IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

IN RE: LOESTRIN 24 FE ANTITRUST LITIGATION	MDL NO. 13-2472-WES
	NOVEMBER 13, 2017
	PROVIDENCE, RI

BEFORE THE HONORABLE PATRICIA A. SULLIVAN

MAGISTRATE JUDGE

(Plaintiffs' Motion to Compel)

APPEARANCES:

FOR THE DIRECT PURCHASER PLAINTIFFS:	ZACHARY D. CAPLAN, ESQ. Berger & Montague 1622 Locust Street Philadelphia, PA 19103
FOR THE END-PAYOR PLAINTIFFS:	MATTHEW C. WEINER, ESQ. Hilliard & Shadowen 2407 S. Congress Avenue Suite E 122 Austin, TX 78704
FOR PLAINTIFFS: Walgreen Co., HEB, Kroger, Safeway and Albertson's	LAUREN C. RAVKIND, ESQ. Kenny Nachwalter Four Seasons Tower 1441 Bricknell Avenue, Suite 1100 Miami, FL 33131

	SANTIAGO H. POSAS, ESQ. Oliverio & Marcaccio 55 Dorrance Street, Suite 400 Providence, RI 02903
FOR THE WARNER and WATSON DEFENDANTS:	LAUREN PAPENHAUSEN, ESQ. KATHERINE DYSON, ESQ. White & Case 75 State Street Boston, MA 02109
	NICOLE J. BENJAMIN, ESQ. Adler, Pollock & Sheehan One Citizens Plaza, 8th Floor Providence, RI 02903
FOR THE LUPIN DEFENDANTS:	KATIE GLYNN, ESQ. Lowenstein Sandler 390 Lytton Avenue Palo Alto, CA 94301
Court Reporter:	Denise P. Veitch, RPR One Exchange Terrace Providence, RI 02903

13 NOVEMBER 2017 -- 10:09 A.M.

THE COURT: I think where we are, again, with some very helpful color coding, I found as I was preparing the document that seemed the easiest for me to work with in terms of focusing not on the universe, but rather on what needs to be decided was Plaintiffs' B; so I thought unless whoever is going to be taking the lead in argument has a better idea, that might be a good way to move through the issues.

I also actually cut out and took the timeline and turned it into a single timeline, so I'm certainly very focused on the timeline, which I also found to be extremely helpful.

Other than I think one item which I will tell you in a moment that I think I'm ready to decide, I think everything is going to be under advisement because it seems to me the complexity of the different arguments, the different time periods, it just wouldn't be appropriate for me to kind of wing it from the bench, so even if I -- I'm pretty sure I know what I'm deciding -- I'd like just to take a step back and think it all over.

The single exception is I think Warner RFP 99, which is looking for antitrust policies. It seems to me that a no time period just didn't make any sense and

that the proposed start date from the Defendants seemed a little late in the game in that January of '09 is also the date of an operative event. So I think there ought to be -- you ought to get time periods with effective antitrust policies in effect somewhat prior to that date, so my thinking was that the time period should be from January 1 of 2008 to December 31 of 2013, which is the Defendants' proposed closing date, and that it just didn't seem necessary to get policies going back to the beginning of time or after 12/31 of 2013. So unless someone thinks that's wildly wrong, let's not devote any time to arguing that one and just -- oh, no. Uh-oh, uh-oh.

(Pause)

Okay. We've got to call the case again and get everybody on the record again. All right. Deep sigh. Sorry about that, guys. We're going to have to call the case again, and this time just say your names fairly quickly because I guess we weren't recording on somebody's mics.

So we are here In Re: Loestrin 24 Fe Antitrust Litigation, MDL 2472, Plaintiffs' motion to compel, ECF 328, and I would ask Plaintiffs to please begin by introducing yourselves for the record.

Mr. Caplan.

MR. CAPLAN: Good morning, your Honor. Zachary Caplan for the Direct Purchaser Plaintiffs.

MR. WEINER: Good morning, your Honor. Matthew Weiner for the End-Payor Plaintiffs.

MS. RAVKIND: Lauren Ravkind on behalf of Walgreen, HEB, Kroger, Safeway, and Albertson's.

MR. POSAS: Santiago Posas on behalf of the same.

MS. PAPENHAUSEN: Lauren Papenhausen on behalf of the Warner and Watson Defendants.

MS. DYSON: Katherine Dyson on behalf of the Warner and Watson Defendants.

MS. BENJAMIN: Nicole Benjamin also on behalf of the Warner and Watson Defendants.

MS. GLYNN: Katie Glynn on behalf of Lupin, Limited and Lupin Pharmaceuticals, Inc.

THE COURT: All right. Thank you, all, and I'm going to pick up where I left off.

The antitrust policies, I think I will, barring someone wanting to take their valuable time and argue for something different, we go January 1, 2008 to December 31, 2013 for that.

And this is really more directed to the Defendants. The different company argument seemed superficially appealing, but legally perhaps a nullity,

and I'm not sure, and the Plaintiffs in reply noted where is the case law to support such a construct; and that question seemed important to me, so I'd like to hear from the Defendants on that point. And I'm not, I'm not inclined towards adopting the 8/31/2017 universal end date posed by the Plaintiffs. I'm troubled by the arguments that the Defendants have presented which really then requires the harder work of parsing what the request is looking for and how does that topic carry on in time and to what extent have we given enough of a buffer from the operative event to bring us to the point of diminishing returns and lack of proportionality.

Regarding proportionality, the parties have both made presentations. I'm inclined to accept the Defendants' presentation on costs. They seemed -- first of all, the Defendants have provided concrete actual cost information and then projected what they expect the cost if the motion were simply granted as presented, and nothing seemed out of whack to those very large numbers to me; therefore, I am not interested in hearing argument on the proportionality kind of data points. That doesn't mean that proportionality is a reason to deny the motion; it's simply a factor, and there's no doubt that the Court is

going to consider that as the timeline becomes more and more remote from the operative event. The burden of searching for and producing the documents begins to become more significant to the Court's decision in light of the incorporation of the proportionality concept into Rule 26. So I've sort of crossed the river on accepting the facts with respect to proportionality. I don't think there's any need for that to be further sliced.

An issue that I want to hear from the Plaintiffs on is the documents that were presented from the up-to-the-minute time period and to really understand how those documents reveal the relevancy of information contemporaneous to those documents such that bringing the searches up to, basically up to the minute, which is really what the Plaintiffs are looking for, seems to make sense.

I also just want to make sure some of my assumptions are correct. Data collection is not an issue. The parties have reached an agreement in terms of data collection which will allow the economic experts to assess market effects. So we're really looking at speaking documents in that the other thing that is not in issue are the regulatory materials. The parties have reached an agreement on that.

And I do as a sidebar have to observe that I think both sides have approached the meet and confer process with extreme good faith. The briefs were very helpful and very well written and there was a little bit of is someone making an *ad hominem* attack on someone else, which I think no one was, so let's not talk about that either.

All right. With that, I'm not sure who is going to take the lead for the Plaintiffs, but whoever it is -- Mr. Caplan, I think it's you.

MR. CAPLAN: I think that falls to me, your Honor. Good morning.

THE COURT: Good morning.

MR. CAPLAN: At the start I just want to thank your Honor for taking the time to consider Plaintiffs' motion. I think I can safely speak for all the parties that we appreciate the work that your Honor and your staff have devoted to helping us work through these issues in this complex antitrust litigation.

What I'd like to do for the Plaintiffs is just briefly summarize the grounds for our motion and then touch on a few points from Defendants' opposition brief, and when I go through the grounds for our motion I'm going to do that by going through the factors in Rule 26.

As your Honor is aware, Plaintiffs seek production of documents relevant to certain disputed requests through August 31, 2017, as laid out in Plaintiffs' Exhibit B to Plaintiffs' motion. And Plaintiffs believe we have submitted relevancy explanations to support our time periods for these limited requests, and Defendants have not met their burden of showing that the time periods are disproportional.

I do want to be clear up front about the fact that since the conference that we had in September, the Defendants did agree to produce certain documents up through 2015 as a result of our ongoing meet and confers, so really what's at issue today is whether on a smaller subset of documents, though, extending that out to 2017. And we also believe that -- well, just to back up. As part of that we granted or we agreed with the Defendants' proposal, 150-day extension to the case schedule so that they could accomplish that document production, and we at least think that this should all just happen once. They should only have to go back to the well once to collect documents for whatever is the result of these time periods disputes.

And just by way of background, as your Honor is aware, Judge Smith's August 2017 opinion in an order

upheld our case in its entirety. This includes the reverse payment allegations consisting of the three complex deals between the Warner and Watson Defendants, the *Walker Process* and sham litigation allegations, the product hop from Loestrin to Minastrin, and that all of this is part of an ongoing anticompetitive scheme designed to inhibit generic competition in the marketplace for Loestrin and Minastrin and preserve the prescription base for this drug.

At the conference in September, your Honor made several observations, just briefly, including that we had presented colorable relevancy explanations regarding each disputed time period, that the meet and confer process was conducted in good faith, that disputes were narrowed down to reasonably small differences, and that this litigation yields a proportionality analysis under Rule 26(b) that favors longer time periods generally.

And since that conference we did work with the Defendants to reach additional agreement. For example, Plaintiffs backed off of certain requests related to the Femring deal because the Defendants represented that that agreement did terminate on a certain date. And as your Honor stated, the last compromise offers we gave to the Defendants are Exhibit S to Plaintiffs'

motion, and the text highlighted in yellow is our proposed compromise or Plaintiffs' proposed compromise.

So turning to the grounds for our motion, the reason we asked your Honor's assistance by this motion is simply to ensure we're getting documents we need to work with our experts and prove our claims, working of course within the confines of Federal Rule 26(b). The standard for relevancy under the rule is so that, you know, how often cases such as *Oppenheimer Fund v. Sanders*, which is 437 U.S. 340, and relevancy is any matter that bears on or that could reasonably lead to other matters that could bear on any issue that is or may be in the case. And on top of that courts have generally recognized in antitrust cases relevancy is to be widely construed and the cost of production is less weighty consideration than in other matters, in such cases such as *United States v. IBM Corporation*, 66 F.R.D. 186.

So then we have this proportionality analysis now out (unintelligible) the rules, but Rule 26(b) instructs the courts to look at six different factors in that analysis. The first factor, the importance in the issues at stake in the litigation. We think this favors the Plaintiffs. There's a public interest in the outcome of this litigation. It also has the chance

to develop an area of law, specifically the product hop allegations.

On the second factor, there's a very large amount in controversy, potentially extending into the hundreds of billions of dollars. As we stated in our reply briefing, some courts often compare the amounts in controversy to the requested -- the class of the requested discovery in conducting the balancing on this factor, and here we think that balance clearly weighs in favor of the discovery Plaintiffs are requesting.

On the third factor, Defendants have ample resources. These are multi-national pharmaceutical companies with billions of dollars of revenue. They earned hundreds of millions of dollars of revenue from these products and from the anticompetitive behavior, the alleged anticompetitive behavior.

And on the fourth factor, Plaintiffs have no other way of obtaining this information.

So then we get into the meat of it, which is at least what we've been arguing about, which has been the relevancy, or which is really the fifth factor. We believe that we set forth relevancy explanations in our briefing that are sufficient. The reason we laid out the chronology was that some cases, for example, *Inline Packaging*, have looked towards what the

complaint embraces within its narrative in determining the temporal scope of relevancy. We think that the chronology here shows the temporal scope of relevancy runs up to today even, not even August 31st, 2017. And we can go into those relevancy explanations further, depending on where you have questions.

But the factor that the Defendants really hang their hat on is the sixth factor, which is the burden factor. I think there's two important points to note before you even get into the burden or looking at the burden.

The first is that this is a pretty unusual situation because in most cases I've been involved with, granted I'm relatively young, we're usually fighting over older documents on archived sources. That's usually where the problem area is.

This is at least the first case I've been involved with where we're arguing over the production of recent documents, which typically Defendants say are much easier to produce.

The second thing I would state is that this case began in April 2013, and the Warner and Watson Defendants didn't even merge until October 2013, meaning that the Defendants had been aware of this litigation since before all this merger activity began

and to some extent should have been preparing their files in such a way to produce documents for this litigation.

And then getting into some of these burden arguments, I would just say that Defendants' brief really ignores the substantial work that the parties did to limit burden. We had extensive meet and confers on custodians and search strings, including a conference with your Honor. We spent months of time on the meet and confers related to time periods, resulting in the agreement on the vast majority of time periods. Plaintiffs also made substantial effort to coordinate our requests among all Plaintiffs so as not to burden the Defendants from hearing from 15 people regarding all these requests.

And I have to say Plaintiffs felt like we were ambushed a little bit on the opposition brief. The first time -- throughout the meet and confer process we had asked Defendants to provide information regarding what issues they were having with these extended time periods on a more of a request-by-request basis. We asked for information about their document collection, trying to find out other ways that maybe we could work through some of these issues to reduce burden, and basically what we were told is that it's none of our

business. And then the first time we actually got information about any of this was in the declaration submitted with their opposition brief, and we just think that this is an unfair way of proceeding essentially because we didn't have an opportunity to meet and confer on these issues.

And as, for example, Principle 4 of The Sedona Conference, Commentary on Achieving Quality in E-Discovery discusses that parties should meet and confer about document collection, about identifying documents, about what parties are doing to process search and review documents and what techniques are being used, and we just don't think that was done here.

THE COURT: Let me ask you a loaded question, Mr. Caplan. Are you suggesting that further meet and confer would be productive? I mean I think time's up. I'd rather decide. I'm not urging you to go back and meet and confer unless you really thought, having seen the burden presentation now, there might -- there are ideas for compromise that have not been discussed, and obviously when the judge decides we're, you know, killing fleas with a hammer and who knows what else gets squashed in the process; that is, I won't be able to have the nuance that you would if you did it by negotiation.

MR. CAPLAN: And I hear that, and I have thought about that because especially seeing the information that the Defendants presented in their declarations, it was information that would have been helpful to the meet and confer process.

The issue we have with returning to meet and confer is that we've been talking --

THE COURT: Time's up, yes.

MR. CAPLAN: Time's up. We've been talking about time periods for six months. We asked for this information repeatedly and they didn't get it to us.

And I would also just say that some of the issues that were raised in the declarations that were submitted raise questions for us about the scope of their discovery efforts. One example is in Ms. Dyson's declaration at paragraph five. It seems to indicate that the discovery efforts for these later time periods are limited to seven custodians, even though I think we have something like 35 custodians, which is just something that Defendants have never told us previously.

And also Dyson declaration footnote 2 seems to indicate that the Defendants are not actually collecting all custodial documents; they're only collecting custodial documents for certain requests.

At least that's how I interpreted it, but I'm not sure if that was the meaning. But those are issues that would be good to get more clarity on because of course if we're going to get discovery from these time periods we want to make sure it's covering everything that we would need.

And I know your Honor doesn't want to get into arguing over the cost estimate, and I think that's a totally fair point. I don't think we dispute that the cost could be substantial. But I would just mention that we're not arguing about one Defendant here. We're arguing about both or -- all of the Defendants, the Warner and Watson Defendants together. This is every Defendant in the case except Lupin, which is differently situated.

And we just think that there is substantial reason to think that the Defendants may have overstated the cost of the requested document production. I mean I do find it inexplicable why no efficiencies can be achieved through the work that's been done to date.

So -- and we also just dispute -- the Defendants say multiple times in their opposition brief that this is full-scale discovery, which I just didn't really understand because we're arguing over a limited set of requests and it may be on a limited number of

custodians, from what I understood from Ms. Dyson's declaration.

THE COURT: I'm not urging you to do this, but I'll just throw out in terms of my day that at 11:00 I'm supposed to have a criminal hearing, which might be 15 minutes, might be an hour. I don't think it will be more than an hour. We have attorney conference rooms along the hall, if it seemed productive; and I'm not instructing you to do it. I think you're exhausted with meet and conferring, and it's time for a decision. But whenever I hear an attorney's remarks suggesting that the meet and confer process was not as full blown as it could have been and that possibly further discussion would be productive, if you wanted, to linger, use those conference rooms and then reconvene and report whether progress had been made on anything that would come off the table. So I wouldn't want to reopen the argument, but rather just hear back after I finish that criminal proceeding, we could do that, just so you know.

MR. CAPLAN: No, that's a good option to have. I mean I think we would like to hear, you know, a little bit from the Defendants. But that's really the stuff that I wanted to cover.

THE COURT: All right. Here's my biggest

question for the Plaintiffs, and it's a question that arises when I look at the first 18 and 20 of the Warner RFPs, and those two requests are really kind of bull's-eye requests for the case, one looking for all agreements between Warner and anybody and any of the parties to the patent litigation concerning Loestrin 24. So there we are, we're right in the heart of the matter. And then 20 focuses on Minastrin and the Minastrin NDA. Those are time-focused events, time-focused events that are at the core of the case.

So my question is why does it make sense for the time period to continue, for example, for 20 all the way to 2017? I can see why you would argue that it ought to continue a little bit after when the Minastrin NDA was actually approved by the FDA, which I think is what the Defendants have proposed. But there's a big difference between more than four years later, so I mean that really -- I think I'm probably confused.

Ms. Papenhausen.

MS. PAPENHAUSEN: I just think that that might be misstating the Defendants' position.

THE COURT: Oh, okay.

MS. PAPENHAUSEN: So on number 20 we've agreed to provide all regulatory files without regard to date.

THE COURT: Right.

MS. PAPENHAUSEN: We've agreed to provide the Minastrin NDA and supplements through the end of 2016.

THE COURT: Correct.

MS. PAPENHAUSEN: And we've agreed to all other documents through the end of 2015.

THE COURT: Oh, okay.

MS. PAPENHAUSEN: E-mails and, you know, whatever else through the end of 2015.

THE COURT: So the Minastrin other is 2015? My little chart says '13, so about that --

MR. CAPLAN: No. That's my error.

THE COURT: That actually makes my question even more pointed.

MR. CAPLAN: Well, I think a good example, your Honor, is that one of the issues that came up in Judge Smith's opinion is this chewable labeling related to Minastrin 24.

THE COURT: Right.

MR. CAPLAN: And we see, you know, for example, Exhibit N to Plaintiffs' motion is discussing it is an FDA request related to the chewable labeling on Minastrin 24 requesting Warner Chilcott, not Allergan or Actavis, to remove the chewable word from the drug name. And so the Defendants' argument has been we have this document and, you know, these regulatory documents

are sufficient.

But as the cases we cite in our brief make clear, a regulatory document is not sufficient to understand invidious design pattern or intent. And we need to see the internal communications that were occurring related to this document to be able to interpret it and to be able to see what it means and how --

THE COURT: Remind me of the documents.

MR. CAPLAN: Exhibit N.

THE COURT: N. Got it.

MR. CAPLAN: As in Nancy.

THE COURT: Yes. Got it. Got it.

MR. CAPLAN: And my colleague, Mr. Weiner, may want to make a point, but --.

THE COURT: What's concerning, and it's partly a function of the procedural history of the case, which both sides have observed that the case has continued from a 2013 filing to really not getting starting in realtime until you came back from the First Circuit and started over, so here we have a relatively new case that's actually a very old case. And that phenomenon has caused the discovery process to be the focus in post-case filing speaking documents, as opposed to data collection, because the data collection is resolved,

that it's just, it's troublesome. You know, the rules contemplate that you would actually have to make a separate motion to, you know, supplement your pleading to really create actionable events.

You've alleged a conspiracy and an ongoing conspiracy, and I realize that. But when does it stop? I mean that's the concern is as, you know, sort of Loestrin, Minastrin, and progeny prove through time for the next 25 years. When is the end point?

MR. CAPLAN: I mean I think your Honor touches on a good point. I think that's an issue that courts, you know, have struggled with to some extent.

But we, you know, as we've discussed in our briefing, believe that Minastrin 24 generic entry represents at least somewhat of an end point, although we weighed -- still propose to have certain discovery after that date to see how Minastrin generic entry, how --

THE COURT: How it works.

MR. CAPLAN: -- the Warner and Watson Defendants reacted to it and also --

THE COURT: Yes.

MR. CAPLAN: -- the chain of (unintelligible) --

THE COURT: Yes, and that's --

MR. CAPLAN: -- at Merck --

THE COURT: And that's a 2017 event.

MR. CAPLAN: Right. And I would just, too, it is true --

THE COURT: So, Mr. Caplan, is that problem not solved for you by the fact that you're going to get the data so that your economists can look at what the price activity looks like in the aftermath of the launch of the generic Minastrin? So why would the speaking documents be required, unless you're really launching a new conspiracy theory, which you can't do unless you supplement your complaint.

MR. CAPLAN: There's a few reasons for that. I mean as it pertains to the product hop, I would say that a huge part of what's going to be occurring later in this litigation is arguing over procompetitive justifications for the conduct, and ex post documents after the product hop occurred speaks to those procompetitive justifications. I mean I think we saw that a bit in -- I don't know if your Honor has looked at the *Asacol* case that was cited in the briefing had a summary judgment opinion late last week, and we saw the court weighing those procompetitive justifications, which involved conduct that occurred post the date of the hop, to be able to weigh whether the new drug was actually an improvement; and you have to see what the

company was talking about, --

THE COURT: Yes.

MR. CAPLAN: -- how people were reacting to it.

THE COURT: But isn't the problem the hop is in 2013, is the point that the Defendants are making, and if they're committed to producing documents through late 2015, or mid 2015, late 2015 in some instances, isn't two-and-a-half years enough of a buffer to pick up what you need and then as time continues to roll forward we get into the diminishing return of proportionality?

MR. CAPLAN: We don't think it is on the product hop. We believe that Minastrin 24 generic entry represents a more reasonable date. The end of 2015, the end of 2016 are kind of untied to anything, whereas Minastrin generic entry really represents a date that makes sense. I understand that, you know, Plaintiffs offered a compromise date that was before that date, but it was just that; it was a compromise. From the beginning on these requests we've sought documents to the present, even, you know, when we served these requests, I can't even remember when, I think at the beginning of the year.

And I would also say that these documents going up through 2017 speak to other issues beyond the

product hop. I mean I think one of the issues that the Defendants have really stressed is relevant market, and we're going to see a lot of documents especially concern generic since Minastrin/Loestrin are the same product, as least as far as we allege. What happened on Minastrin is going to be relevant to what happened on Loestrin, and it's going to be relevant for our experts in modeling the but-for world.

THE COURT: All right.

Anybody else on the Plaintiffs' side have anything very brief to say? Otherwise I want to hear from the Defendants because we are a little bit time limited.

(Pause)

MR. CAPLAN: All right. Thank you.

THE COURT: Ms. Papenhausen, I'm going to start with a question.

MS. PAPENHAUSEN: Sure. Actually --

THE COURT: Go ahead.

MS. PAPENHAUSEN: Sorry to cut you off, but just to first say thank you for accommodating the change in the hearing time to accommodate my schedule. I appreciate it.

THE COURT: No problem.

MS. PAPENHAUSEN: Now ask away.

THE COURT: Okay. I want to make sure that there is no risk to the Plaintiffs in the position that the Defendants are taking of the following happening; that is, that I say to the Defendants you can't -- or the Plaintiffs you can't have documents after, I don't know, some date in 2016 that I arbitrarily pick, you can't go all the way to the end of August of 2017; and then the Defendants seek to introduce material from that prohibited time period which you have to support your position.

I want to make sure that once a time period, the door is shut, it's shut for everybody. And that is the Defendants will not spring a trap on the Plaintiffs from the Plaintiffs not getting access to documents for a time period which the Defendants have the ability to analyze and say ah-ha, look at this, let's put this into evidence because our expert will rely on this, some event, for example, in 2017.

MS. PAPENHAUSEN: We are certainly not looking to sandbag. We're not looking to be selective. You know, this really is an issue of what's the burden of doing all this --

THE COURT: And I'm not suggesting an intentional sandbag. What I am -- well, let me back up. Sometimes when I'm listening to motions to compel

the party resisting production is focused entirely on burden and sometimes when I say to that party, you know, after you win maybe you lose because you can't introduce this material either, and all of a sudden there's a little "s-s-s" and suddenly the position changes. So I want to be clear.

And I think the Plaintiffs have raised this concern in their briefs, and I think some of the cases the Plaintiffs have pointed to have been examples of where the extended time period was actually something that the Defendant took advantage of, used because the documentary evidence from a later time period was consistent with the Defendants' theory of the market and so forth. And I want to make sure that you guys have thought that through, sort of not just stopped your analysis with the burden and you accept that it's sauce for the goose and sauce for the gander once I go, if I go with your position or with something in between the two.

MS. PAPENHAUSEN: I think this is not a case, not a situation where we are solely focused on burden. I think that there are really relevance concerns here. Now, can I sit here and say there can't possibly be some 2017 document that might be relevant? I haven't seen all the documents. I don't know that sitting

here.

But, for example, if we think about the relevant market, you know, there will be discovery from 10 or 12 years about the relevant market. The relevant market isn't changing so much in 2016-2017 that, you know, having the relevant market documents from further back in time won't get what you need. You know, might some expert come up with some question that leads to some document, maybe. Certainly if there are documents we plan to use them and rely on, we would produce those.

I don't, sitting here right now, have in mind anything that I'm saying, you know, we really are planning on using that from this late in time period. You know, I think it does really come back to the issue of the peculiar procedural posture here, and if this case had gone on in the normal course none of these years of discovery would have been available, and certainly Plaintiffs wouldn't have said that they couldn't prove their case absent these additional years worth of discovery.

THE COURT: So from the Defendants' perspective, if your dates are chosen by the Court but I also include some language saying that you're foreclosed from trying to rely on documents after the date that

you asked for in regards to the topic encompassed by the request, you would have no problem with that?

MS. PAPENHAUSEN: I hesitate to say no problem when I haven't seen every document that there is. You know, I haven't heard every request that an expert might have. You know, that makes me anxious simply not knowing how the case might develop, what may be out there.

As I said, we're certainly not looking to sandbag. We're not looking to selectively do anything. There's nothing that we have in mind that we think we're planning on using or relying on from 2016 or 2017. I just hate to say that, you know, in all possible permutations of this very complex case that nothing might come up.

THE COURT: Okay. I'm just wondering how I can protect the Plaintiffs, other than by doing what I just suggested. Is there something the Defendants might suggest?

MS. PAPENHAUSEN: I think --

THE COURT: I think possibly reinforcements are coming.

(Pause)

MS. PAPENHAUSEN: I think that the searches we are conducting are the searches we're conducting. It's

not as though, you know, we're going to be running big searches beyond that and finding lots of documents. I mean if we did, if we were, we would produce them. We would turn them over.

I mean the only thing might be, you know, and I hesitate to mention but, you know, they always in theory have the option of, you know, looking at what we produce and if there's some gaping hole that something relevant appears, to say, yes, that we need more on, you know, that seems to me to be the normal protection that you would have in a case, is that if something appears, if something pops up, to be able to say wait a second, you know, we need more discovery around X.

THE COURT: Let me use a concrete example of what concerns me. Mr. Caplan focused my attention on the date of the launch of the generic Minastrin. If your experts said hey, we've done some data analysis from that time period and we need to see the speaking documents in that vicinity to see what really was the thinking and the price point that was chosen, see if there's any memos discussing it or anything like that, that wouldn't be fair to the Plaintiffs.

MS. PAPENHAUSEN: And I'm still coming back to struggling with how that might possibly be relevant. Certainly the data --

THE COURT: And that's why I'm asking you this question, because if the answer is it's not relevant and it's so clearly not relevant that you're prepared to say no problem, Judge, put that little addendum in your order, then my brain is saying obviously it's not relevant. It's kind of one of those the-thing-speaks-for-itself; that is, if you're willing to throw the towel in because you know the towel is without substance, so you're not throwing a towel in because it's completely irrelevant, then that tells me something, that you've assessed the relevancy at zero.

On the other hand, if you're uncomfortable because there's some possibility that conceivably as things gets tense, as they always do as trial is approaching or expert depositions are about to happen, that it's conceivable that that's relevant, then I think that changes how I do the proportionality analysis. Obviously proportionality is troubling to me as we get more and more remote in time. But if relevancy has sunk down in the Defendants' estimation to zero to the point where push-tush, no problem with being foreclosed from that topic, you know, broadly written Warner request 20 is, you know, any documents, well, that's the focus on the Minastrin NDA, so, but, you know, continuing forward business plans for

Loestrin or Minastrin.

So if you're positive that a business plan around the generic launch in March of 2017 is not conceivably relevant from anybody's perspective, not just from theirs, but from yours, that tells me something.

MS. PAPENHAUSEN: I really can't see any way that the Minastrin business planning going on in 2016 and 2017 is relevant to any issue actually in dispute. You know, yes, you might care about the thought process, the business planning at the time of the alleged hop in 2013. Maybe you need a buffer. We're giving a two-and-a-half year buffer after that. Maybe something else relevant might be in there.

I can't see any way in which the business planning, the thought process, the forecasts, any of that that anybody is doing in 2016 and 2017 are relevant.

The actual data may be relevant, --

THE COURT: Right. That's different.

MS. PAPENHAUSEN: -- but the business planning, as you say, the speaking documents, I can't see any way they're relevant. And maybe it's just the curse of being a cautious lawyer; it's tough to concede all possible future things.

But sitting here today and having spent an inordinate amount of time thinking about these issues and the relevance of these documents and whether there is anything that we might want in these documents, we haven't seen it.

THE COURT: All right. I think that's fair.

So I'll let you start your argument. Go ahead.

MS. PAPENHAUSEN: Well, I just wanted to first address the question that the Court raised first about the different companies, and to be clear, our position is not that there's some per se bar to seeking discovery just because there have been corporate changes. But it very much goes to relevance and the attenuated nature of the relevance, that we're not just talking about diminishing returns further in time, but we're talking about really different companies that are completely differently situated, so it's hard to see how what those different companies are doing many years hence in time have any relevance to the actual issues in this case.

One case that springs to mind is the *Arrow Enterprises* case that the Plaintiffs cite to, I believe, talks about discovery of comparator contracts, which is one of the issues currently in dispute; and it says, well, you can get similar contracts for this

company for a period of six months. And so to move from that to you get contracts from all these companies, and really, regardless of who actually signs the contract, it's a very different company now in 2017 than it was back in 2009 with a thousand employees. Very different company. To say you get all contracts for a period eight-and-a-half years after the agreement because one of those might be relevant to this agreement seems far too attenuated and well past the point of diminishing returns. And so really that is how we view the issue of the different companies, is just that it is one more factor to consider in terms of relevance and how relevant these things are far removed in time from the actual events that are alleged in the complaint.

The Plaintiffs don't cite a single case, whether a pharmaceutical antitrust case or otherwise, a single case allowing discovery as long as four years or eight-and-a-half years after the alleged conduct at issue in the complaint. And they haven't provided any reason why that discovery is necessary here, why it's relevant, or whether it's even likely to exist here. And certainly not enough of a reason to say that it necessitates the additional half million dollars in discovery expenditure, not including, of course,

outside counsel time, which I'm sure your Honor can imagine is not insignificant. And it may be true that in an antitrust case discovery is broad, but it's not limitless, and there has to be a good reason to seek it, and there has to at some point be an end point.

And there are certainly, there are events that have happened out in the world. For example, generic Minastrin entry is an event that has happened. But what the Plaintiffs haven't done is explained how those events actually tie to the likelihood of relevant documents existing in the Defendants' files. So yes, generic Minastrin entry happened, we can see the data to see the effect, the impact in the market of that. As I said before, I can't imagine any relevance from the business planning around that that happened in 2017.

You want to talk business planning in 2013, I think that's a different question. I think that the case law on the product hop, you know, if you look at the *Namenda* case, the *Nexium* case, they all frame it in terms of two things really. One is consumer coercion, and consumer coercion is something that we're going to know about in 2013. That's when any patient switched. That's when the "it," if there was an "it," would have happened.

And then the other thing that they focus on and that they look at is what is the risk. They frame it in terms of the risk, the likelihood, the probability that this conduct would lead to anticompetitive effects, and so it's clearly focused, I mean, to talk about risk, to talk about what's anticipated. It's focused at the time of the conduct, and the conduct was 2013. That was the decision that was made. That's exactly when the decision was made. And to somehow think that people are still talking about that decision or creating relevant documents about that decision four years later seems far-fetched.

I do think it's helpful to focus on the different requests and thinking about the relevance of what the Plaintiffs are seeking. I had thought of that in terms of buckets. We can walk through the requests in order if your Honor finds that easier.

THE COURT: I'm actually watching my clock, unfortunately. What I'd like you to do, and I probably cut Mr. Caplan off because I didn't ask him that, but I partly didn't ask him because I'm kind of leaning towards the Plaintiffs' position on the two start date disputes. So there are three start date disputes. One was the antitrust policies, which I think I've resolved.

But on the start dates for I think Warner RFP 18 and Watson 35 to 37, the dispute appears to be the Plaintiffs' proposal to start at the same time as the FDA NDA approval, and the Defendants have proposed dates in 2007, and it seemed like the February '06 date made sense. So I didn't ask Mr. Caplan about that because I thought it made sense, but I wanted to focus your attention on that.

Why not start with what seems to be the operative starting event?

MS. PAPENHAUSEN: On Watson request 35 to 37, I would point out that our proposed date, which is September 1, 2007, was actually the Plaintiffs' proposed date. It was the date from their RFP that we agreed to. And it isn't clear at all, and they've provided no explanation for why they now think they need a year-and-a-half earlier than they ever even asked for in the RFP.

The requests 35 to 37 ask about an ANDA for a company other than Watson. The first ANDA from a company other than Watson was filed in 2009. I can't fathom any basis to think that anyone would have been talking about that ANDA three-and-a-half years before it happened. It's not asking about the Watson ANDA; it's asking about companies other than Watson, which

would be Lupin, which would be 2009.

On Warner request 18 they're asking essentially about communications and drafts with Watson about Loestrin 24, but they're asking from six months before there was ever even a lawsuit between Warner and Watson. Again, we haven't seen or learned of any reason to think that these companies are communicating about these issues. The date we've given is about a year's buffer before they started exchanging draft settlement agreements.

THE COURT: Thank you. That's helpful. I think otherwise if you could collapse conceptually the buckets and just really highlight briefly the differences between your two dates, because I want to give Mr. Caplan some time to rebut, and we're already having people arrive for the next hearing.

MS. PAPENHAUSEN: Sure. The first bucket I would say is the Generess agreement bucket and what Plaintiffs, at least, call the Generess agreement bucket. But I think that that's a little bit misleading because, in fact, the parties have agreed on end dates for I think it's a dozen requests about the Generess agreement, everything about the Generess agreement: The performance, the payments, the prices of Generess. Everything about the Generess agreement

the parties have agreed on a 2015 end date, and the Plaintiffs have agreed that that works for them to have documents about the Generess agreement through the end of 2015.

So there are just a few small points of disagreement. One of them is this issue we spoke about earlier where they're seeking documents about royalties for other products, and the agreement that we've made is to give them documents, you know, documents sufficient to show the royalties on these other products for a period of three-and-a-half years, stretching two years after the agreement at issue. And we think that going much further, certainly going the eight-and-a-half years they seek, you know, gets into royalties from all these other companies at these points, very remote in time, that it seems hard to see how there's any relevance.

And then the other Generess disputes, they're seeking -- one of the requests, request number 69, they're seeking documents about the decision-making around the agreement, and it seems obvious that the decision-making around the agreement happened around the time of the agreement and not eight-and-a-half years later.

Another one they're seeking documents about, any

bids that other companies may have made to distribute Generess, and again it seems obvious that any such bids would have happened before this exclusive distribution agreement was entered into in January of 2009. So that's the reasoning behind those small differences.

But again, I think it's important to bear in mind that everything about continuing performance of the Generess agreements, payments under the Generess agreement, we've all agreed on a 2015 end date.

They do also, what I would think of as the next bucket would be there are a few requests relating to the settlement agreement, the Loestrin 24 settlement agreement. And essentially these documents ask for -- these requests ask for documents about the consideration of the settlement agreement and the decision to enter into it and any valuation that happened. For example, show us everything about the board of directors of Watson considering this agreement and whether to enter into this agreement. It seemed obvious that that happened, if it happened, around the time of the agreement and not eight-and-a-half years later.

There's also a bucket of documents relating to an authorized generic. This is an issue that the Plaintiffs don't address in their reply but I think is

a good example of yes, there's an event that's out there. There was an authorized generic of Loestrin 24 that Allergan introduced in 2015. But the Plaintiffs haven't tied that to any issue actually relevant to this case, because the reason that they're seeking discovery on an authorized generic at all has to do with Warner's agreement in 2009 not to introduce an authorized generic within Watson's first 180 days on the market with its generic. So this is an agreement, January 2009. This Court has held, the Plaintiffs have argued, these agreements need to be valued at the time they're entered into.

So the question is what's the value of that promise not to enter into, not to do an authorized generic? And the Plaintiffs would argue the value is very high because otherwise Warner was ready, willing, able, prepared to launch that authorized generic, that that was the thought process in January of 2009.

So their request asks for things about, you know, tell us your readiness, willingness, and ability to launch an authorized generic, tell us about, you know, your thoughts on pricing an authorized generic, tell us about whether you had manufactured any authorized generic that you subsequently destroyed.

The leap happens when you think about how is any

of that relevant? How is the reason for seeking this discovery relevant to Allergan deciding in November 2015 that it would launch an authorized generic of Loestrin after five generics of Loestrin 24 had already entered the market. It's a completely different thought process, completely different set of events. Allergan's readiness, willingness, and ability to launch a generic, an authorized generic in 2015 has no bearing on the thought process that was happening in January 2009, which is what the court has held is relevant. You've got to look at the time of the agreement in valuing it.

Then the next bucket would be requests seeking documents about other companies' generics, other companies' generic Loestrins. And really the issue here is, again, value is considered at the time. You know, projections at the time of the agreement may be relevant. But the idea that what Allergan is thinking in 2016 somehow bears on anything, we can't see any relevance to that, and certainly no reason to think that they would have --

THE COURT: I don't want to cut you off, but I think I'm going to, Ms. Papenhausen. I want to give Mr. Caplan a little bit of time. So is there anything like vitally important that you haven't said that will

take one minute?

MS. PAPENHAUSEN: One thing that I think your Honor needs to understand, the Exhibit N that Mr. Caplan pointed to is FDA correspondence.

THE COURT: Yes.

MS. PAPENHAUSEN: And --

THE COURT: You're going to be providing all of that.

MS. PAPENHAUSEN: We have provided. That's why they have --

THE COURT: Right.

MS. PAPENHAUSEN: And to be clear, it was not unintentional that we produced any of this. We produced 40,000 documents from 2014 and later. It's not unintentional. It's part of our search and production.

But this correspondence should not be confused with there was a 2014 situation when the substantive label from Minastrin changed. It changed from being to or bold to you can chew or swallow it. That's a substantive change in the label. They're getting all of the documents for the -- relating to the alleged product hop they are getting through the end of 2015. They'll have all the speaking documents around that.

This issue in 2016 was an administrative

correspondence with the FDA about whether in the nonproprietary name of Minastrin, Allergan could say Minastrin 24 Fe chewable tablet or whether it could just say Minastrin 24 Fe tablet in the name as it appears on the package. It's not a substantive change in the label in any way. And I haven't heard from Plaintiffs any reason to think that this change has any relevance to the issues in the case, certainly any relevance such that, you know, full scale searching of e-mails and business documents and everything else is necessary. They are getting the complete regulatory, they do have the complete regulatory file, so I just wanted to clear that up.

THE COURT: Okay.

Mr. Caplan.

MR. CAPLAN: Yes, your Honor. I'll make this as brief as possible. Just since we're on Exhibit N, I just wanted to note this is directly related to the same topic as the Court talked about in its opinion and this is also the FDA telling Warner Chilcott, not Allergan. We constantly hear that this is only Allergan and Actavis, this time period, and this is the October 2016 document addressed to Warner Chilcott that they cannot include the word "chewable" in the name of the drug product, which we think is pretty directly

relevant to the case.

I would also just point out in the same vein about Ms. Papenhausen's argument that these are only the Allergan and Actavis Defendants after a certain date. Exhibit O is a document showing that the Loestrin 24 NDA was transferred back to Warner Chilcott from Allergan in April 2016. So I can't tell you what to make of that because we haven't seen the other documents. But it does appear that that was not just Allergan and Actavis and totally unrelated to the Defendants that we've sued on.

The other point I just wanted to make was we had really the same questions for the Defendants as your Honor did about using documents from later time periods against us if they aren't produced, and I think this is a really important factor here for two reasons. I mean the first is that the Defendants are pushing this early relevant market summary judgment, or they've successfully pushed this early summary judgment on relevant market, and we are going to need a full and thorough production in the near future. Selective production of documents related to points that the Defendants have selectively raised in response to points that we raise is not going to be fair. It's not going to be efficient. It's not going to allow the

process to proceed in an efficient fashion, in a fair fashion.

And we didn't hear any --

THE COURT: Mr. Caplan, is your concern solved by my inclusion of the language I suggested? That is, once I move away from your end date, closer to their end date, I also say that as to that topic covered by that request they can't use anything after the end date that they've persuaded me to adopt, so you can't see it and they can't use it.

MR. CAPLAN: I don't think it is, and the reason I don't think it is is because I think that we've identified relevant events that happened as late as the Minastrin generic entry. And I would urge the Court to adopt a time period that goes several months after the date of Minastrin generic entry. And I think both parties will analyze at least aspects of that as part of summary judgment and going forward in this case.

And we didn't hear a commitment from the Defendants to not use those documents. And I think the Court could adopt, you know, an artificial cutoff which, I mean, to me it would be an artificial cutoff and it would at least establish fairness. But I don't think we would be getting to the truth of the matter of what happened here.

And I also would just say that especially in this case where the law is not as developed, I think both of the parties are a little unclear where we're going to go exactly, and I think that weighs in favor of allowing this broad of discovery.

And the other only point I would make is the point made in the briefing on the *Asacol* case, because the Defendants have stated repeatedly that the only conduct that's relevant, as you know, the date that an event happened. And *Asacol*, I was in this case with counsel from White & Case; not Ms. Papenhausen, but Ms. Dyson, actually. We negotiated time periods pretty easily that went three years beyond the date of the product hop. There were certain documents going before and after that date. So I just think the statement that there's no cases out there that apply such broader time periods is not in fact true.

THE COURT: All right. As promised, I'm taking this under advisement except for antitrust policies which I will put into the decision so it's unambiguous that I ruled on that.

And I thank you for a very helpful argument. My offer -- when we get done with the criminal matter that we're going to be starting as soon as we can get ourselves organized, if you decide you want to talk

further and come back in an hour or so for five minutes, you can do that. And you don't have to, and I'm not urging you to do so; it's simply creating an opportunity if it seems like it would be productive. As far as I'm concerned it's under advisement unless you tell me otherwise.

MS. PAPENHAUSEN: Thank you, your Honor.

MR. CAPLAN: Thank you.

THE COURT: Court will be in recess.

(Adjourned)

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

I, Denise P. Veitch, RPR, do hereby certify that the foregoing pages are a true and accurate transcription of my stenographic notes from the official digital sound recording of the proceedings in the above-entitled case.

/s/ Denise P. Veitch
Denise P. Veitch, RPR
Federal Official Court Reporter

November 20, 2017
Date