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

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

AstraZeneca submits this supplement in support of its motion for directed verdict:

Plaintiffs spend much of their Opposition reciting and characterizing undisputed or immaterial facts that are not relevant to the "Teva payment" issue—what they refer to as their "qualitative" evidence. Plaintiffs point out that AstraZeneca and Teva were unable to settle Prilosec in 2006, *see* Opp'n at 10, that in May 2007 the parties discussed settling both Nexium and Prilosec, *id.* at 11-12, that in July 2009 Teva initiated discussions to settle both cases, *id.* at 13-14, that counsel drafted and circulated the agreements together, *id.* at 14-17, that a draft press release referred to the settlements as "a definitive agreement to settle patent litigation involving" generic Nexium and generic Prilosec and suggested excluding from the release the amount of the Prilosec settlement, *id.* at 17-18, and that Teva decided to settle the Nexium case after pursuing it for years, seeking a declaratory judgment, previously rejecting AstraZeneca's May 27, 2014 entry date, and taking the position in July 2009 that its Nexium case was "strong," *id.* at 20-24.

None of this constitutes primary evidence upon which Plaintiffs may rely to overcome a directed verdict motion like the one they are confronted with here. That is because none of this helps Plaintiffs establish that AstraZeneca would have recovered damages substantially more than $9 million had it gone to trial against Teva in the Prilosec case; or, furthermore, that the

payment was far less than an amount appropriate to settle Teva's exposure. From this evidence, no reasonable jury could infer the *values* associated with either of those payment questions, and that is what is required.

The Court's insistence that Plaintiffs present *quantitative* evidence reflects the reality, accepted and endorsed elsewhere, that without it there can be no fair application of the *Actavis* payment analysis. In addition to the Court's statement to that effect, Judge Sheridan in the *Lipitor* case enforced essentially the same rule. That case, too, involved allegations of a "payment" other than cash from the innovator to the generic. "In exchange for [a generic company's] agreement to delay its launch of generic Lipitor until November 30, 2011, [the brand company] allegedly gave substantial financial inducements to [the generic company], including" a "sweetheart agreement to dismiss damages claims likely worth hundreds of millions of dollars in [other] litigation in exchange for a token 'pretextual' payment of $1 million." *In re Lipitor Antitrust Litig.*, 2014 WL 4543502, at * *17, 19, 25 (D.N.J. Sept. 12, 2014).

Lipitor cited with approval this Court's conclusion that *Actavis* permits reverse payment claims to be based on "payments" in forms other than cash. *Id.* at 18 (quoting *In re Nexium (Esomeprazole) Antitrust Litig.*, 968 F. Supp. 2d 367, 392 (D. Mass. 2013)). But Judge Sheridan went on to hold that a "non-monetary payment must be converted to a reliable estimate of its monetary value so that it may be analyzed against the *Actavis* factors." *Id.* This is essentially the same thing the Court ruled here in requiring that Plaintiffs present evidence sufficient for the jury to put a number on the "sweetheart settlement" that Teva allegedly received. This Court's rule is even more friendly to plaintiffs, because unlike in *Lipitor,* which entered a *Twombly* dismissal because the *complaint* contained insufficient allegations, here Plaintiffs' only obligation was to present sufficient evidence at trial in the form of a reasonable royalty expert.

Plaintiffs apparently now contend they can get all the way to the jury, and not just past *Twombly*, solely through reliance on their so-called "qualitative" evidence. *See, e.g.*, Opp'n at 18 ("This evidence and reasonable inferences therefrom permit the jury to find that efforts to cover up the 'package' nature of the 'prazole' deals show that the Prilosec settlement disguised a reverse payment."). There is no such thing as a "qualitative" payment—that is an oxymoron. For the all of the reasons the Court has previously stated (and which the court in *Lipitor* embraced) "qualitative" evidence provides no reliable estimate of the alleged payment and therefore no basis to satisfy *Actavis*.

Dated: November 12, 2014

Respectfully submitted,

/s/ Dane H. Butswinkas

Dane H. Butswinkas (*pro hac vice*)
John E. Schmidtlein (*pro hac vice*)
Paul B. Gaffney (*pro hac vice*)
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
Ph: 202-434-5000
Fax: 202-434-5029
DButswinkas@wc.com
JSchmidtlein@wc.com
PGaffney@wc.com

Michael P. Kelly (*pro hac vice*)
MCCARTER & ENGLISH, LLP
Renaissance Centre
405 N. King Street, 8th Floor
Wilmington, DE 19801
Ph: 302-984-6301
Fax: 302-984-2493
mkelly@mccarter.com

William A. Zucker, Esq., BBO # 541240
MCCARTER & ENGLISH, LLP
265 Franklin Street
Boston, MA 02110
617.449.6500

617.607.9200 (facsimile)
wzucker@mccarter.com

Counsel for AstraZeneca LP, AstraZeneca AB, and Aktiebolaget Hässle

/s/ J. Douglas Baldridge
J. Douglas Baldridge (*pro hac vice*)
Lisa Jose Fales (*pro hac vice*)
Danielle R. Foley (*pro hac vice*)
Sarah Choi (*pro hac vice*)
VENABLE LLP
575 7th Street, NW
Washington, DC 20004
(202) 344-4000
(202) 344-8300 (fax)
jdbaldridge@venable.com
ljfales@venable.com
drfoley@venable.com
schoi@venable.com

Leslie F. Su (BBO No. 641833)
MINERVA LAW, P.C.
300 Brickstone Square, Suite 201
Andover, MA 01810
(978) 494-4695
leslie.su@minervalawpc.com

Counsel for Ranbaxy Pharmaceuticals, Inc., Ranbaxy Inc., and Ranbaxy Laboratories, Ltd.

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 12, 2014.

/s/ Benjamin M. Greenblum
Benjamin M. Greenblum