IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

APOTEX, INC., Plaintiff,	:	CIVIL ACTION
v.	:	No. 2:06-cv-2768
CEPHALON, INC., et al., Defendants.	:	

ORDER

AND NOW, this 18th day of August, 2014, upon consideration of Apotex, Inc.'s "Motion for Partial Summary Judgment of Antitrust Liability" (06-2768, doc. no. 601), and the opposition and reply associated therewith, the Court finds as follows:

1. This case is one of four consolidated antitrust lawsuits referred to as the In re Modafinil Litigation. As part of a motion filed last September, Apotex sought summary judgment on the issue of Defendant, Cephalon, Inc.'s, monopoly power in the modafinil market. In an earlier opinion, I resolved a portion of Apotex's motion, deferring consideration of the monopoly power aspect. King Drug Co. of Florence, Inc. v. Cephalon, Inc., 2014 WL 982848, at *5 n.8 (E.D. Pa. March 13, 2014). This Order addresses that issue.
2. Under the familiar standard of Federal Rule of Civil Procedure 56(a), summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." A party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317,

322 (1986). The burden then shifts to the non-moving party to produce sufficient evidence to allow a reasonable jury to return a verdict in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In resolving the motion, a court must take care not to involve itself in the weighing of evidence or resolution of factual disputes, and must view the record in the light most favorable to the non-moving party. Tolan v. Cotton, 134 S. Ct. 1861, 1866 (2014).

3. A necessary element of a monopolization claim is the "possession of monopoly power in the relevant market." United States v. Grinnell Corp., 384 U.S. 563, 570 (1966). Monopoly power is "the power to control prices or exclude competition." Id. at 571. That power may be proven through "direct evidence of supracompetitive prices and restricted output," or "inferred from the structure and composition of the relevant market." Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 (3d Cir. 2007). Direct proof is "rarely available," and thus monopoly power is typically shown by defining the relevant market (both geographically and by product), and then demonstrating that the defendant commands a dominant share of that market. Harrison Aire, Inc. v. Aerostar Int'l, Inc., 423 F.3d 374, 381-82 (3d Cir. 2005); see also United States v. Aluminum Co. of Am., 148 F.2d 416, 429 (2d Cir. 1945) (90% share of the ingot market constituted monopoly power).

4. Apotex contends that undisputed evidence of Cephalon's patent-related activity (which created a barrier to entry into the modafinil market), its history of significant price increases for Provigil without lost sales, its large (95%) gross margins on sales of Provigil, and various statements of senior executives at Cephalon boasting that Provigil faced no competition, constitute direct evidence establishing as a matter of law

Cephalon's monopoly power. Apotex further argues that this direct evidence absolves it of the normal responsibility to define the contours of the market. See Broadcom Corp., 501 F.3d at 307 n.3 ("[D]irect proof of monopoly power does not require a definition of the relevant market.").

5. Cephalon disputes the economic significance of these facts (and the facts themselves) at every turn. For example, while Apotex points to Provigil's high and increasing price, Cephalon argues that the prices Apotex cites have not been compared to an appropriate measure of its costs, and thus may not be supracompetitive at all. (Ceph. Ex. D ¶ 103); Meijer, Inc. v. Barr Pharma., Inc., 572 F. Supp. 2d 38, 55-56 (D.D.C. 2008) (noting that branded drugs generally have higher costs associated with them than generics and that "[w]ithout a showing that [the brand name's] higher prices were the result of restricted output," the evidence did not "unambiguously" establish market power). Further, Cephalon notes that despite statements emphasizing Provigil's uniqueness, Cephalon executives also made statements recognizing that Provigil faced competition in numerous of its on- and off-label uses. (Ceph. Opp. 8-10.)

6. These are just a sample of the many factual disputes regarding the issue of monopoly power. All the briefing and exhibits highlight that this is not a motion appropriately resolved on summary judgment. Indeed, Apotex has cited no case granting summary judgment to an antitrust plaintiff on the issue of market power based on direct evidence. There is nothing unique about the evidence in this case that would suggest a different result.

7. In addition to its direct evidence, Apotex suggests that it has provided sufficient indirect evidence to prove Cephalon's monopoly power as a matter of law. It asserts that the

relevant market is modafinil products, and there is no dispute that Cephalon dominated in that realm.

8. Apotex's evidence on this point presents an even less convincing case for summary judgment, because it tends to show nothing more than a typical battle of the experts over the existence and economic significance of data relevant to market definition and other issues. For example, Apotex presents evidence that modafinil is unique, and that it has favorable side-effect and abuse profiles that distinguish it from other wakefulness-promoting agents, such as amphetamines (e.g., Adderall XR, one of the proposed competitors). (Apotex Ex. SS.) But one of Cephalon's experts presents evidence that modafinil was only one of several treatment options for many of the uses to which it was put. (Ceph. Ex. D.) These and other disputes mean that Apotex's motion falls far short of conclusively establishing the relevant product market—a highly fact-intensive inquiry. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956) (observing that with regard to the relevant product market, the "varying circumstances of each case determine the result"). The cases cited by Apotex in support of its motion generally involve a definition of the relevant market that was reached only after a full trial. See Brown Shoe Co. v. United States, 370 U.S. 294, 326 (1962) (affirming district court market definition made after trial); du Pont, 351 U.S. at 379 n.1 (affirming district court's market definition made after a "lengthy trial" with 140 pages of fact findings); SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1063-65 (3d Cir. 1978) (affirming market definition of district court in non-jury trial). A trial is similarly necessary here to sort through competing versions of the facts.

WHEREFORE, it is **ORDERED** that Apotex's motion is **DENIED** with regard to the issue of Cephalon's monopoly power.

BY THE COURT:

/s/ Mitchell S. Goldberg

Mitchell S. Goldberg, J.