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.	Case No. 3:08-cv-4168 (MLC/DEA) District Judge Mary L. Cooper Magistrate Judge Douglas E. Arpert Motion Return Date: *Document Filed Electronically*

MEMORANDUM IN OPPOSITION TO DEFENDANT SANOFI'S MOTION FOR SUMMARY JUDGMENT ON LIABILITY

Timothy I. Duffy
Joseph C. Amoroso
COUGHLIN DUFFY LLP
350 Mount Kemble Avenue
P.O. Box 1917
Morristown, NJ 07962-2075
Telephone: (973) 267-0058
Facsimile: (973) 267-6442
tduffy@coughlinduffy.com

Thomas J. Cullen, Jr. (admitted *pro hac vice*)
Kamil Ismail (admitted *pro hac vice*)
James A. Frederick (admitted *pro hac vice*)
Eben S. Flaster (admitted *pro hac vice*)
Derek M. Stikeleather
GOODELL, DEVRIES, LEECH & DANN, LLP
One South Street, Twentieth Floor
Baltimore, Maryland 21202
Telephone: (410) 783-4000
Facsimile: (410) 783-4040
tjc@gdldlaw.com
kxi@gdldlaw.com

Attorneys for Plaintiff Eisai Inc.

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INTRODUCTION

Defendants sanofi-aventis U.S. LLC and sanofi-aventis, U.S., Inc.'s ("sanofi") motion for summary judgment on liability reflects its conduct in the market: unreasonably aggressive, manipulative, and without any regard for the controlling rules and authorities. The crux of its argument is that the Third Circuit's recent Meritor opinion must be construed to say the exact opposite of what it actually holds. Sanofi divines from Meritor a bright-line rule on loyalty discounting that flatly contradicts its holding and result. Sanofi's view also contradicts the settled law of the case as the Court has already considered and ruled upon these issues and no new facts warrant re-opening those decisions. Sanofi's brief even contradicts the express views of the economist that it cites as supporting its opinion. In sum, sanofi's brief denies reality.

In a case that presents myriad genuine issues of material fact that preclude summary judgment for sanofi, sanofi remains conspicuously muted on any pro-competitive efficiencies that might justify its indefensible contracting, sales, and marketing practices. Instead, it defiantly insists that hundreds of pages of legal argument and thousands of pages of exhibits all stand for the proposition that 'there's nothing to see here' and the case is essentially over. Not so. Sanofi [redacted] by ignoring the rules and bullying the market. But these same tactics will not win this lawsuit. Sanofi's summary judgment motion should be denied.

LEGAL STANDARD

Controlling authority is clear that the "traditional summary judgment standard applies with equal force in antitrust cases." Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1000-01 (3d Cir. 1994) (reversing summary judgment on multiple antitrust claims); InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 159-60 (3d Cir. 2003) (recognizing generally that "the movant's burden on a summary judgment motion in an antitrust case 'is no different than in any other case'"). Even in the specific context of antitrust litigation, the Third Circuit is "keenly aware that credibility determinations are not the function of the judge; instead the non-movant's evidence must be credited" at summary judgment. J.F. Feeser, Inc. v. Serv-a Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (vacating summary judgment and holding that "[w]hen summary judgment is requested in the context of antitrust litigation, adherence to [traditional] standard is appropriate"); Miller v. Indiana Hosp., 843 F.2d 139, 143 (3d Cir. 1988) (reversing summary judgment and holding that purported requirement that an antitrust plaintiff must produce "substantial evidence" to survive summary judgment "has no place in an antitrust case where Congress has given the jury the responsibility of resolving disputed fact issues"). Rule 56 does not put a heavier burden on antitrust plaintiffs.

Sanofi's brief ignores these well-settled legal standards for summary judgment in antitrust actions and argues incorrectly that simply because this is an antitrust case Eisai's evidence must "overcome a higher threshold" to withstand summary judgment. *See* Def.'s Mot. at 8 (citing Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 73 (3d Cir. 2010); In re Flat Glass Antitrust Litig., 385 F.3d 350, 357 (3d Cir. 2004)). Not so. These cases address the Supreme Court's Matsushita standard.[1] *See* id. (citing Matsushita Elec. Indus. Co. v. Zenith

[1] Sanofi tries to stretch Race Tires far beyond the limits set by prior controlling precedent. *See* Defs.' Br. at 8 (arguing that Race Tires "clarified" the evidentiary burden on plaintiff opposing summary judgment in antitrust action). Race Tires' recitation of the "higher threshold" language from Flat Glass (paraphrasing Matsushita) is mere *dictum* given that Race Tires (1) never actually applied a "higher threshold" and (2) favorably cited Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 468 (1992), which holds that Matsushita "did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases . . . . Matsushita demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision." Sanofi's attempt to deviate from a settled controlling precedent cannot be a "clarifi[cation]" of a legal standard. *See* Holland v. N.J. Dep't of Corrections, 246 F.3d 267, 278 (3d Cir. 2001) ("[T]o the

Radio Corp., 475 U.S. 574, 588 (1986)). And Matsushita only applies when a plaintiff's antitrust claim rests solely on (1) *circumstantial* evidence of (2) an alleged *conspiracy*. *See* Rossi v. Standard Roofing, Inc., 156 F.3d 452, 466 (3d Cir. 1998) ("Under our jurisprudence, the Matsushita standard only applies when the plaintiff has failed to put forth direct evidence of conspiracy.") *See also* Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1001 (3d Cir. 1994) (holding that "the analyses set forth in Monsanto and Matsushita do not apply when a plaintiff has offered direct evidence of concerted action"); InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 160 (3d Cir. 2003) ("[W]hen a plaintiff relies solely on circumstantial evidence in an antitrust case, we must apply special considerations so that only reasonable inferences are drawn from the evidence. This is because 'antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case.'") (quoting Matsushita, 475 U.S. at 588)).

The Matsushita standard does not apply here. First, Eisai is not challenging an alleged conspiracy but an actual contract, the Lovenox Systems Agreement, second, Eisai's case does not rest solely on ambiguous circumstantial evidence.

LEGAL ARGUMENT

I. Sanofi's renewed request for rigid application of the price-cost test over the Rule of Reason was rejected by the Court in 2009, rejected by the Third Circuit's recent Meritor opinion, and is rejected by a current F.T.C. Commissioner whom sanofi itself cites

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extent that [a case within the circuit] is read to be inconsistent with earlier case law, the earlier case law . . . controls"). Instead, under Third Circuit rules, any panel opinion that contradicts a prior panel opinion should not be followed. *See* Pardini v. Allegheny Intermediate Unit, 524 F.3d 419, 426 (3d Cir. 2008) ("Accordingly, '[t]his Circuit has long held that if its cases conflict, the earlier is the controlling authority and the latter is ineffective as precedents.'") (quoting United States v. Rivera, 365 F.3d 213, 213 (3d Cir. 2004)). In any event, even if the "higher threshold," from Matsushita did apply, Kodak makes clear that the only burden it imposes is that "the plaintiffs' claims make s economic sense," which is plainly true here. Kodak, 504 U.S. at 468.

Sanofi's insistence that it could not possibly have violated the antitrust laws because Eisai did not allege or prove that Lovenox was priced below cost lacks merit. This Court considered and rejected the same argument in 2009 on sanofi's motion to dismiss, and none of the relevant facts have changed since then. The rule of reason is both the controlling law of the case and has been embedded as controlling law in the Third Circuit's 2012 Meritor opinion. And a current Federal Trade Commissioner, on whom sanofi relies for its views on loyalty discounting has openly *rejected* application of the price-cost test to loyalty discounts.

A. It is law of the case that the rule of reason, not the price-cost, applies here

Sanofi has already made – and lost – its argument that Eisai must allege below cost pricing of Lovenox to have a valid antitrust claim. It is the law of the case that the rule of reason, not the price-cost test, applies here. When moving to dismiss the case in 2008, sanofi correctly noted the unremarkable fact that "Eisai makes no allegation that sanofi-aventis US has priced below cost . . . ." Defs.' 10/27/08 Mot. to Dismiss, ECF No. 28-2, at 11. From that modest factual predicate, sanofi made the legally incorrect argument that Eisai's failure to plead below-cost pricing in a single-product loyalty contract case invalidated its antitrust claims. *See* id. (quoting Brooke Group and citing other cases that it re-cites in its pending brief. But it has never been Eisai's theory that sanofi's Lovenox prices were predatory or "too low." *See* Pl.'s Opp. (ECF No. 34) at 20 (responding that complaint alleging Sherman and Clayton Act violations "requires no allegation of price-cost margins to make that allegation complete").

With the issue cleanly joined and without any factual dispute about below-cost pricing, the Court conducted a full hearing and denied sanofi's motion to dismiss. The Court ruled from the bench that this case "is a pure antitrust complaint" and "alleges sufficient facts to meet each of the essential elements of the type of Sherman I, the type of Sherman II and the type of Clayton

III allegations here." 6/12/09 Hr'g Tr. at 71. The Court further recognized that this was not an "improper bundling-type of allegation" but was based upon "at least a plausible economic theory of a rule of reason adverse economic effect based upon the ability to monopolize through these contracts." Id. at 70-71. The Court then reaffirmed this conclusion in its opinion rejecting Sanofi's first motion for summary judgment, noting that it had "already essentially rejected" Sanofi's argument that "its Lovenox discount program has the effect of lowering prices." The Court found it sufficient that Eisai's expert, Professor Einer Elhauge, had offered the opinion that [redacted] "causes an anticompetitive effect on the market because the exclusionary conditions attached to the different discount levels allow sanofi-aventis to charge higher prices than it otherwise would. . . . The conditioning of price discounts upon customers purchasing exclusionary levels of their requirements from an alleged monopolist effectively forecloses competitors from the market and prevents customers from dealing in the goods of competitors." Ex _, Memo Op. 20-21.

Sanofi now raises its price-cost argument yet a third time. But this Court's two prior decisions mean it is the law of the case that the Rule of Reason applies, not the price-cost test. *See* DeFranco v. Wolfe, 387 F. App'x 147, 156 (3d Cir. 2010) ("The law of the case doctrine 'expresses the practice of courts generally to refuse to reopen what has been decided.'" (quoting Messenger v. Anderson, 225 U.S. 436, 444 (1912) (Holmes, J.)); In re Pharmacy Benefit Managers Antitrust Litig., 582 F.3d 432, 439 (3d Cir. 2009) (recognizing "as a rule courts should be loathe to [revisit their own prior decisions] in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would make a manifest injustice").

B. Sanofi misconstrues Meritor as creating antitrust immunity for its contracting, sales, and marketing practices

To prevail on summary judgment, sanofi needs the Court to misread the Third Circuit's recent Meritor opinion and adopt sanofi's tortured construction of its holding. But Sanofi's construction of Meritor is simply unreasonable. It must be rejected.

1. Sanofi misinterprets ZF Meritor as establishing a per se rule for the price-cost test, which is what the Third Circuit's opinion squarely rejected

Sanofi's summary judgment motion fundamentally misconstrues ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254 (3d Cir. 2012), *cert. denied*, 12-1045, 2013 WL 673880 (U.S. Apr. 29, 2013). Meritor limited application of the price-cost test to instances where pricing is "the clearly predominant mechanism of exclusion" and held that "the rule of reason is the proper framework within which to evaluate Plaintiffs' claims." Id. at 277. It did not establish a per se rule that "single product loyalty discounts cannot be found to violate the antitrust laws unless the defendant's pricing has been below cost." *See* Defs.' Br. at 1. Notably, here and in Meritor:

- plaintiff challenged defendant's single product loyalty discounting as exclusive dealing under Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, id. at 263;
- plaintiff never alleged that defendant was engaging in predatory, *i.e.*, below-cost, pricing, id. at 267;
- defendant argued that it was entitled to summary judgment under the price-cost test because there was no evidence that it priced its goods below cost, id. at 263; and
- the "most significant issue in th[e] case" was "whether Plaintiffs' allegations under Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act [we]re subject to the price-cost test or the 'rule of reason' applicable to exclusive dealing claims," id. at 268.

Rejecting defendant's argument, Meritor "h[e]ld that Plaintiffs' claims are not subject to the price-cost test, and instead must be analyzed as de facto exclusive dealing claims under the rule of reason." Id. at 263, 303. Meritor limited application of the price-cost test to instances where pricing is "the clearly predominant mechanism of exclusion" and held that the antitrust rule of reason was otherwise applicable. Id. at 277.

Unfazed by this adverse controlling precedent, which found the defendant's above-cost single product loyalty discounts were anticompetitive, sanofi argues that Meritor somehow *supports* its argument. Incredibly, sanofi claims that Meritor held that "single product loyalty discounts cannot be found to violate the antitrust laws unless the defendant's pricing has been below cost." Defs.' Br. at 1. Wrong.

If sanofi's construction of Meritor were accurate, the defendant in Meritor would have won. But, in making the same above-cost pricing argument, the defendant, Eaton Corp., lost at trial and on appeal. Its petitions for review by the Third Circuit *en banc* and later the Supreme Court, were all denied. Remarkably, after Eaton's (and sanofi's) core position on the price-cost test has been squarely rejected, sanofi now defiantly declares victory. *See* Defs.' Br. at 14 (citing Meritor for argument that "price-cost test applies" here because "this is a single product loyalty discount case" without recognizing that Meritor was also "a single product loyalty discount case").

It is with a short memory and considerable audacity that sanofi and its expert, [redacted] argue here that Meritor *required* a price-cost test for all single product loyalty discounts. [redacted] recently signed a brief that asked the Supreme Court to *overturn* Meritor because it rejected a price-cost test, stating (correctly) that Meritor "held that loyalty or market share rebates could violate the antitrust laws even though the goods were priced above an appropriate measure of cost."[2] Brief for Eighteen Scholars as Amici Curiae in Support of Petitioner, Eaton Corp. v. ZF Meritor LLC, No. 12-1045 (U.S. filed Mar. 28, 2013) ("Amicus Br.") at 4 (filed March 28, 2013). [redacted] amicus brief further conceded that Meritor held that a price-cost test should be applied only "when price is the clearly predominant mechanism of exclusion." Id. at 5.

Sanofi obfuscates by narrowly citing to Meritor's footnote 11, which rejected the argument that a price-cost test *never* applies to loyalty discounts. But this footnote was used only to support the limited proposition that "predatory pricing principles, including the price-cost test, would control if this case presented *solely* a challenge to Eaton's pricing practices." Meritor, 696 F.3d at 273-74 & n.11 (emphasis added). Contrary to its early unqualified statements, sanofi only later concedes that Meritor held that the price-cost test did *not* apply to the loyalty discount at issue there and generally does not apply to loyalty discounts unless price is the clearly predominant mechanism of exclusion. Defs.' Br. at 12.

Eisai's theory of liability is consistent with Meritor and uses economic theories that Meritor specifically endorsed. In contrast, sanofi's expert is on record before the Supreme Court explicitly stating that he believes Meritor's rule of reason approach is "erroneous and unworkable" and who, thus, applied a price-cost test here that contradicts Meritor's holding. Amicus Br. at 4; Hausman Report ¶ 103. But Meritor explicitly rejects "a per se rule of non-liability under the antitrust laws for all contractual practices that involve above-cost pricing." Meritor, 696 F.3d at 278 ("We decline to impose such an unduly simplistic and mechanical rule because to do so would place a significant portion of anticompetitive conduct outside the reach

[2] Remarkably, [redacted] did so in a brief that stated his only interest was as an academic interested in the proper development of antitrust law, Amicus B at 3, [redacted]

of antitrust laws without adequate justification.").[3] Instead, it limited application of the price-cost test to instances where pricing is "the clearly predominant mechanism of exclusion" and held that "the rule of reason is the proper framework within which to evaluate Plaintiffs' claims." Id. at 277.

Meritor reinforces this Court's prior rulings. *See* id. at 269 ("declin[ing] to adopt [defendant]'s unduly narrow characterization of the case as a 'pricing practices' case, i.e., a case in which price is the clearly predominant mechanism of exclusion") This Court's prior rulings recognized, like Meritor, that "Plaintiffs consistently argued that the [Lovenox contracts] in their entirety constituted de facto exclusive dealing contracts, which improperly foreclosed a substantial share of the market, and thereby harmed competition." Id. In such circumstances, "[t]he price-cost test is not dispositive." Id.

2. The Rule of Reason applies here because pricing is not the sanofi's clearly predominant mechanism of exclusion of rivals from the LTC drug market

For multiple independent reasons, the facts here show that the rule of reason applies. Specifically, price was not sanofi's clearly predominant mechanism for exclusion of rivals in the LTC drug market because for several years sanofi's practices [redacted]

[3] This is consistent with LePage's and other cases in the Third Circuit, which have also rejected defendants' requests to immunize all exclusionary practices that do not include below-cost pricing. *See* Behrend v. Comcast Corp., CIV.A. 03-6604, 2012 WL 1231794, at *31 (E.D. Pa. Apr. 12, 2012) (LePage's, Inc. unequivocally closes the door in this Circuit on an assertion that above cost pricing safe-harbors otherwise exclusionary conduct.").

[redacted]

[redacted] Sanofi's argument for the price-cost test under Meritor thus must rest on the untenable premise that a monopolist's "clearly predominant method of exclusion" is predatory pricing even when its loyalty contracts prevent customers from buying *less* expensive rival products. Such obtuse reasoning turns Meritor on its head and violates the principle that antitrust laws should hesitate to condemn practices that lower prices for customers. *See* Meritor, 696 F.3d at 273 (recognizing proper context for application of price-cost test would be where plaintiffs are improperly "seeking to impose antitrust liability [on the defendant] for prices that are too low"). The rule of reason prevents mechanical application of a rule that would immunize behavior that harms both rivals and consumers by blocking access to rivals' less expensive products. Id. at 278; *see also* United States v. Dentsply Int'l, Inc., 399 F.3d 181, 189 (3d Cir. 2005) (recognizing that "economic realities rather than a formalistic approach must govern the review of antitrust activity").

Where, as here, loyalty contracts allow a monopolist to exclude rivals who, like Eisai, offer their products at *lower* prices, it cannot possibly be the case that price was the predominant mechanism of exclusion. Instead, the loyalty contracts here excluded rivals *despite* sanofi's higher prices. In this respect the evidence here is even stronger than in Meritor, where the court held that price was not the predominant mechanism of exclusion for loyalty contracts even though there the "[defendant's] average prices were lower than Plaintiffs' average prices, and on several occasions, Plaintiffs declined to grant price concessions requested by the OEMs."

Meritor, 696 F.3d at 266-67. *See also* Dentsply, 399 F.3d at 186 (applying rule of reason to exclusive dealing claims despite recognizing that "rivals are not entirely excluded from the market and some of their prices are higher"). Sanofi cites no case applying a price-cost test to a loyalty contract that foreclosed a *lower*-priced rival.

[redacted] Meritor holds that price is not the clearly predominant mechanism of exclusion even for a freely terminable loyalty discount when buyers had some incontestable demand they could not satisfy without at least some purchases from the monopolist, and would have to suffer higher prices on those incontestable purchases to buy more from the rival. *See* Meritor, 696 F.3d at 278, 283, 287. [redacted] Similarly, Meritor applied the rule of reason in part because of its recognition that "due to Eaton's position as the dominant supplier, no OEM could satisfy customer demand without at least some Eaton products, and therefore no OEM could afford to lose Eaton as a supplier." Meritor, 696 F.3d at 283. When monopolists bundle their incontestable and contestable demand, as sanofi did here, the rule of reason applies. *See* id. at 285 (recognizing that a monopolist can improperly "use its power to break the competitive mechanism and deprive customers of the ability to make a meaningful choice."). Sanofi cites no case that applies a cost test to a loyalty discount that bundled contestable and incontestable demand.

Sanofi wrongly argues that Meritor is limited to cases where the defendant "threatened to cut off supply entirely if customers allowed their purchases to drop below their market share thresholds." Defs.' Br. at 13. But nothing in Meritor indicates that the defendant there had ever threatened to cut off supply. Instead, Meritor relied on the mere possibility that the defendant *might* impose "financial penalties *or* supply shortages." Meritor, 696 F.3d at 277 (emphasis added); *see also* id. at 277-78 (citing risk of "cancellations," "shortages," *or* "price increases"). Moreover, the court so held even though only two of the four contracts there were terminable by the seller, id. at 265, and no one had ever been terminated for noncompliance, id. at 282-83, thus indicating that the price penalty on incontestable demand was the main mechanism of exclusion. [redacted] Because this is the main mechanism stressed in Meritor, this suffices to deny sanofi's motion. Moreover, Sanofi itself stresses [redacted] Thus, even if one wrongly concluded that the possibility of termination by the seller was a necessary factor in Meritor, it is clearly present here.

[redacted] Again, Meritor flatly contradicts this claim, because it found the loyalty contracts were anticompetitive even though they were "easily terminable" and "included a 'competitiveness' clause, which permitted the [buyer] to purchase from another supplier or terminate the agreement if another supplier offered a better product or a lower price." Meritor, 696 F.3d at 287. Other binding Supreme Court and Third Circuit authority concurs that buyer terminability does not negate the foreclosing effects of exclusionary contracts.[5] Sanofi's motion ignores this directly controlling authority. [redacted]

Meritor also held price was not the clearly predominant mechanism solution when the loyalty discounts raised buyer switching costs. 696 F.3d at 287. [redacted]

[5] See FTC v. Brown Shoe, 384 U.S. 316, 318-19 & n.13 (1966) (condemning discounts conditioned on obligation to "concentrate" dealer business on the defendant's shoes, which in practice meant 75% of purchases, even though buyers could "voluntarily withdraw" at any time), *rev'g* 339 F.2d 45, 53 (8th Cir. 1964) (sustaining agreement in part because "[r]etailers were free to abandon the arrangement at any time they saw it to their advantage so to do"); Standard Oil Co. v. United States, 337 U.S. 293, 296 (1949) (invalidating exclusive dealing agreements that lasted only one year and were terminable upon thirty days notice); Standard Fashion v. Magrane–Houston, 258 U.S. 346, 351–52 (1922) (condemning loyalty condition given for 50% discount even though loyalty contracts were terminable upon 3 months notice); v. Dentsply, 399 F.3d at 193 (holding loyalty contract illegal even though it was terminable); LePage's v. 3M, 324 F.3d 141, 147–52, 157 n.11 (3d Cir. 2003) (en banc) (condemning loyalty discounts even though they were terminable).

[redacted] Sanofi wrongly argues that this rationale is limited to cases where the defendant "required two of four customers to remove competitive products entirely from their respective 'data books,' which were essential in making downstream sales." Defs.' Br. at 13. But this argument fails for several reasons. First, the only enforcement of this condition in Meritor was that the defendant *might* impose "financial penalties *or* supply shortages," Meritor, 696 F.3d at 277 (emphasis added). Second, this databook exclusion in Meritor applied to only two of the four customers; one of those two customers did not actually comply with this condition, and the other complied only to avoid losing price rebates. Id. at 265-266. Thus, Meritor flatly contradicts sanofi's claim that an exclusionary condition cannot be anticompetitive if the only penalty imposed for violation is increased prices. To the contrary, Meritor explicitly held that the fact that buyers accepted the exclusionary conditions only to avoid higher prices was "not dispositive." Id. at 277.

Further, contrary to sanofi's defense claim that inclusion in these data books was "essential to making downstream sales," Defs.' Br. at 13, Meritor observed there that "buyers always remained free to request" unlisted products, but that this is insufficient to establish that rivals "were not foreclosed" because "doing so involved additional transaction costs." Meritor, 696 F.3d at 287. Thus, Meritor clearly establishes that contracts that increase the transaction costs of buying from rivals are foreclosing.

Meritor held that price was not the clearly predominant mechanism of exclusion, even though a clause there allowed buying from a rival whenever that rival offered a lower price or better product, because the court accepted the theory that this clause was irrelevant when the loyalty discount program produced a foreclosure that prevented the rival from becoming efficient enough to supply all demand or offer a lower price. Id. at 287. *See also* id. at 281 (indicating that excluding "potentially" equally efficient rivals is as bad as excluding an equally efficient one). Here the facts are even stronger. [redacted] Defendants cite no case that applies a cost test to a loyalty discount that raised rival costs.

[redacted]

[redacted] But no exclusive dealing agreement ever makes sales by a rival literally impossible. The buyer under any exclusive dealing contract could always buy from the rival as long as they were willing to incur the financial penalties. Yet exclusive dealing agreements are clearly deemed foreclosing. The caselaw is clear that a contract is foreclosing if it creates any "clog on competition." Standard Oil & Standard Stations v. United States, 337 U.S. 293, 314 (1949). In one case, the Supreme Court considered an agreement that allowed buyers to purchase a product from a rival whenever the defendant would not match the rival price. *See* Int'l Salt Co. v. United States, 332 U.S. 392, 396–97 (1947). Even though the rival could overcome the exclusionary condition by pricing one penny below the defendant, the Court treated this as a condition to "foreclose competitors." Id. at 396. The Court reasoned that the clause freeing buyers if the rival priced lower than the defendant: "does not avoid the stifling effect of the agreement on competition. The [defendant] had at all times a priority on the business at equal prices. A competitor would have to undercut [defendant's] price to have any hope of capturing the market, while [the defendant] could hold that market by merely meeting competition. We do not think this concession relieves the contract of being a restraint of trade..." Id. at 397. Thus, the Court equated "foreclosure" with "restraint" on buying from rivals, even where the restraint exercised a penalty of only one penny. Later, the Court reaffirmed this conclusion, finding that another agreement that allowed buyers to purchase a product from a rival whenever the defendant would not match the rival price was an agreement to "foreclose competitors". N. Pac. Ry. Co. v. United States, 356 U.S. 1, 9, 11–12 (1958).

[redacted]

[redacted]

C. A current F.T.C. Commissioner rejects sanofi's argument against application of the Rule of Reason to single-product loyalty discounting

Sanofi's argument against the rule of reason in exclusive dealing cases that challenge single-product loyalty discounting errs in its depiction of the views of Eisai's antitrust expert, Harvard Law Professor Einer Elhauge, as contrary to Third Circuit law and "out of synch with prevailing economic thinking." *See* Defs.' Daubert Mot. to Excl. Prof. Elhauge ("Defs.' Elhauge Br.") at 3-5. As stated above, Prof. Elhauge's views line up squarely with Meritor and the commonly held view that the price-cost test is a poor vehicle for judging exclusive dealing claims.

Sanofi cites "now-Federal Trade Commissioner Joshua Wright, a highly regarded Ph.D. economist," as a prime example of the supposedly dominant view that the price-cost test must be applied in the absence of below-cost pricing. Defs.' Elhauge Br. at 4. But Commissioner Wright recently announced his view that "exclusive dealing law [*i.e.*, the rule of reason] is ***superior to price-cost legal standards for evaluating loyalty discounts***." *See* Pl's Suppl. St. ¶ 18.

Commissioner Wright explained that "[p]rice-cost tests . . . simply do not comport with the underlying economics of exclusive dealing." *Id.* He contrasted the price-cost test with the rule of reason in evaluating loyalty discounts as a choice "between a simple legal test based upon the wrong economic model and a legal test — albeit a more complex rule of reason analysis — based upon a more accurate set of economic models." *Id.* Thus, "the legal framework developed to evaluate exclusive dealing claims ought to be used to evaluate claims relating to loyalty discounts." *Id.*

Because of the superiority of the rule of reason over the price cost test in loyalty discounting cases, Commissioner Wright endorses the rule of reason for F.T.C. decisions on bringing enforcement actions as well as in court cases. *See id.* Thus, Prof. Elhauge's opinion on the limits of the price-cost test in loyalty discounting cases is not "his own novel and legally irrelevant view about the effects of loyalty discounts." Defs.' Elhauge Br. at 13, 15. It is the same view held by the Third Circuit and F.T.C. Commissioner Wright. [6]

II. The slow erosion of sanofi's monopoly power does not prove that its actions were pro-competitive, especially where sanofi has never stated any pro-competitive efficiency for its loyalty contracts

Sanofi argues incorrectly [redacted]

The Third Circuit explained why, under the rule of reason, single product loyalty discounting can be anticompetitive, even where the dominant firm loses market share:

> [S]uppose an established manufacturer has long held a dominant position but is starting to lose market share to an aggressive young rival. A set of strategically planned exclusive-dealing contracts may slow the rival's expansion by requiring it to develop alternative outlets for its product, or rely at least temporarily on inferior or more expensive outlets. Consumer injury results from the delay that the dominant firm imposes on the smaller rival's growth.

Meritor, 696 F.3d at 271 (quoting Phillip Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1802c, at 64 (2d ed. 2002)). The mere fact that a rival fights and makes some gains in its battle against a monopolist's anticompetitive practices does not mean that there was never any violation to begin with. *See*, *e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366, 381 (1973) (holding that three rivals' eventual success in breaking monopoly "does not condone the anti[competitive] tactics which [defendant] sought to impose").

[redacted]

[redacted]

[redacted] The question is whether sanofi acted anti-competitively to maintain its monopoly power. *See* Dentsply, 399 F.3d at 196 ("While we may assume that [defendant] won its preeminent position by fair competition, that fact does not permit maintenance of its monopoly by unfair practices."). That Lovenox's market share still exceeded 90 percent almost 15 years after it entered the market suggests that sanofi *did* harm competition, even if its stranglehold was slowly slipping. The issue is not whether Eisai and other rivals had any "commercial success," Defs.' Br. At 23, but whether they would have enjoyed *more* success if sanofi had not acted unlawfully. *See* Standard Oil v. United States, 337 U.S. 293, 308-09 (1949).

[redacted] *See, e.g.*, Meritor, 696 F.3d at 266 (recognizing that plaintiff's "transmissions required frequent repairs and in 2002 and 2003, [plaintiff] faced millions of dollars in warranty claims"); Dentsply, 399 F.3d at 185 (recognizing that defendant's main "competitors did not as actively promote their products" and that the plaintiffs' "apparent lack of aggressiveness is not a matter of apathy, but a reflection of the effectiveness of [defendant's] exclusionary policy"). [redacted]

The rule of reason requires a defendant with "market power" to show that its "challenged conduct promotes a sufficiently pro-competitive objective" or "normal business purpose." United States v. Brown Univ., 5 F.3d 658, 668-69 (3d Cir. 1993); LePage's, 324 F.3d at 164.

[redacted]

[redacted] *see also* QBE Ins. Corp. v. Jorda Enterprises, Inc., 277 F.R.D. 676 (S.D. Fla. 2012); *see also* Ierardi v. Lorillard, Inc., 1991 WL 66799, at *2 (E.D. Pa. Apr. 15, 1991).[8]

III. Sanofi's sales and marketing practices are relevant to Eisai's antitrust claim, which looks at sanofi's conduct taken as a whole

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[redacted]

Sanofi casts out a host of straw-man arguments to try to avoid having to explain the [redacted] Sanofi's arguments resolve few, if any, of the genuine issues of material fact that require denial of its summary judgment motion.

[redacted] *See* W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 109 n.14 (3d Cir. 2010) (recognizing that making false statements about a rival, "can give rise to antitrust liability, especially when it is combined with other anticompetitive acts").[9]

[redacted] *See* LePage's, 324 F.3d at 162 (examining anticompetitive effect of defendant's "exclusionary practices considered together" and "the monopolist's conduct taken as a whole"; Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962); *see also* Caldera, Inc. v. Microsoft Corp., 72 F. Supp. 2d 1295, 1319 (D. Utah 1999).

Sanofi tries to further derail the Court's inquiry by asking the Court to apply a test that a few other circuits'– but not the Third Circuit – use only when assessing antitrust claims whose sole or primary basis for liability is "advertising or speech." *See* Defs.' Br. at 28. But the Third

[9] Santana Products Inc. v. Bobrick Washroom Equipment Inc., 401 F.3d 123 (Third Circuit 2005), on which sanofi relies, was not a monopolization claim; the Third Circuit later recognized that Santana's language about false statements likely not implicating antitrust laws was "overly broad." West Penn, 627 F.3[rd] at 109 14.

Circuit has favorably cited an article by Prof. Maurice Stucke, which criticized the standard that sanofi's proffers for judging deception, and concluded that deception by a monopolist violates antitrust laws whenever the "deceit reasonably appears capable of making a significant contribution to maintaining or attaining monopoly power." W. Penn, 627 F.3d at 109. And the sanofi simply ignores many other cases holding that deception can be anticompetitive without applying this onerous standard. *See*, *e.g.*, Caldera, 72 F. Supp. 2d at 1319.[10]

[redacted] *See* N. Pac. Ry., 356 U.S. at 9, 11–12 ("Of course if these restrictive provisions are merely harmless sieves with no tendency to restrain competition, as the defendant's argument seems to imply, it is hard to understand why it has expended so much effort in obtaining them in vast numbers and upholding their validity, or how they are of any benefit to anyone, even the defendant.").

[redacted]

[10] *See also* Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297 (3d Cir. 2007); *In re* Warfarin Sodium Antitrust Litig., 214 F.3d 395, 396–97 (3d Cir. 2000); United States v. Microsoft Corp., 253 F.3d 34, 76–77 (D.C. Cir. 2001) (*en banc*); Nat'l Ass'n of Pharm. Mfrs., Inc. v. Ayerst Labs., 850 F.2d 904, 914–17 (2d Cir. 1988); Int'l Travel Arrangers, Inc. v. W. Airlines, Inc., 623 F.2d 1255, 1257–58 (8th Cir. 1980)

[redacted] West Penn is controlling authority that making false claims about a product is not competition on the merits and is relevant to antitrust claims, while also rejecting sanofi's overexpansive reading of Santana. *See* W. Penn., 627 F.3d at 109 n.14. *See also* LePage's, 324 F.3d at 152 ("Anticompetitive conduct can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties."); W. Penn, 627 F.3d at 109 (same).

The Third Circuit has already recognized that deceptive conduct that also violates FDA regulations still states an antitrust claim. *See* In re Warfarin Sodium Antitrust Litig., 214 F.3d 395, 397 (3d Cir. 2000) (reversing dismissal of antitrust claims against manufacturer of Coumadin for disparaging Coumadin's generic form, warfarin sodium and for attempting to prevent and/or delay its FDA approval).

IV. The law of the case is that Eisai has suffered an antitrust injury and has antitrust standing to advance its claim and recover damages here

The speciousness of sanofi's argument that Eisai has not presented any evidence of antitrust injury is underscored by the fact that the Court already has *twice* recognized the anticompetitive nature of challenged conduct: "The conditioning of price discounts [*i.e., the avoidance of price penalties*] upon customers purchasing exclusionary levels of their requirements from an alleged monopolist effectively forecloses competitors from the market and prevents customers from dealing in the goods of competitors. This type of exclusive dealing arrangement 'is of concern under the antitrust laws.'" (Aug. 2010 Mem. Op. at 22.) Noting that "the Court has already essentially rejected th[e] argument" that "Eisai has not alleged the type of injury that the antitrust laws are intended to prevent," id. at 21, it unambiguously held "[w]e now find for purposes of standing that Eisai complains of injury 'of the type for which the antitrust laws were intended to provide redress': stifling competition through monopolization, or an otherwise 'purposefully anticompetitive scheme' alleged here to be sanofi-aventis's Lovenox discount program." Id. at 22.

[redacted] output or price was adversely affected by [redacted] However, this claim fails both legally and factually. Legally, an excluded rival need not prove adverse output or price effects to show antitrust injury. Competitor plaintiffs automatically satisfy the "antitrust injury" test in exclusionary contracting cases, for exclusionary contracting is illegal "precisely because it tends to exclude rivals from the market, thus leading to reduced output and higher prices."[11] "[W]hen foreclosure is the mechanism by which consumers may ultimately be injured, *any injury* suffered by foreclosed rivals constitutes antitrust injury."[12] The Third Circuit held antitrust injury was established if the loyalty contracts foreclosed a substantial share of the market and restrained rival's growth rate. *See* Meritor, 696 F.3d at 289. No evidence was ever presented in *Meritor*

[11] Areeda & Hovenkamp, IIA *Antitrust Law* ¶ 348 (3d ed. 2007); *see also id.* ¶384d3 ("[w]hen one manufacturer unlawfully agrees with customers that they will not patronize rival suppliers, the rivals have undoubted standing to sue. The rationale for illegality in such cases is that the exclusive dealing contracts unduly 'foreclose' rival suppliers from the market and ultimately weaken them – to the detriment of competition. Thus, the complaining manufacturer easily fills within the rationale for finding a violation once it sufficiently proves injury, causation, and damages."); *id.* ¶ 391e ("Antitrust injury in foreclosure cases. If an incumbent monopolist takes steps to maintain a monopoly by foreclosing a would-be rival from entering, the would-be entrant is injured because it does not earn the profit that it would have earned if it had entered. Consumers are also injured because they do not get the benefit of the competition that would have accompanied entry. *Both consumers and foreclosed rivals suffer antitrust injury.*") (emphasis added),

[12] Areeda & Hovenkamp, X *Antirust Law* ¶ 1767 (3d ed. 2011) (emphasis added).

that prices had risen or output had declined. *See also LePage's Inc.*, 324 F. 3d at 159 ("When a monopolist's actions are designed to prevent one or more new or potential competitors from gaining a foothold in the market by exclusionary ... conduct, its success in that goal *is not only injurious to the potential competitor but also to competition in general.*") (emphasis added). One reason is that the antitrust rule of reason infers likely anticompetitive effects on price and output from a substantial foreclosure share where there is no offsetting procompetitive efficiency. *See* Eisai MSJ Br. at 25-28. [redacted]

When denying sanofi's motion for summary judgment in 2010, this Court also considered and rejected the arguments that Eisai lacks antitrust standing. Aug. 2010 Mem. Op. at 18. ("Applying the factors for determining antitrust standing as set forth in AGC and City of Pittsburgh, the Court determines that Eisai has standing to pursue its antitrust claims against sanofi-aventis."). Thus, it is the law of the case that Eisai has suffered an antitrust injury and has antitrust standing. *See supra* § I.A.

Sanofi's contention that [redacted] warrants reopening the Court's 2010 decision is meritless. *See* Defs.' Br. at 42-45. Sanofi argues that this law of the case does not apply based on [redacted]

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[13] Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 Antitrust L.J. 175 (2007); Elhauge Report ¶¶ 116-120, 124; Elhauge Reply Report ¶¶ 157, 169, 177, 182, 211-214.

[redacted] as does the Court's sound conclusion that Pfizer "would likely lack standing because Eisai is the more direct victim." Id. at 27.[14]

V. Eisai has presented ample evidence of the relevant product market

Sanofi's one-paragraph swipe at Eisai's proof of the relevant product market definition mostly defers to its Daubert brief [redacted]

CONCLUSION

For these reasons, Eisai respectfully asks the Court to deny sanofi's motion for summary judgment in its entirety.

Respectfully submitted,

/s/

Timothy I. Duffy
Joseph C. Amoroso
COUGHLIN DUFFY LLP
350 Mount Kemble Avenue
P.O. Box 1917
Morristown, NJ 07962-2075
Telephone: (973) 267-0058
Facsimile: (973) 267-6442

[redacted]

Thomas J. Cullen, Jr. (admitted *pro hac vice*)
Kamil Ismail (admitted *pro hac vice*)
James A. Frederick (admitted *pro hac vice*)
Derek M. Stikeleather (admitted *pro hac vice*)
GOODELL, DEVRIES, LEECH & DANN, LLP
One South Street, Twentieth Floor
Baltimore, Maryland 21202
Telephone: (410) 783-4000
Facsimile: (410) 783-4040

Attorneys for Plaintiff Eisai Inc.

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