

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

In re: NEXIUM (ESOMEPRAZOLE) ANTITRUST LITIGATION	MDL No. 2409 Civil Action No. 1:12-md-02409-WGY
This Document Relates To:	
All Actions	

PLAINTIFFS' SUPPLEMENTAL BRIEF CONCERNING QUANTITATIVE EVIDENCE

In their briefing opposing directed verdict¹ and at argument on Wednesday afternoon Plaintiffs detailed multiple calculations that the jury could perform to reach a reasonable estimate of the net payment contained in the Prilosec settlement. The quantifications include:

- 1) In this scenario, the jury could take the profit figures that Ms. Julie sent to AstraZeneca in 2006 in an attempt to settle the Prilosec case:

Exh.48, adjusted to cover entire period of infringement	= \$37.3 million Teva profits ²
Times 80% profits to AstraZeneca (Exhs. 31-32)	= \$29.8 million
Times 1.3 for interest	= \$38 million
Minus \$9 million settlement	= \$29 million net payment
Adding attorneys' fees of \$15 million	= \$44 million net payment

- 2) This scenario uses one of the profit figures Mr. Pott purportedly relied upon:

Exh. 57	= \$23.7 million Teva profits ³
Times 80% profits to AstraZeneca	= \$18.9 million;
Times 1.3 for interest	= \$24.6 million;
Minus \$9 million settlement	= \$15.6 million net payment
Adding attorneys' fees of \$15 million	= \$30.6 million net payment

¹ ECF 1190 at 25-45.

² *Id.* at 38-40.

³ *Id.* at 42-43.

- 3) This calculation shows that Teva was willing to pay Impax and Teva’s own attorneys \$14.8 million (including interest) *in addition to* what Teva paid AstraZeneca to settle the inevitable infringement case. Teva effectively bought an incomplete product from Impax (one that might and actually did infringe); had Teva instead bought the complete non-infringing product from AstraZeneca, it would have had to pay AstraZeneca *at least* as much as the other costs that Teva knew it would incur. That is, Teva was willing to pay \$14.8 million in excess of the \$9 million that Teva paid AstraZeneca in the Prilosec settlement. In a fair settlement, AstraZeneca would have received \$14.8 million *more*. The math follows:

Exh. 57	= \$6.4 million to Impax
Plus infringement defense fees of “at least” \$5 million ⁴	= \$11.4 million ⁵
Times 1.3 for interest	= \$14.8 million net payment
Adding attorneys’ fees of \$15 million	= \$29.8 million net payment

- 4) This scenario shows the “official” profit figures from Teva. Applying the 80% profit share, the math follows:

Exh. 129	= \$25.5 million Teva profits ⁶
Times 80% profits to AstraZeneca	= \$20.4 million
Times 1.3 for interest	= \$26.5 million
Minus \$9 million settlement	= \$17.5 million net payment
Adding attorneys’ fees of \$15 million	= \$32.5 million net payment

Using instead the 50% profit percentage from the *Apotex* case, the math follows:

Exh. 129	= \$25.5 million Teva profits ⁷
Times 50% profits to AstraZeneca	= \$12.8 million
Times 1.3 for interest	= \$16.6 million
Minus \$9 million settlement	= \$7.6 million net payment
Adding attorneys’ fees of \$15 million	= \$22.6 million net payment

The 80/20 deals that are being used as a benchmark for these calculations are likely too favorable to the generic, and therefore show smaller payments. These deals were part of the side deals in

⁴ *Id.* at 36-37.

⁵ For this calculation there is no need to subtract the \$9 million settlement because that money was paid to AstraZeneca.

⁶ ECF 1190 at 42-43.

⁷ ECF 1190 at 42-43.

the Ranbaxy settlement and were ways to transfer money to Ranbaxy. As Ranbaxy's own documents state, the "industry standard" is 90%.⁸ If the jury were reasonably to use the 90% "industry standard," the net payment amounts would be larger.⁹ Regardless, each of these net payment figures are larger than avoided litigation costs.

During argument on Wednesday afternoon, the Court discussed the illogic of AstraZeneca spending \$15 million to litigate the Teva-Prilosec, AstraZeneca winning that case on the merits, and AstraZeneca then settling that case for a payment of only \$9 million. The Court recognized that it seemed silly to think that AstraZeneca would lose \$6 million on a case that it won.

During this colloquy the Court queried is "[s]ix million big enough?"¹⁰ But the \$6 million not the whole story. \$6 million is simply the amount that AstraZeneca was in the hole from its litigation expenses – that is, the Court's calculation assumes that AstraZeneca was entitled to *zero damages*. If AstraZeneca were entitled to \$10 million in damages, that become \$16 million.

⁸ 11/5/14 Tr. 107:13-23; Exh. 103.

⁹ As plaintiffs explained in their brief opposing direct verdict, though authorized generic deals are not perfect comparators, they are "[t]he best comparators that do exist. . . . In such agreements the brand is already facing generic competition (just as in the Prilosec situation) and is seeking to obtain (or recoup) some profit by selling a generic itself (just as in the hypothetical AstraZeneca/Teva negotiation for generic Prilosec). . . . [T]he fundamental similarity is that each type of agreement allows the generic to enter the market when it otherwise would not be able to do so. This, combined with the fact that both types of agreements allow generic entry into an existing, known market and an immediate profit opportunity for the generic, make authorized generic distribution agreements the most appropriate comparators." DV Opp'n Br. at 39-40.

¹⁰ 11/12/14 Tr. Afternoon Motion Hearing at 36.

The evidence shows that the Apotex court awarded 38% of net sales, plus interest (the total award amounted to \$104 million).¹¹ Exhibit 129 shows over \$41 million in Teva net sales. Multiplying that net sales figure by the Apotex court's 38% rate yields damages of \$15.6 million, and adding interest brings that total to over \$20 million. Adding that \$20 million in damages to the \$6 million that the Court discussed equals a net payment of \$26 million – an amount that this Court has already heard is sufficient to show a large and unjustified payment.¹²

Plaintiffs have shown multiple ways that, based on the primary evidence, the jury could reasonably calculate a large net payment from AstraZeneca to Teva. And, as the Court recognized, even the most basic consideration of AstraZeneca recovering only 60% of its litigation costs (\$9 million/\$15 million) *and zero damages* in a case that AstraZeneca won shows that the \$9 million settlement of the Prilosec litigation is a large net payment from AstraZeneca to Teva.

All of these *quantitative* analyses must be viewed against the backdrop of the *qualitative* evidence showing that the too low Prilosec settlement was a *quid pro quo* for Teva's agreement to settle the Nexium case with the same industry standard entry date of May 2014 to which Ranbaxy had previously agreed. As the Supreme Court explained in *Actavis*, a large payment induces the generic challenger to "quit its patent invalidity or noninfringement claim," "give up the patent fight," and "stay away from the patentee's market."¹³ AstraZeneca's willingness to forgive part of the debt that Teva owed because of its infringing Prilosec sales caused Teva to

¹¹ 11/6/14 Tr. at 106 ("So the Apotex award is 38 percent of net sales plus zero; correct? A. Correct").

¹² Summary Judgment Opinion at 116 [ECF No. 977].

¹³ *FTC v. Actavis*, 133 S. Ct. 2223, 2233 (2013).

“give up the patent fight.” *Actavis* teaches that this is precisely the anticompetitive harm that is unlawful.

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CERTIFICATE OF SERVICE

I, Thomas M. Sobol, hereby certify that I caused a copy of the foregoing to be filed electronically via the Court's electronic filing system. Those attorneys who are registered with the Court's electronic filing system may access these filings through the Court's system, and notice of these filings will be sent to these parties by operation of the Court's electronic filing system.

Dated: October 20, 2014

/s/ Thomas M. Sobol
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