14-2017

United States Court of Appeals
for the
Third Circuit

EISAI INC.,

Appellant,

SANOFI-AVENTIS U.S. LLC AND SANOFI US SERVICES INC.

Appellees.

Direct Appeal from the United States District Court for the District of New Jersey, No. 3:08-cv-4168 (MLC/DEA)

REDACTED BRIEF OF APPELLEES SANOFI-AVENTIS U.S. LLC AND SANOFI US SERVICES INC. IN OPPOSITION TO APPEAL BY EISAI INC.

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RULE 26.1 DISCLOSURE STATEMENT

Appellee sanofi-aventis U.S. LLC has the following parent corporations: Sanofi-Synthelabo Inc., Aventis Pharmaceuticals Inc., Aventis Holdings Inc., Aventisub Inc., Aventis Inc., sanofi-aventis Amerique Du Nord, and Sanofi. Sanofi is a publicly held company that indirectly owns 10% or more of the stock of sanofi-aventis U.S. LLC.

Appellee Sanofi U.S. Services Inc. has the following parent corporations: Aventis Inc., sanofi-aventis Amerique du Nord, and Sanofi. Sanofi is a publicly held company that indirectly owns 10% or more of the stock of Sanofi U.S. Services Inc.

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COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether the district court properly granted summary judgment to defendant-appellees sanofi-aventis U.S. LLC and Sanofi US Services Inc. (collectively, "Sanofi US") on the following three alternative bases, any one of which is sufficient to justify its decision:

   a. Because plaintiff-appellant, Eisai Inc. ("Eisai"), challenges a market-share discount that predominantly operates based on price, the "price-cost" test applies, meaning that Sanofi US's prices were lawful as long as they were above cost, which they indisputably were.

   b. Even if the price-cost test did not apply, Eisai's claims still fail for several reasons, including because the record lacks evidence that the challenged contracts substantially foreclosed Eisai from the market.

   c. Eisai's claims fail for the independent reason that the undisputed facts show an absence of antitrust injury to Eisai.

2. Whether the district court abused its discretion in denying Eisai's request for discovery of deposition transcripts from a 2003 litigation.

COUNTERSTATEMENT OF THE CASE

Eisai filed this lawsuit in 2008 challenging discounts that Sanofi US offered to customers through its "Lovenox Acute Contract Value Program" (the "Lovenox Discount Contract"). A15 (Op. at *8). Eisai concedes that Sanofi US has never priced its product below cost.

The Supreme Court has repeatedly rejected attempts by plaintiffs to transform above-cost pricing into an antitrust violation. In doing so, the Court has emphasized that the antitrust laws encourage discounts and other forms of price competition. Consistent with this guidance, courts of appeals throughout the country apply the "price-cost test" to reject antitrust claims challenging defendants' above-cost pricing, including claims, like Eisai's here, challenging so-called "market share" discounts.

In *ZF Meritor, LLC v. Eaton Corp.*, this Court joined its sister circuits in holding that "the price-cost test applies to market-share or volume rebates offered by suppliers within a single-product market." 696 F.3d 254, 274 n.11 (3d Cir. 2012). The court explained that where "price is the clearly predominant mechanism of exclusion, the price-cost test tells us that, so long as the price is above cost, the procompetitive justifications for, and the benefits of, lowering prices far outweigh any potential anticompetitive effects." *Id.* at 275.

Here, Eisai challenges a market-share and volume rebate offered in a single-product market. Under the rule set forth in *ZF Meritor*, the price-cost test applies. And, because there is no dispute that Sanofi US's prices were at all times above its costs, the district court properly entered summary judgment in favor of Sanofi US.

On appeal, Eisai tries to avoid the price-cost test by arguing that the Lovenox Discount Contract excluded predominantly based on something other than price as a result of: (1) "payoffs" to customers; (2) a "Formulary Access Clause" that required non-discrimination against Sanofi US's product on hospital formularies; and (3) Sanofi US's marketing conduct.

As for the purported "payoffs," when Eisai filed this suit it called them what they are – "discounts." *See, e.g.*, A169, A170, A173, A179, A181-A183, A185, A190. Later, Eisai began calling the discounts "penalties." A72 (Op. at *65). Now, on appeal, Eisai has shifted to calling the discounts "payoffs." *See, e.g.*, Appellant's Br. 4. As the district court correctly noted, "[t]he label given does not change the nature of Eisai's claim." A72 (Op. at *65). What Eisai now calls a "payoff" is the amount by which Sanofi US lowered prices to customers, and this cannot be labeled a "non-price" mechanism of exclusion.

As for the "Formulary Access Clause," it was neither exclusionary nor non-price. Eisai cites no case law supporting its claim that a non-discrimination

provision is exclusionary. And, as the district court noted, the only penalty for violation of the clause was a loss of discounts, making the provision ultimately about price. A74 (Op. at *67).

Finally, with respect to the alleged marketing conduct, this was not part of the Lovenox Discount Contract and does not speak to whether the contract purportedly excluded based on price. This Court in *ZF Meritor* considered whether a challenged contract operated predominantly based on price or used other mechanisms of exclusion by analyzing "anticompetitive provisions in the LTAs [Long Term Agreements]." 696 F.3d at 277, 287. Marketing practices do not affect whether the contract operated based on price or non-price mechanisms.

In summary, the district court correctly held that the Lovenox Discount Contract was a market-share and volume discount that fundamentally operated based on price. Under the law of this Circuit, the district court held that the price-cost test applies and, because there is no dispute that prices were above cost, the court entered summary judgment for Sanofi US. A77.

The district court went on to rule in the alternative that, even if it were to apply the "exclusive dealing" analysis that Eisai advocates, the undisputed facts still support a grant of summary judgment in Sanofi US's favor. This is true for several reasons including because the contracts at issue were not in fact exclusive and because Eisai failed to introduce evidence that it was substantially foreclosed

from competing for customers' business. Instead, Eisai cites only a legal conclusion from its proffered expert, a law professor, regarding the degree of alleged foreclosure. *See* Appellant's Br. 16-17 (citing Elhauge Report). The district court properly rejected this conclusory assertion of foreclosure. *See* A89 (Op. at *82) (noting undisputed evidence that Eisai could and did compete for and win business).

In addition, the district court noted that Sanofi US was entitled to summary judgment on another alternative basis: Eisai failed to introduce evidence of antitrust injury. Even in its brief to this Court, Eisai asserts that, had it competed more aggressively by lowering its prices, it "***would have been less profitable.***" Appellant's Br. 57 (emphasis added). The undisputed fact that Eisai could have reduced its profit margins and continued to compete demonstrates Eisai's lack of antitrust injury. As the district court correctly explained, "[t]he fact that Eisai might lose some profit in its effort to maintain or increase its market share is not an anticompetitive effect of Sanofi's conduct, but instead a procompetitive one." A83-A84 (citing *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 337 (1990)). "The problem for Eisai here is that cutting prices in order to increase business often is the very essence of competition. . . . Because Eisai cannot establish an antitrust injury, Sanofi is entitled to summary judgment." A84 (internal quotation marks and citations omitted).

Finally, Eisai challenges the decision denying its request for discovery of deposition transcripts and exhibits from a 2003 litigation involving different parties and a different contract from the present case. Both the magistrate and the district court weighed the relevant factors and the decision to deny the discovery was well-reasoned and certainly not an abuse of discretion. Nor did the decision prejudice Eisai's case. Eisai obtained millions of pages of documents, took more than 30 depositions, and issued subpoenas to approximately 350 third parties.

For all of these reasons, Sanofi US respectfully requests that this Court affirm the decision of the district court.

STATEMENT OF FACTS

Sanofi US markets Lovenox, a pharmaceutical, in the United States. A9 (Op. at *2). Lovenox is an injectable anticoagulant that prevents and treats deep vein thrombosis. A169 (Compl. ¶¶ 1-2). Lovenox is a low molecular weight heparin ("LMWH") (A8, Op. at *1), and was the first such drug approved by the Food and Drug Administration ("FDA"). Appellant's Br. 12. Lovenox has been sold in the United States since 1993. *Id.* During the time period relevant to this litigation, Sanofi US invested heavily in clinical research related to Lovenox and employed a U.S. sales force of around 850 representatives to market the product. A23 (Op. at *16).

Eisai distributes a competing drug, Fragmin, in the United States. Fragmin was originally launched in 1996 by Pharmacia Corp., which was acquired by Pfizer in April 2003. A177 (Compl. ¶ 34); A10 (Op. at *3, n.3). Pfizer chose not to market Fragmin in the United States. A32 (Op. at *25). More than two years later, on September 27, 2005, Eisai and Pfizer entered into a Supply, Distribution and Profit Sharing Agreement that entitled Eisai to begin marketing Fragmin in the United States. A10 (Op. at *3, n.3). Eisai recognized that Pfizer's long period of not marketing the drug might make it difficult to revive the product. A32 (Op. at *25) (quoting A4880 (Pl.'s Response to Defs.' Rule 56.1 Statement ("Pl.'s 56.1 Response") ¶ 82)).

Promotion and Pricing

Eisai began promoting Fragmin in 2006 with approximately 130 sales employees. A33 (Op. at *26). Despite employing a relatively small sales force tasked with selling a product that had not been promoted for nearly three years, along with many other acknowledged obstacles, sales of Fragmin grew substantially during the years it was marketed by Eisai. A32-A33 (Op. at *25-26).[1]

Eisai's price for Fragmin during this time period was approximately 7.8 times its incremental cost, meaning that Eisai had an approximately 85% profit margin on sales of additional units. A70 (Op. at *63). On appeal, Eisai criticizes the district court for finding that Eisai had an 85% profit margin. But the court's finding was based on specific and uncontroverted evidence ***from Eisai's own expert*** who "testified that in 2009, for example, Eisai charged a price for Fragmin that was 7.8 times its cost, or, in other words, Eisai's profit margins on Fragmin in 2009 were approximately 85%." A70 (Op. at *63) (citing A3893 (Elhauge Report ¶ 51).[2] Eisai's brief to this Court suggests its profit margin was lower than 85%

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[1] Eisai suggests it [redacted] ***sold*** on marketing Fragmin than Sanofi US spent on Lovenox (Appellant's Br. 1, 30), but a "per unit sold" basis is not a relevant metric. It is undisputed that Sanofi US spent more than $1.6 billion marketing Lovenox (A23 (Op. at *16)), compared to Eisai's approximately [redacted] (A1201). *See also* A1206 (April 2009 Fragmin Business Update acknowledging that [redacted]).

[2] *See also, e.g.*, A5091 (Elhauge Dep. 174:15- 175:15) [redacted]

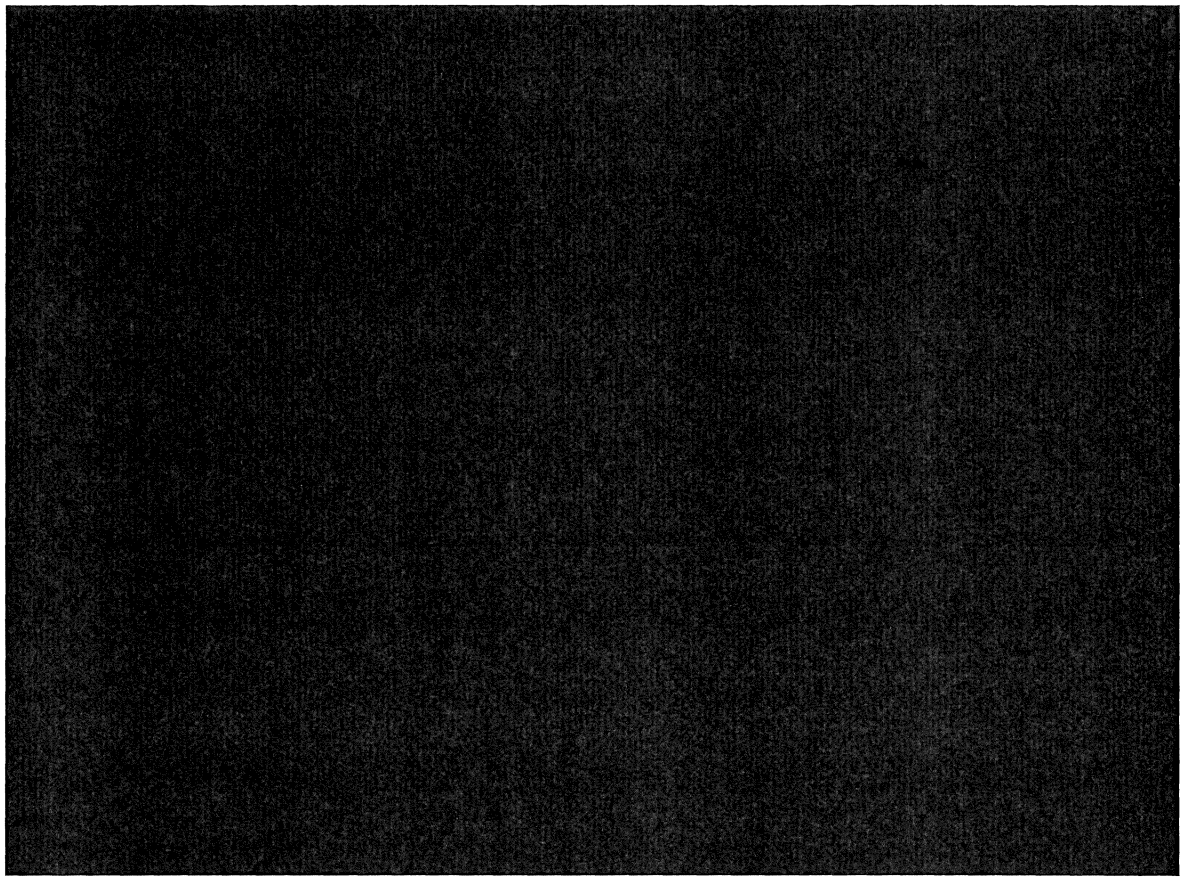
(how low, Eisai does not say) [redacted]. But the antitrust laws are not concerned with how Eisai and its business partner divide up the pie and, in any event, fixed costs are irrelevant to profit margins on incremental sales. *See, e.g., Advo, Inc. v. Phila. Newspapers, Inc.*, 51 F.3d 1191, 1198 (3d Cir. 1995) ("[T]he most important measure is marginal cost—the cost of producing each incremental unit of output.").[3]

[redacted]

[redacted]

[3] Not only did Eisai's expert testify as to this profit margin, Sanofi US raised the issue of Eisai's large profit margin in its summary judgment briefing and at oral argument, and Eisai did not once claim a different profit margin on incremental units sold, much less claim that it was losing money on incremental units. If Eisai is now suggesting its standard costs were only a "small fraction" of its costs of selling ***incremental units*** of Fragmin (and it is not clear that Eisai is (*see* Appellant's Br. 9)), this is unsupported by the record. Eisai's "licensing" and "marketing" costs were not increased by selling an incremental unit of Fragmin, and distribution costs were trivial [redacted]) according to Eisai's own expert. A6135 (Economides Report ¶ 38).

[4] *See* A6912 (chart color revised to improve legibility). Each unit sold includes multiple doses.



Eisai makes various claims about its pricing, for example that its [redacted]. *See, e.g.*, A6100 (Pl.'s Suppl. Rule 56.1 Statement ¶ 1); Appellant's Br. 30 (claiming that Fragmin was priced [redacted] and Eisai offered "special discounts" to some customers). But the [redacted] is not a relevant metric. [redacted], as shown above, and the testimony from Eisai's own expert shows that [redacted] *See* A3872-73 (Elhauge Report

¶ 19) [redacted]

Other products that competed with Lovenox and Fragmin during the relevant time period included Innohep and Arixtra. A10-A11, A14 (Op. at *3-4, *7).[5] Lovenox, Fragmin, Innohep, and Arixtra are often referred to collectively as the Lovenox Therapeutic Class ("LTC"). A14 (Op. at *7).

It is undisputed that the challenged loyalty discount is a so-called "single product" discount: That is, as Eisai itself has repeatedly acknowledged, Lovenox's pricing was not linked to purchases of any other product. As Eisai's counsel told the district court, "[t]his is not a bundling case. It is a case involving single product loyalty rebates." *See, e.g.*, A1831 (Mot. to Dismiss Hr'g Tr. 39:14-19, June 12, 2009). Moreover, the Lovenox Discount Contract required no minimum purchases of Lovenox, and the contract did not prohibit customers from purchasing anticoagulants from competitors. A17, A86-A87 (Op. at *10, *79-80). Customers (hospitals) were at all times free to decide whether to take advantage of the discounts. A17 (Op. at *10). In addition, the agreements were terminable by customers for any reason with 30 days' written notice. *Id.* If a customer

[5] Arixtra, marketed by GlaxoSmithKline, is not a LMWH but was treated as a part of the LTC. Appellant's Br. 12.

terminated the contract, it could continue purchasing Lovenox "off contract" at the wholesale price: There was no threat of loss of supply. *Id.*

The Lovenox Discount Contract also included a volume discount component that Eisai appears no longer to be challenging on appeal. *See, e.g.*, Appellant's Br. 18.[6] And the contract included a "Formulary Access Clause." This provision conditioned discounts on Lovenox not being "more restricted or limited in its availability" than other anticoagulants on hospitals' "formularies," or lists of approved treatments. A18-20 (Op. at *11-13).

Like Sanofi US, Eisai also offered loyalty discounts to purchasers of Fragmin, as shown below. *See* A33 (Op. at *26); A5110.

	Share of LTC Needs Purchased From Eisai			
Volume	<4.99%	5% - 24.99%	25% - 50%	>50% (Total Discount Off Gross)
<250,000	1%	5%	25%	40%
$250,000 To $499,999	1%	5%	25%	42%
$500,000 To $874,999	1%	5%	25%	43%
$875,000 To $1,249,999	1%	5%	25%	44%
>=$1,250,000	1%	5%	25%	45%

[6] Eisai suggests there was no volume component for "systems" (groups of hospitals purchasing collectively). *See* Appellant's Br. 20-21. This is inconsistent with the record: [redacted] *See, e.g.*, A1436 (Sanofi Ex. 23 at SA-000009574).

In addition to its standard discounts, on occasion Eisai offered even greater "out of template" discounts to certain hospitals, and it is undisputed that Eisai won even more business when it did so. A34 (Op. at *27). It is also undisputed that Fragmin's share of LTC sales in the United States nearly doubled during the relevant time period, from 4.3% to 8.2.% (A87, Op. at *80), Arixtra's share more than quadrupled from 2.3% to 9.9% (A87, Op. at *80), and total sales of LTC products increased, in Eisai's words, [redacted] A3251 (Fragmin 2007 Business Plan).

In July 2010 a generic version of Lovenox was launched for sale in the United States and Sanofi US ended the Lovenox Discount Contract. A17 (Op. at *10). Over the two years after Sanofi discontinued the challenged contract, it is undisputed that Eisai's share of sales [redacted] A4021 (Hausman Report ¶ 156).[7]

Procedural History

On August 18, 2008, Eisai filed a complaint against Sanofi US in the United States District Court for the District of New Jersey asserting five claims for

[7] [redacted] Appellant's Br. 22. First, the district court assumed for purposes of the summary judgment motion that Sanofi US had market power, so this point is not relevant to Eisai's appeal. [redacted]

relief under federal and New Jersey antitrust statutes. A35 (Op. at *28). Eisai sought and received massive discovery, including millions of pages of documents from Sanofi US and more than 30 depositions.

Eisai also sought deposition transcripts from a case brought in 2003 by Organon Sanofi-Synthelabo ("OSS"), a joint venture marketing Arixtra. A306. The 2003 OSS Litigation challenged the contracting practices of Aventis and the alleged impact of those practices on the entry of Arixtra into the United States. [redacted]. The 2003 OSS Litigation was voluntarily dismissed in August 2004.[8] *Organon Sanofi-Synthelabo LLC v. Aventis Pharm., Inc.*, No. 6:03-cv-00224-GAP-DAB (M.D. Fla. Aug. 25, 2004). The magistrate judge and the district court denied Eisai's request to compel production of deposition transcripts from this litigation.

On June 3, 2013, Sanofi US moved for summary judgment with respect to liability and damages, and Eisai moved for partial summary judgment with respect to liability. On March 28, 2014, the district court granted summary judgment in favor of Sanofi US on liability. A4; A8. Eisai filed its notice of appeal with this Court on April 23, 2014. A1.

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[8] [redacted]. A3386-87 (Pl's 56.1 Statement ¶ 4).

STANDARD OF REVIEW

The Third Circuit exercises *de novo* review of a district court's order granting summary judgment. *Mass. School of Law at Andover, Inc. v. Am. Bar Ass'n*, 107 F.3d 1026, 1032 (3d Cir. 1997). Under Rule 56 of the Federal Rules of Civil Procedure, a court must enter summary judgment if the moving party "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In antitrust cases in particular, "[t]he entry of summary judgment in favor of an antitrust defendant may actually be required in order to prevent lengthy and drawn-out litigation, which may have a chilling effect on competitive market forces." *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 73 (3d Cir. 2010). Accordingly, in order to defeat a motion for summary judgment, antitrust plaintiffs "must overcome a 'higher threshold' which is imposed in order 'to avoid deterring innocent conduct that reflects enhanced, rather than restrained, competition.'" *Id.* (quoting *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 357 (3d Cir. 2004)).

The Third Circuit reviews discovery decisions for abuse of discretion, *Brumfield v. Sanders*, 232 F.3d 376, 380 (3d Cir. 2000), and "[d]iscretion is abused only where no reasonable man would take the view adopted by the trial court." *Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 115 (3d Cir.1976). In addition, an appellant bears a heavy burden of showing that a denial of discovery caused "actual or substantial prejudice."

Cyberworld Enter. Tech., Inc. v. Napolitano, 602 F.3d 189, 200 (3d Cir. 2010) (citation omitted); *Walker v. Centocor Ortho Biotech, Inc.*, 558 F. App'x 216, 221 (3d Cir. 2014).

ARGUMENT

As the district court concluded in its comprehensive and careful opinion, Eisai's claims fail as a matter of law because the market-share and volume discount that Eisai is challenging must be evaluated under the price-cost test. In addition, Eisai's claims fail even if the court were not to apply the price-cost test as directed by this Court in *ZF Meritor* and instead were to apply Eisai's proposed exclusive dealing analysis because the conduct at issue is not exclusive dealing and, in any event, Eisai failed to provide evidence that it was substantially foreclosed from competing. Eisai's claims also fail for lack of antitrust injury. Finally, the district court did not abuse its discretion in denying discovery of deposition transcripts from a 2003 litigation.

I. THE PRICE-COST TEST REQUIRES DISMISSAL

A. The Price-Cost Test Applies to Loyalty Discounts

In recent decades, the Supreme Court has steadfastly rejected every attempt by plaintiffs to transform above-cost pricing strategies into antitrust violations. The Court has repeatedly held that when an antitrust plaintiff challenges a defendant's "pricing practices, only predatory [*i.e.*, below-cost] pricing has the requisite anticompetitive effect" to give rise to an antitrust

violation. *Atl. Richfield*, 495 U.S. at 339; *see also Pac. Bell Tel. Co. v. LinkLine Commc'ns, Inc.*, 555 U.S. 438, 451-52 (2009); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 319 (2007); *Brooke Grp. Ltd. v. Brown & Williamson*, 509 U.S. 209, 222 (1993); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 117-18 & n.12 (1986). The Court has adhered to this rule "regardless of the type of antitrust claim involved." *Atl. Richfield*, 495 U.S. at 340; *Brooke Grp.*, 509 U.S. at 223. This requirement stems from the fundamental principle that the antitrust laws ***encourage*** discounting and other forms of price competition because they "afford substantial benefits to consumers" and are procompetitive. *Ortho Diagnostic Sys., Inc. v. Abbott Labs., Inc.*, 920 F. Supp. 455, 469-70 (S.D.N.Y. 1996).

If the law permitted challenges to above-cost discounts, it would invite successful companies to "refrain from aggressive price competition" for fear of antitrust liability, and it would encourage competitors to file lawsuits rather than lowering their prices to compete. *LinkLine*, 555 U.S at 451-52; *see Weyerhaeuser*, 549 U.S. at 319. By applying the price-cost test, courts provide a strong mandate to competitors that they should compete on price and quality, not through litigation. *See Cargill*, 479 U.S. at 115-16. The courts have also noted that the price-cost test helps avoid the courts being turned into price regulators. *See, e.g.*, *Brooke Grp.*, 509 U.S. at 223 (explaining that above-cost discounting "is beyond the practical

ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting"); *ZF Meritor*, 696 F.3d at 273 (noting that "it is beyond the practical ability of a judicial tribunal to ascertain whether above-cost pricing is anticompetitive") (internal quotation marks omitted).

Accordingly, a plaintiff challenging a defendant's pricing practices must prove "that the [defendant's] prices . . . are below an appropriate measure of [the defendant's] costs." *Brooke Grp.*, 509 U.S. at 222. This "price-cost" test applies regardless of a defendant's market share. *See ZF Meritor*, 696 F.3d at 275 n.11. As long as pricing is at or above cost, any equally efficient seller can compete simply by matching the defendant's discounted prices. *See Cargill*, 479 U.S. at 115 & n.10; *Barry Wright v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983). To the extent that a particular competitor cannot compete effectively in the face of above-cost pricing, this simply "represents competition on the merits," which is what the antitrust laws exist to protect. *Brooke Grp.*, 509 U.S. at 223. The antitrust laws are not designed to protect inefficient competitors from the rigors of competition. *See id.*; *see also Atl. Richfield*, 495 U.S. at 341.

The courts of appeals follow the same approach. For example, the First Circuit held that above-cost discounts linked to near exclusivity were not anticompetitive because "the Sherman Act does not make unlawful prices that exceed both incremental and average costs." *Barry Wright Corp.*, 724 F.2d at 236.

In *Virgin Atlantic Airways v. British Airways*, the Second Circuit applied the price-cost test to a conditional discount and held that the plaintiff "failed in its burden to show below cost pricing." *Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 269 (2d Cir. 2001). Similarly, the Sixth Circuit held that discounts conditioned on exclusivity were "not predatory [and] any losses flowing from them cannot be said to stem from an anti-competitive aspect of defendant's conduct." *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 452 (6th Cir. 2007). The Eighth Circuit applied the price-cost test to reject an attack on market-share discounts because the discounts "were significantly above cost." *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1059-63 (8th Cir. 2000). And the Ninth Circuit applied a price-cost analysis to reject a challenge to bundled discounts in light of the Supreme Court's "forceful[] suggest[ion] that we should not condemn prices that are above some measure of incremental cost." *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 901 (9th Cir. 2008).

In *ZF Meritor*, the Third Circuit joined its sister circuits in holding that the price-cost test is the correct standard to use when evaluating single-product market-share discounts. 696 F.3d at 274-75 & n.11. In so ruling, the Third Circuit clarified that its previous decision in *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) does not apply to single-product loyalty discounts. *Id.*

In its brief to this Court, Eisai re-names the well-known price-cost test (discussed by name by this Court in *ZF Meritor*) with a new label of Eisai's making: the "low price exception to the Rule of Reason." *See, e.g.*, Appellant's Br. 36, 39. Eisai's new name is not the term that the courts have used, and it is not an accurate description of the test. As a threshold matter, as this Court explained in *ZF Meritor*, the price-cost test is an "application of," not an exception to, the rule of reason. *See* 696 F.3d at 273. In addition, Eisai's new label is inconsistent with the precedent: Antitrust plaintiffs often claim that their prices are lower than those of the defendant (which often has a well-established brand and quality, and thus higher prices than more recent entrants), but this does not stop the courts from applying the price-cost test. *See, e.g.*, *Concord Boat*, 207 F.3d at 1046-47, 1062-63 (applying price-cost test notwithstanding the fact that plaintiff's price was lower than defendant's price); *Se. Mo. Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 615-16 (8th Cir. 2011) (same); *Cascade Health Solutions*, 515 F.3d at 911 (same); *United States v. AMR Corp.*, 335 F.3d 1109, 1120 & n.15 (10th Cir. 2003) (similar).

Indeed, in a differentiated product market firms compete on both price ***and*** quality, and a higher price often indicates customers' perception of higher quality. This Court has specifically noted that firms routinely engage in "both price and quality competition, and a firm's comparatively high price may simply reflect a superior product." *Harrison Aire, Inc. v. Aerostar Int'l, Inc.*, 423 F.3d

374, 381 (3d Cir. 2005). Because price differences between competitors often reflect product quality—that is, competition on the merits—the law does not turn on who has the cheapest product.

Nor did this Court say otherwise in *ZF Meritor*. Instead, rather than endorsing anything resembling Eisai's "low price exception," this Court held that "market-share or volume rebates" are subject to the price-cost test. 696 F.3d at 274-75 & n.11. That is, where pricing is above cost, market share rebates are not exclusionary: If a rival wants to make a more compelling offer (*e.g.*, offer a discount) to try to convince the customer to use its product instead of a competing alternative, it remains free to do so.

This Court further noted that the price-cost test represents a balancing of a number of factors including the potential benefits and harms of above-cost pricing as well as "the anticompetitive effects of allowing judicial inquiry into above-cost pricing" and reflects "a conclusion that the balance always tips in favor of allowing above-cost pricing practices to stand." *ZF Meritor*, 696 F.3d at 273. In short, when the practice in question is a "market-share or volume rebate" the "price-cost test applies" unless, as the district court put the point nicely, "essentially, something more is happening" and the predominant mechanism of alleged exclusion of the challenged contract is not in fact price. A67 (Op. at *60).

Against that backdrop, the question is whether non-price mechanisms are the predominant mechanisms of alleged exclusion in the Lovenox Discount Contract—not (as Eisai would have it) whose price was allegedly lower.

B. Price Was the Predominant Mechanism of Alleged Exclusion

From the beginning this case has focused on Sanofi US's price structure. All but one of the substantive paragraphs in Eisai's 111-paragraph Complaint relate to the Lovenox Discount Contract. A169-A173, A181-A191 (Compl. ¶¶ 1-13, 58-70, 72-81, 85, 91-93, 98-99, 103-104). The terms "price" and "discount" appear a combined 30 times in the Complaint. And out of the 150 paragraphs in Eisai's key expert report, 145 relate to Sanofi US's discounting and pricing practices. A7547-A7636 (Elhauge Report ¶¶ 1-144, 150).

Eisai initially argued that the Lovenox Discount Contract was unlawful because it threatened disloyal customers with a "price increase." Eisai's Opp'n to Sanofi US's Mot. to Dismiss 12 (ECF No. 34). But, in its summary judgment briefing (and after this Court's decision in *ZF Meritor*) Eisai switched gears to argue that "pricing is not the [sic] sanofi's clearly predominant mechanism of exclusion of rivals from the LTC drug market." Mem. in Opp'n to Sanofi US's Mot. for Summ. J. on Liab. 9 (ECF No. 312). Rather, Eisai argued on summary judgment that the Lovenox Discount Contract was predominantly a "non-price"

mechanism of exclusion for six reasons.[9] The district court carefully walked through each of these six points and concluded that, viewing the record in the light most favorable to Eisai, each of the alleged "non-pricing mechanisms for exclusion in the Lovenox Program relates back to price. The inescapable conclusion is that the price is the 'predominant mechanism of exclusion.'" A74 (Op. at *67).

In its brief to this Court, Eisai again argues that the Lovenox Discount Contract used predominantly non-pricing mechanisms of exclusion, but instead of the six arguments raised below, Eisai raises three, only one of which appeared in Eisai's prior list of six factors why the contract is purportedly "non-price." The purportedly non-price factors that Eisai raises on appeal are: (1) "payoffs" to customers; (2) the Formulary Access Clause; and (3) marketing conduct. Each of these arguments also fails.

1. "Payoffs" to Customers Are Neither "Non-Price" Nor Exclusionary

Eisai argues that the Lovenox Discount Contract was predominantly a "non-price" mechanism of exclusion because it used "payoffs to hospitals for refraining from buying rival products." Appellant's Br. 45. As a threshold matter, it is difficult to understand how Eisai can with a straight face call a reduction in the

[9] Eisai's six reasons were that the Lovenox Discount Contract allegedly: (i) prevented customers from buying less expensive rival products; (ii) bundled contestable and incontestable demand; (iii) imposed "disloyalty penalties that were not the same as 'discounts'"; (iv) raised buyer switching costs; (v) worsened rival efficiency; and (vi) used formulary access clauses. A66-A67 (Op. at *59-60).

net price that customers paid a "non-pricing mechanism." *Id.* Indeed, Eisai asserts at one point that customers saved an additional [redacted] as a result of Sanofi US's Lovenox Discount Contract. *Id.* at 17.

Eisai correctly notes in its brief to this Court that "discounts" and "rebates" are interchangeable for antitrust purposes. *Id.* at 44. Eisai tries to characterize the Lovenox Discount Contract as not being either a discount or a rebate, but Eisai has previously acknowledged that the Lovenox Discount Contract offered "discounts" and "rebates" to customers. *See, e.g.*, A169, A170, A173, A179, A181-A183, A185, A190 (Compl. ¶¶ 3, 7, 13, 51, 60-64, 69, 98). As Eisai's counsel explained to the district court: "This is not a bundling case. It is a case involving single product loyalty rebates." A1831 (Mot. to Dismiss Hr'g Tr. 39:14-19, June 12, 2009); *see also* A1826 (34:15-16 ("That is what the case is about. These are loyalty discounts.")).

While Eisai now uses the more pejorative term "payoffs," as the district court correctly noted, the label that Eisai chooses "does not change the nature of Eisai's claim." A72 (Op. at *65). Any discount or rebate could be derogatorily labeled a "payoff." The undisputed evidence showed that, in its relationships with customers, Sanofi US's "only leverage was price, specifically

the loss of the steep discounts." A68 (Op. at *61).[10] Eisai's challenge to the Lovenox Discount Contract is unquestionably a claim about pricing. A74 (Op. at *67).

Nor are the purported "payoffs" exclusionary. Eisai argues that the Lovenox Discount Contract constituted "payoffs to hospitals for not purchasing rival products." *See* Appellant's Br. 6-7. The same sort of loose rhetoric could be leveled at any discount. When a customer chooses between products, if it buys one product it inherently chooses not to buy the alternative. Any type of discount, whether attached to a volume and market-share condition or no condition at all, could be described pejoratively as a "payoff" to the customer to buy the seller's product instead of buying a rival's product. That does not mean competitors have been excluded from competing. Here, the undisputed facts demonstrate that Eisai had every opportunity to compete for customers' business. A93 (Op. at *86). Hundreds of hospitals bought Fragmin for a majority of their LTC needs (A35, Op. at *28), and Eisai's success rate increased when Eisai offered greater discounts (A34 (Op. at *27)). *See also* A920-30.

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[10] Eisai suggests that Sanofi US [redacted]. *See* Appellant's Br. 3. It is not clear what relevance Eisai believes this point to have. To the extent the antitrust laws say anything on this topic, they certainly do not require manufacturers to engage in resale price maintenance. *Cf., e.g., Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007) (resale price maintenance not condemned as per se illegal under federal antitrust law, but could raise antitrust liability).

In sum, the purported "payoffs" to customers were neither non-price nor exclusionary. They reflect price competition that the antitrust laws not only permit but actively encourage. *See, e.g.*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986).

2. The Formulary Access Clause Is Neither "Non-Price" Nor Exclusionary

The Lovenox Discount Contract included a "Formulary Access Clause" requiring that, to receive discounts, a customer ensure that "Lovenox is not more restricted or limited in its availability than any other" LTC product. A20 (Op. at *13); A1432. In its brief to this Court, Eisai elevates this factor to number two of three purported non-price exclusionary mechanisms (rather than sixth of six, as in its summary judgment papers). Eisai also ratchets up its language about this contract provision. For example, Eisai asserts at one point in its brief that Sanofi US entered into "agreements with hospitals to block access to their formularies." Appellant's Br. 23. While perhaps intended as rhetorical flourish, this statement is simply inconsistent with the undisputed facts in the record. Eisai more accurately describes the provision when it notes that the Formulary Access Clause prohibited hospitals from *disfavoring* Lovenox compared to other LTC products. *Id.*

As the district court explained, Sanofi US's Formulary Access Clause was neither "non-price" nor "exclusionary." First, the Formulary Access Clause was not "non-price." As the district court correctly noted, the only consequence of

violating the Formulary Access Clause was loss of a discount. A74 (noting that violation of the clause's equal-treatment provision "did not restrict the [hospital's] access to Lovenox, but instead accelerated the loss of the contractual discount"). Eisai makes the same point itself in its brief to this Court. *See, e.g.*, Appellant's Br. 24 (noting that the consequence of a violation was a loss of all "payoffs"). In other words, if Eisai wanted to persuade a customer to discriminate against Lovenox on its formulary, nothing prevented Eisai from offering more attractive discounts on Fragmin to compensate for any discounts lost as a result.

This is an important distinction from the facts in *ZF Meritor*, in which a customer's noncompliance with the defendant's contract provisions threatened the future availability of supply. A74 (Op. at *67) (citing *ZF Meritor*, 696 F.3d at 282-83). Because in the present case a violation of the Formulary Access Clause could only result in a loss of a discount, this provision "relates, once again, to price." *Id.*

Second, the Formulary Access Clause was not exclusionary. The provision did not prevent Eisai or other competitors from gaining access to hospital formularies. A20-A21 (Op. at *13-14 ("The clause also did not prohibit a [hospital] from putting other LTC drugs on its formulary; rather, it prevented a [hospital] from favoring another LTC drug over Lovenox on the formulary.")). And, as the district court explained, a provision preventing discrimination simply is not

exclusionary conduct: The provision "did not require hospitals to remove competitor LTC drugs from formularies or to give Lovenox preferential treatment." A73 (Op. at *66).

Eisai argues that *equal* treatment of drugs on formulary can be exclusionary. Appellant's Br. 24. But the district court correctly rejected this proposition (*see* A73-A74), and even on appeal, Eisai does not cite any legal precedent in which a provision requiring equal treatment was held to be exclusionary. The Formulary Access Clause thus stands in stark contrast to the restrictive provisions of the long-term agreements examined in *ZF Meritor*, which required two of four distributors "to remove competitor products from [their] data books entirely." A73 (Op. at *66) (citing *ZF Meritor*, 696 F.3d at 265-66). In summary, the Formulary Access Clause was neither "non-price" nor exclusionary in nature.

3. Marketing Conduct Does Not Determine Whether the Lovenox Discount Contract Allegedly Excludes on a Price or Non-Price Basis

Finally, Eisai argues on appeal that Sanofi US's alleged deceptive marketing was a non-price mechanism by which the Lovenox Discount Contract excluded rivals. Appellant's Br. 17. But marketing conduct is not part of the

contract, and is not relevant to the question whether the challenged contract excludes Eisai predominately because of price or non-price features.[11]

This Court in *ZF Meritor* considered whether a challenged contract operated predominantly based on price or used other mechanisms of exclusion. 696 F.3d at 277, 287 (analyzing "anticompetitive provisions in the LTAs [Long Term Agreements]"). Marketing practices are not provisions in the contract and do not speak to whether the contract operated based on price or non-price mechanisms. Rather, when an antitrust plaintiff challenges marketing conduct, there is a well-established and distinct legal test for analyzing those claims. This is a critical point, because antitrust claims challenging marketing conduct are highly suspect, and the courts scrutinize them extremely carefully.

As this Court put the point, "[t]he natural remedy" for allegedly misleading marketing "would seem to be an increase in [competitors'] efforts on future [opportunities], not an antitrust suit." *Santana Prods., Inc. v. Bobrick Washroom Equip., Inc.*, 401 F.3d 123, 132-35 (3d Cir. 2005); *accord Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 400 (7th Cir. 1989) (Easterbrook, J.) ("If such statements should be false or misleading or incomplete or just plain mistaken, the remedy is not antitrust litigation, but more speech—the marketplace

[11] Indeed, this argument did not appear in Eisai's list of six purportedly "non-price" mechanisms in its opposition to Sanofi US's summary judgment brief. *See* Mem. in Opp'n to Sanofi US's Mot. for Summ. J. on Liab. 9-10, 21 n.9 (ECF No. 312).

of ideas."); *Sanderson v. Culligan Int'l Co.*, 415 F.3d 620, 624 (7th Cir. 2005) ("Some other law may require judicial intervention in order to increase the portion of truth in advertising; the Sherman Act does not.").

When an antitrust plaintiff challenges marketing conduct, that conduct is generally presumed to have a *de minimis* impact on competition. *See, e.g.*, *Santana Prods.*, 401 F.3d at 129 (affirming district court ruling that plaintiff failed to meet its burden of showing defendant's marketing had more than a "*de minimis* effect" on competition); *Am. Council of Cert. Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 323 F.3d 366, 370 (6th Cir. 2003) ("[A]ntitrust claim[s] premised primarily on advertising or speech must overcome a presumption that . . . [there is only] a *de minimis* effect on competition."); *Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jobanovich Legal & Prof'l Publ'ns, Inc.*, 108 F.3d 1147, 1151-52 (9th Cir. 1997) (same). To overcome that presumption, a plaintiff must show that the challenged conduct was clearly false, clearly material, clearly likely to induce reasonable reliance, made to buyers without knowledge of the subject matter, continued for prolonged periods, and was not susceptible to neutralization. *Am. Prof'l Testing Serv.*, 108 F.3d at 1152.[12]

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[12] And, after the plaintiff establishes all of these elements, it must also establish the other elements of a Sherman Act claim, including that the statements posed a dangerous probability of giving the defendant monopoly power in a properly-defined market.

Eisai cannot meet any of these requirements here, despite the massive volume of customer discovery including some 350 subpoenas and depositions of personnel from nine hospitals and numerous other medical witnesses. As the district court explained, among other problems with its marketing claims, Eisai "failed to come forward, in response to Sanofi's motion for summary judgment, with evidence of hospitals' reliance on these alleged deceptive acts," and in fact the uncontroverted evidence was affirmatively to the contrary. A96 (Op. at *89). "[I]n making their treatment and formulary decisions, [customers] would ***not*** rely on statements from sales representatives without independently verifying such statements."[13] *Id.*; *see also, e.g.*, A2266 [redacted]

[13] Eisai's attempts to recast alleged violations of FDA marketing regulations into antitrust violations fares no better. Appellant's Br. 29-30. As the district court aptly stated, even if marketing conduct ran "afoul of FDA regulations [that] does not mean that it also violated the antitrust laws." A95, n.16 (Op. at *88); *see also Eon Labs Mfg. v. Watson Pharm., Inc.*, 164 F. Supp. 2d 350, 361 (S.D.N.Y. 2001) (violation of FDA labeling regulations not actionable under Sherman Act). "The Sherman Act is not a code of medical ethics or methodology." *Schachar*, 870 F.2d at 400. In any case, Eisai points to no evidence that doctors or hospital decision makers relied on any of the alleged violations of FDA marketing regulations.

added). There is no evidence in the record to the contrary—not a single customer indicated that it relied on sales pitches without doing its own research.

Eisai's marketing claims fail for the independent reason that Eisai showed no reason why it could not neutralize any allegedly deceptive statements through marketing of its own. A96 (Op. at *89); *accord Am. Prof'l Testing Serv.*, 108 F.3d at 1152 ("The argument that its neutralization efforts were not completely successful is unavailing; the test refers to 'susceptible to neutralization' not 'successful in neutralization.'"); *Covad v. Bell Atl. Corp.*, 398 F.3d 666, 674 (D.C. Cir. 2005).

Even on appeal, Eisai makes no attempt to meet its burden of showing that the challenged statements were, among other requirements, clearly material, induced reasonable reliance, and not susceptible to neutralization by Eisai.[14]

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[14] While the district court accepted for purposes of resolving Sanofi US's summary judgment motion that there was a campaign of deception, we note that, out of the massive record of evidence, the phrases "fear, uncertainty and doubt" and "FUD" (A4612-A4614) appear in connection with ***only one hospital*** [redacted]. In addition, the majority of the small set of marketing documents Eisai chose to highlight in its brief as its ***best evidence*** of purported misconduct do not even date from the relevant time period (September 2005 - August 2010). *See, e.g.*, A3424 (referencing documents from 2000, 2001 and 2002); A3426 (referencing documents from 1999, 2000 and 2002); A3427 (referencing document from 2002); A3428 (documents from 2001); A3429 (referencing documents from 2000); A3430 (referencing documents from 2003); A3431 (referencing documents from 2000 and 2001); A4537-38 (document from

Eisai claims Sanofi US's purported campaign of deception "had its intended effect" because one hospital (out of 6,000 in the nation), [redacted] Appellant's Br. 27-28. This claim of antitrust impact based on the [redacted]—is nonsensical.[15]

Eisai also makes a blanket assertion that Sanofi US's marketing conduct had [redacted]. *See, e.g.*, A3422-28; A4542; A4545; A4573." None of Eisai's cited sources support this claim. Eisai's citations collectively refer to a total of 25 hospitals (again, out of 6,000 in the nation). Of those, the uncontroverted proof shows that 19 actually ***switched away from Lovenox*** to a competing drug, clearly demonstrating that there was no detrimental reliance on

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2000); A4603 (document from 2001) ; A4606 (document from 2002); A4615 (document from 2002); A4616-17 (document from 1999)).

[15] SA0105 (Email dated Aug. 8, 2011, [redacted]). This document is subject to a pending motion to supplement the Joint Appendix. Even without this document, however, the fact remains that the record contains no testimony from [redacted], and Eisai cannot identify any false statement, much less meet all of the other requirements for an antitrust claim.

any alleged statement.[16] Of the six remaining, two used substantial amounts of LTC drugs other than Lovenox;[17] two had Fragmin on formulary;[18] one said it would not consider a switch to Fragmin until Eisai provided [redacted]

[16] *See* A6036 (Sanofi Ex. 203) & A6050 (Sanofi Ex. 204) ([redacted] switched in 2007); A4574 (Eisai Ex. 118) & A5921 (Sanofi Ex. 193) ([redacted] switched in 2002); A1595 (Sanofi Ex. 29) ([redacted] switched in 2005-2006); A6029 (Sanofi Ex. 201) ([redacted] switched in 2003); A1969 (Sanofi Ex. 48) (University Community Hospital switched in 2008); A6096 (Sanofi Ex. 211) ([redacted] switched in 2008); A1180 (Sanofi Ex. 14) ([redacted] switched in 2008); A4703 (Eisai Ex. 146) ([redacted] switched in 2008-2009); A4703 (Eisai Ex. 146) ([redacted] switched in 2008-2009); A4703 (Eisai Ex. 146) ([redacted] switched in 2008-2009); A1951 (Sanofi Ex. 47) (Holmes Medical Center switched in 2007); A1951 (Sanofi Ex. 47) (Health First System switched in 2007); A5143 (Sanofi Ex. 145) (Froedtert Hospital switched in 2009); A4709 (Eisai Ex. 149) ([redacted] switched in 2008); A6061 (Sanofi Ex. 205) ([redacted] switched 2008); A6063 (Sanofi Ex. 206) ([redacted] switched in 2007); A5218 (Sanofi Ex. 146) ([redacted] switched in 2007); and SA0104 (Galko Dep. 228:12-24) ([redacted] switched in or around 2000).

[17] *See* A5931, A5934 (Sanofi Ex. 195 at ESI 00871626, 29) & A5271 (Sanofi Ex. 148 at ESI 02639428) (Fragmin's share was [redacted]).

[18] *See* A5976 (Sanofi Ex. 197); A5987 (Sanofi Ex. 198); A4723-24 (Eisai Ex. 151); and A5287 (Sanofi Ex. 150) (Fragmin and Arixtra were on formulary at [redacted]).

[19] *See* A6080 (Sanofi Ex. 210 at ESI 02353758); A5681 (Sanofi Ex. 170 at ESI 01283711). Eisai acknowledged that [redacted] A5685 (Sanofi Ex. 171 at ESI 00728459).

Eisai complains of [redacted].[20] This is not the "rare case" in which deceptive marketing might be actionable under the Sherman Act. A96 (Op. at *89). As this Court noted in *Santana Products*, "'deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned.'" 401 F.3d at 132 (quotations omitted); *see also W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 109 n.14 (3d Cir. 2010) ("false statements about a rival, without more, rarely interferes with competition enough to violate the antitrust laws").

Finally, we note that, even if marketing conduct affected the question of whether the Lovenox Discount Contract is "price" or "non-price"—which it plainly does not—Eisai cannot seriously assert that alleged marketing claims are the "predominant" conduct challenged in this case, which Eisai has always acknowledged is fundamentally about the discounting in Sanofi US's contracts. *See, e.g.*, A1826. Marketing allegations take up just ***two sentences*** of the entire Complaint. A185 (Compl. ¶ 71). And marketing claims were mentioned in only 5 out of 150 paragraphs of the report filed by Eisai's key proffered expert, law professor Einer Elhauge. A7634-A7635 (Elhauge Report ¶¶ 145-49).

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[20] *See* A4609 (Eisai Ex. 122). The quote, which Eisai crops, specifically refers to [redacted] (Emphasis added.) This does not support an inference that a salesman made clearly false statements, much less that these statements induced reasonable reliance by the customer that harmed, and could not be neutralized by, Eisai.

In sum, in challenging the Lovenox Discount Contract, Eisai fundamentally challenges a loyalty discount. This is predominantly pricing conduct to which the price-cost test applies.

C. Applying the Price-Cost Test Here Requires That Summary Judgment Be Granted in Favor of Sanofi US

Eisai does not dispute that, if the price-cost test applies, Sanofi US is entitled to summary judgment. Eisai concedes that "[a]t no point during the period September 2005 to August 2010, did Sanofi US sell Lovenox to a hospital customer at a price that was below its cost." A4866 (Pl.'s Resp. to Defs.' Rule 56.1 Statement ¶ 45). Because it is undisputed that Sanofi US at all times priced Lovenox above cost, the district court properly applied the price-cost test to grant summary judgment in favor of Sanofi US.

II. EXCLUSIVE DEALING ANALYSIS ALSO REQUIRES DISMISSAL

After determining that Sanofi US was entitled to summary judgment, the district court went on to provide an alternative basis for its decision. Specifically, the court considered whether the result might be different if, instead of applying the price-cost test, it applied Eisai's proposed framework and "analyze[d] Eisai's claims as if pricing were not the predominant form of exclusion." A77. Even under this alternative approach, the district court concluded that Sanofi US is entitled to summary judgment.

Eisai now argues that the district court improperly "imported" its price-cost analysis into its alternative "exclusive dealing" analysis. Appellant's Br. 47-48. This is not correct. First, the district court carefully considered whether the contracts at issue were *de facto* exclusive dealing arrangements and concluded that they were not. A86 ("[T]he Court is not persuaded that Lovenox contracts were even exclusive."). Second, even assuming the contracts were exclusive, the court reviewed the evidence and concluded that the contracts did not have the probable effect of substantially lessening competition. A87-89 (Op. at *80-82); *see also, e.g.*, *ZF Meritor*, 696 F.3d at 271 ("[A]n exclusive dealing arrangement is unlawful only if the 'probable effect' of the arrangement is to substantially lessen competition.") (internal citation omitted).

A. The District Court Correctly Found No Exclusive Dealing

"A threshold requirement for any exclusive dealing claim is necessarily the presence of exclusive dealing." *ZF Meritor*, 696 F.3d at 282. As this Court has explained, plaintiffs often challenge conduct "as *de facto* exclusive dealing arrangements" but their characterization does not resolve the question. *Id.* at 275. A traditional exclusive dealing arrangement requires a buyer to make all of its purchases from one supplier, and "[a]n agreement affecting less than all purchases does not amount to true exclusive dealing." *See Barr Labs., Inc. v. Abbott Labs.*, 978 F.2d 98, 110 n.24 (3d Cir. 1992).

Only under limited circumstances will a contract constitute exclusive dealing when it does not expressly require a customer to make purchases ("*de facto* exclusive dealing") and when it does not cover 100% of the customer's demand ("partial exclusive dealing"). *ZF Meritor*, 696 F.3d at 282. A claim based on *de facto* or partial exclusive dealing "is rarely a valid antitrust theory." *Id.* at 283. To the contrary, a partial exclusive dealing arrangement is "generally lawful because market foreclosure is only partial, and competing sellers are not prevented from selling to the buyer." *Id.*

Similarly, where contracts are short term or easily terminable, this, too, undermines a finding of exclusivity. *See, e.g.*, *W. Parcel Express v. United Parcel Serv. of Am., Inc.*, 190 F.3d 974, 976 (9th Cir. 1999). The defendant's "Long Term Agreements" in *ZF Meritor* were found to constitute exclusive dealing because they were by definition long term and because they used a threat of non-supply to force mandatory purchase requirements. 696 F.3d at 282-83.

In the present case, the district court carefully reviewed the case law on exclusive dealing and then applied it to the Lovenox Discount Contract. *See* A84-A93 (Op. at *77-86). The court noted that the Lovenox Discount Contract did not prevent customers from purchasing Fragmin. The undisputed facts showed that, by 2007, more than 900 hospitals had added Fragmin to their formularies, increasing Fragmin's reach from a base of 2,400 hospital formularies in 2004. A35

(Op. at *28). This growth occurred while the Lovenox Discount Contract was in place and put Fragmin on the formularies of more than half of the approximately 6,000 hospitals in the United States. A14, A35 (Op. at *7, *28).

In addition, unlike in *ZF Meritor*, under the Lovenox Discount Contract customers had no risk of loss of supply. A86 (Op. at *79). The only consequence a customer faced if its Lovenox purchases fell below any threshold was the reduction of its discount. *Id.* (citing A4860-A4861 (Pl's Resp. to Def.'s 56.1 Statement. ¶¶ 34-35)). And Sanofi US's customers obtained meaningful discounts even if their purchases of Lovenox were well below exclusive. For example, a customer would receive a 9% to 21% discount, depending on volume, while purchasing a quarter of its requirements from competitors. A87 (Op. at *80 (citing Pl's Resp. to Def.'s 56.1 Statement ¶ 30)). In short, the district court concluded that the problematic features in the contracts at issue in *ZF Meritor* are not present here. A86-89 (Op. at *79-82).

Moreover, the Lovenox Discount Contract's term was not "of sufficient duration to prevent meaningful competition." *ZF Meritor*, 696 F.3d at 271. As Eisai concedes, the Lovenox Discount Contract was freely terminable on 30 days' notice. *See, e.g.*, A87 (Op. at *80); A4864 (Pl's Resp. to Def.'s 56.1 Statement¶ 41). Courts have generally held that contracts that are terminable in less than one year do not constitute true exclusive dealing arrangements. *See, e.g.*,

Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 395 (7th Cir. 1984) ("Exclusive-dealing contracts terminable in less than a year are presumptively lawful . . . ."); *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162-64 (9th Cir. 1997) (similar); *Barry Wright Corp.*, 724 F.2d at 237 (two-year term not unlawful); *W. Parcel Express*, 190 F.3d at 976 (contract terminable for any reason with little notice is not anticompetitive); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 596 (1st Cir. 1993) (similar).

In fact, exclusive contracts that are terminable on short notice facilitate competition that the antitrust laws encourage. *See Race Tires Am.*, 614 F.3d at 83 ("It is well established that competition among businesses to serve as an exclusive supplier should actually be *encouraged*."); *Paddock Publ'ns, Inc. v. Chi. Tribune Co.*, 103 F.3d 42, 45 (7th Cir. 1996) (same). In its brief, Eisai suggests that perhaps the Lovenox Discount Contract was difficult to terminate. Appellant's Br. at 54. Eisai cites no evidence to support this suggestion and, in fact, there is extensive evidence in the record of customers walking away from the Lovenox Discount Contract. *See* A4914-17, A4921-22, A4927, A4931, A4936 (Pl.'s Resp. to Def.'s 56.1 Statement ¶¶ 172, 177, 179, 185, 193, 206, 213, and 219). This stands in sharp contrast to *ZF Meritor*, in which the long-term agreements at issue lasted five years or longer, and the record evidence showed that customers found the termination provision "meaningless." 696 F.3d at 287.

For all of these reasons, the challenged Lovenox Discount Contract did not constitute exclusive dealing arrangements as such contracts are defined under prevailing case law.

B. The District Court Correctly Found No Substantial Foreclosure

Even if Sanofi US's contracts were deemed to be exclusive, the district court correctly held that the contracts still would not be unlawful under applicable precedent because Eisai failed to provide evidence that the contracts substantially lessened competition.[21] A62, A85, A89 (Op. at *55, *78, *82). "[A]n exclusive dealing arrangement is anticompetitive only if its 'probable effect' is to substantially lessen competition in the relevant market, rather than merely disadvantage rivals." *ZF Meritor*, 696 F.3d at 281 (citing *Tampa Elec.*, 365 U.S. at 328-29). To this end, "modern antitrust law generally requires a showing of

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[21] As noted above, the district court assumed for purposes of resolving Sanofi US's summary judgment motion that Sanofi US has market power in a purported LTC market. *See* A64 (Op. at *57). Sanofi US does not concede market definition or power, and there are factual disputes as to both. Building on this assumed market, Eisai asserts in its brief that proof of market power ***automatically establishes anticompetitive effects***. Appellant's Br. 49, 52 (citing *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993)). This is not accurate. As the Supreme Court has explained, "[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; ***it is an important element of the free-market system***. The opportunity to charge monopoly prices—at least for a short period—is what attracts business acumen in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (first emphasis added) (internal quotation marks omitted).

significant market power by the defendant, substantial foreclosure, contracts of sufficient duration to prevent meaningful competition by rivals, and an analysis of likely or actual anticompetitive effects considered in light of any procompetitive effects." *Id.* at 271 (citations omitted); *see also* A86 (Op. at *79) (citing factors from *ZF Meritor*). Eisai falls well short of meeting this test.

First, Eisai failed to offer evidence of any foreclosure, let alone the ***substantial*** foreclosure required to prove an exclusive dealing claim. "[T]here was no evidence that any customers wanted to buy more Fragmin but were prevented from doing so because of Sanofi's conduct or the Lovenox Program." A88 (Op. at *81). Out of 6,000 hospitals in the United States, Eisai referred to only *88* hospitals as purported examples of foreclosure in its summary judgment papers, which as a matter of law cannot constitute substantial foreclosure. Moreover, Sanofi US walked through every one of these examples in detail below, demonstrating precisely why each did not constitute evidence of foreclosure. *See* SA0001 at SA0029-SA0037, SA0047-SA0067, SA0072-SA0092, SA0095 (Defs.' Resp. to Pl.'s Rule 56.1 Statement ("Defs.' 56.1 Response"), ¶¶67-79, 96-133,145-181, 191). The majority of these hospitals either switched to Fragmin or had

Fragmin on formulary with no restrictions on doctors prescribing it. Eisai introduced no evidence to the contrary.[22]

Eisai now asserts that the district court improperly resolved a disputed issue of fact on the issue of customer foreclosure and [redacted] Appellant's Br. 21, 51. Eisai cites no declaration or deposition testimony from either customer that it wanted to buy more Fragmin but was prevented from doing so. [redacted]

[22] Four of the six customers deposed by Eisai testified that their hospitals switched away from Lovenox. A1951, A1954 (Edwards Dep. 35:2-23, 149:4-6, June 8, 2012 (Holmes Regional switched to Fragmin)); A1968, A1973 (Moorman Dep. 171:10-22, 234:14-235:5, June 18, 2012 (University Community switched to Fragmin)); A1984, A1988 (Karpinski Dep. 63:23-64:11, 87:22-88:12, June 22, 2012 (Froedtert switched to Fragmin)); A1594, A1601 (McCurdy Dep. 17:10-19:10, 104:8-105:18 (Citrus Memorial switched to Innohep)). One used more than 50% Fragmin. A5643 (Person Dep. 51:16-20). And one testified that all products were on formulary without any restrictions on use. A5672 ([redacted]).

[23] [redacted] A6080.

[redacted] A3403 (Pl.'s 56.1 Statement ¶ 70); A4303 (Eisai Ex. 57). In sum, there is no evidence in the record that either customer was prevented from buying Fragmin by the Lovenox Discount Contract, much less that there was ***substantial*** market-wide foreclosure, as required under well-established law.[24]

Eisai also asserts that the district court ignored "proof" of increased price, reduced output, and loss of customer choice. Appellant's Br. 48. Eisai offers no citations to record evidence supporting these claims, nor could it do so. [redacted] Eisai does not explain the "reduced output" or consumer choice assertions at all, and all of these assertions about [redacted] and consumer harm are in any event inconsistent with the record, including testimony from Eisai's expert economist. *See, e.g.*, A6132 (Economides Report ¶ 33) [redacted]

[24] In recent government actions targeting exclusive dealing, market-wide foreclosure levels have been higher than 70%. *See, e.g.*, *Pool Corp.*, FTC. No. 101-0115, Compl. ¶ 28 (2011), http://ftc.gov/os/caselist/1010115/111121poolcorpcmpt.pdf (foreclosure of "more than 70 percent" of market); *Transitions Optical*, FTC. No. 091-0062, Compl. ¶ 23 (2010), http://www.ftc.gov/os/caselist/0910062/100303transopticalcmpt.pdf (foreclosure of "over 85%" of market).

[redacted] (emphasis added). Eisai's unsupported assertions of harm do not create a disputed issue of fact.[25]

Finally, Eisai asserts that evidence of foreclosure is unnecessary given the opinions of law professor Einer Elhauge. As a matter of law, Eisai is incorrect that an opinion by a law professor obviates the need for record evidence. As the Supreme Court has explained, while expert testimony may be a useful guide to interpreting facts, "it is not a substitute for them." *Brooke Grp.*, 509 U.S. at 242; *Advo, Inc.*, 51 F.3d at 1198-99 (same).

Moreover, the particular opinion here is not supported by either the law or the record facts in this case. Professor Elhauge asserts that the Lovenox Discount Contract foreclosed between 68% and 84% of the relevant market. *See, e.g.*, Appellant's Br. 2 (citing A3926-A3929 (Elhauge Report at pp. 69-72). Professor Elhauge calculated this number by counting as "foreclosed" [redacted] A3925 (Elhauge Report ¶ 107). Simply equating receipt of a discount with foreclosure is a methodology that has no basis whatsoever in the law (or in economics). It is well established that

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[25] Eisai also argues the district court failed to view the alleged conduct "as a whole." Appellant's Br. at 47. This is an incorrect reading of the district court's opinion, which addressed all of the conduct raised by Eisai and found a lack of substantial foreclosure. In addition, it is well established that legally deficient individual claims "collectively cannot have any synergistic effect." *Ne. Tel. Co. v. Am. Tel. & Tel. Co.*, 651 F.2d 76, 95 n.28 (2d Cir. 1981); *Cal. Computer Prods. Inc. v. Int'l Bus. Machs. Corp.*, 613 F.2d 727, 746 (9th Cir. 1979) (same); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1366-67 (Fed. Cir. 1999) (same).

foreclosure is not defined based on which company wins a sale. If "foreclosure" were determined based on the winning bid, any time that a company offered a discount and won a customer, that customer would be "foreclosed." This is of course not the law. Instead, "the relevant inquiry is what products are reasonably available to a consumer, not what products the consumer ultimately chooses to buy." *C.R. Bard*, 642 F.3d at 616; *see also Omega Envtl.*, 127 F. 3d at 1163 ("foreclosure calculation includes the full range of selling opportunities reasonably open to rivals") (internal quotation marks omitted); *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 597 (8th Cir. 1987) (foreclosure analysis focuses on the competitive process "regardless of which competitor wins or loses").[26]

Apart from his unsupported legal opinion that all customers who received discounts from Sanofi US were "foreclosed," Professor Elhauge offered another analysis, which he labeled the "dead zone" analysis. Here, Professor Elhauge asserts that the Lovenox Discount Contract prevented customers from

[26] Professor Elhauge's opinions on the law have been rejected by other courts. *See, e.g.*, *Applied Med. Res. Corp. v. Ethicon, Inc.*, No. 03-1329, slip op. at 24-25 (C.D. Cal. July 11, 2006) ("J&J claims that Elhauge's presumption amounts to an impermissible opinion on the law. J&J's assertion is well-founded. Where a purchaser is free to take a bundled product separately, there is no presumption that the option is not economically viable; rather, it is part of the antitrust plaintiff's burden to prove that the option is not viable. It is not the role of an expert to rewrite the law."); *Pinal Creek Grp. v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1046 (D. Ariz. 2005) ("Elhauge is precluded from offering his opinion regarding the law that governs this case and federal antitrust law.").

using Fragmin for between roughly 10% and 60% of their LTC needs (in Professor Elhauge's view, less than 10% Fragmin would not affect Lovenox discounts, and greater than around 60% Fragmin would save customers money regardless of Lovenox pricing). Thus if, for example, a customer wanted to use precisely 50% Fragmin and 50% Lovenox, Professor Elhauge asserts that the customer would fall into the "dead zone" and be discouraged from purchasing in these proportions.[27]

There are numerous problems with Professor Elhauge's proffered analysis. For example, Professor Elhauge does not explain why all customers would not simply shift more than 60% of their LTC purchases to Fragmin. Eisai's brief to this Court asserts at least five times that Lovenox and Fragmin are

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[27] Eisai asserts in passing that it was denied "economies of scale" and cites the Elhauge Report. Appellant's Br. 32. It is not clear how this relates to the legal issues presented for appeal. We note, however, that there is no evidence to support this assertion. Fragmin is produced by Pfizer for distribution worldwide. [redacted] Out of a massive record including millions of pages of documents, the Elhauge Report cites [redacted] This is not evidence of economies of scale for Fragmin, and to suggest otherwise is flatly misleading. [redacted] A6135 (Economides Report ¶ 37). Indeed, this assumption is the only one possible on the record that Eisai created.

"comparable" and "interchangeable" products.[28] If Eisai is correct that Fragmin is interchangeable with Lovenox for "most" or all ("classwide") uses, then hospitals can use Fragmin for more than 60% of their LTC needs and are outside of Professor Elhaugue's "dead zone."

In an attempt to have it both ways, Eisai switches gears on its "clinically comparable" arguments, and asserts that customers cannot fill a portion of their demand (how large, Eisai does not say) with Fragmin. Eisai labels this "incontestable" demand. "Incontestable demand" is not a defined term in the case law, and Professor Elhauge defined it more than seven different ways in his report and deposition.[29] In its brief to this Court, Eisai appears to define as "incontestable" that portion of demand accounted for by a single cardiology indication that is unique to Lovenox (STEMI cardiology), because Eisai cannot actively promote

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[28] *See* Appellant's Br. 1 ("Fragmin was, for most patients, at least clinically comparable to Lovenox . . . ."); 12 ("The four LTC drugs are comparable and reasonably interchangeable."); 13 (products are [redacted]); 15 ("clinically comparable" for "most patients"); 51 (same).

[29] These definitions ranged from a very low threshold ("incontestable" means a competitor would need to offer [redacted] (*see* A7562, Elhauge Report ¶ 23 & n. 48) to a very high threshold (the customer will [redacted] price is, *see* SA0103, Elhauge Dep. 128:12-15). *See also* SA0103, Elhauge Dep. 133:24-25, 134:11-13, 136:11, 141:19-20, 163:11-16, 197:2-6 (offering different definitions of what constitutes "incontestable demand"). Ultimately, Professor Elhauge testified [redacted] SA0103 (Elhauge Dep. 208:7-9).

Fragmin for this use. *See* Appellant's Br. 16 (referring to the "Unique Cardiology Indication" and asserting that "Sanofi used its power over these ***'incontestable sales'*** also to leverage control of sales for [other] uses") (emphasis added). Eisai noticeably fails to indicate what percent of demand is accounted for by this cardiology indication.[30] The record evidence demonstrates that *all* cardiology uses combined represent less than [redacted] of LTC purchasing, and STEMI is a subset of that demand. *See* A7662 (Fragmin Business Plan). Thus, customers could use Lovenox for the unique STEMI cardiology application and still have more than [redacted] of their purchases left to be filled, leaving them far outside Professor Elhauge's "dead zone."

Wholly apart from these serious problems, as the district court noted, the "dead zone" analysis also fails because it is entirely premised on Eisai's *existing* pricing. But, as the district court explained, "Eisai could have increased its discounts to decrease the span of Professor Elhauge's 'dead zone.'" A70. For example, by increasing its discount from 40% to 48%, as it did on occasion, Eisai could have decreased the "dead zone" so that a customer could save money by buying around half of its LTC needs from Eisai, and if Eisai discounted further the purported "dead zone" would continue to shrink. A71. Eisai offers no reason why

[30] As Eisai has pointed out, Fragmin, too, has a unique indication: Fragmin is approved for long term treatment of DVT in cancer patients. A3390 (Pl.'s 56.1 Statement ¶ 13).

it should be deemed "foreclosed" without first being obligated to reduce its mark-up and compete on price.

Finally, we note that, if Eisai were truly foreclosed from competing as a result of the Lovenox Discount Contract, one would have expected that, when Sanofi US terminated the challenged contract (in Eisai's words, removed the [redacted]), Eisai's share would have increased dramatically. In fact, however, the undisputed record evidence shows that, after Sanofi US terminated the contract, [redacted]. *See* A4021 (showing [redacted]).

In sum, Eisai's failure to identify actual evidence of foreclosure—much less *substantial* foreclosure—is fatal to its claims even when analyzed under the framework favored by Eisai. This also distinguishes Eisai's claims from the claims asserted in *ZF Meritor* and *LePage's*, in which the plaintiffs introduced evidence that the defendants' conduct prevented customers from carrying their products. For example, in *ZF Meritor* the plaintiff introduced "considerable testimony" from customer witnesses that they did not want to remove plaintiff's transmissions from their data books but were forced to do so in order to avoid being cut off from supply of the portions of defendant's transmissions they would continue to need. *See* 696 F.3d at 277-78. And, in *LePage's*, the plaintiff introduced evidence from large customers like Staples, Kmart, Sam's Club, and

National Office Buyers that they were prevented from carrying LePage's products. 324 F.3d at 158.

In fact, rather than showing foreclosure, the evidence in the record demonstrates that "both Fragmin's and Arixtra's market shares grew during the relevant period, which indicates that customers could walk away from the Lovenox discounts when they so desired, and they did." A88 (Op. at *81). Growth in competitors' sales and shares further distinguishes this case from cases in which antitrust plaintiffs have prevailed, including *ZF Meritor*, where the plaintiff saw its share drop from 17% to 4% before it exited the market. 696 F.3d at 264, 267.

Eisai asserts, without citing any support from the record, that Sanofi US's conduct held Fragmin back from even greater success. Appellant's Br. at 54. But Fragmin's success in the relevant time period—touted by Eisai's executives as "impressive" "double digit" growth (A912-A913, Defs.' 56.1 Statement ¶111)—proves that Eisai was capable of competing for business.[31] Where competitors' sales are growing, the plaintiff by definition has not met its burden of showing

[31] Similarly, Eisai's claim that Fragmin's success in Canada proves that Sanofi US's contracts are anticompetitive (Appellant's Br. at 32) is based on numerous assumptions not supported in the record, [redacted] Eisai made a strategic choice not to seek discovery related to Canada, either from Sanofi US, Sanofi US's Canadian affiliate, or Eisai's business partner, Pfizer. Eisai bears the burden of its own decision.

substantial foreclosure. *See, e.g.*, *Concord Boat*, 207 F.3d at 1059 (no antitrust violation where two customers testified that they were able to switch to a competitor); *SMS Sys. Maint. Servs., Inc. v. Digital Equip. Corp.*, 188 F.3d 11, 19-20 (1st Cir. 1999) (rejecting antitrust claim where customers were able to switch to competitors); *CDC Techs., Inc. v. IDEXX Labs., Inc.*, 186 F.3d 74, 80-81 (2d Cir. 1999) (no foreclosure where plaintiff's "sales increased" during the relevant period); *Omega Envtl.*, 127 F.3d at1164 (no foreclosure where a third-party competitor increased its share "from approximately 6% to 8%" during the relevant period).

In sum, even if the Lovenox Discount Contract constituted exclusive dealing—which it did not—Eisai has nonetheless fallen far short of producing evidence that the "probable effect" of the contract was to "substantially lessen competition, rather than merely disadvantage rivals." *ZF Meritor*, 696 F.3d at 281. These failures provide an alternative basis for affirming the district court's judgment in favor of Sanofi US.

III. LACK OF ANTITRUST INJURY ALSO REQUIRES DISMISSAL

The district court offered a third, independent basis for concluding that Sanofi US is entitled to summary judgment: Eisai failed to provide evidence that it suffered antitrust injury. *See* A82-A84.

It is axiomatic that the antitrust laws were designed for "the protection of ***competition***, not ***competitors***." *Brooke Grp.*, 509 U.S. at 224 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). Accordingly, "[t]o establish antitrust injury, the plaintiff must demonstrate: '(1) harm of the type the antitrust laws were intended to prevent; and (2) an injury to the plaintiff which flows from that which makes defendant's acts unlawful.'" *ZF Meritor*, 696 F.3d at 281 (citation omitted).

Eisai made no such showing here. As the First Circuit explained in affirming the grant of summary judgment for an antitrust defendant, the plaintiff "did not set forth any evidence from which an inference can be drawn that there was a reduction in output within the relevant market during the relevant period," and the fact that plaintiff's "sales, profits, and market share have increased during the relevant period provides further indication that no antitrust injury exists here." *Sterling Merch., Inc. v. Nestle, S.A.*, 656 F. 3d 112, 122-123 (1st Cir. 2011).

The same is true in the present case. Eisai offers no competent evidence that customers paid more or output decreased while the LTC contracts were in operation. [redacted]

As both the law and Eisai's own evidence make clear, competing through discounting is inherently procompetitive. *Concord Boat*, 207 F.3d at 1062 ("Cutting prices is the 'very essence of competition.'") (quoting *Matsushita Elec.*, 475 at 594). As Eisai's brief acknowledges, "Low prices benefit consumers ***regardless of how those prices are set.***" Appellant's Br. 41 (quoting *Atl. Richfield*, 495 U.S. at 340) (emphasis added). A supplier's decision to reward its most loyal customers with its best prices "promotes competition on the merits." *Virgin Atl.*, 257 F.3d at 265. Eisai's contrary choice not to compete more aggressively on price is not a choice that the antitrust laws reward.

Volume and market-share discounts are commonly used across a wide range of industries, including by firms without market power. Indeed, they are used in this particular industry, including by Eisai itself, "confirming that such a practice was a normal competitive tool" in this industry. *Concord Boat*, 207 F.3d at 1062; *see also, e.g.*, *Trace X Chem., Inc. v. Canadian Indus., Ltd.*, 738 F.2d 261, 266 (8th Cir. 1984) ("Acts which are ordinary business practices" in a particular industry "do not constitute anti-competitive conduct violative of Section 2"); *Berkey Photo Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 291 (2d Cir. 1979) (noting that defendant's conduct did not violate Section 2 of the Sherman Act where it was what a smaller firm with "no market control might" have done).

Legitimate and vigorous competition caused Eisai to offer larger discounts on Fragmin to some hospital customers.[32] *See, e.g.*, A34, A93 (Op. at *27, *86); A2556 (Sanofi Ex. 76 at ESI 01405417, 22) [redacted]; A2568 (Sanofi Ex. 78 at ESI 00497993) (successful "out of template" offer made to Memorial Sloan Kettering with 48% discount on Fragmin purchases in return for hospital buying 70% of its LTC needs from Eisai).[33] This is precisely what the antitrust laws encourage, and Eisai had every opportunity to offer similar discounts to other customers, but chose not to do so. [redacted]

[32] *See also, e.g.*, A1883 ([redacted]).

[33] Eisai also failed to establish antitrust injury because it failed to meet its burden of "assur[ing] to a reasonable degree that its alleged damages . . . did not result from factors other than the alleged illegal acts." *Van Dyk Research Corp. v. Xerox Corp.*, 478 F. Supp. 1268, 1327-28 (D.N.J. 1979) (citation omitted), *aff'd* 631 F.2d 251 (3rd Cir. 1980), *cert. denied*, 452 U.S. 905 (1981). "In private antitrust actions, the burden is placed upon the plaintiff to show" that alleged injury "***was in fact caused*** by the unlawful acts of the defendant and did not result from some other factor." *R.S.E. Inc. v. Pennsy Supply Inc.*, 523 F. Supp. 954, 964 (M.D. Pa. 1981) (emphasis added). The record contains extensive evidence regarding the reasons why Fragmin may have underperformed in relation to Lovenox, including several years of no promotional support for Fragmin, Sanofi US's substantially larger sales force, and other factors, and Eisai offered no testimony whatsoever addressing these other factors and the degree to which they contributed to Eisai's share of sales growing less quickly than Eisai might have liked. A79 (Op. at *72).

[redacted].

This fundamentally is not antitrust injury. As the courts have explained, "[w]hen a firm . . . lowers prices but maintains them above predatory levels, the business lost by rivals cannot be viewed as an 'anticompetitive' consequence of the claimed violation." *Atl. Richfield*, 495 U.S. at 337.

The courts have further cautioned that "[t]he entry of summary judgment in favor of an antitrust defendant may actually be required in order to prevent lengthy and drawn-out litigation, which may have a chilling effect on competitive market forces." *Race Tires Am.*, 614 F.3d at 73. This is particularly true in cases brought by competitors, whose "interests are not necessarily congruent with" the interests of consumers. *Barr Labs.*, 978 F.2d at 109. So too here. In light of Eisai's lack of antitrust injury, and for the other reasons previously noted, the district court correctly granted summary judgment in favor of Sanofi US.

IV. NO ABUSE OF DISCRETION IN DISCOVERY RULING

The district court properly denied Eisai's request for discovery of deposition transcripts from the 2003 OSS Litigation. A99-100. The district court explained that the requested transcripts were "unlikely to lead to the discovery of admissible evidence" under the circumstances, including because the discovery sought related to a different contract, a different competitive product, and different

parties, and the court further held that, in light of the massive amount of discovery that Eisai had already received, the burden of the additional discovery "outweighs its likely benefit." A104-A105; Appellant's Br. 59. This decision was correct, and certainly was not "arbitrary, fanciful, or unreasonable." *Lindy Bros. Builders*, 540 F.2d at 115.

Nor does Eisai attempt to show that the transcripts were "crucial" to its case or that it suffered any "actual or substantial prejudice" from the denial of the discovery, which is fatal given that this Circuit will not overturn a discovery order "without a showing of actual [or] substantial prejudice." *Cyberworld Enter. Tech.*, 602 F.3d at 200. Moreover, Eisai suffered no prejudice because it deposed four of the witnesses from the prior litigation and was free to ask them questions about the products and contracts at issue in the 2003 case. *See* A438 (Hr'g Tr. 5:21-25, June 28, 2012) (noting that Eisai had "nine plus" hours to depose a key witnesses from the prior case).

CONCLUSION

For the foregoing reasons, Sanofi US respectfully requests that the decision of the district court be affirmed.

Respectfully Submitted,

DATED: October 2, 2014 By: *s/George S. Cary*

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(A)(7)(C)

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,905 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I certify under L.A.R. 31.1(c) that the text of the electronic brief is identical to the text in the paper copies, and that a virus detection program (Kapersky Endpoint Security version 10.2.1.23(a)) has been run on the file and that no virus was detected.

I certify under L.A.R. 28.3(d) that at least one of the attorneys whose names appear on the brief is a member of the bar of this court.

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word 2010 in 14-point Time New Roman font.

Dated: October 2, 2014
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CERTIFICATE OF SERVICE

I certify under Fed. R. App. P. 25(d)(1)(B) that, on the date indicated below, I filed the foregoing brief and Supplement to the Joint Appendix with the Clerk using the CM/ECF system, which will send notification of such filing to court of record for Plaintiff-Appellant. I further certify that counsel for Plaintiff-Appellant are registered CM/ECF users.

I further certify that I caused seven (7) copies of the redacted and unredacted brief and four (4) copies of the sealed Supplement to the Joint Appendix to be delivered by overnight carrier to the Clerk of the Court at the following address:

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