UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

In re: Nexium (Esomeprazole Magnesium) Antitrust Litigation This Document Relates to: All Actions	MDL No. 2409 Civil Action No. 1:12-md-02409-WGY

MEMORANDUM IN SUPPORT OF ASTRAZENECA DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW REGARDING THE ALLEGED TEVA PAYMENT

There is no evidence from which a reasonable juror could answer "Yes" to Question 1 on the Court's Verdict Form: "Did the settlement of the AstraZeneca-Teva patent litigation result in a large and unjustified payment by AstraZeneca to Teva."

-- Plaintiffs have offered no competent reasonable royalty opinion, despite the Court's warnings that their case could not proceed without one.

-- Even if there were competent evidence of a reasonable royalty, Plaintiffs have offered *no* evidence that $9 million was an unfair compromise of the Teva Prilosec case. Plaintiffs offered no expert testimony that Teva paid and AstraZeneca accepted an amount that was unreasonably low under all of the circumstances.

-- All of the primary evidence contradicts Plaintiffs' assertion that Teva received a discount to settle its Prilosec exposure as consideration for accepting a later licensed entry date for generic Nexium.

-- There is no primary or expert evidence to support Plaintiffs' contention that AstraZeneca had meritorious claims for willful infringement damages and/or an award of fees under the "exceptional case" rule, and surrendered them as a payoff to Teva.

AstraZeneca is entitled to judgment as a matter of law on any and all of these grounds.

LEGAL STANDARD

"In deciding a motion for judgment as a matter of law, the court will direct the verdict when the evidence leads to but one reasonable conclusion." *Schultz v. Rhode Island Hosp. Trust Nat'l Bank*, Civ. A. No. 88-2870-JLT, 1994 WL 326376, at *1 (D. Mass. May 21, 1994) (granting directed verdict).[1] Plaintiffs may not "rely on conjecture or speculation to justify the submission of an issue to the jury," nor may they point to "a mere scintilla of evidence." *Tang v. State of Rhode Island*, 163 F.3d 7, 11 (1st Cir. 1998). And their evidence "must comprise more than fragmentary tendrils." *Silva v. Worden*, 130 F.3d 26, 30 (1st Cir. 1997).

> [T]he court is not required to submit a question to the jury merely because some evidence has been introduced by the party having the burden of proof. Indeed, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.

Favorito v. Pannell, 27 F.3d 716, 721 (1st Cir. 1994). "[T]he standard for granting summary judgment is more exacting than the standard for granting judgment as a matter of law." *SEC v. EagleEye Asset Mgmt., LLC*, 975 F. Supp. 2d 151, 157 (D. Mass. 2013).

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO OFFER A COMPETENT REASONABLE ROYALTY ANALYSIS.

Plaintiffs knew their threshold obligation: to provide the jury "a proper reasonable royalty damages calculation under accepted methodologies." ECF No. 857 at 3. They bear the burden of showing that the $9 million received by AstraZeneca was "*so far below* what [Teva] would have been required to pay had damages been assessed in litigation" that it constituted a payment.

[1] Rule 50 "affords the court the alternative of denying a motion for summary judgment while . . . scheduling the trial to begin with a presentation on that essential fact which the opposing party seems unlikely to be able to maintain." Fed. R. Civ. P 50(a), Advisory Committee Note, 1991 Amendment.

ECF No. 977 at 107 (emphasis added). "[I]f there isn't a substantial unjustified payment, case over[.]" ECF No. 1030 [09/30/14 Tr.] at 6.

On this threshold issue, Plaintiffs bet their case on the testimony of Dr. McCool. But his testimony regarding the "reasonable royalty" that AstraZeneca could have collected from Teva in the Prilosec case does not remotely satisfy the *Daubert* test for admissibility under Federal Rule of Evidence 702. An expert's testimony must rest "on a reliable foundation." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). "The reliability analysis applies to all aspects of an expert's testimony: the methodology, the facts underlying the expert's opinion, the link between the facts and the conclusion." *Heller v. Shaw Indus., Inc.*, 167 F.3d 146 (3d Cir. 1999).

Dr. McCool's reasonable royalty analysis is so riddled with *Daubert* problems that it is difficult to know where to begin.

1. He did not identify *any* methodology underlying his opinion that the "hypothetical negotiation" would have resulted in agreement on a 55 percent royalty on net sales, plus a $10 million upfront payment. He could not identify a single example of a license that carried that high of a royalty on net sales, 11/6/14 Tr. at 144, either from his own experience or his comparator study (more on which *infra*). With respect to the $10 million component of his royalty—facially implausible to begin with given Teva's profits of roughly $20 million or less—Dr. McCool could not identify an example of a non-exclusive licensee[2] ever making an "upfront payment" of *any* size. 11/6/14 Tr. at 124.

2. From the "pro forma" he created Dr. McCool concluded that Teva in 2004 would have agreed to pay AstraZeneca 68 percent of Teva's profits from selling generic Prilosec.

[2] The parties do not dispute that the "hypothetical negotiation" under *Georgia-Pacific* in this case is for a non-exclusive license.

11/5/14 Tr. at 128. By 2004, however, Teva already had agreed to share 35 to 50 percent of those same profits (depending on sales) with its strategic partner, Impax. *See* Ex.73; 10/28/14 Tr. at 119. In Dr. McCool's hypothetical negotiation, then, Teva, a willing licensee, would have voluntarily negotiated a license requiring it to pay AstraZeneca and Impax collectively between 102 and 118 percent of its profits. That is absurd. Neither Dr. McCool (nor Plaintiffs) have identified any real-world or court-credited hypothetical license negotiation where the licensee agreed to a deal on which it was guaranteed to lose money. *See* 11/6/14 Tr. at 64-67.

3. To "support" his conclusion, Dr. McCool had his staff conduct an online search for comparator agreements, a search that he purposely designed to locate only agreements that substantiated the opinion he had already reached, and to avoid finding any comparator agreements that might undermine it. He directed his staff "to look only for ones that you thought had high rates and not to look at ones that had low rates." 11/6/14 Tr. at 123. He had no interest in considering comparable licenses for late-stage products if they carried royalty rates lower than the 55 percent of net sales that he had already adopted as his opinion. "I saw no point in seeing them." 11/7/14 Tr. at 41. A results-driven "methodology" like this one—"contrived to reach a particular result"—violates *Daubert*. *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1293 n.7 (11th Cir. 2005). Dr. McCool does not come close to "employ[ing] in the courtroom the same kind of intellectual rigor that characterizes the practice of an expert in [his] . . . field." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999).

4. To make matters worse, even the licenses he deemed worthy to consider he admitted misreading. He conceded that in fact it "wasn't true" that they all "had royalty rates that were greater than 50 percent of net sales." 11/6/14 Tr. at 123. Many had royalty rates that were at or below 50 percent of *profits*, which he acknowledged would translate into a royalty that

was significantly lower than net sales, 11/6/14 Tr. at 117-18, 119-20, 120-21, and none had royalty rates approaching 55 percent of net sales paired with a $10 million upfront payment, 11/6/14 Tr. at 144. *Cf. ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 870 (Fed. Cir. 2010) ("Dr. David used licenses with no relationship to the claimed invention to drive the royalty rate up to unjustified double-digit levels. Dr. David based his damages on seven ResQNet licenses, five of which had no relation to the claimed invention."); *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1328 (Fed. Cir. 2009) (rejecting reliance on patent licenses where "some of the license agreements [were] radically different from the hypothetical agreement under consideration for the . . . patent"). Because these shortcomings in his list were exposed at his deposition, Dr. McCool was left to try to marginalize them at trial—saying that they were only a "sanity check" on his opinion and that his opinion would stand even if one disregarded these non-comparable comparables. But it is now clear that this list provides no check at all, as not a single transaction supports his opinion. Nowhere does he "adequately explain how the data he reviewed in the form of other license agreements support the hypothetical license terms he proposes." *Real View, LLC v. 20-20 Techs., Inc.*, 878 F. Supp. 2d 282, 288 (D. Mass. 2012) (precluding expert testimony).

5. During direct examination, Dr. McCool told the jury:

> And if nobody remembers anything else I say, remember what I'm about to say. The primary driving factor behind a negotiation like this is that the end result needs to be a result that keeps the infringed upon, which is AstraZeneca in this case, whole. In other words, they don't take a hit as a result of all of this.
>
> There's a tendency to focus on the infringer. There's a tendency to focus on the impunity to the infringer. As I understand it, the federal court system admonishes against that.

11/5/14 Tr. at 100. Even assuming that this captures the appropriate legal standard under *Georgia-Pacific*, Dr. McCool failed his own test. He did no analysis to determine what royalty

rate would keep AstraZeneca "whole." He engaged in no "market analysis" to determine whether Teva's entry as the fifth generic seller of Prilosec took *any* sales from AstraZeneca, as opposed to sales from the prior four generic entrants, 11/6/14 Tr. at 53, 55, 127, an analytical prerequisite for determination if, under *Georgia-Pacific*, AstraZeneca needed to be made "whole" at all, and if so by what amount. Nothing in *Georgia-Pacific* requires Teva to surrender profits earned by taking sales from other firms, including those generic manufacturers who lawfully entered the market before Teva. Dr. McCool's proffered royalty rate also would, without question, impose a punitive result on Teva by guaranteeing that it would lose money.

6. Dr. McCool also invoked reliance on his "experience." 11/5/14 Tr. at 135-36. This is appropriate, but only so long as an expert "explain[s] how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." *McGovern ex rel. McGovern v. Brigham & Women's Hosp.*, 584 F. Supp. 2d 418, 426 (D. Mass. 2008). Dr. McCool did just the opposite. He conceded he had no personal experience with a royalty rate anywhere near the rate he has opined to here. 11/6/14 Tr. at 144. He has negotiated only two patent licenses, both conveyed *exclusive* rights, and each bore only a royalty of 4 percent on net sales, plus an upfront payment of less than $10,000. 11/6/14 Tr. at 36, 144. The only license he knew of from his employment at Eli Lilly (which he did not actually negotiate) carried an 8 percent royalty. 11/6/14 Tr. at 144-45. Dr. McCool's experience also includes testifying once before as a reasonable royalty expert, but as with his licensing experience, this, too, raises *Daubert* issues. In that case, his estimated royalty was far lower—12 percent of net sales, plus an upfront payment of $2 million—and even

those comparatively modest terms were criticized as "overreaching and unpersuasive" by that trial court, which slashed them to 6 percent and $100,000. 11/6/14 Tr. at 41.[3]

7. Dr. McCool disregarded obviously relevant but inconvenient facts.

-- He was unaware of any agreement where a licensee in the same or similar circumstances as Teva had agreed to a royalty of more than 30 percent of profits, 11/6/14 at 121, but refused to let that affect his opinion that Teva would have agreed to pay a rate nearly twice as high, plus a $10 million initial payment on top of that.

-- His opinion cannot be squared with a license negotiated by AstraZeneca and Teva in 2008 on a different generic product which provided for a 2.3 percent royalty on net sales once five generics were in the market. 10/31/14 Tr. at 71.

-- His opinion similarly was unaffected by AstraZeneca's offer to settle with Apotex for a 37 percent net-profits royalty—lower than the royalty later obtained from Teva—even though Apotex had greater exposure to damages because it launched its infringing generic Prilosec earlier and was not a party to the Nexium litigation. 10/29/14 Tr. at 32; 11/6/14 Tr. at 106-07.

Providing opinions that disregard the applicable, controlling standard, and basing them instead on "gut instinct," 11/6/14 Tr. at 103-04, brings to bear no expertise at all on the relevant issues. "[A] subjective analysis without any methodological constraints does not satisfy the requirements of *Daubert*." *Bricklayers and Trowel Trades Int'l Pension Fund v. Credit Suisse Secs. (USA) LLC,* 752 F.3d 82 (1st Cir. 2014).

8. Dr. McCool relied heavily on profit splits in distribution agreements, despite acknowledging multiple, significant differences between these agreements and bare patent

[3] *Univ. of Colo. Found., Inc. v. Am. Cyanamid Co.*, 216 F. Supp. 2d 1188, 1194 (D. Colo. 2002).

licenses of the sort Teva was hypothetically taking. He conceded, for example, that distributors do not make the product but are simply resellers of purchased products, and often receive marketing and other support, and that all of these differences were factors that lead to the innovator receiving a higher share of profits under distribution agreements than they do when they simply license their patents. 11/6/14 Tr. at 79-80. He then concluded, without explanation or any attempt at rationalization, that distribution agreements with 90-10 or 80-20 profit splits were more appropriate comparators than the mountain of other evidence that revealed, to his knowledge, that no licensee had ever paid the high royalty and upfront payment terms he was positing. 11/6/14 Tr. at 138-43. Asked to identify any basis for an industry norm of an astounding 90 percent profit share for the licensor, he could say only that "I don't have any reason to believe it's *not* that." 11/6/14 Tr. at 85 (emphasis added). But indeed he did. He conceded that the only "industry practice" he actually knew of concerning the split of profits between licensor and licensee, is the "25 percent rule," that is, where the licensor (AstraZeneca) keeps 25 percent of the profits and the licensee (Teva) 75 percent. *See* 11/6/14 Tr. at 85-87. Then he inexplicably ignored it in finding that Teva would have agreed to pay more than twice that, plus $10 million up front.

This is the ultimate indictment of Dr. McCool's "methodology." Unable to identify a single instance where Teva had ever agreed to pay "a royalty that was greater than 10 percent of net sales," 11/6/14 Tr. at 90-91, Dr. McCool nevertheless insists that Teva in a "hypothetical negotiation" would have agreed to a license with AstraZeneca requiring payments from Teva far in excess of its profits. 11/6/14 Tr. at 63, 65, 66-68. On the other hand, he also conceded that if he used the $25,516,865 profit figure he was supplied by Plaintiffs' counsel, and applied the 50 percent royalty rate Judge Cote used in *Apotex*—a decision that he cites with approval nearly

twenty times in his report, and which involved the same patents at issue with Teva and a defendant against whom AstraZeneca had a stronger claim—Teva's reasonable royalty damages would have been $12.75 million. 11/6/14 Tr. at 51-52, 61. And if he had adjusted the profit figure downward to reflect the profits Teva actually kept after paying Impax under their contract, the reasonable royalty damages are reduced to $9.8 million. Considering that AstraZeneca collected $9 million and saved millions in attorneys' fees, there is no plausible basis to call this a "sweetheart settlement."

II. PLAINTIFFS HAVE NO EVIDENCE THAT THE PRILOSEC SETTLEMENT WAS NOT FAIR AND REASONABLE.

Plaintiffs have another complete failure of evidence—no witness has testified that the $9 million Teva paid AstraZeneca was an unreasonable compromise of Teva's Prilosec exposure. The operative question is whether the $9 million was "*so far below* what [Teva] would have been required to pay had damages been assessed in litigation" that it constituted a payment. ECF No. 977 at 107 (emphasis added). And essential to analyzing that question is the principle that a settlement is a compromise of disputed claims. Teva was not required to pay AstraZeneca the maximum royalty that Judge Cote might have imposed at trial in order to avoid *Actavis* liability. Nor was AstraZeneca required to gamble and try to collect the full damages lawfully available at trial to insulate itself from a massive antitrust action because it settled the Nexium case at the same time.

The "so far below" question requires evidence of the reasonable settlement value (or range) of the Prilosec case and a comparison of that amount (or range) to the $9 million settlement here. And to this end what an appropriate settlement would be unquestionably is something that would require expert presentation to help the jury "understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. No jury reasonably could be expected to evaluate

without expert assistance the legal significance and strengths and weaknesses of the parties' claims and defenses in the Teva Prilosec case—not least among them Teva's contention that it was not bound by the Impax ruling and was entitled to litigate its own defenses on invalidity and unenforceability. *See, e.g.*, 10/31/14 Tr. at 36-38. Accordingly, even had Dr. McCool presented the jury with a "payment" opinion in his report—Plaintiffs chose not to have him do so[4]—the question would remain whether $9 million was a reasonable compromise of the exposure Teva faced. Plaintiffs promised in opening statements this testimony would be forthcoming, telling the jury, "that's what we care about; are they doing a reasonable settlement on the merits of the litigation," and that "the testimony will be, in fact, a fair and reasonable settlement of that litigation would have been $40 million, $30 million, or more." 10/21/14 Tr. at 84. They did not deliver. The questions pertinent to that analysis were not posed by Plaintiffs to Dr. McCool, nor have they been answered by anyone else, much less an expert qualified to render such opinions. *See* 11/6/14 Tr. at 16-17. Plaintiffs marshaled no evidence at all on that question.

There is a good reason why Plaintiffs never attempted to leverage Dr. McCool's reasonable royalty opinion to an opinion that the $9 million settlement payment was unreasonably low. In attempting to justify his rate calculation, Dr. McCool stated repeatedly and insistently he knew of "no true comparables" to the AstraZeneca-Teva settlement. 11/5/14 Tr. at 100; 11/6/14 Tr. at 118. If this is true, then there could be no possible basis for any opinion that AstraZeneca's acceptance of $9 million to settle that liability was so unreasonable that it could be deemed a pay-off to Teva.

[4] He testified only to the royalty rate, not its application to the proper royalty base.

III. THERE IS NO PRIMARY EVIDENCE OF A "SWEETHEART SETTLEMENT."

The primary evidence confirms that AstraZeneca and Teva negotiated the Prilosec settlement based on the merits of that case, and did not engineer a "sweetheart settlement" to delay the entry of generic Nexium.

1. The numbers in evidence tell a very different story from the one originally alleged by Plaintiffs.[5] The only testimony as to Teva's profits on infringing generic Prilosec sales is from Ms. Julie, who testified that they were approximately $20 million, before payment by Teva to Impax under their contract. 10/31/14 Tr. at 81. The evidence is uncontradicted that the $9 million settlement was the product of negotiations that occurred after Teva produced in discovery financial information for generic Prilosec for the entire period of infringement. *See* 10/28/14 Tr. at 48, 54, 57, 63, 82-83. These materials included "profitability information [such] that [AstraZeneca] was able to look at a range of what [Teva's] profits were . . . and make a determination of what was a reasonable settlement in the context of the litigation." *Id.* at 63. It is undisputed that Teva never "ask[ed] AstraZeneca to reduce the damages it sought in the Prilosec litigation in return for Teva's agreement to settle the Nexium litigation," and that AstraZeneca never told "Teva that it would forgive some or all of the damages in the Prilosec litigation if Teva would agree to not market generic Nexium until May 27, 2014." 10/28/14 Tr. at 134; *see also* 10/28/14 Tr. at 76-77 ("A. No, that's not the reason. I have not heard that before. Nobody said that to me before."). Ms. Julie explained that Teva "[w]ould . . . have settled the Nexium case on the same terms it did without settling Prilosec," 10/31/14 Tr. at 87, and Plaintiffs have no competent evidence to dispute this.

[5] *See* ECF No. 131 ¶ 130 (hidden payment worth "hundreds of millions of dollars or more."); ECF No. 114 ¶ 102 ("massive infringement damages").

2. Plaintiffs point to evidence that AstraZeneca and Teva discussed and negotiated the settlements together, exchanged drafts of the agreements in the same emails; and signed the agreements on the same day. *See, e.g.*, 10/27/14 Tr. at 143-45, 150; 10/28/14 Tr. at 75-76. This proves nothing except that the two settlements were discussed, memorialized, and executed at the same time, which is hardly surprising. AstraZeneca and Teva are large pharmaceutical companies in a highly competitive and heavily regulated industry, and thus typically "have a number of cases in common," 10/27/14 Tr. at 144, including "at any point in time," 10/28/14 Tr. at 134-35. Nexium and Prilosec, in fact, were only two of at least four cases ongoing around the time of the negotiations here. *See* 10/30/14 Tr. at 38; *see* 10/31/14 Tr. at 60 ("we frequently talk with people we have multiples disputes about, all of the disputes"). Some of those cases settled; others did not. That Nexium and Prilosec were among those that settled is not probative of whether either settlement contained a hidden payment, or, if so, its size.

3. Plaintiffs' theory presupposes that AstraZeneca would have insisted on a significantly higher settlement payment from Teva in Prilosec had the parties not settled Nexium. Put another way, Plaintiffs contend that AstraZeneca treated Teva more favorably than AstraZeneca would have treated a similarly situated Prilosec defendant who, unlike Teva, was not suing to invalidate the Nexium patents. The primary evidence disproves this. The record shows that, as a percentage of profits, AstraZeneca was willing to settle on similar terms with the Prilosec defendant most similarly situated to Teva—Apotex.

There is no closer "comparator" than the Teva and Apotex cases over their generic Prilosec products. Both launched at risk with products later found by the same federal judge to infringe the same Prilosec patents in the same proceeding. By the time the Federal Circuit affirmed in 2008 and the cases returned to the district court for damages proceedings, the

Nexium patent litigation was ongoing. Teva was a party to the Nexium litigation; Apotex was not. AstraZeneca nonetheless made settlement offers to each of Teva and Apotex that would have compromised their exposure on similar terms, when measured as a percentage of infringing profits. The $9 million settlement AstraZeneca secured from Teva actually amounted to a higher percentage of profits than AstraZeneca had agreed to take from Apotex (37 percent).[6] *See* 10/29/14 Tr. at 32. No reasonable jury could find a payment where AstraZeneca offered to settle a different but basically identical claim on more favorable terms than Teva received.

IV. NO REASONABLE JURY COULD FIND THAT ASTRAZENECA FORFEITED VALUABLE CLAIMS FOR ENHANCED DAMAGES.

Central to Plaintiffs' "sweetheart settlement"[7] theory is that AstraZeneca relinquished valuable willful infringement and "exceptional case" claims it had asserted against Teva. *See* 10/28/14 Tr. at 26-32. Plaintiffs have not substantiated this allegation. They rely only on AstraZeneca's contention interrogatory responses in the underlying patent case on willfulness, *see* Exs. 43, 44, as if the identification of a good-faith basis for *seeking* enhanced damages were sufficient to establish an *entitlement* to them. Proof of entitlement requires expert proof, and Plaintiffs' experts neither address the likelihood of a recovery by AstraZeneca, nor quantify the amount of enhanced damages Judge Cote in her discretion might award.

The trial record puts to permanent rest the notion that AstraZeneca relinquished anything of material value. In its entire history, Teva has *never* been found to be a willful infringer, or ordered to pay its opponents' fees after an "exceptional case" finding. 10/31/14 Tr. at 84, 85-86. This is true even though, as Plaintiffs' questioning established, Teva regularly launches generic

[6] Indeed, the $9 million Teva settlement amounts to a higher royalty than AstraZeneca obtained after a trial with Apotex. *See AstraZeneca AB v. Apotex Corp.*, 985 F. Supp. 2d 452, 487 (S.D.N.Y. 2013).

[7] DPP Second Supp. Resps. to Interrogs. at 17-18 (9/10/13).

products "at risk," that is, despite unresolved litigation with an innovator company over their product.

There is no reason to believe—and more importantly for the present motion, no evidentiary basis for a reasonable jury to conclude—that the result would have been different had the issue been litigated in Prilosec. Teva's strategic partner Impax had a no-infringement opinion letter from counsel, *see* 10/31/14 Tr. at 40-41; Exs. 73, 84 at 4-5, and AstraZeneca moved neither for a preliminary injunction to remove Teva from the market nor for summary judgment against Teva on the relevant claims, *see* 10/29/14 Tr. at 36. These facts make a willful infringement finding extremely remote if not impossible.[8] Certainly there was no evidence from Plaintiffs that such an award has ever been imposed in these circumstances. Underscoring all of this is what actually happened to AstraZeneca's *other* willful infringement claim in the Prilosec litigation: AstraZeneca lost that claim on summary judgment. The Court ruled that Apotex—the Prilosec defendant most similarly situated to Teva, who had challenged the same patents as Teva—had "raised a substantial question of infringement . . . that required 'an exhaustive analysis' by the Court." *AstraZeneca AB v. Apotex Corp.*, No. 01 Civ. 9351, M-21-81, 2010 WL 2541180, at *5 (S.D.N.Y. June 9, 2010).

[8] *See Read Corp. v. Portec, Inc.*, 970 F.2d 816, 828–29 (Fed. Cir. 1992) ("Those cases where willful infringement is found despite the presence of an opinion of counsel generally involve situations where opinion of counsel was either ignored or found to be incompetent."); *see also In re Seagate Tech., LLC*, 497 F.3d 1360, 1374 (Fed. Cir. 2007) ("A patentee who does not attempt to stop an accused infringer's activities in this manner should not be allowed to accrue enhanced damages based solely on the infringer's post-filing conduct."); *Solvay, S.A. v. Honeywell Specialty Materials LLC*, 827 F. Supp. 2d 358, 366-67 (D. Del. 2011) ("Solvay discredited its own contentions regarding the baselessness of Honeywell's invalidity defenses by failing to move for summary judgment of validity or willfulness").

CONCLUSION

For the reasons stated, judgment as a matter of law should enter for AstraZeneca on all claims.

Dated: November 10, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Benjamin M. Greenblum, hereby certify that this document was electronically filed and served using the Court's ECF system on November 10, 2014.

/s/ Benjamin M. Greenblum
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