UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

. . . . .	. CIVIL NO. 13-MD-02472-S-PAS
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LOESTRIN 24FE ANTITRUST LITIGATION	. PROVIDENCE, RHODE ISLAND
	. MARCH 3, 2017
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TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE PATRICIA A. SULLIVAN
UNITED STATES MAGISTRATE JUDGE

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(Court called into session)

(10:00:38 AM)

THE CLERK: All persons having any business before this the Honorable District Court of the United States within and for the District of Rhode Island draw near, give your attention and ye shall be heard. God save the United States of America and this Honorable Court. The Honorable Patricia A. Sullivan, United States Magistrate Judge presiding. You may be seated.

THE COURT: Morning everyone.

COUNSEL: Good morning, Your Honor.

THE COURT: The Court is in session in the matter of Loestrin 24 FE Antitrust Litigation. This is Civil Action MDL-13-2472-S and the case has been scheduled for this morning for the Court to hear argument on the defendant's motion to compel product market discovery.

Before we plunge into the very interesting merits of this motion, I'd like counsel to identify yourselves for the record. And one very important thing, the record for this hearing is being created by the microphones which are creating a recording. We don't have a live stenographer. That means two things. First, if you want to be on the record, you need to direct your remarks to a microphone. We've got one at the podium which is probably the best, although for purposes of

entering your appearance now you've also got them at counsel table. Second, if a transcript is ordered, it will be created after the fact by someone who's not present and therefore is not noting who's speaking. So before you speak please identify yourself again. I know it's annoying to remember to keep doing that, but if you want the record to accurately reflect who is saying what, whoever transcribes will probably get me right but after that nobody else will be correct.

So with that, I think I'd like to maybe if we could begin at counsel table to my left and just go across and have counsel who will be making oral presentations during the argument. Counsel who are present but won't be presenting and don't need to be on the record can, you don't need to enter an appearance. Yes.

MR. CARNEY: Good morning, Your Honor, Peter Carney--

THE COURT: Good morning.

MR. CARNEY: --of White and Case for the defendants, Warner Chilcott and, and Watson and with me is my colleague Danny Audette. I'll probably be taking the lead on a lot of the defendant's arguments and Ms. Audette will be speaking to, to certain issues.

MS. AUDETTE: Good morning, Your Honor.

THE COURT: Good morning. Thank you, Mr.

Carney.

MR. NALVEN: Good morning, Your Honor, I'm David Nalven from Hagens Berman Sobol Shapiro in Boston. I am representing the direct purchaser class plaintiffs. They are the wholesalers and the, the retailers who are proceeding by assignment. Your Honor, although I, I have been working on this case since the inception, my understanding is that because the court rules asking that only two counsel for each party enter appearances, I had not previously entered an appearance or pro hac motion. I understand that yesterday a pro hac motion was filed on my behalf. My, my colleague Mr. Pine is here if you'd like to hear from him.

MR. PINE: Morning, Your Honor.

THE COURT: Good morning, Mr. Pine. Mr. Nalven, I actually saw the pro hac motions and thought, gosh, I wonder if that's somebody who's going to be arguing tomorrow. The motion as far as I'm aware, Ms. Saucier, you can confirm, has not been referred to me so I can't grant it as I sit here. That said, I have no problem with your presenting argument based on the pendency of what appears to be a competent motion to move your admission pro hac vice. I'm sure Judge Smith will either act on it himself or refer it to me and in light of that status, no problem with your presenting the argument.

MR. NALVEN: Thank you, Your Honor.

THE COURT: And just to be clear, you're the so called retailer plaintiffs, no?

MR. NALVEN: No--

THE COURT: No, no.

MR. NALVEN: No, Your Honor.

THE COURT: Okay.

MR. NALVEN: So, so we are the direct purchaser class plaintiffs--

THE COURT: Class. Okay.

MR. NALVEN: --and functionally we are drug wholesalers; that is, we purchase directly from the manufacturers,--

THE COURT: Right.

MR. NALVEN: --but we are also some retailers who are proceeding based on assignments from wholesalers but we are proceeding on a class basis.

THE COURT: All right, thank you for that clarification. You said that originally and I was busily getting your names spelled right.

MR. PERWIN: Good morning, Your Honor.

THE COURT: Good morning.

MR. PERWIN: Scott Perwin on behalf of the Walgreen plaintiffs.

THE COURT: And you--

MR. PERWIN: My clients and Mr. Thiel's clients are also retailers proceeding by assignment but not as a class action. We filed our own case and did not invoke Rule 23.

THE COURT: All right.

MR. BUCHMAN: Good morning, Your Honor, Michael Buchman from Motley Rice, New York City office and with me today is Robert McConnell from the Providence office,--

THE COURT: Mr. McConnell.

MR. BUCHMAN: --and we are representing the end payor plaintiffs, the consumers and health insurers that purchased, and I will be doing the argument on behalf of the end payors. Mr. McConnell will not.

THE COURT: All right. Great. Thank you all. Is there anyone else who needs to enter an appearance before we get started? It seems like we're in good order.

I'd like to make some preliminary comments before I hear from counsel for the movants which is where we'll begin. I have read the filings of the parties. I'll be candid. I have not read all of the attachments or all of the expert reports. I basically focused my attention principally on the arguments and the briefs, but also on the cases which I, and I've read and reread with care to really understand I hope, to try to understand what I think are some of the key cases, the very recent

Asacol decisions out of the District of Massachusetts. Judge Dein's I think very thoughtful decision, the *Aggrenox* decision out of Connecticut which I understand the certification for an interlocutory appeal has been declined. If I'm wrong about that somebody set me straight. The *Avcon* decision and others. The impressions, and I always like to share with those of you who haven't appeared before me before my post reading the briefs impressions. This is not a prediction of how I will rule. It's simply where I, if I had to rule right now without hearing argument, these are the principles that would guide me. I am very mindful that the task that Judge Smith has given me is to decide a motion to compel, not to dabble in making any merits based decisions. I do not feel that I am sitting in the same shoes that Judge Underhill was sitting in when he wrote *Aggrenox*. Rather, I find myself more analogous to where Judge Dein found herself in analyzing what was in issue for *Asacol*. Because of that I am inclined to grant the defendant's motion particularly as to the direct and retailer plaintiffs for the following reason.

The parties appear to agree that therapeutic interchangeability is not in issue. If that was the focus of the discovery, there would be no need for this discovery and the burden of it would clearly lead to the

motion being denied. That doesn't seem to me to be the focus of the discovery. Rather, it seems that the focus of the discovery is that being a fact that everyone agrees to, are the products as to which discovery is sought economically interchangeable and that is the thrust of what the defendants are seeking evidence on. There's no doubt that the classic economic I'll say pure analysis and particularly and arguably in a case like this would say that the Court should always begin by looking for direct evidence of market power that a large reverse payment to preserve a super competitive price opportunity created by a patent to extend that monopoly power now inappropriately under which I think is the holding of activists, that if you check the box on all of those points, then you're in the realm of direct evidence of market power and you don't need to go to the relevant product market which is what this discovery is focused on. The problem is I'm deciding a discovery motion. I'm not deciding the merits and there's no doubt that concepts like large reverse payments, competitive versus super competitive prices are matters that are seriously in dispute in this case and that what the defendants are saying is that we need this evidence in order to rebut the proof that the reverse payment is large, whatever that means, to rebut proof that the product price is super competitive and the role of the

court in deciding a discovery motion is not to decide the facts, and I found powerful the fact that in *Asacol* the court begins by saying of course this kind of discovery is relevant. In *Asacol* the court then goes on to say that what's being sought is microdata sets and there's a macro data set that solves the problem, so you can't have this discovery unless it turns out you really need it, and I want to see an expert who says you need it.

In this case I have a discovery request that isn't seeking micro, as I understand it, microdata sets where a macro data set solves the problem. I do have, the plaintiffs clearly dispute it, but I do have an expert opinion that the information is necessary and there's no doubt that as the case proceeds it's possible that Judge Smith might conclude that the direct evidence of market power is such that the surrogate demonstration of a relevant product market is not necessary and ultimately irrelevant, but for purposes of where we are right now when we're not doing fact-finding seems to me to block the discovery is using the discovery motion to determine merits which is inappropriate. So those are some preliminary thoughts.

The other observation I want to make and I want to, this is why I kind of left the end payors out of my laundry list but pay attention, Mr. Buchman, these are my

end payor's remarks. It seems and there, I, probably about 10 o'clock last night I said I better go read everything again but I didn't. I went to bed instead, to see whether there's more focus on the, what I'm going to call the downstream kind of Illinois Brick Hanover Shoe discovery which is really focused towards the end payors principally, and as to that when I was all done and started really letting these thoughts roll around in my mind, the following is just very broad impressions. On the one hand, that the defendants are certainly entitled to appropriate discovery particularly where the end payors are raising claims under not nec, not federal law but other laws where it gets really complicated as to what happens as an overcharge moves through the stream of distribution and then what discovery is appropriate. So I, my starting point is to say, golly I think there's got to be downstream discovery that should happen and is relevant. When I looked at the description of what the defendants were looking at in the defendant's brief, I kind of scratched my head as to how that's relevant. So are they asking for the right stuff, and that's when I went to bed instead of going any further. So as to that issue of, you know, tracing the overcharge through the stream of distribution and what discovery is necessary on that, my thinking is that it's clearly relevant but given

that it's relevant, then what is it? What should be provided, recognizing that as you get more and more remote, I think the burden increases? You get out to individuals, it's probably a pretty high burden actually and just doing the proportionality burden relevancy balance makes me say you want to be really targeted in terms of what's ordered on that discrete issue. So no decisions, these are not decisions. These are impressions and I can be persuaded probably of anything at this point.

Did I see a question, Mr. Berman?

MR. PERWIN: Your Honor, I was just going to suggest that given Your Honor's preliminary remarks would it make more sense for the plaintiffs to go first to try to convince you that maybe the motion shouldn't be granted?

THE COURT: Well Mr. Carney hasn't won yet.

MR. PERWIN: Okay.

THE COURT: Far from it. So I think I would like to hear from the movant first. Hopefully the movant will be brief.

MR. PERWIN: If he's smart he will be.

THE COURT: He'll be very smart and he'll be brief, and then we'll give the plaintiffs time to really talk through everything and obviously then the defendants can come back at it with a little rebuttal.

Mr. Carney?

MR. CARNEY: Thank you, Your Honor, and we listened carefully to what you said and I'll basically reserve most of my time to respond. I think obviously we agree with, with, with virtually all that you said yet we have sort of a slew of cases both pre and post activists where this discovery has been granted. One case I didn't hear Your Honor mention is *Doryx* and I've been a bit--

THE COURT: Oh yeah, I should have--

MR. CARNEY: --of a broken record in that but that one, you know, the trial court judge ordered this kind of discovery. It's very similar to the Third Circuit granted summary judgment on those bases. *Avcon* another oral contraceptive case for oral contraceptives information was required to be produced on that.

THE COURT: Mr. Carney, just a question on if, am I right or wrong about this. In *Avcon*, the court allowed the discovery but then on the merits found that the market was limited to the brand AB rated equivalence--

MR. CARNEY: I don't think that's, I don't think that's correct. I think what happened is in *Avcon* the discovery was ordered. There was a motion for summary judgment. The plaintiff survived the motion for summary judgment, but it was a factual issue to go to the jury basically over what the market would be. This is

different for instance than the *Yaz* case where there're two dismissals.

THE COURT: Oh, that's what I'm thinking.

MR. CARNEY: There the product market--

THE COURT: Yeah.

MR. CARNEY: --it was dismissed twice on product market. So, you know, I guess backing up we would say the big picture, you know, when you look at a case like *Yaz*, and *Yaz* is an interesting one. It was dismissed where they argued that it was just, you know, that product. Footnote nine of that decision actually says, that's improbable when you consider one of its closest competitors is Loestrin 24 and, you know, rejected arguments that the plaintiffs have made. So we think and we have a potion, a pending motion to dismiss on this. We actually think that if there's any market that could be, you know, incredibly broad, this is exactly it as the *Yaz* suggests. You know, we, we have kind of put in evidence, I know you haven't had a chance to read all the attachments and we apologize for the scope of what we put but it's obviously an important issue. We attached an NIH study that surveyed 12,000 women. It listed the top brands. Loestrin wasn't in the top 10. It wasn't in the top 20. It was the 50th brand and of the 80,000 women using it surveyed, only .2 percent, not 2 percent, but .2

percent were using Loestrin. The biggest players, Yaz and some of the others had market shares in the single digits, maybe getting into the teens. So this is a very fragmented area and so we think this is very important discovery and have have focused on that. We've also tried to get it done upfront. This is one that the parties have been back and forth on over the years in different cases. We all know each other from these cases. Courts have come down different ways ultimately on the merits because it is very factual driven but that's why we say we need the discovery, and on *Aggrenox*, I know you're going to hear a lot about *Aggrenox*. That is, it had activists which kind of changed the structure a little bit but ultimately said these are rule of reason cases. Judge Underhill did do a very thoughtful opinion. The certification was denied but they often are. The courts really want these things to be hashed out at the district court level and we've seen that in this case where things that might have gone up and gotten sorted out to maybe the frustration of those of us in the trenches on it, know we've got to soldier through it. So *Asacol*, the magistrate as you know didn't follow *Aggrenox*. You're kind of going out on a slender read there I think to take that view and it's interesting that a judge has done that and we'll see if that, if that holds us, but we don't think that that case upends, you know,

longstanding supreme court precedent about the rule of reason and defining a product market. We think it's key discovery here for a, for a number of reasons. One is, these parties are coming in as litigants and saying there is no, you shouldn't be looking at substitution outside of the brand and the generic, but yet many of them have as their business model to do exactly that in the real world and so we focused on for instance, CVS and Kroger, and this kind of goes to our custodian issue. These companies have what are called therapeutic P&T committees that evaluate what should be on formularies? What should be substituted? And we've asked for the notes and, and information about that because they're assessing whether or not they should pay for Loestrin and overwhelmingly in the public ones we've been able to find, the conclusion is and this is partly governed by the Affordable Care Act which says that you've got to as an insurer provide at no cost an oral contraceptive. Well obviously the formularies go for the generic one and they've made over and over again the conclusion that you don't need expensive Loestrin. We won't reimburse. You can take any of a slew of other drugs that have been genericized and that, that's good, that's safe and CVS says, look we can, we have committees that consider the safety, the efficacy and we have no reason to think they're putting anyone at

risk, but also the economics, and so they look at that and so that's their business model and then in this Court for these purposes the argument is always as it is in these cases, it's the, the brand and the generic of that product. So we want to explore that and this is different than what we put to, to Magistrate Dein and Mr. Nalven and I had the pleasure of doing that argument and a lot of issues about that.

Our focus, we, we frankly on the defense side, we, we've changed our position in terms of what we're putting forward. We're not seeking the small data, the data sets. We'll go with IMS. There's sort of an agreement between the parties that that's the information to be used. We're looking for the information that we've always described as qualitative documents that would elucidate what's going on in the data. We can use the IMS data, but why did it move and so we put in the declaration as Your Honor noted, two of them in fact from Suma Addonte (ph). He gave testimony in the *Cater* case before the FDC that ultimately resulted in a finding that the product market there was all potassium chloride. If you take two 10 tablets for the branded 20, he also brought into testimony in the *Doryx* case that resulted in summary judgment finding that all the antibiotics were in the same product market and his point is to know what's going on in

the data you need to look at this and you need to look at why, why was there switching? One point that comes up in these cases a lot and the argument is that the price of the brand never went down and that's always talking about the list price, the gross price, but what's going on behind that always in these complex markets is there are copay cards. There are customer savings cards. There are rebates that are paid, and so the net price will change and in *Doryx* we had this come up where they over couponed. They actually were almost giving the stuff away at one point. They stopped that at some point, but you could see the shift basically of between the brands basically and there was strong endurance inter-brand competition and this is going to come up in the *Solodyn* case that's also pending that these two drugs, that basically it was that they were competing and so for instance the problem with Doryx an issue with it was that it would stick in people's throats, and so people would, drug reps for *Solodyn* would say look if you lick your finger and touch it it sticks to your finger and they were using that to put down, disparage the Doryx product when they were detailing to doctors. So that's what goes on, a lot of inter-brand competition. We're looking for that and that happens in a lot of places. It, it, they, the brands will send out, the manufacturers will send out information, the PBMs will

send it out to all of these parties at different levels. We will seek that information through third party subpoenas. Those tend to be, we always get the argument back they're non-parties. We shouldn't have to do as much work. We're mindful of that and so we need to get done what we can with the parties, with what they have but, you know, we look for that. So that's a reason why as between these different drugs it's important to look at them. We have narrowed what we're seeking. We, you know, we believe the product market frankly is all oral contraceptives. We appreciate that that would be an unrealistic thing to serve discovery on. We thought hard. We narrowed it to 10. We dropped, you know, asking for data. We then said here are some categories of things we want for each. We're willing to have a discussion on the number of drugs, the things we want and the custodians. It's got to be the right custodians, particularly the retailers who have, have limited their custodians to the purchasing department. We said no, look, if you've got people that are having negotiations about different things with their PBMs at branches, that sort of thing, we should be getting that. We don't think there's any undue burden and Ms. Audette can talk to this more later if needed because we're talking about a handful of custodians for each of these, I think the average is, you know, four or

five for the corporations, one or two for the EPPs. So it is a very limited burden in that sense and I'm willing to negotiate the custodians, but we've hit as this is kind of a fault line in these cases and not surprising that we're here on this and, and need the help.

On the EPPs to Your Honor's point, we, we have sought discovery there. We did differentiate between individuals and the, and the health and welfare funds. There, one of our issues is custodians with the health and welfare funds. We want to make sure that to the extent these, these health and welfare funds which we understand are not massive corporations there are going to be fewer custodians. They may outsource their management of, of what drugs are on formulary, how they do this to a PBM or have that provided as a service. We're looking for the folks, whether they're the trustees or whoever it is that has that correspondence with a custodian who, with the, with the PBMs basically that might go into what goes on a formulary and what does not go on a formulary. So that's part of it with EPPs, and then to Your Honor's comment about the downstream issue, this motion we have avoided getting into downstream--

THE COURT: Okay--

MR. CARNEY: --and they need get into downstream, but we have tried to make every request

product market specific. Now it may be, and I think there have been some objections, well that is also downstream and Your Honor noted under *Hanover Shoe* as direct purchasers, yeah there's a bar kind of going after what is the pass on and then we always get into this debate about well, you know, if it's for product market that's a legitimate purpose and we can do that and if we have, you know, end payors we get into complicated state laws and actual damages, we haven't even got to that yet. This is really just focused on the product mark--

THE COURT: So this is, this motion really is not slip sliding into that crazy world.

MR. CARNEY: We, we tried to kind of stay out of it and kind of take this as a first step, see where that gets us and the things that we're seeking from the end payors, you know, again because they're having dialogues with the, with the PBMs or they are themselves trying to figure out what coverage they want to provide their members. We think and we've seen this that it's likely there will be communications about we're not going to pay for expensive Loestrin. You can take one of several generic brands and we've put in formularies including the McKesson one which is an assignor where they basically, you have to use the, the cheaper generic, right, and that's part of the whole, you know, hatch wax on this

team. We're not objecting to that. We're just saying if that's your business policy you can't come into this Court and then say that that should be the product market of, of just the brand and the generic and we might argue about, you know, what is a relevant antitrust market, and as Your Honor said, that, that's kind of what we need the discovery for is to, to look at as Dr. Addonte says, when are, this is paragraph eight of his rebuttal declaration, he sort of says this discovery goes exactly to the economic incentives that there are at different levels in the chain which tends to get the plaintiffs to say well that's downstream but we're saying no, the, the payments are made at different levels. This isn't where you go for bread and there's a coupon on bread or not. There's different levels of, of interaction, and so that's I think kind of generally our position on it and I'll sort of save the balance of our time to, to respond to comments of the, the plaintiffs.

THE COURT: All right, Mr. Perwin.

MR. PERWIN: Thank you, Your Honor, Scott Perwin for the Walgreen plaintiffs. Your Honor doesn't have to decide what the relevant market is in order to decide this discovery motion. We agree with, Your Honor, that that particular issue is not before Your Honor, but you do have to decide whether the defendant's arguments are sufficient

to justify the discovery that they're asking for, and part of being sufficient to justify the discovery is being consistent with the law. The *Aggrenox* case holds among other cases that these arguments are not consistent with the law and the court should not order discovery based on arguments that are not legally sound. I thought I heard Your Honor say that they, they say they need this discovery to show whether there was a reverse payment. This isn't going to have any bearing on whether there was a reverse payment. I don't think even Mr. Carney would, would, I think even Mr. Carney would acknowledge that. I thought I heard Your Honor say that they needed to determine whether there's super competitive pricing. This isn't going to help determine whether there's super competitive pricing. You do that by comparing the price of Loestrin to the, to the cost of making it and so none of this is going to have any bearing on that. What this is going to show is whether or not there is therapeutic switching, a non-price based switching between Loestrin and other oral contraceptives which is not relevant to product market definition and it could show and we've actually agreed to provide these documents whether there's price based substitution, like the formularies, like people picking one oral contraceptive over another, but that argument runs into the cellophane fallacy which is

described in, in among other cases in *Aggrenox* because showing cross elasticity at current prices doesn't reflect on market definition. It may simply show that the defendant has already raised prices as high as they can to the point where if they raise prices any further people will start to switch. That's what these formulary documents will show, but that is not relevant because price elasticity has to be measured at the competitive price which in under economic theory is marginal cost. If these drugs, other drugs only constrain the price of Loestrin when it gets to 90% above marginal or to a margin of 90%, then it's not relevant. All it shows is that is, that they have a 90% profit margin instead of a 95% profit margin, but 90% is enough to show monopoly power. So it doesn't, it doesn't, it's not relevant to the issue that they're asking for.

THE COURT: Here's what concerns me, Mr. Perwin, and it seemed to me that Judge Underhill was expressly doing more than limiting himself to a discovery motion, and the fact that he set it up for an interlocutory appeal I think was the most eloquent aspect of his understanding that he was engaged in a, the creation of a principle for guiding that case not just for discovery but for the entirety of the case--

MR. PERWIN: No question.

THE COURT: --which was so kind of aggressive that he wanted to have an opportunity for the Court of Appeals to speak to it before everybody spent a lot of money with that limitation which didn't work out, but--

MR. PERWIN: Right, and, and there's no question that's correct. Judge Underhill went beyond a discovery motion--

THE COURT: So I'm uncomfortable in this case being Judge Underhill.

MR. PERWIN: Well we're not--

THE COURT: I think I'm Judge Dein.

MR. PERWIN: We're not asking you to be Judge Underhill but Judge Underhill's analysis does reflect on the legal soundness of Mr. Carney's arguments and, and--

THE COURT: No, no question.

MR. PERWIN: And so there's no reason to order discovery if his arguments are not consistent with the law. I mean for example, activists itself recognizes that there can be, it doesn't say there always is but that there can be a relevant mark consisting of a brand and its generics. That's the whole basis for why those kinds of agreements, the reverse payment agreements can have anticompetitive consequences. Mr. Carney's argument is basically no, there can never be an argu, a relevant market consistent of a brand and its generics--

THE COURT: Well I'm not sure--

MR. PERWIN: --because there's always other drugs that can be used as to treat the same condition.

THE COURT: He may be arguing that but I wouldn't be ruling on that basis.

MR. PERWIN: Good.

THE COURT: The ruling would be based on the fact that this case could lead to the Court's conclusion that the market is exactly the way you draw it limited to this brand and it's equivalence, full stop, done or the Court could conclude that the market is the incredibly broad market and that Loestrin has a, I forget, is it 2 or .2% market share and in an incredibly vibrant and competitive market, and that the list price is sort of bears no relationship to actual price and that in fact actual price is down in the trenches with everybody else and that, that's what's going on with the market. I'm not deciding that. I'm leaving open that those are two utterly different ways of looking at the universe both of which are consistent with the law, both of which are positions that are in issue in this case and ultimately the Court could go and Judge Smith may, may decide as a matter of law early in the case one way or the other that, and I believe that issue is somewhat before him, but I've got the discovery motion and for purposes of a discovery

motion your way of looking at the case which is a very linear direct market power, forget about the therapeutic alternatives, focus as Judge Underhill does on, you got a reverse payment, you got a super competitive price, focus on those things. If the answer to those questions is check, check, check, then turn it over to a fact finder and figure out whether you've got violation and damages full stop, but for purposes of discovery and relevance the defendant's ability to get the discovery to create the alternative construct which is no, no, no. I'm going to challenge the viability of that evidence with a very different way of looking at the market through the surrogate, well recognized in the law of a product market.

MR. PERWIN: Absolutely, Judge, and theoretically that's true but the documents they're asking for won't help. It won't help because for example--

THE COURT: Explain that to me cause that--

MR. PERWIN: Sure, sure.

THE COURT: --that could be your winning argument.

MR. PERWIN: The rebates and the discounts and the, that he's been talking about those are on Loestrin. We've already agreed to give them every document that we have that mentions or refers to or relates to Loestrin. That's not in dispute. They want us to run searches on

these other drugs and if, if, and the documents would only mention the other drug because if they mention both drugs Loestrin and another oral contraceptive like Yasmin or Yaz--

THE COURT: Yeah.

MR. PERWIN: --we'd turn them over.

THE COURT: Right.

MR. PERWIN: We're not withholding documents just because they also mention other drugs in the same therapeutic class. So what we're talking about is documents that don't mention or relate to Loestrin at all. What is that going to show? How is that going to show that there's--

THE COURT: Yeah, and let me stop Mr. Perwin cause here's what bothered me. If a document is a marketing document and that's one of the categories that they're looking at where the document is ruminating about strategies for pushing the purchasing to, I don't know, I don't know if Yaz is a cheap product or not--

MR. PERWIN: I, I--

THE COURT: --so let's pretend it is,--

MR. PERWIN: I don't either.

THE COURT: --I have no idea. You know, how to push all the business to Yaz and Yaz is at the right price point and the other products that we're going to steal all

the market share away from are going to sort of fall away and the document doesn't name the other products. It just names the products that it's trying to draw the business toward. That document it seems to me is a squarely relevant document which is dealing with economic interchangeability and has a bearing on what a product market ought to look like and yet your search doesn't pick it up, only if I grant the motion to compel is the defendant going to get it.

MR. PERWIN: Well there, there's two answers, Judge. First of all, my clients are retailers. We don't push market share from one drug to another. We fill prescriptions that come in the door. Now Mr. Carney will, is going, is going to tell you well there may be formularies out there and we may have something to do with the formularies but there's much easier ways to get those formularies. They already got them publicly and put them in their brief. They can get them from the people who write the formularies, that is the managed care organizations. My, my clients could have a document like that but the question before the Court is, is it worth it to make us go look for documents like that given the likelihood that they exist? And our position is of course, it's not. We don't, you know, we have, our client, my clients sell every drug on the market. We

don't have lots of documents that talk about particular drugs who are trying to move market shares from one drug to another. We, those are documents that are used to try to influence doctors prescribing habits. By the time the, the pharmacist gets a prescription that's already happened or it hasn't happened and we fill the prescription and if it's not, if it's, if it's a prescription for a branded drug and there's no AB range in there, we fill it with a brand. If there's a prescription for a branded drug and there is an AB rated generic 95% of the time before with the, with the generic.

The second answer is the cellophane fallacy which we are now going to start calling the *Doryx* fallacy because again cross elasticity or price substitution at current prices in this kind of case simply reflects the fact that the branded price, branded drug has already been pushed up to monopoly prices and at that point at the margin you start seeing people--

THE COURT: But they don't agree with you. They want to dispute that--

MR. PERWIN: Well, but we can find that out by just looking at their, at their prices and their costs.

THE COURT: But they don't--

MR. PERWIN: That's the only way--

THE COURT: But--

MR. PERWIN: That's the only way to do it. If, so, but either way, Judge, either it's going to show that there is, if it shows that there is cross elasticity then that doesn't help anybody because if we're right and the market is and they've already raised prices to monopoly levels, you would expect to see cross elasticity. If they're right and there's a broader product market, you'd expect to see cross elasticity. So cross elasticity doesn't tell us which is, who's right. The only way to tell who's right is to look at the price of the branded drug and compare it to how much it cost to make it and see whether there's a substantial profit margin which shows that the existence of other oral contraceptives has not prevented Warner Chilcott from raising prices to monopoly levels and therefore if that's the case they're not on the market whether there's cross elasticity or not because you would expect as economists would tell you that once prices have been raised at high levels you're going to see some price based switching.

THE COURT: Of course.

MR. PERWIN: That's, they would have, if, if that weren't the case they would have kept raising it--

THE COURT: Right.

MR. PERWIN: --until that happened. So that's, that's the answer. So these arguments are simply not

consistent with the law and let me respond to a couple of the cases that Mr. Carney cited.

The *Doryx* case, the order that he's referring to there was directed to the generic plaintiff Mylan, a manufacturer--

THE COURT: Um-hmmm.

MR. PERWIN: --of generic drugs. It was not directed to the purchasers who are in the case. We had to produce data but we didn't produce the documents, the qualitative documents that they're looking for. We did produce purchase data which as, as Mr. Carney says is rel, irrelevant because you'd have to IMS data we can, that can be used for the same purpose. The *Yaz* case Mr. Carney said it was just one product. Well that's just not true. The market definition in *Yaz*, there were two market definitions in *Yaz* and neither one of them was just one product. The first one was all drugs that contain these two active ingredients. That's the first thing that Sando tried, and they said that Yazmin and Yaz were in different product markets but they both contain the same two active ingredients. So by, by definition of the relevant market they were in the same product market. So in other words, Sando made inconsistent allegations. They said the market is every drug that has these two active ingredients and then they said but they're in separate markets. Yaz and

Yasmin are in separate product markets even though they both contain the same two active ingredients. So that didn't work. Then they came back and said well it's all drugs that are used to treat fertility and PMDD, premenstrual dysphoric disorder and they and they said Yasmin and Yaz are in that market but they're the only drugs in that market, and the court said no because there's obviously other drugs that are used to treat both of those conditions. You can, you can make a combination of drugs that would be used to treat both of those conditions. So in both cases they made allegations that were inconsistent with the market. They did not allege a product market consisting of a particular branded drug and its AB rated generics which is what we allege here. So that market, product market was not before the court and if they had made that argument and that product market definition they probably would have survived a motion to dismiss. So it doesn't reflect on the product market that we're offering. And in *Avcon* there was also an order by a magistrate to will provide data on other drugs and then eventually as Mr. Carney said there was a summary judgment ruling but that again involved data, didn't involve searching for documents.

As I said earlier we've already agreed to produce all of the Loestrin related documents that we

have. If there are documents that show either price based substitution or therapeutic clinically based substitution between Loestrin and other drugs, he's going to get those documents. The only thing we have declined to do is to produce documents that don't mention Loestrin that may mention some other drug and Your Honor gave an example. We don't think those documents are going to be found in our files and even if they did because of the cellophane fallacy, they won't shed any light on what the actual product market is. The way, the only way to determine what the product market is is to see through the other drugs that Mr. Carney claims are in the product market, did they constrain the price of Loestrin to its marginal cost, and the answer to that is obviously no because we will be able to show and I don't think it's disputed that Loestrin is sold at multiples of its marginal cost. Now that by definition as, as Judge Underhill recognized is market power. So you don't have to make that decision but, but you do have to decide whether these arguments make any sense and they don't and that's why the motion should be denied.

THE COURT: Mr. Perwin, before you sit down, if I accept that the documents sought by the defendants are conceptually relevant and I'm prepared to issue an order,--

MR. PERWIN: Yes.

THE COURT: --is there a narrowing and a focus effecting your clients that would target the discovery? I mean you're saying if the discovery is properly framed your clients are going to have virtually no responsive documents, I think. I think that's what you said.

MR. PERWIN: Well I, I mean I think they'll, they'll have documents, the same number of documents they have about Loestrin, they'll have about Yaz or about Yasmin. There are some, there's some product literature. There's price and price announcements. There's, you know, occasional emails about some supply shortage or some issue that has brought, you know, bubbled up, that somebody needs to take, take a look at but, you know, they, they're not going to help, number one as I said, and number two, I guess the narrowing would be let's limit it to the purchasing department. Those are the documents that we've agreed, those are the custodians that we've agreed to search for, for Loestrin and we could run, if the Court orders us to we'll obviously run additional searches on these other nine or 10 oral contraceptives but we would like to limit it to the purchasing department. Our, the, first of all it's not practical for us to search individual pharmacies, you know, Walgreen has 8,000 pharmacies. We can't possibly search all of those. There

is a department in the headquarters that contracts with third party payers. Those are, those contracts are not drug specific. They obviously include all the drugs and they and they're negotiations that we have that somebody like Walgreen has with third party payers as to what they're going to get reimbursed for filling a prescription but those are not going to have documents that deal with these particular drugs. To the extent that there are such documents, they're going to be in the purchasing department. They're going to look a lot like the Loestrin documents that we've already agreed to produce and that's what I would, I would limit to the custodians that we've already identified. I would, I would suggest limiting additional searches to those same custodians.

THE COURT: What about the defendant's argument that the retailer plaintiffs have what's described as a therapeutic interchange program? What--

MR. PERWIN: Well we--

THE COURT: --where does that, if it exists, where does is reside?

MR. PERWIN: Some of the, some of the retailers have associated PBMs and PBMs do put together formularies and do make I guess some effort to try to limit the prescriptions that are fill that they have to fill to drugs that are less expensive than potential other drugs.

So, but as I said earlier they already, those formularies are easy to find. They're not, they're not hard to get and the only therapeutic interchange program that I know of, I mean if, if they mean a, a program to call doctors up and get them, try to get them to write prescript, change their prescription, I'm not aware of any such programs. I am aware that Kroger has a small PBM. CVS has a large PBM and they do create formularies. I don't believe that they engage in therapeutic interchange in the sense that you're referring to which is to they get a prescription for product A, the pharmacist calls the doctor and says there's another drug that's less expensive, can you change a prescription? That, that's, that's not what happens. What they do is they put together formularies that have to do with coverage and then the doctors learn from their patients that well this drug that you're prescribing is not covered and the doctor may change their, their prescription at that point, but it's not directly from the third party payer to the doctor. It's via the patient. The patient who has to pay out of their pocket for a drug because it's not covered on the formulary will tell the doctor that and the doctor may say okay well let's try something cheaper. But those formulary documents are, first of all, we don't dispute that there are formularies and that some--

THE COURT: Right.

MR. PERWIN: --formularies encourage the, the prescribing of generics as opposed to brands even though they may not be AB rated equivalence and they, and they know that and they have ways of getting those formularies either publically or through subpoenas to the people who create the formularies, but the retailers in general are not a good source of information for that and we cited in our brief the *Solodyn* case in which the magistrate in that case ruled that we were not required to add custodians from the PBM's sides of the business and search for documents relating to those formularies.

THE COURT: Thank you.

MR. PERWIN: Thank you, Your Honor.

THE COURT: All right, Mr. Nalven.

MR. NALVEN: Thank you, Your Honor, David Nalven for the direct purchaser plaintiffs.

Your Honor, we very much appreciate the attention that you have given to Judge Dein's opinion in the *Asacol* case but respectfully, we do think that the *Asacol* case is highly instructive of the resolution of the dispute in this case. Just to be clear, the dispute in *Asacol* was precisely the same dispute as is presented here. It's true that the defendant here has dropped its request for data, but in *Asacol,* the defendant was also

asking that the plaintiffs search their files for documents concerning nine additional drugs. That is in that case the plaintiffs had agreed to search their, their files for the documents concerning the drugs at issue and the defendant said we also want you to search for nine other drugs that, that they say are probative of relevant market. Judge Dein looked at that dispute, a dispute very much like this one and, and by the way it's, it's analogous in other ways. You had the same defendant, Warner Chilcott. You, you actually had the same lawyers, Mr. Carney and me and, and truth be told, you had briefs that were very similar to the briefs that were presented here. So, and, and it's in the same circuit. So, so you have a highly analogous set of facts and ruling. Of course Your Honor is not bound by Judge Dein's decision. It's instructive and it's also instructive that it was appealed to the district court judge who overruled the objections asserted by the defendant.

In *Asacol* it's true that Judge Dein, Judge Dein's ruling was based in part of the fact that the defendant did not offer a declaration of an expert who said he would use the information that was sought and, and based on Judge Dein's analysis as well as the absence of a declaration, Judge Dein ruled with, with, with a magistrate judge hat on, not a Judge Underhill hat on,

ruled that whatever discovery would be generated by the requests was, was not sufficiently probative to merit the burden that the discovery would require, classic discovery analysis. So in this case the defendants have offered a, an expert declaration. They've offered two from Mr. Addonte. It's important though to look back at Judge Dein's decision and particularly footnote two in Judge Dein's decision where she said that her ruling was without prejudice to the defendants providing a declaration from an expert that, that the discovery was necessary, necessary to formulate an opinion. Now it's important to look at Mr. Addonte's declarations and I know Your Honor has gotten a lot of papers and so it's hard to get through all of the--

THE COURT: And I haven't, I have not read the expert declarations--

MR. NALVEN: --and, and, and I very much appreciate--

THE COURT: Full confession.

MR. NALVEN: I, I very much appreciate that,--

THE COURT: I will.

MR. NALVEN: --but I would urge Your Honor to look at them carefully because Mr. Addonte in his declarations, he says things like, it would be reasonable to look at these things or, or they, they would shed some

light on these things but nowhere will you find in his declaration a statement that any of the discovery that's being sought, that this is this is defendant's expert. They got to work with him on these declarations. Nowhere will you find a statement by him that the information that they seek is necessary to a relevant market analysis. Judge Dein's decision was consistent with a decision that was issued by Magistrate Judge Peck in the Southern District of New York, also in a, in a pharmaceutical antitrust case, and we cite Magistrate Judge's, Magistrate Judge Peck's decision on page four of our brief where he says, if the defendant gives me an expert affidavit explaining how the expert plans to use this and why this is a better source of national data, et cetera, and there were also data and documents at issue there. He says then I will consider the data assuming that the testifying expert, this is what Judge Peck said, is willing to be on the hook that, it being on the hook, he says, I would grant the information and he says if and only if the expert is willing to be on the hook. Here we have an expert who never said that the information was necessary and I think that that's significant. You have on the other hand a lengthy declaration from Meredith Rosenthal offered by the direct purchaser plaintiffs who is a professor at the Harvard School of Public Health and she

offers a declaration that says with no holds barred, she says that the materials subject to the motion are neither necessary nor sufficient for the determination of an antitrust market. She says they're not necessary and she further says that because the materials are not nationwide materials but come from just very small particular wholesalers and retailers, that they are potentially misleading. So I realize that Your Honor hasn't had the opportunity to go back and look at the evidence underlying Judge Dein's decision and the evidence that's presented here, but we would respectfully request that the Court do so and consider that information instructive.

Now Mr. Addonte also identifies specific categories of information that he says are potentially informative and the things that he identifies are in particular information about insurance coverage, drug formularies, patient savings cards and the like. Now let me talk about our, the, the, the representative plaintiffs to whom discovery is, of whom discovery is sought and, and these requests. The class that we represent is a class of wholesalers, that is direct purchasers from the manufacturer Warner Chilcott, and retailers and these are relatively small retailers as opposed to the CVS and the Walgreens of the world who are proceeding under assignment. Wholesalers have no formularies. Wholesalers

just buy from manufacturers and sell to retailers. They have no formularies. They have no P&T committees. They have no PBM agreements. They have no insurance arrangements. They obviously have no therapeutic interchange programs. I mean these are companies that buy product in bulk and sell it in bulk. They don't have any contact with consumers. As to the wholesalers who are part of the class that we represent, they simply don't have this information. Now the defendants have asked them, well we want you to search for your documents concerning these 10 additional drugs and the 10 additional drugs by the way are probably more like 19 or 20 additional drugs because the terms will pick up more than one drug. It's, it's an enormous burden for little to no yield as it relates to the wholesaler plaintiffs. As to the retailer plaintiffs who are proceeding by assignment and are therefore part of the class, so Your Honor, my firm's client is Ahold USA American Sales Company. It's a, it's a company that owns grocery store chains including Stop and Shop right here and so we also have no formularies. We have no P&T committee. We have PBM agreements as Mr. Perwin described but these agreements don't say anything about individual drugs, nothing. They basically say this is the amount that we will reimburse for a brand drug. This is the amount that we will

reimburse for a generic drug and it's not drug by drug. There's a, there's a formula. We have no therapeutic interchange program, policy, instruction or anything of the like. We have provided the Court with a declaration from the person responsible for purchasing who's been with the company for more than 20 years, who will be deposed in this case and she has said there is no therapeutic interchange. Just as Mr. Perwin described, when a consumer comes into the pharmacy and hands up the prescription at the bench or the doctor calls it in, our pharmacists dispense the brand or if there's a generic pursuant to state law or insurance contracts, they dispense the generic. That's it. There isn't, there, there isn't a policy where they turn to the, to the, to the patient and say, why don't you try this. That's not the way it works. We all have been the pharmacy. We all know about the interactions that we have with pharmacies. There's no policy. There's no practice. That's not the way it works. We dispense what the prescription requires us to dispense. So for our client to then go back and, and pull all of our documents relating to 10 other drugs and by the way, we have also already agreed to pull documents for nine drugs or nine drug names which actually because of the naming of drugs is actually going to end up being dozens of drugs which will of course also include

the Yazes and the Avcons of the world because those doc, those products may be named in our documents. It's an enormous burden with, with no meaningful yield.

THE COURT: Mr. Nalven, let me just ask you a sort of very practical question. Is the essence of the dispute here, I mean if you've responded to the document request not by saying objection irrelevant but rather by saying, we have no documents, then is the defendant pressing you notwithstanding your response, there are no documents, to nevertheless run searches which will come back and affirm after you've spent a lot of money to run the searches that there are no documents?

MR. NALVEN: Well--

THE COURT: Cause those are two different--

MR. NALVEN: --yes.

THE COURT: --worlds for purposes of a motion to compel. One is overcoming the relevancy objection. The other is a very practical proportionality problem; that is, you say there's no documents. The defendant says well, I want you to run these searches anyway and you say why, there's, nothing will come up and generally, as long as everything's credible and the defendants are going to get other documents that might give them clues that the representation is wrong and they'll take the deposition and they can cross examine and suggest that the

representation is wrong and then go back for a second bite. If turns out it's not right then, you know, we, courts certainly don't order litigants to make futile and expensive searches for things that are known not to be there.

MR. NALVEN: Case closed. Your--

THE COURT: But that's way past rel, that's a different issue than 99% of what's being argued to me today. That's different.

MR. NALVEN: Well, Your Honor, we, we did argue relevance, but we also have argued in this case that the burden exceed the value and I, and I want to be very clear about it. I, I have not said that our client has no documents--

THE COURT: No--

MR. NALVEN: --and, and here's why. The defendant for example has asked for documents with respect to what they refer to as the, the 10 other drugs reflecting price changes, okay? So our client buys a lot of drugs. Buys probably, you know, several thousand different drugs. They're on the list serve for hundreds of brands and generic manufacturers. They, they frequently get emails saying here's our new price or they get an email from a distributor saying, here's our new price list and, and, and, and undoubtedly one of those

drugs will turn up on the price list. They're not maintained in any way. They're not really used in any way because we pay the price that we pay based on what we buy.

THE COURT: Yeah, and if those documents list Loestrin they're going to be produced.

MR. NALVEN: That's, that's correct. If they list Loestrin they are going to be produced. If they list Yaz and they don't list Loestrin they're not going to be produced, but they're not maintained in any meaningful way, and so the only way that we can find that document is, is if we searched for every document that has the word Yaz on it and then had lawyers go through those documents to make sure that we were producing only the ones that were relevant. That's what I mean about the needle in the haystack and there isn't any need for that document because there, there are data sets publically, commercially available, that show the prices at which drugs were sold and show when price changes were made. Let me give you another example, formularies. Okay so, so formularies are creatures of, of pharmacy benefit managers and third party payers. When you go to Stop and Shop and you hand up your prescription, the, the pharmacist doesn't take out a formulary and, and look at whether you're entitled to get that drug and at what price. When, when you give the pharmacist your card and he or she puts it

into the machine, it actually goes to a third party vendor. That third party vendor interfaces with the PBM and, and, and, you know, through the magic of, of computers is able to determine in about a half a second whether you are eligible to purchase that drug and at what price, and then the information goes back to the intermediary and back to Stop and Shop. We don't maintain formularies in any, we, we don't have possession of them and we don't maintain them in any organized way. Are, are there formularies floating around in our database? I have seen them. I, I recently saw a formulary for Maryland, Maryland Medicaid program for 2012. I mean there, there are a few floating around. Formularies by the way change constantly and because there are dozens of PBMs and hundreds of third party payers, it means that there are thousands of formularies. We have, you know, a few random, but if we're to search for formularies, it means that we have to search, you know, our entire third party payer department because one of the employees there may have received that, you know, Maryland Medicaid formulary in 2012. So it's that sort of searching that is, is extraordinarily burdensome and yielding, you know, really no, no, no, no, it's really of no probative value.

So we do think and I, and I want to be clear that we join the argument made by Mr. Perwin, but we do

want to add that with respect to our wholesaler representative, we think that the information that's being sought, it, it really just misses the mark and with respect to the retailer who is a class member, again, there are no formularies. There are no insurance agreements. There are PBM agreements but they are not drug specific. We have provided a declaration saying that we have no therapeutic interchange programs. In essence, anything that Mr. Addonte says might be helpful in his declarations are things that if we have their random and the burden of searching for them exceeds the benefit.

I just want to close with, with one other point. In, in the meet and confers that we had, the defendant at some point sent us a list of something like 30 or 35 individual custodians whose documents they believe we should search. Now they did of course caveat that with, well we're willing to negotiate. What I heard Mr. Carney say today is, well they're searching the purchasing department, maybe we're looking for four to five additional. We think that those are unnecessary, but we also are, are, you know, mindful of the Court's at least preliminary view and, and I hope that the Court is mindful that our primary, our sole interest in challenging this motion to compel is, is not to keep evidence from the defendant but to avoid the enormous burden, an unnecessary

burden that this discovery would entail and, and so with that in mind we think the motion should be denied because the burden is, is large and unnecessary, but we also recognize that if the defendants continue to press that, that they need to be exceedingly targeted in what it is they're seeking.

THE COURT: Thank you very much, Mr. Nalven, very helpful. Mr. Buchman.

MR. BUCHMAN: Good morning, Your Honor, Michael Buchman from Motley Rice's New York office on behalf of the end payor plaintiffs. Your Honor, just for purposes of clearing up the record, I understood Your Honor to mention downstream discovery,--

THE COURT: Yeah.

MR. BUCHMAN: --and I just want to clear for the record that the defendants are not seeking downstream discovery from the end payor plaintiffs. I do understand why Your Honor did mention that and the reason is because the direct purchaser plaintiffs at the end of their opposition brief did mention downstream discovery and as a precautionary measure did brief that issue but we did not. The end payor plaintiffs did not brief that issue to the extent it is an issue, I would respectfully request a 10 day extension to brief that issue in 10 pages if the Court deems it--

THE COURT: Yeah.

MR. BUCHMAN: --necessary.

THE COURT: The defendants have been clear that they're not looking for it, and now that I've heard from counsel I understand why when I was all done I said, I'm really confused about what's going on with downstream. The answer is nothing so no worries.

MR. BUCHMAN: Thank you, Your Honor. Then let me proceed--

THE COURT: I'm not going to order downstream.

MR. BUCHMAN: Thank you. Then let me proceed with the argument today on the product market. If I may approach, I am going to be using a PowerPoint presentation--

THE COURT: Sure.

MR. BUCHMAN: --and I would like to hand it up to the Court.

THE COURT: Are we geared up to do that, Ms. Saucier, today?

MR. BUCHMAN: It's paper.

THE COURT: Oh, it's just paper. Oh okay, good.

MR. BUCHMAN: May I approach, Your Honor?

THE COURT: Actually Ms. Saucier can probably help you out so you don't have to climb over everybody.

MR. BUCHMAN: Your Honor, in addition to the

PowerPoint presentation I've also handed up a complete copy of the transcript from the *Aggrenox* hearing on argument. The reason I've provided a complete copy is to blunt any objection that any portion of the PowerPoint presentation was not complete. For purposes of completeness you have the entire transcript. It's also very interesting reading to the extent the Court would like to review that in connection with this motion.

THE COURT: Yeah, Judge Underhill is brilliant. I acknowledge that. My concern is that he's the district judge and I'm not, and I think that's, I'm very focused on this being a motion to compel in a box and that my job is to look at it that way. I'm, and I'm going to be candid so Mr. Carney pay attention. Mr. Nalven's argument about burden is something that I'm concerned by, and I'm going to want to hear the defendant's response to that, but Mr. Buckman, you may proceed.

MR. BUCHMAN: Thank you, Your Honor. If for a moment we can step back and just discuss what this case is. It's sort an atypical Sherman Act case, atypical from what we would normally see. It's not a competitor case where two competitors are arguing about monopolization of a particular market or in this case a therapeutic category. It, it's not that case. It's also not a merger case. So the broad expanse of discovery that you would

see in that type of case just doesn't apply in this case because what this case is really about is a patent and it's really about the patenting of a molecule and it's also really about a reverse payment agreement and that reverse payment agreement concerned a branded product and a generic product. That's really what this case is about. It's atypical from the typical Sherman Act case that you would see. It's very narrow in its focus and the plaintiffs are the master of their complaint and they have defined this case in a particular way, and as Judge Underhill said during oral argument as you'll read in the transcript, the plaintiffs have sort of picked their poison. We're either going to win or lose by that mark, by that position that we've taken, and it really means that the product market definition that we've proposed is the sole focus and everything that the defendants are seeking is sort of irrelevant. So what is relevant here is, is basically the molecule and what we have heard this morning from Mr. Perwin and from Mr. Nalven is that the discovery has to be suited or tailored towards the case law, and on the first page of the PowerPoint presentation you'll see, actually the first two pages, you'll see a number of cases that actually go our way which suggest that the discovery in this case will be irrelevant, that the product market is limited to the molecule and really

this is a body of case law that the Court should take into consideration in connection with this motion for discovery. And by the way, we would also join, the end payors would join in the arguments that were raised by or made by Mr. Nalven and by Mr. Perwin as well.

If you then turn to the next page where it, the heading is *In re Aggrenox Antitrust Litigation*. I've excerpted this from pages three through five of the transcript for oral argument in the *Aggrenox* case and this is what the court basically said, actually from, from the decision, excuse me. This is what the, the court basically said. It said as a practical matter the only relevant market in this case and in similar cases brought under *Actavis* will be the market in which the challenged settlement agreement allegedly acted as an anticompetitive restraint. That is, in this case it will be implicitly defined by the scope of the disputed patent. That was my argument before that we're looking at here is a patent, a molecule and a restrictive agreement and for that reason it is separate and distinguishable from the typical antitrust case that we all would expect to see and he goes on, and I'm, I'm not going to read this for Your Honor. You could, you can read this if you're interested after argument, but it's there for you if, if you're interested to see exactly what he said in more detail about why this

is really a narrow market.

And then if we turn the page to the heading proportionality, and in this particular day and age the type of discovery that the defendants are seeking, it has to be tailored to the law. It has to be proportional. It has to be reasonable. This is a different era now where as opposed in days past and being a younger lawyer with less experience than some of my contemporary's here--

MR. NALVEN: Thank you, Michael.

MR. BUCHMAN: I said less experience. I said less experience but I'm, the point being that back in the day when antitrust cases were much more expansive, you were entitled to discovery on a broad scale basis.

THE COURT: Sure.

MR. BUCHMAN: Today there is a much more narrow proportional basis that one has to seek discovery, and if you look at what the court said on page 25 at the oral argument in *Aggrenox*, the court said, well that raises another thing I wanted to ask you about. Why can't the plaintiff choose the claim they want to bring. It's their claim. You can, sorry. Their claim is you have market power in Aggrenox. You can charge super competitive prices for Aggrenox. These would be the market for Aggrenox and its generics and we're going to win or lose on that theory. So the fact that you might be able to

come in and say there's another larger market that we think is relevant in which Aggrenox does not have any market power, why would that matter? The plaintiffs haven't, have kind of picked their poison and it's either going to work or not for them. Aren't they allowed to do that as a master of their complaint? And then he goes on to say, if they can demonstrate, and I know you don't concede this, but if they can demonstrate that Boehringer was charging super competitive prices for Aggrenox, I don't understand why it matters that there's cross elasticity's because that's already been worked in whatever the price is. They don't have to prove for example that Boehringer had complete control of some broad market and could charge whatever it wanted to. They have to show that whatever the competitive pressures were they were still able to charge a super competitive price and if they can do that, then why does it matter what those pressures were? Why isn't that just complicating unnecessarily the context of this lawsuit? So his argument was proportionality. Why do we need to go beyond the scope of the molecule and all these other drugs that defendants are seeking when it's unnecessary? It will complicate this lawsuit. It's burdensome and it will cost hundreds of thousands of dollars for the plaintiffs to produce these documents. Now this is an argument, Your

Honor, that you would hear the defendants making when the plaintiffs are asking for this discovery. So I find myself in an unusual position making this argument, but it's one that it needs to be made because it's true. It's unnecessary. It's duplicative. It's burdensome and it's costly discovery, and I just want to amplify one point that Mr. Nalven made. Mr. Nalven stated that the defendants in Mr. Addonte's declaration never said, never said that he absolutely needed this information. The declaration is on Exhibit C of the, the Dicar (ph) affidavit. The Addonte declaration, Your Honor, is five pages. It's very short and if Your Honor looks at that declaration, you'll see that the use of the word May is replete throughout that document. It may show this. It may show that. It may show a lot of different things but nowhere in that declaration does Mr. Addonte say he absolutely needs this information. In, in the absence of such an affirmative statement, I would suggest to the Court that it is not necessary.

But more importantly, Your Honor, if you look at the *Cater* decision, the FTC decision which the defendants didn't cite in their opening brief. They only cited their administrative law judge decision without acknowledging that the administrative law judge's decision was overturned unanimously by the Federal Trade Commission,

and what Dr. Addonte said before the Federal Trade Commission is also important because he concedes that this sort of discovery is unnecessary.

In the Weiner Exhibit C at 5864, we cite Dr. Dr. Addonte in the *Cater* decision where he said, if you've satisfied yourself that you have a true anticompetitive effect in a situation of this kind, and when I say this kind I'm referring to *Cater* which was a generic drug case, then you've probably satisfied yourself that there's monopoly power as well. That just goes to the point that the discovery that the defendants are seeking in this case is unnecessary. The focus should be on direct evidence. It shouldn't be on these other points that are irrelevant. It's just not necessary. It's burdensome and it's costly. It's expensive.

Lastly, the last page of our slide the molecule's market, again, these are just my two points about focusing on the anticompetitive agreement, that's what this case is all about and more importantly with regard to end payors or consumers, the script is the driver. The doctor receives tremendous detailing from pharmaceutical representatives about a host of drugs that are available in a marketplace and within a therapeutic category, and when the doctor is advised by these detailers as we know of them in the industry, the doctor

then gets to make a choice of what he or she believes is in the best interest of the patient. At the time that they see their patient they make an informed decision about which of these drugs in a therapeutic category is the most helpful for that patient. They write the script. The script defines that purchase. That is what controls this case. It's all the script and the prescription they're after which is either for the branded or the generic product. It's not for all these other drugs. So the molecule is really the market in this, in this, sorry. The molecule is really important in this case. The anticompetitive agreement surrounds what this case is about and there's certainly no need for the type of the discovery that the defendants are seeking in this case in a world where proportionality dictates discovery.

Unless the Court has further questions, thank you, Your Honor.

THE COURT: Thank you, Mr. Buchman. Mr. Carney, briefly.

MR. CARNEY: Yes, Your Honor. I'll try to real brief hit upon the key points and I might ask Ms. Audette to say something about the, the burden points really quickly as well. We kind of ticked through and the various speakers, some of the key issues. On the *Aggrenox* case I think I heard sort of that being reargued which I

thought we weren't really going to do so I'll just circle back on that and say, a lot of thought went into that decision. I think it, it's kind of a head of the law, that we were sort of accused of not being consistent with the law. *Aggrenox* decision takes a reading of activists and then veers off from a host of the case law that we've cited such as *The Walker Process*, *Brown Shoe*, other Supreme Court cases. The First Circuit in remanding this case expressly said that you look at the relevant product market in remanding this. So we are completely consistent with the law. Judge Underhill we think is getting ahead of things and he may ultimately turn out to be right. We, we don't think so. We briefed that extensively. Everybody knows that but we, we don't think the Court needs to risk going with, with, with that decision as he himself acknowledged. If he's got it wrong you got to come back and do all this discovery again. The cellophane fallacy was a feature of that decision. I, I guess a point on that that we would make and it's not the Doryx fallacy. It's actually the, the Doryx court looked at this issue and we're talking not just about price increases which is what everyone talks about in the cellophane fallacy, but how prices were going, net prices were going down and looked at that interbrain competition and frankly all the cases that deal with cellophane

fallacy, many of them anyhow say, don't say that that is a reason not to do discovery. In fact, Judge Underhill recognized that. He said, he, he basically recognized and said I don't think there's a risk here. I don't think we need to go into that discovery he said because of his view of the role of direct evidence. So he's got to be right about all of that but he recognized that risk. So discovery should be permitted on those things.

And then on, on the retailers, and Ms. Audette may just touch on this briefly but, you know, Walgreens for instance is I think is something like a $60 billion company. When we hear about the smaller retailers they're like $20 billion companies. We're not seeking to go down to the pharmacy level and we've been clear about that. We're looking more at a corporate level. We can be very reasonable about the number of, of custodians. That's a dialogue that hasn't been really had because of the initial objection and I'm not surprised about that. They have a--

THE COURT: Sure.

MR. CARNEY: --you know, there's a rubicon basically and, and, and we can get to that. There was a brief response on the *Yaz* point and the argument that was being made was that they simply had contradictory, they got dismissed twice and the reason they got dismissed

twice is because they had contradictory allegations. The court the second time around certainly acknowledged that the contradictory allegations do not help a plaintiff but then did expressly compared to Loestrin, so that was a factor, but I wouldn't say that that was the only difference.

On, on this issue of the therapeutic committees that Kroger and CVS have, you know, there was a lot of argument made about the types of documents we're seeking. We, we do want formularies but part of what we're looking for is, is the commentary that happens on these formularies and the commentary that happens in the purchasing departments, on when there is a change. So some of the documents that were discussed were price announcements and the like. We know that purchasers of drugs as they see a new drug coming into the market and think it's going to take away from a competing drug, stop buying lots of that drug for instance. We have brand clients who when they go out and generic clients when, when, when they go out and get contracts, you know, the, the market is looking at what's going to happen to the old drug? Do I, am I going to sell as much basically. That sort of analysis is extremely relevant for, for these cases.

There was mention to *Solodyn* and the ruling in

Solodyn on some of these issues and a point that was made by the magistrate there was, that was happening very late in the game. *Solodyn's* on a tight time schedule and this issue, I don't think the magistrate was happy about the timing in which that was raised. I think that's a factor. We've been up front about this from the very beginning and we actually think there's a lot of efficiency here to get this done. No one's actually started doing, you, you know, these searches from what I understand on their side. So we can, we can kind of rationalize that and be efficient.

There was extensive discussion about the declaration of Dr. Addonte and he has testified in numerous cases and he is a very careful economist. He's been credited by numerous courts. We don't concede at all that the standard is necessary or sufficient and Dr. Addonte hasn't seen the actual documents they have. We know from past cases what's, what's there. Any economist if he's good or she is good is going to be careful about exactly what they say about these things, but paragraph eight of Dr. Addonte's rebuttal declaration is very clear that these documents go to the economic incentives at the different levels that are involved and, and are going to be helpful and that the limitations that have been put on by the plaintiffs, it's very clear about this are, are

unhelpful.

And then I think just turning to the EPP presentation, on that a couple of quick points. First, there's a citation to kind of the case is supporting plaintiffs position and we don't dispute that there are cases that have come out and said that there is a single product, product market, but I think if you look at these cases, Geneva Farms for instance. That was one where the decision was made after full discovery. Asacol, this is listed as limiting the market to, to branded Asacol, the court mentioned expressly did not make that ruling, just was looking at what the discovery was that was going to be awarded. *Cardizem*, that ruling limiting the relevant market to *Cardizem CD* and it's AB rated bioequivalence, that came after full discovery. So we think we're right on this. We think we'll win when we get full discovery. Frankly, we think we should win on a motion to dismiss but, but we're entitled to discovery if we don't and then *Mayor*, the *Avcon* case cited on page two is the same, in fact that parenthetical says the jury could find the relevant market was Avcon and an AB rated equivalence. That's the one that survived summary judgment but it was a factual issue.

And then on the, on the proportionality point, again, I think that, that came down to the, the Judge

Underhill's focus on the, on the role of direct evidence and we think that's an edgy and progressive ruling. We think that there's good case law on direct evidence that's been out there for some time that it, it often isn't available and often isn't sufficient. Dr. Addonte's declaration goes into why it's particularly difficult in the pharmaceutical industry to use direct evidence and the *Remeron* case talks about the same. I think that's the District of New Jersey. So there's a lot of reasons to think, sure they have every right to, to go for a case under direct evidence, but that's kind of their peril and we should be entitled to our, our discovery.

On *Cater*, I guess I just got to back up because we were sort of accused of not disclosing that the Federal Trade Commission had reversed the ALJ. We did a rule of reason, I considered all this, but the FTC was overruled by the Eleventh Circuit. The decision was completely vacated and in, in that case the FTC Commission basically Eleventh Circuit said they, they didn't do the rule of reason correctly. So the idea that that was a foundation for activists I think is not all that sound.

I guess circling back, Ms. Audette said a couple of things on the, on kind of what, what's been agreed to so far and what's the burden? I would just say we, we are, I see multiple lines of areas that we can have a

conversation on. We've said 10 products. If there's an argument that one or two of them are particularly difficult, we're open to a discussion on, you know, what, what can come out of that. We've said that we hit a certain number of custodians. We, we're open to having a discussion on, you know, outside of the purchasing department for instance, who, who is it and say the corporate pharmacy level, not the pharmacists. If there's a particular category of document, there's really a strong reason to believe that it just doesn't exist, that we're, we're open to a discussion on that. With the end payors we actually don't expect that there will be a lot of custodians. I think they've been offering us one or two each. I, I think it, it's a matter of making sure that if there are folks that are helping the communications with the PBMs, whether it's a trustee, whoever it is, that we get that, and that's a dialogue we can have, and I guess I would say, and we did a little bit on this in the declaration of our discovery expert, Ms. Audette may touch on this, the plaintiffs, especially the DPP's have been unwilling to have a compromise on search terms, were like limiting terms. We're open to as Your Honor knows, from sitting next door and going through long bullion strings, we know how to do those and we can do those, but our sense is that we haven't had a dialogue on things like that

because the, the technology and the way they're approaching it doesn't allow that and if that's the case that's a decision they've made and they've kind of increased their burden that way, but we're willing to have discussions about limiting terms basically and maybe I'll just turn it over to Ms. Audette for a minute to talk about, you know, how this hasn't been an undue burden and what we're asking for would not be.

THE COURT: All right, very briefly, Ms. Audette.

MS. AUDETTE: Thank you, Your Honor. Mr. Carney touched on a lot of the points that I would have raised. I just want to put this into perspective. With respect to DPPs' burden argument. DPPs have agreed to search two custodians here. One of the DPPs ASE Ahold submitted a declaration in connection with, with their opposition. Ms. James, the senior manager of the supply chain for Ahold has conceded that Ahold has a number of the types of documents that the defendants are seeking here. In paragraph 10 of her declaration Ms. James states that the Ahold has emails from drug sellers with product and pricing information. In paragraph 11 she admits that they have generic tracking reports from third parties. In that same paragraph she says that Ahold creates their own reports based on these third party generic tracking

reports. In paragraph 12 Ahold admits that it has communications with generic sellers concerning the launch and pricing of generic products. In paragraph 15 Ahold admits that its pharmacy purchasing department may have documents generated by third parties containing product descriptions or approved indications. Now, Ahold is saying that they will produce those documents so long as they contain the proposed drug names that Ahold is agreeing to search, but they won't produce those documents for any of the 10 oral contraceptives, and we would submit, Your Honor, that Ahold hasn't shown why producing those documents that they'll produce that if they have the name Loestrin or Minastrin, are more burdensome to produce if they contain the name, only, they don't contain the name Loestrin or Minastrin but do contain Yaz or Beyaz or Alesse or one of the other 10 oral contraceptives that defendants are asking them to search.

Also, Your Honor, Ahold is a $26 billion company. They have the resources to perform these searches and as Mr. Carney mentioned, we have been willing to work with Ahold from the beginning on search terms and limiting terms to ease any burden as well as we're, we've been willing to discuss appropriate custodians for this discovery. Thank you, Your Honor.

THE COURT: All right, its sounds like--

MR. BUCHMAN: Your Honor?

THE COURT: --Mr. Buchman, 10 seconds.

MR. BUCHMAN: I can do it from here, Your Honor.

THE COURT: All right.

MR. BUCHMAN: Mr. Carney said that the Eleventh Circuit overturned the FTC decision--

THE COURT: Yeah, in *Cater*?

MR. BUCHMAN: Correct, that's, that's, I think he misspoke. The decision if you look at it didn't--

THE COURT: Which I will.

MR. BUCHMAN: --did not address product market. It addressed scope of the patent and the *Actavis* decision overturned the Eleventh Circuit obviously on that issue so that's all I'd like to say for clarification.

THE COURT: All right. I'll figure that out. Mr. Nalven?

MR. NALVEN: Your Honor, and if I may, just on the burden. The, the burden declaration that Ahold has submitted are at 263 one through four and so we would just commend your attention to those. As we said there, there's no dispute that Ahold may have floating around in its system a document that would be pulled back if we searched for any of the 10 additional oral contraceptive terms. The question is whether the, it's proportional in that the information returned would be worth the burden of

searching. Thank you.

THE COURT: Thank you. All right, I'm going to take this under advisement. I will try and get you a decision as quickly as possible. I realize that with discovery disputes delay is worth than just figuring it out. Ms. Saucier here's your list of counsel back and I just want to thank counsel. It is a pleasure reading the briefs and hearing argument of the caliber we just had. So, thank you.

COUNSEL: Thank you, Your Honor.

(Court adjourned)

(11:37:06 AM)

CERTIFICATION

I, Maryann V. Young, court approved transcriber, certify that the foregoing is a correct transcript from the official digital sound recording of the proceedings in the above-entitled matter.

/s/ Maryann V. Young March 15, 2017

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