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

DEFENDANTS' POST-ARGUMENT SUBMISSION IN SUPPORT OF THEIR MOTIONS FOR DIRECTED VERDICT

Defendants respectfully submit this short Memorandum in response to the points made by plaintiffs' counsel during oral argument on Wednesday afternoon:

1. Plaintiffs' latest theory -- that the Prilosec settlement payment amount ($9 million) was less than the total attorney fees AstraZeneca expended litigating the Prilosec cases against Teva and Impax ($15 million) is somehow evidence of a payment -- is directly contradicted by the testimony of plaintiffs' own economic expert. Dr. McGuire testified that when a party is rationally deciding whether to enter into a settlement, the attorney fees expended up to that point are not relevant; rather "it's the part that's left. That's the only thing you can save. You can't save it if you've already spent the costs. You can only save the stuff you can avoid." 11/7/14 Tr. at 102. Thus, according to plaintiffs' own expert, these sunk litigation costs are irrelevant.[1] What matters is how the actual settlement compares to what AstraZeneca reasonably would have recovered in the Prilosec case and how much it would have cost AstraZeneca, go forward, to get there. On this issue, plaintiffs again admitted that they have

[1] While there is no need to reach the issue of why AstraZeneca expended the amount that it did, it is undisputed that AstraZeneca's objective in the Prilosec litigation was not just to recover royalty damages, but to get Teva off the market, which it successfully did in May 2007 once Impax was found to infringe. Further, AstraZeneca could not selectively enforce its patents; it had to sue Teva/Impax in order to try to keep the other generics (Apotex, Mylan, Lek, etc.), all of whom had larger sales than Teva, off the market as well. 10/28/14 Tr. at 136-137. Plaintiffs' new theory that prior litigation costs expended are a relevant benchmark does not stand under its own weight.

presented zero evidence. In Mr. Sobol's own words in reference to AstraZeneca's claim in the Prilosec case -- "**we don't know how much it was worth**." 11/12/14 Directed Verdict Hearing Tr. at 37 (emphasis added). That is precisely why plaintiffs' claims fail as matter of law.

2. After arguing the entire case that *Apotex* is irrelevant because it was based on a different record, Mr. Sobol put up numbers during the hearing purporting to show that if the royalty rate Apotex was ordered to pay by Judge Cote in her 2013 decision was applied to Teva, then Teva might have owed $12 to $15 million in the Prilosec case, depending on the royalty base used. But the *Apotex* award was in the context of a judgment, not a settlement. AstraZeneca had to expend more than $5 million in attorney fees in the damages phase of the *Apotex* case to get to that award. 10/28/14 Tr. at 136. Apotex has appealed seeking a reduction in that award (while AstraZeneca did not appeal), so AstraZeneca still has not been paid a dime by Apotex even though it was found to infringe in the same trial as Impax back in 2007. Ex. 1 ¶ 103. In these circumstances, no reasonable jury could find that the $9 million actually paid by Teva in 2010 in the context of a settlement was "so far" below a reasonable settlement or what AstraZeneca reasonably would have recovered in litigation (net of the attorney fees that would be required to obtain that recovery) that it amounts to a reverse payment. ECF No. 977 at 107.[2] Further, and as plaintiffs themselves have argued, the *Apotex* decision was not available at the time the parties negotiated their settlement. *See e.g.* ECF No. 1192 at 15. According to the testimony of Dr. McCool which remains in the record, there were no comparables at the time of the Teva settlement.

3. Contrary to plaintiffs' assertions, *Actavis* is clear that it is the plaintiffs' burden to prove the existence of a reverse payment, and specifically a large and unjustified reverse

[2] It is undisputed that AstraZeneca offered to settle the *Apotex* case for a lower royalty rate (37% of profits) than the 50% of profits it was ultimately awarded by Judge Cote. 10/29/14 Tr. at 32-34. It is by no means surprising that plaintiffs offer to settle cases for less than they might recover if they take the case through judgment.

payment, before any antitrust scrutiny of a patent settlement is triggered under the rule of reason. *FTC v. Actavis*, 133 S. Ct. 2223, 2237 (2013); *see also* ECF No. 977 at 58. Here the allegedly discounted Prilosec settlement is the sole basis for the claim of a reverse payment. Because plaintiffs have presented zero evidence of what an "undiscounted" settlement or litigation result would have been in the Prilosec case and now admit that they do not know and did not prove what that case was worth, defendants are entitled to a directed verdict on plaintiffs' sole remaining theory of liability.

Dated: November 13, 2014

Respectfully submitted,

/s/ Laurence A. Schoen

Laurence A. Schoen, BBO # 633002
Adam L. Sisitsky, BBO # 637532
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKYAND POPEO, P.C.
One Financial Center
Boston, MA 02111
Telephone: (617) 542-6000
Facsimile: (617) 542-2241
LASchoen@mintz.com
ALSisitsky@mintz.com

KIRKLAND & ELLIS LLP
Jay P. Lefkowitz, P.C. (*pro hac vice*)
Karen N. Walker, P.C. (*pro hac vice*)
Kevin T. Van Wart (*pro hac vice)*
Jonathan D. Janow (*pro hac vice*)
655 Fifteenth Street, N.W., Suite 1200
Washington, D.C. 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200
karen.walker@kirkland.com
jonathan.janow@kirkland.com

Attorneys for Teva Pharmaceuticals USA, Inc. and Teva Pharmaceutical Industries, Ltd.

/s/ Dane H. Butswinkas
Dane H. Butswinkas (Of Counsel)
John Schmidtlein (Of Counsel)
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

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

Counsel for AstraZeneca LP, AstraZeneca AB, and Atkiebolaget 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
Ph: (202) 344-4000
Fax: (202) 344-8300
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
Ph: (978) 494-4695
leslie.su@minervalawpc.com

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

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of November 2014, I filed and served the foregoing via the Court's CM/ECF system, which will serve notification of such filing by email to all counsel of record.

/s/ Laurence A. Schoen
Laurence A. Schoen