

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

IN RE AGGRENOX ANTITRUST
LITIGATION

No. 3:14-md-2516 (SRU)

THIS DOCUMENT RELATES TO:
ALL ACTIONS

ORDER TO SHOW CAUSE

This multidistrict pharmaceutical antitrust litigation aggregates several dozen member cases against several defendants and comprises claims by two putative classes and several putative opt-out plaintiffs (who have recently become more numerous as new cases have been added). It is, of course, a very large matter, with much at stake for many parties, and expensive to litigate. Discovery has already been (and promises to continue to be) extensive, and the defendants seek to enlarge it with documents and information relating to various drugs other than the one named in the case caption and its generic equivalent. The defendants consider such material relevant to the definition of the product market, and they seek to prove, ultimately, that Aggrenox alone (or Aggrenox and its generic equivalent) does not and cannot constitute an antitrust market. The plaintiffs disagree, and they concede that their case lives or dies according to their ability to prove overcharges of a single product that constitutes an antitrust market alone or along with its generic equivalent. It is manifestly in the interest of justice to resolve that disagreement as early as possible, before needlessly multiplying the expense of litigation for all parties.

“Proof that a firm has unlawfully ‘monopolized’ a market requires evidence that the firm possesses ‘monopoly’ [or ‘market’] power,” Phillip E. Areeda & Herbert Hovenkamp, IIB Antitrust Law § 500 (3d ed. 2007) (p. 107), and it is clear that proving a firm possesses such

power may require defining the relevant market and establishing the share of the market that the firm controls. It is not clear, however, that evidence relating to market definition and market share are necessary when antitrust plaintiffs seek to prove (and concede that it is their burden to prove) antitrust violations by direct evidence of market power—namely, by proving overcharges that could not occur without it. Accordingly, the defendants are ordered to show cause why I should not enter an order restricting discovery and evidence in this case to the market in Aggrenox and any AB-rated bioequivalent substitute for Aggrenox.

The defendants are directed to submit briefing responsive to the following questions: (1) whether an antitrust plaintiff's proof of overcharges (which, by definition, constitutes proof of supracompetitive prices) necessarily proves market power, because the extraction of supracompetitive prices is itself an exercise of market power; (2) whether, in this case (or in any case brought under *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013)), an allegation of supracompetitive prices can be proved or disproved directly with sales and pricing data regarding only the allegedly supracompetitively priced product and its generic(s); and, if so, (3) whether, in such a case, an explicit articulation of (and discovery and argument on) antitrust market definition is necessary or material. The defendants are directed to address the so-called Cellophane Fallacy,¹ either as part of their responses to the questions above or separately, and whether and how they avoid committing that fallacy in their positions on the questions above.

¹ The Cellophane Fallacy—sometimes also called the Cellophane “paradox”—has been widely discussed in academic literature but infrequently invoked by courts. It is named in reference to *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956), an antitrust case about cellophane wrap. The Second Circuit described it as:

The economic error [of] . . . failing to recognize that a high cross-elasticity of demand may, in some cases, be the product of monopoly power rather than a belief on the part of consumers that the products are good substitutes for one another. As the district court succinctly stated: “At a high enough price, even poor substitutes look good to the consumer.” That is, in the *Cellophane* case, the high cross-elasticity

The defendants shall submit within twenty-one days a memorandum addressing the questions above. The plaintiffs shall submit any responses within fourteen days of that filing.

So ordered.

Dated at Bridgeport, Connecticut, this 8th day of January 2016.

/s/ STEFAN R. UNDERHILL
Stefan R. Underhill
United States District Judge

between cellophane and wax paper simply may have been a function of the high price that du Pont demanded for cellophane.

United States v. Eastman Kodak Co., 63 F.3d 95, 105 (2d Cir. 1995) (internal citation omitted). The Supreme Court has not addressed the Cellophane Fallacy by name, but it seemingly recognized the principle in *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992), when it observed that:

The fact that the equipment market imposes a restraint on prices in the aftermarkets by no means disproves the existence of power in those markets. See Areeda & Kaplow ¶ 340(b) (“[T]he existence of significant substitution in the event of *further* price increases or even at the *current* price does not tell us whether the defendant *already* exercises significant market power”) (emphasis in original). Thus, contrary to Kodak’s assertion, there is no immutable physical law—no “basic economic reality”—insisting that competition in the equipment market cannot coexist with market power in the aftermarkets.

504 U.S. at 471.