASTOW: Okay. If you offer money
14 to a customer as here not to try to sell more, and we
15 explained in our briefs how the operation of their
16 program was not designed, at least very much, to sell
17 more of their product, it was designed to get the
18 hospitals not to buy our product for exclusivity.
19 We're saying that that's not --

20 JUDGE ROTH: Well you're going to need
21 Lovenox or you're going to need the equivalent, and so
22 you're going to buy something, and if you discourage
23 them from buying your competitor's product they're
24 going to buy your product.

25 MR. FASTOW: Not necessarily. In a

1 market in which price goes down normal economics would
2 tell you that volume will go up.

3 JUDGE ROTH: But the demand for Lovenox
4 is -- or the demand for the equivalent is based upon
5 medical need, and if hospitals need to buy it they're
6 going to buy it from somebody.

7 MR. FASTOW: But that's the point of
8 many of our experts. Rosenblatt, Casanova,
9 Melvin, is that within the indications these
10 products are comparable for medical need and that's
11 what the whole -- for example, the formulary access
12 clause was designed to stop was what they call
13 therapeutic interchange where a hospital may say if
14 two products can provide the medical need but one is
15 cheaper we want to emphasize the cheaper product. But
16 the formulary access clause with sanofi using its
17 monopoly power to say no it doesn't matter how low
18 Eisai reduces its price, they still can't get ahead of
19 us on the formulary.

20 JUDGE ROTH: But they can get equal to
21 you.

22 MR. FASTOW: They can get equal, but
23 not ahead, and it's the ability to get ahead, or from
24 sanofi's perspective, to fall behind that puts
25 competitive pressure on their pricing, and that's what

1 this is all about. Not trying to sell more by sanofi,
2 but trying to raise its price, and what they were
3 doing is saying if we can take away the rival products
4 providing competitive pressure, they're quality
5 products, they're lower price, if we can find a way
6 that they do not pressure our price then we can continue
7 to raise our price. And the way they did that was by
8 artificially making our products look worse.

9 I've been watching -- let me give you
10 an example. I've been watching a lot of football
11 lately and it reminds me of the defensive back who's
12 perfectly free to run as fast as he can to get to a
13 pass before the receiver and get -- and try to
14 intercept it. That's competition, that makes the game
15 good. But the defensive back is not free to grab the
16 receiver by the shoulder and pull him back so it's
17 easier for the defensive back to get to that pass, and
18 that's what sanofi did. It didn't run faster as the
19 Supreme Court said it could do --

20 JUDGE AMBRO: I know which game you're
21 talking about, you're talking about the
22 Detroit/Cowboy's game that happened --

23 (Laughter)

24 MR. FASTOW: We were watching the same
25 game, Your Honor.

1 JUDGE AMBRO: Yeah.

2 JUDGE FUENTES: There's a non-quantitative
3 dynamic it seems to me at play here, which is that
4 Lovenox is pretty much the first -- the first drug on
5 the scene, and so it immediately had the market share,
6 it was able to win the hearts and minds of hospitals
7 and doctors and therefore have loyalty.

8 I mean I'm looking at that dynamic and
9 on the other hand I don't see anything that prevented
10 Eisai from doing the same thing.

11 MR. FASTOW: Eisai came in I guess it
12 was about a year -- I'm sorry -- Fragmin came in about
13 a year and a half or two after Lovenox did. Eisai competed
14 when they got the product by substantially lower
15 prices, by substantially greater promotional efforts.
16 I think we said that we had three to one promotional
17 expenditure per unit compared to Lovenox, we competed
18 in a way that even sanofi called our marketing
19 efforts, quote, "competitive threats." So we were
20 competing. And this is a distinction to ZF Meritor
21 where the court said that defendant's price was lower
22 than the plaintiff's price, not higher.

23 JUDGE FUENTES: But the other side would
24 say that there were a huge number of doctors that were
25 very loyal to the Lovenox brand.

1 MR. FASTOW: And sanofi was perfectly
2 free to continue, as was the defendant in ZF Meritor,
3 they could have just continued to try to unilaterally
4 raise its price if I wanted to if it had brand
5 recognition product line scope, for example, they
6 could have done that.

7 JUDGE ROTH: To get back to my question,
8 which I don't think you answered. A discount that is
9 based in part upon the percentage of use of a
10 competitor's product, is that an antitrust violation?

11 MR. FASTOW: The answer is it can be
12 depending on the circumstances. If you have an 8
13 percent market participant saying that then it may not
14 be, when you have a 92 percent monopolist --
15 persistent monopolist doing that then certainly under
16 the facts of this case it is, and in any event we
17 submit it's not within the safe harbor, but it
18 certainly can be an antitrust violation, as this court
19 found in ZF Meritor.

20 JUDGE ROTH: But it's a manipulation of
21 price isn't it?

22 MR. FASTOW: It's not a manipulation of
23 price, and I think when you go back and look at the
24 concepts of LePage's, En Banc and then Dentsply and
25 ZF Meritor you see the Supreme Court saying that the

1 -- I'm sorry -- this court saying that the Supreme
2 Court did not in its decisions provide antitrust
3 immunity to any defendant that comes in and shouts
4 "price" in a crowded courtroom.

5 What it has to be is a price that
6 benefits consumers -- plainly benefits consumers. And
7 they said that in Brooke Group that's what happened.
8 Now keep in mind in Brooke Group the defendant only had
9 11 to 12 percent of the market, so it didn't have any
10 choice except to try to expand its business by making
11 consumers happier, and it engaged in a price war to
12 reduce the price of its "black and white" cigarettes.

13 Here you have a monopolist who not --
14 who could have just reduced its price, in fact we know
15 that it knows how to do that because when there was
16 generic entry in 2010 what did sanofi do? It almost
17 immediately within days dropped its price by 20
18 percent, right? And it abandoned its Lovenox
19 contracts. Abandoned the market share
20 requirements, abandoned the formulary access clauses.

21 So sanofi knew how to do that and it
22 knew how to do exactly what the Supreme Court said in
23 Brooke Group it could do, but it didn't want to chill
24 that generic entry because it wanted to make hay while
25 the sun was shining to both maximize its market share,

1 keep its market share high, and be able to keep
2 raising its prices, which is what it did. And so it
3 didn't benefit consumers as the defendant did in Brooke
4 Group, it hurt consumers. It kept raising prices in a
5 market where Professor Rosenblatt said you would
6 normally expect prices to be going down because of the
7 competition.

8 JUDGE FUENTES: But you also increase your
9 -- Fragmin also increased its prices.

10 MR. FASTOW: That we did because --

11 JUDGE FUENTES: So, I was wondering if in
12 order to compete, especially in that dead zone area,
13 why couldn't you lower your price -- why couldn't
14 Fragmin lower its prices?

15 MR. FASTOW: This is something I was
16 getting to. Is first of all of course we were already
17 substantially lower, but the impact of sanofi's anti-
18 competitive conduct took away much of the benefit from
19 the rivals of further lowering their prices, and let
20 me explain that.

21 The benefit, why you would -- would you
22 lower a price? You would lower your price because you
23 thought that even though you're getting less per unit
24 you can sell more units and offset the lower price and
25 offset the additional cost of the more units, right?

1 JUDGE ROTH: But you also lower your
2 price to increase your market share.

3 MR. FASTOW: Well that's what I'm
4 saying is to sell more units.

5 But what the sanofi conduct did is said
6 basically you can lower your price but you can't get
7 substantially more market share. You can lower your
8 price to virtually nothing if you want, but you still
9 can't get ahead of me on a hospital's formulary. You
10 still can't get primacy in front of me in terms of --

11 JUDGE AMBRO: How -- the formulary, how
12 -- you just get placed before another competitor; is
13 that it?

14 MR. FASTOW: It's --

15 JUDGE AMBRO: It's placement on a
16 formulary list, right?

17 MR. FASTOW: Yes. So in terms of
18 therapeutic interchange when you could use one product
19 or another product. (Indiscernible) said well we're
20 going to prefer this one and in part -- in our case
21 because the price is substantially lower. And so what
22 that did was -- and this is just like in Dentsply
23 where the court said -- and it's Dentsply at pages 189
24 and 190, is the court said, it wasn't apathy of
25 Dentsply's rivals that made them less aggressive, it

1 was a result of the exclusionary policies, and that's
2 what happened here --

3 JUDGE AMBRO: But again --

4 MR. FASTOW: -- an objective
5 perspective --

6 JUDGE AMBRO: -- back to where --

7 MR. FASTOW: Sure.

8 JUDGE AMBRO: -- we pretty much started.
9 Let's just say you've placed prior on the formulary
10 list, you're placed ahead of a competitor, what
11 evidence is there that there was any actual harm from
12 that?

13 MR. FASTOW: That there was any?

14 JUDGE AMBRO: Any actual harm from that.
15 Any decreasing of competition with regard to your
16 client's drug, Fragmin?

17 MR. FASTOW: There's evidence of both
18 harm to competition and harm to us.

19 The evidence of harm to competition is
20 that notwithstanding what you would expect in a market
21 with quality products with lower price, sanofi was
22 able to continue to raise its price. That's the harm
23 to consumers, consumer choice was stifled, quantity
24 didn't grow as fast. All the indicia and the
25 antitrust indicia harm to competition, price, choice,

1 quantity were harmed, and we know from Professor Elhauge
2 that he said that the competitors were foreclosed from
3 68 to 84 percent.

4 In terms of harm to us its that
5 foreclosure, plus we have our yardsticks that all show
6 that when we are free in a world -- free from sanofi's
7 anticompetitive conduct we would have had between 28
8 to 54 percent of the market, and that would have
9 benefited not only us but consumers because it would
10 have been a bigger market share for a product at a
11 much lower price, a comparable product in general
12 terms, and it would have forced sanofi -- if we had
13 been able to get to let's say 50 percent of the
14 market, that would have forced sanofi to reduce its
15 price, not raise its price. That was its whole plan
16 is by putting the rivals in the corner and
17 constraining their growth, constraining the ability of
18 hospitals to choose those products. It said even
19 though you're a lower price I don't have to worry
20 about you that much, because if I can still make 82
21 percent of the sales in my rising prices then I'm
22 good.

23 JUDGE FUENTES: This program is for about
24 how long, about five years?

25 MR. FASTOW: The program at the time

1 that we're at issue when Eisai took over the product
2 was about five years.

3 JUDGE FUENTES: What was the -- I don't
4 know what the exact price increases were, but were
5 there normal price increases given rising costs,
6 expenses, and so forth, or were they so high that it
7 was clearly monopolist?

8 MR. FASTOW: Well, I think two answers
9 to that.

10 One is that they were above -- sanofi
11 in its brief argues about a price index, and I think
12 you see it is about the same, maybe a little bit
13 higher than that. You can see again in Elhauge's
14 figures 3 and 6 the price increases.

15 But the key point here is, as
16 Dr. Rosenblatt explains, in this market if this were a
17 normal functioning market where the price mechanism
18 was working price would have gone down, because the
19 ability -- because sanofi already was charging
20 monopoly price, and we know it's monopoly prices
21 because when the generic entry came they immediately
22 dropped their price by 20 percent. So what would have
23 happened was price would have gone down. It's not a
24 question of by how much, and we're not in, you know,
25 1982 where there was inflation of, you know, 15 or 18

1 percent, price -- under normal economics and
2 pharmaceutical economics, as Dr. Rosenblatt explains,
3 should have been going down. If hospitals were free to
4 say, well for this purpose I can choose either
5 product, I'm going to get the cheaper Fragmin or the
6 cheaper Arixtra then prices would have gone down both
7 because they would have been paying less for the
8 products they bought from the rivals and because it
9 would have forced sanofi to reduce its price or its
10 market share would have gone down even more. That's
11 why sanofi didn't do what the Supreme Court plainly
12 invited it to do.

13 In Brooke Group the Supreme Court said
14 you want to exclude your competitors just lower your
15 price unilaterally as the court in Weyerhaeuser
16 says and you're good.

17 JUDGE AMBRO: Well at this point why
18 don't we get Mr. Cary up and then we'll get you back
19 on rebuttal.

20 MR. FASTOW: Thank you.

21 JUDGE AMBRO: Thank you.

22 MR. CARY: Good afternoon, Your Honors.
23 George Cary for sanofi.

24 JUDGE AMBRO: Almost afternoon. We're
25 close.

1 MR. CARY: Your Honors, this case is
2 about conditioned discounts. There's nothing alleged in
3 the contracts that sanofi had with its customers for
4 Lovenox that did anything other than grant conditional
5 discounts in exchange for meeting certain market share
6 thresholds.

7 JUDGE AMBRO: Are there any pro-
8 competitive benefits to sanofi's price structure?

9 MR. CARY: Yes, Your Honor.

10 JUDGE AMBRO: And what would that be?

11 MR. CARY: I think the Concord Boat
12 case makes it very clear. ZF Meritor makes it
13 very clear.

14 JUDGE AMBRO: No, no -- okay. So what
15 are they?

16 MR. CARY: The pro-competitive benefit
17 is competition. It is that sanofi is seeking to
18 incent customers to give it a higher market share by
19 offering discounts in exchange. That's the very
20 essence of competition, which is what the Supreme
21 Court said in Matsushita.

22 In Virgin Atlantic the Second Circuit
23 said that rewarding loyal customers is a way to
24 compete for business.

25 JUDGE AMBRO: But it almost sounds like

1 you're restricting consumer choice by effectively
2 raising your competitor's prices if you follow with
3 Mr. Fastow's analysis.

4 MR. CARY: Yes, but Mr. Fastow's
5 analysis is incorrect for the following reason. He
6 continuously refers to Eisai's low prices. In fact
7 for those customers who started off with Lovenox and
8 had a high percentage purchase of Lovenox Eisai's
9 prices were higher. They only offered substantial
10 discounts if somebody would commit to shifting 50
11 percent of the purchases to them.

12 In other words shifting market share is
13 what competition is about. They charged prices about
14 15 to 20 percent higher than sanofi's prices to
15 customers who are buying 75 percent from sanofi.

16 JUDGE ROTH: So they were basing a
17 discount on the percentage of the product that was
18 bought from them rather than from competitors.

19 MR. CARY: Yes, exactly. So if a
20 customer, for example --

21 JUDGE ROTH: So the same thing they're
22 complaining about with you, but they're saying because
23 they were eight percent it was not harmful.

24 MR. CARY: That's right. They're
25 saying different rules apply because we were first in,

1 we were successful, we had an installed base before they
2 entered. That's not what the Supreme Court has said,
3 that's not what this court has said in ZF Meritor.

4 JUDGE ROTH: Can I ask you an irrelevant
5 question? Why is sanofi spelled with a lower case s?

6 (Laughter)

7 MR. CARY: I think it's probably some
8 clever marketing person, Your Honor.

9 JUDGE ROTH: I thought it might be a
10 typewriter that didn't work.

11 JUDGE AMBRO: Well either that or it was
12 drafted by E.E. Cummings.

13 JUDGE ROTH: Yeah.

14 (Laughter)

15 MR. CARY: That's right.

16 But the point again is, Your Honors,
17 Eisai's prices were not lower than sanofi's prices to
18 those customers who were already using sanofi, they
19 were higher. They priced at about \$151 -- at \$183
20 where sanofi's price was \$151 for those customers.
21 They chose a pricing strategy. Their strategy was
22 match Lovenox's list price, and as Judge Fuentes
23 pointed out when sanofi's prices went up their prices
24 went up, and then only give discounts to those people
25 who were buying a majority of their purchases from

1 them. It's a pricing strategy.

2 Meritor makes very clear, it couldn't
3 be any clearer, and I'll quote, price cost test
4 "extends to above cost discounting or rebate programs
5 which condition the discounts or rebates on the
6 customer's purchases of a specified volume or a
7 specified percentage of requirements." That's what
8 this is.

9 So the clear holding in ZF Meritor
10 applied to the clear facts -- undisputed facts here
11 mean that summary judgment was appropriately granted.

12 JUDGE FUENTES: But it's the formulary
13 program that the way it was set up was to discourage
14 other hospitals or hospital organizations to not buy
15 from your competitors.

16 MR. CARY: Your Honor, we -- the only
17 repercussion of violating, if you will, the formulary
18 access clause is to lose the discounts. So if they
19 wanted to offer their own discounts, which were more
20 valuable, if they wanted to compete on price --

21 JUDGE FUENTES: Yeah, but it was set up so
22 that the more you buy from us the less you will buy
23 from any of our competitors.

24 MR. CARY: Well that's what market
25 share discounts do by definition.

1 JUDGE FUENTES: But you say the bigger
2 discount you will get by buying less from our
3 competitors.

4 MR. CARY: Right. And that's what
5 market share discounts do. The question was asked is
6 that illegal? Mr. Fastow responded it could be. ZF
7 Meritor makes unambiguously clear it is not illegal as
8 long as those prices are above cost in the paragraph
9 that I just read to you from page 274 in Meritor. If
10 all you're doing is offering a market share discount
11 the more you buy from me logically the less you buy from
12 others you get a lower price, unless that lower price
13 is below cost ZF Meritor could not be clearer.

14 And on formulary access again the only
15 stipulation is you will not disadvantage sanofi in
16 order to get the discount. You can choose to forego
17 sanofi's discount and instead take an equivalent
18 discount from Eisai and convert 50 percent, 60
19 percent, 70 percent, whatever percent you want. It's
20 a matter of price competition. They chose not to
21 compete for all those customers by charging them a
22 high price and not giving them a discount.

23 As Your Honor pointed out a new entrant
24 in a marketplace typically will come in and offer a
25 discount in order to entice customers to move away

1 from the product they're using. They chose not to do
2 that. They chose to preserve profits at the expense
3 of market share and then they say now put the
4 handcuffs on sanofi, now prohibit sanofi from offering
5 its own discounts.

6 Well as Matsushita makes clear that
7 is the essence of competition. Each company can go in
8 and try to entice customers to move by offering them
9 the better price.

10 JUDGE AMBRO: Is it fair to say that if
11 you have a competition between two products with
12 different but overlapping functions, some are the
13 same, some are different, that the market's demand for
14 the overlapping functions is a contestable part of the
15 demand while the market's demand for a function that
16 only one of them has is an incontestable part of the
17 demand of the market?

18 MR. CARY: Your Honor, I would not
19 describe it that way, and I don't think that --

20 JUDGE AMBRO: I understand and that's
21 Professor Elhauge's analysis.

22 MR. CARY: Right.

23 JUDGE AMBRO: But what's wrong with that
24 theory, which I've probably stated quite
25 simplistically?

1 MR. CARY: Yeah. What's wrong with
2 that theory is -- well the first thing that's wrong
3 with it is nowhere in the case law does that theory --
4 can it be found.

5 JUDGE AMBRO: No, I understand that, and
6 that's a question for the other side. But as a
7 theory --

8 MR. CARY: Yes.

9 JUDGE AMBRO: -- does it make sense to at
10 least in terms of setting up the players use that as a
11 way to understand the issue before we actually get to
12 the issue?

13 MR. CARY: Your Honor, I don't think
14 so, and it goes back to the distinction that ZF
15 Meritor drew between LePage's and the facts of ZF
16 Meritor.

17 In LePage's you're talking about
18 different product markets, so you're talking about
19 products that are not functionally interchangeable.

20 Here these products are in the same
21 market, you heard Mr. Fastow say that --

22 JUDGE AMBRO: Well yes and no. To some
23 extent they're the same market for deep vein
24 thrombosis, to some extent they have other -- each has
25 other things that it can treat that one has the other

1 one does not. So what's wrong with saying, okay, I'm
2 looking for a way to analyze, they're saying that
3 there's been an antitrust violation, you're saying
4 there hasn't. How do I go about at least setting up
5 the players or setting up the parts of the issue that
6 I need to look at before I do the actual analysis?

7 MR. CARY: Well --

8 JUDGE AMBRO: I'm almost asking you a
9 factual means of making sure that I have the
10 predicates for the analysis correct.

11 MR. CARY: Right. So let me walk
12 through several -- several levels of that question.

13 First level, if they're in the same
14 market, which is what Eisai alleged here, then they
15 are functionally interchangeable. Factually they have
16 alleged that they are clinically interchangeable.

17 JUDGE AMBRO: In part.

18 MR. CARY: The lack --

19 JUDGE AMBRO: In part.

20 MR. CARY: No, the lack of a label
21 indication does not prevent a physician from
22 prescribing either drug for any of the indications
23 with respect to these kinds of products. It is -- it
24 precludes the pharmaceutical company from promoting
25 it, it does not preclude an individual physician from

1 prescribing it, and --

2 JUDGE AMBRO: Let me --

3 MR. CARY: -- in fact many hospitals
4 converted 100 percent to Fragmin for all uses. And in
5 other countries they're used interchangeably for these
6 other uses.

7 JUDGE AMBRO: What function of sanofi's
8 drug, Lovenox, would a doctor prescribe that is not
9 contained in Fragmin? You're a doctor in --

10 MR. CARY: I don't believe -- I don't
11 believe there are any. I believe the record here is
12 that these products were clinically interchangeable.

13 JUDGE AMBRO: There's no -- there's 100
14 percent overlap is what you're saying.

15 MR. CARY: One hundred percent overlap.
16 There were differences in label indications, but as
17 judge -- as the judge below indicated that is a
18 function of quality competition. In other words Eisai
19 could have done the clinical trials, could have
20 established the label indication and then been free to
21 promote it. So that's point number one. Because
22 they're in the same market, because they're clinically
23 interchangeable it's a function of competition --
24 quality competition, what indications you go for.
25 Fragmin had its own indication in oncology, as sanofi

1 went for its indication in a particular type of
2 cardiac use.

3 But in any event going to the second
4 part of your question as a factual matter those
5 indications are less than 10 percent of the market.

6 JUDGE AMBRO: So would a doctor think of
7 Fragmin with regard to that particular type of cardiac
8 use?

9 MR. CARY: Yes.

10 JUDGE AMBRO: Still would.

11 MR. CARY: Yes.

12 JUDGE AMBRO: Still could.

13 MR. CARY: Still could, yes. The only
14 prohibition is that the company is not permitted to
15 promote for that use if they don't have a label
16 indication. Hospitals can and did switch 100 percent
17 away from Lovenox.

18 JUDGE AMBRO: But if a company can't
19 promote for that use based on the approval that's been
20 given to it, doesn't that really make the case for the
21 other side that there are differences between the two
22 drugs?

23 MR. CARY: The only difference --

24 JUDGE AMBRO: Overlapping -- some
25 overlapping, some not?

1 MR. CARY: The only difference is that
2 sanofi has invested in those clinical trials, Eisai
3 invested in different clinical trials, nothing
4 prevented Eisai from getting that label indication.
5 It chose not to do that.

6 But again, in terms of the facts of
7 this case which Your Honor asked me to apply it, here
8 both indications, their indication is around five
9 percent, the cardiac indication is less than eight
10 percent -- eight to ten percent, so it's a very small
11 portion. Even if you were to look at that as
12 incontestable they could have overcome any discount
13 offered on account of those -- those indications and
14 they did so. There are hospitals that converted 90
15 percent to Fragmin, 85 percent to Fragmin.

16 The record shows that hospitals in a
17 variety of contexts have different splits between
18 Fragmin and Lovenox, and the conclusion as to which
19 one to use is based on the doctors' preferences, the
20 hospitals' preferences, and the price.

21 And when they did in fact go out of --
22 when Eisai went out of its template of structured
23 discounts and offered greater discounts the record
24 evidence is that they usually won those -- those
25 contests. It was only because they chose not to

1 extend that so-called out of template program further.
2 They chose not to compete on price further that their
3 market share was what it was.

4 JUDGE FUENTES: I would --

5 JUDGE AMBRO: Go ahead.

6 JUDGE FUENTES: I'm sorry. I would imagine
7 you would be a fan of the price cost test in this
8 case.

9 MR. CARY: Yes.

10 JUDGE FUENTES: But you heard your
11 adversary on the other side say LePage's really
12 controls, and the price cost test that was adopted in
13 Meritor was in the fashion of a footnote and it was
14 dicta. Can you respond to that?

15 MR. CARY: Yes. First of all it was
16 not in the footnote, it was in the text at page 274 to
17 276, they describe the price cost test.

18 JUDGE AMBRO: Well footnote 11 says,
19 "Accordingly, we join our sister circuits in holding
20 that the price cost test applies to market share or
21 volume rebates offered to suppliers within a single
22 product market." But you can't really make that
23 holding in a footnote to contradict a -- what was done
24 en banc in LePage's, right?

25 MR. CARY: That's correct, but LePage's

1 made very clear that the gravaman, the thrust of
2 LePage's was about bundling products in different
3 product markets. It was using the market power in one
4 product market in order to extend the monopoly in
5 another product market. And the court analogized in
6 LePage's that conduct to tying and said it's the same
7 infirmity as tying.

8 And unlike here where Eisai could have
9 done a clinical trial and gotten any label indication
10 that was appropriate for this category of drugs it's
11 not the case in LePage's that LePage's can go off and
12 enter a variety of different product markets in order
13 to counter-balance that impact. That's the
14 fundamental difference. That's why the court
15 correctly said in a single product market case the
16 price cost test will always apply if that's --

17 JUDGE AMBRO: Well ZF Meritor was a
18 single product.

19 MR. CARY: Sorry?

20 JUDGE AMBRO: ZF Meritor was a single
21 product, manual transmissions.

22 MR. CARY: Yes.

23 JUDGE AMBRO: And the court there didn't
24 ultimately do a predatory pricing analysis, it did an
25 exclusive dealing analysis did it not?

1 MR. CARY: Yes.

2 JUDGE AMBRO: So why can't you do that
3 here?

4 MR. CARY: Because in Meritor --

5 JUDGE AMBRO: It goes straight to the
6 alternative holding of Judge Cooper.

7 MR. CARY: Right. Because in ZF
8 Meritor the majority opinion was very clear that
9 access to the product was jeopardized. Access to
10 Eaton's products was jeopardized. If you did not
11 comply with their demands you would lose that product,
12 and that product, because it was a highly popular
13 product among truck buyers was something that dealers could
14 not afford to lose.

15 And in fact I would urge you to review
16 the oral argument transcript where Mr. Fastow said,
17 quote, "No, they wanted their only placement in the
18 books." They wanted exclusivity. And to quote
19 Mr. Fastow again, "They wanted the other products out."
20 That was a very different case than this one.

21 In this case no hospital is precluded
22 from buying as much Lovenox as they want. The only
23 repercussion of not meeting a market share target is
24 that you don't get the associated market share
25 discount.

1 JUDGE AMBRO: Well, I mean the argument
2 or the theory is that there is this dead zone where it
3 is economically unappealing to any rational person to
4 have a competitor purchased in lieu of Lovenox.

5 MR. CARY: Yes, the dead zone is an
6 artifice of Eisai's pricing decision. As Judge Cooper
7 points out, if you increase -- if Eisai increased
8 their discounts that dead zone shrinks, and eventually
9 it shrinks down to virtually nothing. They chose not
10 to drop their discounts and --

11 JUDGE AMBRO: But your answer necessarily
12 assumes that there is a dead zone, you're just
13 disagreeing on the amount of the dead zone.

14 MR. CARY: No, no, I don't agree that
15 there's a dead zone, I was merely using their
16 definition. And this is critically important.
17 Professor Elhauge essentially redefines foreclosure in a
18 way not to be found in the case law.

19 Foreclosure is about the opportunity to
20 compete. Eisai had the opportunity to compete, they
21 had customers at the wide range of market shares.
22 They chose what their discount structure would be, and
23 they chose when to discount to win business and when
24 not to discount to win business. There is no dead
25 zone. Every customer --

1 JUDGE AMBRO: So how could -- could the
2 sale by Eisai of Fragmin ever be so low as to
3 eliminate completely the dead zone?

4 MR. CARY: In the price it could be,
5 yes.

6 JUDGE AMBRO: How so?

7 MR. CARY: Well, I think in the -- well
8 using -- first of all every customer can be competed
9 for by offering the maximum discounts that Eisai was
10 prepared to offer.

11 So Professor Elhauge himself says that if
12 Eisai were able to convince a customer to buy more
13 than 64 percent of its requirements from it the dead
14 zone goes away. If they were able to convince them to
15 buy less than ten percent the dead zone goes away.
16 Within the range -- so every customer is open to
17 competition. All they need to do is come in and say
18 convert to us, convert 60 percent to us, 70 percent,
19 80 percent, whatever it is, and you will be better off
20 having converted to us than sticking with sanofi's
21 discounts. That's number one. There is no dead zone.

22 If the customer was not prepared to
23 convert 60 percent, let's say they were prepared to
24 convert 50 percent or 40 percent, all Eisai need do is
25 go out of template, as they call it, instead of the 40

1 percent discount that they offer for 50 percent or
2 more go to 48 percent, the dead zone shrinks. And
3 again, I use that terminology as they use it not
4 because there is such a thing, but the dead zone
5 shrinks. They can compete for 100 percent of the
6 customers simply by convincing them to buy more than
7 64 percent from them or by offering greater discounts
8 and buying less of their requirements from them.

9 There's no customer that's off limits
10 to competition, and that's why this is not foreclosure
11 and that's why Professor Elhauge needs to redefine the
12 term in a way that's not found in any of the case law
13 in order to make the case that there's foreclosure
14 here.

15 JUDGE AMBRO: All right. Thank you very
16 much.

17 Mr. Fastow?

18 MR. FASTOW: Thank you.

19 Well first of all sanofi's counsel
20 studiously avoids LePage's and Dentsply. Can't ignore
21 that.

22 Second on this question of
23 incontestable demand and the dead zone, that's
24 exactly --

25 JUDGE AMBRO: Well, I mean his point

1 about LePage's and Dentsply is that they were -- they
2 were bundling of multiple products and you're trying
3 to apply that to a single product case with what you
4 argue are overlapping on some distinctive functions,
5 he's saying that actually they're the same functions,
6 but you have only permission to put them out there
7 for certain of those functions. So --

8 MR. FASTOW: What we're saying is that
9 the payment for exclusivity are more anti-competitive
10 than the bundle of rebates in LePage's. Because in
11 LePage's at least the defendant was saying I'm trying
12 to sell more of my products across my multiple product
13 lines. Here what sanofi is saying is I want to be
14 able to raise my prices, and so I'm not going to make
15 my product more attractive. In LePage's 3M said I'm
16 making my products more attractive, still lost. Here
17 what is happening is sanofi is saying I'm making my
18 products less attractive to consumers, and the way I'm
19 going to do that is by making rival products even more
20 unattractive artificially.

21 And so what you have is -- counsel says
22 that the notion of incontestable demand isn't in the
23 case law. That term isn't used, but it's very clear
24 in ZF Meritor. The whole discussion of the full
25 product line.

1 Just as counsel says theoretically we
2 could have gotten FDA approval for another indication,
3 there theoretically the plaintiffs in ZF Meritor could
4 have created a factory to build performance
5 transmissions.

6 JUDGE ROTH: Well that's a very
7 different situation.

8 MR. FASTOW: No, Your Honor.

9 JUDGE ROTH: Building a factory and when
10 you are applying to the FDA for an approval and use
11 you can think ahead of what you need or you can adapt
12 without having to build a whole new factory.

13 MR. FASTOW: Well first of all I
14 shouldn't say build a whole new factory. There was a
15 factory, they could have added a line of performance
16 transmission. I don't mean to suggest with a whole
17 new factory.

18 And second, getting FDA approval is a
19 very expensive proposition. The District Court says
20 that there are barriers to entry in this market in
21 large part because of the FDA barriers. So it's not
22 an easy thing. And to say that well all they could
23 not do is promote or market it.

24 Well imagine if you had to go to a
25 store and the store couldn't say you can drink diet

1 Coke for refreshment. You know, we can have it sit
2 here but we can't tell you why it's good for you.

3 Well that's what the FDA --

4 JUDGE ROTH: It's not good for you.

5 MR. FASTOW: -- barrier --

6 JUDGE ROTH: It's not good for you.

7 MR. FASTOW: My wife would agree with
8 you, Your Honor.

9 But so you do have plainly that same
10 proposition --

11 JUDGE AMBRO: That's what you told me
12 last night too.

13 JUDGE ROTH: Yeah.

14 MR. FASTOW: -- in the ZF Meritor case.
15 And what you also have in ZF Meritor, and sanofi's
16 counsel studiously avoids again is the scope of the
17 anti-competitive conduct, that the court in ZF Meritor
18 used the standard of clearly predominant, that low
19 price was the clearly predominant mechanism of
20 exclusion.

21 But here whatever you want to call their
22 payments for market share exclusivity here we have the
23 formulary access clauses and we have the whole set of
24 FUD and other anti-competitive marketing conduct.

25 So even if you were to believe that the

1 payments for exclusivity were Brooke Group discount it
2 still wouldn't fit this case into the safe harbor
3 because of all of the other anti-competitive conduct
4 that was implemented by sanofi as an abuse of its
5 monopoly power to try to protect its high and rising
6 prices.

7 And on the footnote 11, which keeps
8 coming up, let me emphasize that with all respect the
9 "accordingly" sentence, the reference to market share --
10 and that's picked up a couple times in the text, but
11 footnote 11 is the real discussion there -- with
12 respect it's a non sequitur. When you look at the
13 discussion before that all it's saying is well LePage's
14 was a multiple product market, this is a single
15 product market. And I've explained why I submit that,
16 you know, this court can't overrule LePage's.

17 But number two is -- then it says
18 "accordingly" and it starts talking about market share
19 payments with no discussion as to whether market share
20 payments are or are not within the scope of Brooke
21 Group. And the cases that it cites similarly there is
22 no discussion in any of those cases saying, all right,
23 this is what market share payments are and we're going
24 to look at them to see whether this is what the
25 Supreme Court was talking about in terms of benefiting

1 consumers by lowering prices.

2 So while it says that, it says
3 "accordingly" there really is, as you read it, no
4 accordingly there. The discussion before that was on
5 a completely different topic simply distinguishing a
6 multi-product case from a single product case that
7 doesn't go to whether market share payments are or are
8 not within the scope of Brooke Group.

9 And the last point I'd like to make is that
10 when you listen to sanofi and you read the District
11 Court decision it just brings you back to the fact
12 that this is a summary judgment motion, and sanofi
13 makes all kinds of arguments about price scenarios and
14 price situations, Elhauge figure 3 shows you the average
15 prices, with sanofi's prices being substantially
16 higher than Eisai's prices, and if there are issues of
17 fact to be decided of particular sales and marketing
18 scenarios, well that's for the jury, that's not for
19 summary judgment.

20 JUDGE AMBRO: Thank you.

21 MR. FASTOW: Thank you.

22 JUDGE AMBRO: Thank you very much. Thank
23 you both counsel for very well presented arguments.

24 We'll take the matter under advisement.

25 We would ask as I had done in the previous case if

1 counsel would get together with the clerk's office,
2 have a transcript prepared of this oral argument and
3 to split the cost evenly.

4 Thank you.

5 (Proceedings concluded at 12:12 PM)

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C E R T I F I C A T I O N

I, Dawn South, certify that the foregoing transcript is a true and accurate record of the proceedings.



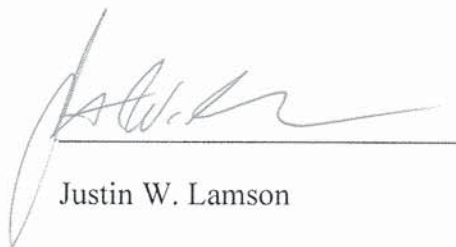
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Date: January 20, 2015

CERTIFICATION

I, Justin W. Lamson, certify that the foregoing transcript is a true and accurate record of the proceedings.

A handwritten signature in black ink, appearing to read "Justin W. Lamson", is written over a solid horizontal line. The signature is cursive and extends to the right of the line.

Justin W. Lamson

Date: 1/26/2015

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