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' OPPOSITION TO DEFENDANTS' RULE 50 MOTION

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I. INTRODUCTION

Whether a payment is "large" is driven by the underlying economics described in the Supreme Court's *Actavis*[1] decision and can be assessed both qualitatively and quantitatively. The evidence adduced at trial, and reasonable inferences therefrom, permit a jury to conclude that AstraZeneca made a large payment to Teva under either rubric.

The Supreme Court emphasized that the "relevant anticompetitive harm" posed by a reverse payment is the brand company's paying its generic competitor to "prevent the risk of competition."[2] 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."[3] This Court expressed a similar analysis in its summary judgment ruling.[4]

The Supreme Court characterized a "large" payment as one that exceeds "a rough approximation of the litigation expenses saved through the settlement."[5] Dr. McGuire reached the same conclusion from an economic perspective: "If you see a payment from the brand that exceeds its expected litigation costs, then there is strong economic evidence that the settlement constitutes a delay in the sense of harming consumers."[6]

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[1] *FTC v. Actavis, Inc.*, 133 S.Ct. 2223 (2013).

[2] *Actavis*, 133 S. Ct. at 2236. *See also id*. at 2230; and at 2234. The underlying rationale of *Actavis* is that substance triumphs over form and that courts should avoid formulaic answers to substantive antitrust questions.

[3] *Id*. at 2233.

[4] *See* Memorandum and Order, ECF No. 977, at 116-17 (Sept. 4, 2014) ("SJ Order") (rejecting Teva's argument that, if payment via the Prilosec settlement was $22.1 million, such a payment was "per se" lawful and stating that "The central question . . . is whether" the savings afforded to Teva by AstraZeneca in Prilosec "constituted a significant foregiveness of debt intended to *induce* Teva to delay its entry into the market for generic Nexium") (emphasis added). *See also id.* at 54 (payment to Ranbaxy was "large and unjustified" if "Ranbaxy was *induced* to delay its generic launch in return") (emphasis added).

[5] 133 S. Ct. at 2236.

[6] 11/7/14 Tr. 88:14-16.

Here, the jury can readily conclude from both qualitative and quantitative evidence that AstraZeneca made such a payment to Teva.

Qualitative evidence. The evidence shows that the Nexium and Prilosec settlement agreements were a single, indivisible, high-level deal that bolted resolution of the Nexium case to a full release for Teva's $100 million-plus exposure in the Prilosec case:

- AstraZeneca and Teva signed the Nexium and Prilosec agreements on the same day after simultaneous negotiations among the same counsel.
- Emails between AstraZeneca and Teva – involving the same AstraZeneca lawyers who negotiated the linked AstraZeneca-Ranbaxy Nexium settlement/side deals – *always* attached drafts of both agreements.
- AstraZeneca and Teva were unable to settle the Prilosec litigation *until* it was tied to resolution of the Nexium litigation.
- AstraZeneca's outside counsel, Timothy Hester, drafted the Prilosec agreement on the same day that he said the parties reached a deal in principle on Nexium.
- Teva rejected the May 2014 generic Nexium entry date twice, and did an about-face only after AstraZeneca offered it the Prilosec deal.

The negotiation and resolution of both litigations at once allows the jury to conclude that AstraZeneca gave Teva a sweetheart Prilosec resolution in exchange for delayed entry in Nexium. Two separate, stand-alone settlements would reflect[7] a legitimate compromise of each claim, with each party getting something and giving up something in each settlement. But defendants' insistence on resolving both litigations in a *single* deal permits the jury to conclude that something else was going on: AstraZeneca got what it wanted in the Nexium piece of the deal and gave up something in the Prilosec piece of the deal; Teva gave up something in the Nexium piece of the deal and got what it wanted in the Prilosec piece of the deal. AstraZeneca definitely got what it wanted in the Nexium piece: Mr. Hester told the jury that getting Teva to

[7] Assuming nothing else amiss in each separate settlement.

accept the May 27, 2014 generic Nexium entry date meant "effectively we had won."[8] It follows that Teva got something substantial in the Prilosec piece of the deal.

AstraZeneca and Teva's deal fused the Nexium and Prilosec agreements, despite AstraZeneca knowing that the bundled AstraZeneca-Ranbaxy agreements triggered FTC antitrust scrutiny. The parties obviously *needed* to resolve both together as part of a single deal in order to effectuate a large payment to Teva.[9]

That conclusion is confirmed by the very identity of the high level inside and outside counsel who shepherded the joint deal: Did it really take the general counsel of AstraZenca (Mr. Pott), the general counsel of Teva (Mr. Egosi) and the chairman of Covington & Burling (Mr. Hester) to settle what the defendants say was the routine damages phase of a $9 million patent case? Or did it take those high-level lawyers to approve, engineer, and try to disguise a payment sufficiently large to induce Teva to quit the Nexium patent fight?

That AstraZeneca made such a payment is confirmed by the overwhelming evidence that Teva abruptly reversed course and quit the Nexium patent fight:

- Teva's business model was to get an *earlier* entry date than the first ANDA filer, *i.e.*, before May 27, 2014.
- In 2007 and 2008, Teva *rejected* AstraZeneca's offer of the May 27, 2014 entry date – the same offer Teva *accepted* after being paid off.
- Teva did not suffer any adverse rulings or events in the Nexium infringement case between May 2008 and the time it quit.
- AstraZeneca wanted to settle the Nexium case before the *Markman* hearing.

[8] 11/4/14 Tr. 59:11 (Hester).

[9] If AstraZeneca and Teva had compromised on the Nexium entry date based on their respective views of the underlying patent merits, as the FTC had long permitted, there would be no reason to resolve both cases in a single deal. The defendants' need to resolve Nexium and Prilosec litigations at once arises *because* the Nexium settlement is *not* a compromise based on each party's view of the merits, as Mr. Pott testified.

- Though Teva claimed it was running short on time to break the bottleneck, Teva settled Nexium in principle in July 2009 – nearly *five years* before the May 2014 entry date.

This qualitative evidence, and reasonable inferences therefrom, permit the jury to conclude that AstraZeneca's payment to Teva was large. It exceeded any reasonable estimate of saved litigation costs and was therefore sufficient to induce Teva to quit the Nexium fight that it had been aggressively waging – precisely the anticompetitive harm that *Actavis* identified.

Quantitative evidence. Before addressing the quantitative evidence that the payment to Teva exceeded AstraZeneca's expected future litigation costs, a few points are worth noting:

- Neither AstraZeneca nor Teva settled the Nexium case based on its assessment of the patent merits.

- Neither AstraZeneca nor Teva settled the Prilosec case based on any apparent analysis of the damages in that case.

- Neither AstraZeneca nor Teva intended the Prilosec settlement to merely reflect AstraZeneca's saved litigation costs in the Nexium case.

Thus, while the plaintiffs can prove quantitatively that the payment exceeded expected future litigation costs, the plain truth is that defendants do not even pretend that the payoff had anything to do with saving those costs.

In any event, substantial evidence shows that the payment from AstraZeneca to Teva exceeded AstraZeneca's expected litigation costs:

- AstraZeneca saved $3-4 million in litigation costs by settling the Nexium case,[10] and a million dollars or less by settling the Prilosec litigation.[11]

- Using Teva's 2006 profit figures and the most conservative calculations, the jury could find that Teva was exposed to a judgment of well over $100 million; even if one discounts entirely AstraZeneca's forceful efforts to collect treble damages, Teva's exposure was well over $50 million.

[10] 11/7/14 Tr. 130:1-10 (McGuire).

[11] 11/7/14 Tr. 130:11-16 (McGuire)

- Dr. McCool testified that a reasonable royalty would be at least 55% of Teva's net generic Prilosec sales plus at least a $10 million up-front payment;[12] As this Court has stated, "[y]ou fill in the blanks and arithmetic can then be done"[13] to translate that into single damages of between $42 million and $57 million (not including enhanced damages).

- AstraZeneca released Teva from its Prilosec liability for only $9 million.[14]

The evidence and reasonable inferences therefrom permit the jury to find that AstraZeneca paid Teva far more than AstraZeneca's saved litigation costs.[15]

Defendants' error. Defendants argue that a payment's size should be assessed by comparing it to Nexium's brand sales. This argument is contrary to *Actavis.* The alleged reverse payment in *Actavis* was small if compared to the brand sales.[16] Brand prices and profits are far larger than those of generic companies – that is precisely why brands are able to pay off their generic competitors to delay generic entry and why such payoffs trigger antitrust scrutiny.[17]

Actavis held that reverse payment cases such as this one present a quintessential fact question: "Although the parties may have reasons to prefer settlements that include reverse payments, the relevant antitrust question is: What are those reasons?"[18] As the Supreme Court then explained: "If the basic reason is a desire to maintain and to share patent-generated monopoly profits, then, in the absence of some other justification, the antitrust laws are likely to

[12] 11/5/14 Tr. 124:9-11 (McCool); *id.* at 125:18-20.

[13] 11/5/14 Tr. 133:17-22 (McCool).

[14] Exh. 46 at AZ-NX-MDL-00002540, Article 4.

[15] While defendants contest the size of the reverse payment, that itself is a factual dispute that the jury must decide.

[16] *See Actavis*, 133 S. Ct. at 2229 (brand company's payments totaled a few percentages of the brand sales during the period of alleged delay).

[17] For example, Teva's forecaster, Ms. King, testified that Teva expects that generic prices with multiple generic competitors will drop to 5% of the brand price. 10/29/14 Tr. 97:21-99:7 & Exh. 58. Indeed, prices can go even lower. *See* 10/31/14 Tr. 66:19-67:3 (generic prices can drop to 1% of brand with multiple generics) (Julie).

[18] 133 S. Ct. at 2237.

forbid the arrangement."[19] Here, the evidence and reasonable inferences therefrom permit the jury to conclude that AstraZeneca and Teva entered into a single transaction to resolve both the Prilosec and Nexium litigations in order to maintain and share AstraZeneca's monopoly profits (as articulated by the jury verdict form).

This Court denied the defendants' motion for summary judgment regarding whether AstraZeneca made a "large and unjustified"[20] reverse payment to Teva.[21] The evidence adduced at trial is far stronger than the summary judgment record. The question "whether AstraZeneca made a large payment to Teva" is factual, and remains one for the jury.[22]

II. PROCEDURAL BACKGROUND

The Court twice addressed the subject matter of the defendants' motion under Federal Rule of Civil Procedure 50 for judgment as a matter of law on whether AstraZeneca made a large and unjustified payment to Teva.

At the September 30 hearing, the Court explained that the plaintiffs must put in evidence of the "large and unjustified payment" to Teva first at trial, and that at the conclusion of the plaintiffs' evidence on this issue defendants may move for "summary judgment:"[23]

> We agreed upon a six-week trial, a six-week trial we're going to have, but you're going to have to put in the Teva stuff first. I want all the stuff from the plaintiff's point of view on substantial and unjustified payment arising out of that Teva . . . AstraZeneca agreements and how they were

[19] *Id.*

[20] *Id.*.

[21] *See generally* SJ Order.

[22] 11/7/14 Tr. 59-63. *See also Santiago Hodge v. Parke Davis & Co.*, 909 F.2d 628, 634 (1st Cir. 1990) ("The standard of review for a motion for directed verdict is similar to that applied to a request for summary judgment"); *id.* ("It is well settled that upon the consideration of a motion for directed verdict, the evidence must be viewed in the light most favorable to the non-movant, giving him the benefit of every favorable inference that may be fairly drawn therefrom.").

[23] Plaintiffs respectfully maintain their objection to the requirement to "front load" the case and to the Court's earlier summary judgment ruling regarding Ranbaxy causation. Plaintiffs also note that this opposition is being filed without benefit of time to review defendants' brief.

> implemented and I want that first. And when you're done, I want to know it because the rule provides that when we have all the evidence on an issue -- and we'll have all the plaintiff's evidence on an issue . . . the defendants can move for summary judgment..[24]

At the October 15 charge conference, the Court further explained its thinking:

> THE COURT: Look, this is how this is going to play out. You've given me no -- I'll now amend Question 1 so it says "in a large and unjustified payment by AstraZeneca to Teva," and I've already ordered that that's the evidence I'm going to hear first. Once I've heard all that evidence, I am not bifurcating the trial we've already bifurcated.
>
> MR. SOBOL: Sure.
>
> THE COURT: Once you've put in all your evidence on that point, then you're to notify the Court. That's the pretrial order. I will expect, because they seem to be champing at the bit here, they will then move for a directed verdict. I will entertain argument on that motion and I will resolve it. Now, if I resolve it against the plaintiffs, I will be satisfied that I have created a sufficient record and I assume I will be satisfied with my ruling that the case is teed up for appeal. If I deny their motion for a directed verdict at that juncture, the case will continue to the point where the plaintiffs rest entirely. I do agree with you that *I think it is up to the defense to come up with the procompetitive justifications*.
>
> MR. SOBOL: Sure.
>
> THE COURT: That's true. And so when you rest, if you, um, eluded directed verdict at that earlier stage in the trial, at least on that point and there would be others, causation and the like, you -- but on that point you probably will elude a directed verdict at the close of all your evidence. *Then we'll see what the defense comes up with as procompetitive justifications* which, I've already said this, you not only will cross-examine, but you may then come up with, if it's genuine, genuine rebuttal. Now that's how I expect to manage the trial. But I'm going to leave the word "unjustified" in there.[25]

Given the Court's statements about what is, and what is not, the subject of the defendants' rule 50 motion, plaintiffs are not addressing here – and have not finished presenting

[24] 9/30/14 Hearing Tr. at 5-6.

[25] 10/30/14 Hearing Tr. at 9-11 (emphasis added).

evidence at trial about – market power, antitrust impact, causation, damages, or other matters. Nor have the plaintiffs tried to imagine and rebuff any-and-all potential justifications the defendants may offer in their case in chief. A further discussion of defendants' burden regarding procompetitive justifications is included in Appendix A.

III. LEGAL STANDARD

Courts should grant directed verdicts only when the evidence "is such that reasonable persons could reach but one conclusion."[26] Courts should not grant a directed verdict in a rule of reason case even if the court is skeptical of an expert's opinion.[27] And the issue of whether a payment is large is a question of fact for the jury.[28]

A comprehensive discussion of the relevant case law is attached as Appendix B.

[26] *Putnam Res. v. Pateman*, 958 F.2d 448, 459 (1st Cir. 1992). Although this statement was made in the context of a judgment notwithstanding the verdict (or "J.N.O.V."), the Court makes it clear that the standards for directed verdict and "J.N.O.V." are the same. *Putnam Res.*, 958 F.2d at 459.

[27] *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1105-06 (1st Cir. 1994).

[28] 11/7/14 Tr. 59:19-60:4 (The Court "the Supreme Court uses the word 'large,' and they don't define it, you know, they don't, they say the other language which I read to the jury, and really the genius of our system, and I will tell them right now, 'You know, folks, you've got to decide this as a matter of fact.'"). As another example, the issue of "fair value" and the value of a legal claim both are considered fact questions to be resolved by a jury. *See Nassif v. U.S. for Use of Bayer & Mingolla Const. Co.*, 187 F.2d 794, 796 (1st Cir. 1951) ("The fair value … is a pure question of fact."); *U.S. v. Bailey*, 707 F.2d 19, 21 (1st Cir. 1983) ("the fair market value of shares of stock is generally considered a question of fact that may not be disturbed unless it is clearly erroneous."); John E. Theuman, *Measure and Elements of Damages Recoverable for Attorney's Negligence In Preparing Or Conducting Litigation—Twentieth Century Cases*, 90 A.L.R.4th 1033 ("Just what amount the client would have recovered in the prior action but for the attorney's alleged negligence is generally a question for the factfinder in the malpractice trial"); *Copp v. Atwood*, No. Civ.03–288–JD, 2005 WL 139180, at *4 (D.N.H. Jan. 24, 2005) (granting summary judgment for plaintiff on question of attorney's liability for malpractice, thus "leaving the issue of damages to be resolved either by the parties in settlement or, if necessary, by a jury.").

IV. ARGUMENT

A. *Actavis* describes a "large" payment as one that exceeds future litigation costs.

The Supreme Court held that an antitrust defendant may be able to defend a payment by showing that it did not exceed the patent holder's reasonably expected litigation costs, a quantitative measure.[29] This is consistent with academic literature:

> The reason the patentee is willing to make a payment that *exceeds its litigation costs* is precisely because the settlement will permit it to exclude competition from the market, whereas if it went to trial there is a chance that the patent would be held invalid or not infringed and the market would become competitive. On expectation, the patentee is paying for an advantage it could not get if it went to trial.[30]

Likewise, *Activating Actavis* proposes jury instructions emphasizing the significance of avoided litigation costs: "In assessing whether this payment is unreasonably large, you may consider whether the payment is no greater than the patent holder's anticipated litigation costs that are avoided through settlement."[31] As Dr. McGuire explained, no brand manufacturer will pay more to a generic than the brand would expect to pay in future litigation costs *unless* the brand concludes that it can get a better deal by paying its competitor – which means obtaining more protection from competition than it expects its patents alone would afford if fully litigated.[32] That size payment is plainly "large."[33]

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[29] *Actavis*, 133 S. Ct. at 2236-37.

[30] Hovenkamp, H., M. Janis, M. Lemley, & C. Leslie, *IP and Antitrust* (2d ed. Supp. 2013) ("*IP & Antitrust*"), §15.3a (emphasis added).

[31] Aaron S. Edlin, C. Scott Hemphill, Herbert J. Hovenkamp, Carl Shapiro, *Activating Actavis*, 26 ANTITRUST 16, 21 (Fall 2013).

[32] 11/7/14 Tr. 86:12-20 ("[W]hat I can say, if you see a payment, that means that date has been delayed. The brand had that going in. They put in some money, they made the payment. The way to understand that from an economic point of view is they're getting something out of it. They're getting longer time to sell without generic competition.") (Dr. McGuire).

[33] Dr. McGuire explained to the jury that a payment is "large" in economic terms if it exceeds the brand company's avoided litigation costs. *See* 11/7/14 Tr. 89:25-91:2.

B. The qualitative evidence shows that AstraZeneca's payment to Teva was large.

1. The indivisible deal that resolved both the Nexium and Prilosec litigations included a large payment from AstraZeneca to Teva.

The evidence, and reasonable inferences therefrom, permit the jury to conclude that the Prilosec and Nexium settlements were a single, indivisible, high-level deal that bolted resolution of the Nexium case to a full release for Teva's $100 million-plus exposure in the Prilosec case.

The Prilosec litigation long pre-dated the Nexium litigation. Teva launched a generic version of Prilosec – "one of the most widely prescribed medicines in history"[34] – in September 2004 "at risk." AstraZeneca sued Teva for infringement in January 2005.[35] But the Prilosec litigation started long before, in the early 2000s; AstraZeneca sued Teva's partner Impax in 2000.[36] AstraZeneca won on patent validity and infringement against multiple other companies in 2002, a decision affirmed on appeal by the Federal Circuit in 2003, a year before Teva launched at risk.[37]

As to Nexium, Teva filed its Paragraph IV certification as the second filer, after Ranbaxy, in November 2005. AstraZeneca sued Teva for infringement in March 2006.[38]

a. AstraZeneca and Teva were unable to settle Prilosec in 2006.

Teva and AstraZeneca tried settling Prilosec in 2006.[39] On April 18, 2006, two weeks after a bench trial in the Prilosec patent case began,[40] Teva sent AstraZeneca financial

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[34] Exh. 52 at 390.

[35] Exh. 1, ¶¶ 101-02.

[36] Exh. 1, ¶100.

[37] Exh. 52 at 390 n.2. *See also Astra Aktiebolag v. Andrx Pharm., Inc.*, 222 F. Supp. 2d 423 (S.D.N.Y.2002), *aff'd*,84 Fed. Appx. 76 (Fed. Cir. 2003) (finding that Genpharm, Cheminor, and Andrx infringed AstraZeneca's Prilosec patents).

[38] Exh. 1, ¶¶ 78-79 (the Paragraph IV certification was actually filed by Ivax, which was acquired by Teva in January 2006, *see id.*); 10/27/14 Tr. 140:23-141:9 (Pott). *See also* 10/28/14 Tr. 23:19-24 ("Teva, at some point, launched in 2004, I believe, and we sued them in 2005.") (Pott).

[39] Exh. 48 (email from Staci Julie of Teva to Marcus Heifetz of AstraZeneca dated April 18, 2006).

information to facilitate a settlement discussion.[41] This 2006 data showed Teva profits nearly twice as large as the defendants now contend they were.[42] AstraZeneca's General Counsel, Mr. Pott, however, testified "I don't recall" when asked to explain AstraZeneca's view in 2009 of the "fair value" of a Prilosec settlement with Teva;[43] while he said AstraZeneca had formed a view of Teva's generic Prilosec *profits* back then, he claimed he could not recall that view either.[44] The evidence, and reasonable inferences therefrom, permit the jury to conclude that AstraZeneca did not perform any Prilosec damages analysis, or use any data at all during its negotiations with Teva.

These early settlement talks between AstraZeneca and Teva went nowhere *until* Nexium settlement talks began.[45]

b. In May 2008, AstraZeneca and Teva discuss settling both Nexium and Prilosec.

In May 2008, the day after Teva filed its Nexium Declaratory Judgment action against AstraZeneca, Ms. Julie, her boss David Stark, Richard Egosi, and another Teva attorney met in Philadelphia with AstraZeneca's General Counsel Mr. Pott and other AstraZeneca lawyers.[46] David Stark is currently acting General Counsel of Teva's parent company and in 2008-09 was

[40] Exh. 52 at 390 ("The case was tried to the Court sitting without a jury for 42 trial days, stating April 3, 2006 and ending June 14, 2006."); 10/27/14 Tr. 160 (Pott).

[41] Exh. 48 (email from Staci Julie of Teva to Marcus Heifetz of AstraZeneca dated April 18, 2006).

[42] *Id.*

[43] 10/28/14 Tr. 49:3-10 ('Yeah, I don't recall what the internal view was.").

[44] 10/28/14 Tr. 49:12-16 ("I think we had a range that we understood their profits so that I could negotiate that in the context of the information I had. Q. So what was the range? A. I don't recall the range.").

[45] 10/28/14 Tr. 58:18-61:3 (Pott agreed that the Prilosec settlement discussions started when Teva and AstraZeneca were discussing the Nexium litigation, but could not explain why). In early 2008 or late 2007, Teva (through its in-house lawyer Ms. Julie) contacted AstraZeneca's general counsel (Mr. Pott) about settling *both* the Prilosec and Nexium lawsuits. 10/27/14 Tr. 143:23-144:5 (Pott); 10/30/14 Tr. 31:22-32:9 (Julie), Exh. 65 (Ms. Julie wrote to Mr. Pott that she, Mr. Egosi, Mr. Stark, and Mr. Yaari planned to attend the May 1, 2008 meeting with AstraZeneca); 10/30/14 Tr. 24:22-25:3 (Ms. Julie testified that she reached out to Mr. Pott at the end of 2007).

[46] 10/30/14 Tr. 38:2-10 (Julie).

the General Counsel of Teva North America.[47] In 2009-2010, Mr. Egosi was the Chief Legal Officer of Teva's parent company.[48] At this May 2008 meeting in Philadelphia about settling the Nexium litigation, Teva and AstraZeneca *also* discussed the Prilosec settlement.[49]

The jury could conclude that all these high-level lawyers – later including Mr. Tim Hester, an antitrust (not patent) lawyer and chairman of the D.C. law firm Covington & Burling LLP[50] – were not needed just to resolve what defendants contend was a routine damages case worth $9 million.

The Prilosec litigation had progressed very poorly for Teva (and very well for AstraZeneca) since their fruitless settlement talks in 2006. In May 2007, the presiding court ruled that AstraZeneca's Prilosec patents were valid and infringed by Teva's partner Impax,[51] forcing Teva to discontinue its sales of generic Prilosec. The Federal Circuit affirmed the district court's decision in August 2008.[52]

Just as AstraZeneca was prepared to pursue the Prilosec patent case against Teva, Teva was fully prepared to press the Nexium patent case against AstraZeneca.[53] At the May 2008 meeting, AstraZeneca offered Teva the May 27, 2014 entry date, but Teva rejected it.[54] Mr. Pott confirmed that Teva's position in May 2008 was that it was "*planning to come to the market*

[47] 10/30/14 Tr. 9:6-10 (Julie).

[48] 10/30/14 Tr. 10:12-15 (Julie).

[49] 10/27/14 Tr. 144:10-145:1, 162:2-8 (Pott); 10/30/14 Tr. 38:13-39:1 (Julie).

[50] 10/31/14 Tr. 161:10-17 (Hester).

[51] Exh. 52; 10/31/14 Tr. 34:17-35:6 (Julie).

[52] Exh. 53. As Mr. Pott testified, as of May 2008, "we had won the underlying case against Teva." 10/28/14 Tr. 40:4-42:10. *See also* 10/30/14 Tr. 90:6-15 (Julie); 10/31/14 Tr. 36:1-2 (Julie).

[53] 10/30/14 Tr. 40:14-19 (Julie).

[54] 10/28/14 Tr. 64:24-65:3 (AstraZeneca offered Teva the May 2014 entry date in May of 2008 but Teva rejected it) (Pott); 10/30/14 Tr. 40:14-20, 42:23-43:17 (Julie); 11/4/14 Tr. 111:6-10 (Hester); 10/30/14 Tr. 42:17-18 (Julie).

[with its generic Nexium] prior to the expiration of our [Nexium] patents."[55] Teva told AstraZeneca that "they were going to keep moving" the Nexium litigation forward, and "in fact, did keep moving it."[56] Mr. Pott understood that Teva's goal was still to get an *earlier* entry date than Ranbaxy.[57]

c. In July 2009, Teva suggested wrapping up the "prazole" litigations.

Just a little over a year later, with a *Markman* hearing in the Nexium case approaching, Teva's general counsel (Egosi) contacted his counterpart at AstraZeneca (Pott) in July 2009 about "wrapping up our *prazole* litigations" (meaning the Prilosec *and* Nexium cases).[58] AstraZeneca's counsel responded by telling Teva that AstraZeneca "want[s] to postpone the upcoming [*Markman*] hearing so we have some time 'to discuss.'"[59]

By July 2009 in the Prilosec case, AstraZeneca had won both at the district court level and in the court of appeals.[60] Teva reported in its 2004 20-F that "Were AstraZeneca ultimately to be successful in its allegation of patent infringement, *Teva* could be required to pay damages related to a portion of the sales of Impax's omeprazole capsules and be enjoined from selling that

[55] 10/27/14 Tr. 146:14-18 (Pott). *See also id.* at 147:12-14 ("yeah, they were saying they were going to litigate the case and try to invalidate or show noninfringement of the patents.") (Pott); 10/28/14 Tr. 64:20-65:14 (Pott). *See also* 10/28/14 Tr. 65:9-67:6 (Pott).

[56] 10/27/14 Tr. 146:9-10 (Pott).

[57] 10/28/14 Tr. 65:14-22 (Pott).

[58] 10/27/14 Tr. 149:15-150:24 (Pott) & Exh. 38 (email from Egosi to Pott dated July 2, 2009) (emphasis added). Mr. Egosi wrote: "Anything new from your end on wrapping up our prazole litigations?" Exh. 38. Mr. Pott testified that by saying "prazole," Mr. Egosi was combining omeprazole (generic Prilosec) with esomeprazole (generic Nexium) into his own shorthand for both cases. *See also* 10/30/14 Tr. 86:5-13 and Exh. 75 (in an August 4, 2009 email to Mr. Pott and Mr. Heifetz (and others), Mr. Egosi writes "[w]e can discuss both esomep and omep."). Ms. Julie explained that this referred to generic Nexium and generic Prilosec. 10/30/14 Tr. 87:9-20 & Exh. 76 (Teva General Counsel David Stark wrote to internal counsel at Teva "Can you guys join this call tomorrow to prep the settlement call with AZ re: esomep and omep…"); 10/30/14 Tr. 38:13-19 (the agenda for a May 1, 2008 meeting between AstraZeneca and Teva's general counsels included both Nexium and Prilosec); 10/30/14 Tr. 38:20-39:1 (both Nexium and Prilosec were discussed at a May 1, 2008 meeting).

[59] Exh. 39 at Teva-ESO-024316 (email from Egosi to Pott dated Aug. 3, 2009).

[60] 10/28/14 Tr. 41:17-42:10 (Pott). *See* Exh. 53 (decision of the Federal Circuit issued Aug. 20, 2008).

product."[61] While Teva may have had an argument that it was not bound by the final judgment of infringement against Impax, it was only a technical argument. Teva sold the very Impax generic Prilosec product that was found to infringe.[62] As a result, whether Teva was technically bound, or the judgment was applied to it as a matter of *stare decisis*, the only real issue was the amount of damages Teva owed AstraZeneca.[63] Mr. Pott agreed that AstraZeneca had a "strong" case against Teva on Prilosec,[64] and AstraZeneca's position was that Teva was liable for an amount "*not less* than a reasonable royalty *and* enhanced damages . . . because Teva willfully infringed"[65] plus attorneys' fees.[66]

In contrast, Teva's position in the Nexium case in July 2009 was strong (*see infra* section IV.B.3.c).

d. Mr. Hester drafted and circulated the Nexium and Prilosec agreements together.

After initially asserting that the parties *first* reached an agreement in principle in Nexium (in July 2009) and *later* discussed a Prilosec resolution,[67] Mr. Hester conceded that his privilege log showed that on July 30, 2009, he worked on both a draft Nexium agreement[68] *and* a draft Prilosec agreement.[69]

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[61] Exh. 110 at F-32 (emphasis added).

[62] Exh., 1, ¶¶ 101, 103; 10/30/14 Tr. 70:15-20 (Julie).

[63] 10/28/14 Tr. 41:17-42:10 (Pott). *See* Exh. 53 (decision of the Federal Circuit issued Aug. 20, 2008).

[64] 10/28/14 Tr. 55:20-22 ("Yes, we had a strong -- we had an underlying finding of infringement and we had removed them from the marketplace. It was strong, yes.").

[65] Exh. 44 at AZ-NX-MDL01016965 (emphasis added); 10/28/14 Tr. 31:13-32:9 (Pott).

[66] Exh. 43 at AZ-NX-MDL-01016203-04. AstraZeneca's position was that "Teva . . . is liable to the same extent as Impax." *Id*. at AZ-NX-MDL-01016197.

[67] 11/4/14 Tr. 92:23-94:1 (Hester).

[68] 11/4/14 Tr. 96:25-97:20 (Hester); *id.* at 98:13-17. *See also* Exh. 98 (privilege log reflecting Hester drafted Prilosec agreement on July 30, 2009).

[69] 11/4/14 Tr. 97:21-98:12 (Hester). *See also* Exh. 98 (privilege log reflecting Hester drafted Nexium agreement on July 30, 2009).

Mr. Pott and Mr. Egosi spoke on August 20, 2009 regarding both the Prilosec and Nexium cases.[70] Less than a week after that call, Mr. Hester circulated draft settlement agreements for both lawsuits[71] providing that (as to Nexium) Teva agreed to the same May 27, 2014 entry date[72] as Ranbaxy – the very date Teva rejected in 2007[73] and 2008.[74] Regarding Prilosec, AstraZeneca agreed to accept a $9 million payment[75] to release Teva from liability that the jury is entitled to value at more than $100 million (discussed further below). The $9 million was just over half of the amount of attorneys' fees AstraZeneca asserts it spent litigating the Prilosec matter ($15 million).[76]

A jury could conclude that because Teva accepted the same date that it had twice rejected earlier, Teva must be getting something else in order to settle.

The "prazole" settlement discussions were inextricably intertwined and culminated in a single transaction. Between August 2009 and January 6, 2010, the day the deal was completed,[77] *every time* a draft of the Nexium settlement was circulated, it was accompanied by a draft of the

[70] Exh. 40; 10/28/14 Tr. 57:12-58:17 & Exhs. 38-39.

[71] 10/28/14 Tr. 61:6-62:7 (Pott) & Exh. 46.

[72] Exh. 46 at AZ-NX-MDL-00002517, Article 5.2.

[73] 11/4/14 Tr. 109:11-21 ("Q. Mr. Hester, are you aware that Mr. Pott offered the May 27, 2014, entry date to Teva back in 2008? A. I thought it was discussed earlier before Judge Pisano even in 2007. I think he may have -- he may have mentioned that date in that initial conference before Judge Pisano to discuss settling the cases. Q. For Teva? A. But Teva didn't agree. Q. Fair enough. A. Because they were going ahead to try and litigate the cases.") (Hester).

[74] 10/28/14 Tr. 64:24-65:3 (AstraZeneca offered Teva the May 2014 entry date in May of 2008 but Teva rejected it) (Pott); 10/30/14 Tr. 40:14-20, 42:23-43:19 (Julie); 11/4/14 Tr. 111:6-10 (Hester).

[75] Exh. 46 at AZ-NX-MDL-00002540, Article 4.

[76] Mr. Pott agreed with Terri Bowman's testimony that AstraZeneca spent about $15 million litigating its Prilosec claims against Teva. 10/28/14 Tr. 72:18-22; 10/29/14 Tr. 131:13-17. *See* Exh. 107 (Declaration of Terri L. Bowman).

[77] Exh. 11 (AstraZeneca-Teva Nexium agreement); Exh. 12 (AstraZeneca-Teva Prilosec agreement); 10/30/14 Tr. 99:24-100:1 (Julie); 10/27/14 Tr. 140:23-141:9 (Pott); 10/28/14 Tr. 39:3-40:10; 10/31/14 Tr. 55:11-13 (Julie).

Prilosec settlement.[78] The two negotiations and settlements were fused together into a single deal.[79] The two agreements were negotiated together by the same lawyers, drafted concurrently, finalized at the same time,[80] and executed together on the same day.[81] Mr. Pott acknowledged that it was "[n]o coincidence" that the settlements were signed the same day.[82]

It is also no coincidence that AstraZeneca used the same cast of attorneys to settle with Teva as it did with Ranbaxy. The jury can conclude that the AstraZeneca and Ranbaxy settlement agreement and side deals were part of a single indivisible transaction.[83] The jury may properly conclude that the same AstraZeneca players used the same phony-separate-deals ploy to make a large payment to Teva.

[78] *See, e.g.*, Exh. 77 (Compilation of 20 cover emails for draft settlement agreements for Prilosec and Nexium dated August 2009 through January 2010); & 10/30/14 Tr. 96:14-99:23 (Julie); 11/4/14 Tr. 74:9-13 (Hester); Exh. 47.

[79] Exh. 77; 10/30/14 Tr. 96:14-99:23 (Julie); 10/30/14 Tr. 8:4-9 (Julie); Exh. 39; 10/27/14 Tr. 151:1-153:22 (Pott); 10/28/14 Tr. 58:15-17 (Pott). Even in denying the relationship between the Prilosec and Nexium litigations, Mr. Hester testified that the two were settled "together": "That's right. And they weren't joined even then. The parties, my understanding was the parties were willing to settle each of them separately, but it made sense to look at whether they could settle them together. Because there were these two disputes, made sense to look at settling two disputes." 11/4/14 Tr. 93:21-94:1.

[80] *See, e.g.*, 10/30/14 Tr. 99:19-100:10 (Julie); Exh. 77.

[81] 10/30/14 Tr. 99:24-100:1.

[82] 10/28/14 Tr. 75:2-5. Mr. Pott acknowledged that the signatures on the two settlements were obtained remotely (as commonly occurs) and the individuals were not all physically in the same conference room. 10/28/14 Tr. 76:3-15. Thus, the jury can easily find that there was no "efficiency" reason for the simultaneous signing.

[83] AstraZeneca admits that Ranbaxy was willing to delay launching its generic until 2012 in return for the "no authorized generic" promise, but AstraZeneca also agreed to a series of lucrative side deals with Ranbaxy, and Ranbaxy agreed to delay its generic launch even further until May 27, 2014. 10/27/14 Tr. 77-87, 95, 98:21-99:14; 118:16-122:18; 127:12-129:25 (Pott); Exhs. 31 (generic Plendil distribution agreement); 32 (generic Prilosec distribution agreement); 33 (Nexium API supply agreement); 34 (tolling agreement for making finished Nexium); 35 (bailment agreement). Ranbaxy made expressly clear that the settlement and side deals were a single transaction and that it would not sign the settlement without the side deals. *See, e.g.*, 10/27/14 Tr. 106:17-108:17 (Pott) (discussing Exh. 27) (email exchange in which Ranbaxy explains that the API side deal "would be a required component to signing off on the Settlement Agreement and the two can be done in parallel.").

e. Mr. Hester hid that the Nexium and Prilosec settlements are a single enmeshed transaction that included a large payment.

Tellingly, the defendants tried to hide that Nexium and Prilosec were resolved in a single deal. On January 4, 2010, Mr. Hester[84] sent Teva's counsel a redline of Teva's draft press release announcing the Prilosec and Nexium settlements.[85] The draft press release that Teva prepared stated: "Teva Pharmaceutical Industries Ltd. (Nasdaq: TEVA) announced today that it has entered into *a* [singular] definitive agreement [singular] with AstraZeneca to settle patent litigation regarding Teva's U.S. generic versions of AstraZeneca's Prilosec® (omeprazole) *and* Nexium® (esomeprazole), including all claims for patent infringement and damages."[86] Mr. Hester proposed changing "a definitive agreement" to "*two* definitive agreements."[87] He also suggested that Teva not disclose that it was paying AstraZeneca only $9 million.[88]

Mr. Hester's experience representing AstraZeneca and Mr. Pott in then-ongoing FTC proceedings involving the payments embodied in the earlier AstraZeneca-Ranbaxy agreements undoubtedly informed his caution.[89] The FTC's investigation of the linked AstraZeneca-

[84] 11/5/14 Tr. 57:14-20 (Hester).

[85] Exh. 77, FQT, AZ-NX-MDL-00024753-758.

[86] Exh. 77, FQT, AZ-NX-MDL-00024753-758, at 756 (emphasis added).

[87] *Id.*(emphasis added). Mr. Hester testified unconvincingly about this change that: "A. I mean they drafted it -- I just thought my change made it more accurate and clearer. It was really just a small drafting point." 11/4/14 Tr. 80:16-18.

[88] Exh. 77, FQT, AZ-NX-MDL-00024753-758, at 756; 11/4/14 Tr. 81:3-10 (Hester). With respect to this edit, Mr. Hester claimed: "we just thought there's no reason to include dollar amounts in a press release like this, it's just an announcement of resolving two pieces of patent litigation, period, end of story." 11/4/14 Tr. 81:14-17.

[89] As Mr. Hester testified, he was brought in because he expected the Teva transaction could be subject to antitrust scrutiny. 11/5/14 Tr. 57:14-20 ("Q. When you were negotiating these transactions, Mr. Hester, did you have it somewhere in your mind that these transactions at some point would be subject to antitrust scrutiny? Yes or no. A. I was brought in as an antitrust lawyer and, yes, I was brought in to be considering the issues from an antitrust perspective, yes.").

Ranbaxy agreements began in July 3, 2008; Mr. Pott gave a deposition on July 23, 2008 (and was defended by Mr. Hester).[90]

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. Why else would Teva and AstraZeneca have worked so hard to conceal and deny the relationship between the agreements? The testimony from both AstraZeneca and Teva witnesses is that the settlements were negotiated in tandem from start to finish and that Teva accepted the May 2014 generic Nexium entry date only after AstraZeneca relented despite its "strong" Prilosec position and agreed to settle the case for what amounts to just a portion of its out-of-pocket attorneys' fees and effectively zero damages.[91]

The evidence and reasonable inferences therefrom permit the jury to find that the payment was "large" because the defendants combined the settlements into a single deal even in the shadow of antitrust liability, and enlisted the assistance of each company's general counsel and the now Chairman of Covington & Burling.

2. The jury is entitled to discredit testimony that simultaneously negotiating, drafting, and executing the Nexium and Prilosec agreements was merely convenient happenstance.

Against this overwhelming evidence, the jury could easily reject, and need not credit, AstraZeneca's and Teva's feeble assertions that the negotiations of the settlements were completely independent of each other. Whether the Prilosec settlement was in fact "separate" from the Nexium settlement *is a classic jury question:* "[W]hether multiple writings should be

[90] Exh. 95, AstraZeneca's First Civil Investigative Demand Responses dated May 29, 2009 (referencing date of July 3, 2008 Civil Investigative Demand); Exh. 99, Excerpts from transcript of investigational hearing, Jeffrey A. Pott, FTC, dated July 23, 2008.

[91] Subtracting the $9 million Teva paid from the $15 million in fees expended by AstraZeneca results in a loss to AstraZeneca of $6 million, and therefore effectively no recovery whatsoever, in a patent case it had *won*.

construed as one agreement depends upon the intent of the parties . . . an issue which is typically a question of fact for the jury."[92]

"A trier of fact is not compelled to accept and believe the self-serving stories of vitally interested defendants. Their evidence may not only be disbelieved, but from the totality of the circumstances, including the manner in which they testify, a contrary conclusion may be properly drawn."[93] This is consistent with the "general principle of evidence law" that "the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'"[94] Thus, particularly where other corroborative evidence exists, courts frequently conclude that the falsity of a defendant's testimony can be persuasive circumstantial

[92] *TVT Records v. Island Def Jam Music Group*, 412 F.3d 82, 89 (2d Cir. 2005) (citations omitted); *Van Orman v. Am. Ins. Co.*, 680 F.2d 301, 306 (3d Cir. 1982) ("two or more writings may constitute a single contract even though they do not refer to each other. Whether two writings are to be construed as a single contract . . . depends on the intent of the parties") (citations omitted); *Am. Graphics Inst., Inc. v. Darling*, 2003 U.S. Dist. LEXIS 9790, at *22-23 (E.D. Pa. May 20, 2003) ("The rule applies even where the parties are not the same, if the several instruments were known to all the parties and were delivered at the same time to accomplish an agreed purpose.") (citing 17A Am. Jur. 2d Contracts § 388).

[93] *United States v. Cisneros*, 448 F.2d 298, 305-06 (9th Cir. 1971) (citing *Dyer v. MacDougall*, 201 F.2d 265, 268 (2d Cir. 1952)). *See also United States v. Cintolo*, 818 F.2d 980, 989 (1st Cir. 1987) (citing *Cisneros* and finding a "jury was reasonably entitled to disbelieve [the defendant's] testimony regarding his motives and to credit the (entirely plausible) contrary interpretation urged by the government").

[94] *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (quoting *Wright v. West*, 505 U.S. 277, 296 (1992)).

evidence of liability or guilt.[95] Acts of concealment may likewise provide circumstantial evidence of the existence of a conspiracy.[96]

If the jury credits the plaintiffs' evidence over the defendants' (as it is free to do),[97] the jury may *further* find that Teva's and AstraZeneca's attempts to disguise the payment, and deny that the forgiveness of Teva's Prilosec litigation was a payment to settle the Nexium litigation, is itself evidence that the payoff was large.[98]

3. Teva abruptly quit the Nexium litigation, after having vigorously pursued it, in exchange for a large payment.

Teva's abrupt reversal of course in quitting the Nexium litigation – after having vigorously pursued it for years – allows the jury to conclude that Teva received a large payment in exchange for quitting.

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[95] *See, e.g., R & B Transp., LLC v. U.S. Dept. of Labor*, 618 F.3d 37, 47 (1st Cir. 2010) (affirming administrative law judge's conclusion that the employer's lies justified a finding that its proffered reason for an adverse employment action was pretext for an unlawful termination); *Velazquez-Fernandez v. NCE Foods, Inc.*, 476 F.3d 6, 13 (1st Cir. 2007) (noting "the Supreme Court has held that proof that the employer's explanation is 'unworthy of credence' is one form of 'circumstantial evidence that is probative of intentional discrimination'" (quoting *Reeves*, 530 U.S. at 147) and indicating that it would be proper to disbelieve explanations that are "inaccurate, unbelievable, idiosyncratic, or misleading"); *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 168 (1st Cir. 1998) (evaluating summary judgment ruling and stating that a non-moving employment discrimination plaintiff may demonstrate pretext by pointing out "'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and [with or without additional evidence and inferences properly drawn therefrom] infer that the employer did not act for the asserted non-discriminatory reasons.'" (modification in original)).

[96] *See, e.g., United States v. Curtis*, 635 F.3d 704, 717 (5th Cir. 2011) ("'[A]cts of concealment done in furtherance of the main criminal objectives of the conspiracy' are circumstantial evidence of the conspiracy's existence" (citing, *inter alia*, *United States v. Evans*, 572 F.2d 455, 468 (5th Cir. 1978) ("explaining that because concealment is one of 'the hallmarks of a conspiracy, . . . the objective and observable acts of the conspirators are relevant and competent circumstantial evidence from which the jury may draw the inference of the existence of the agreement or common purpose'")); *In re Urethane Antitrust Litig.*, No. 04-1616-JWL, 2013 U.S. Dist. LEXIS 69784, at *61-62 (D. Kan. May 15, 2013) (citing *Curtis* and finding relevant evidence that could show an attempt by the defendant to cover up its illegal activities).

[97] *Putnam Res.*, 958 F.2d at 459.

[98] *See generally Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1012-13 (3d Cir. 1994) (noting evidence that defendant was "attempting to disguise the true reason for its actions"); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 196 (3d Cir. 2005) ("Dentsply's asserted justifications for its exclusionary policies are inconsistent with its announced reason for the exclusionary policies, its conduct enforcing the policy, its rival suppliers' actions, and dealers' behavior in the marketplace").

a. In April 2008, Teva filed a declaratory judgment action to clear the way for Teva's generic Nexium.

AstraZeneca and Ranbaxy announced their Nexium deal in April 2008, prompting Teva to take the aggressive step of filing a declaratory judgment action of its own against AstraZeneca in order "to get judicial resolution as to all of the orange book patents" to clear the way for Teva's generic Nexium product to get to market.[99] Teva's in-house counsel, Staci Julie, testified that if Teva did not act, and if Ranbaxy continued to hold first-to-file status, Teva would be bottlenecked behind Ranbaxy.[100]

AstraZeneca's payment to Teva must be evaluated in this context: AstraZeneca had already paid off Ranbaxy, the first ANDA filer. It took less for AstraZeneca to buy off Teva, the second filer, and induce it to join the conspiracy to delay generic competition.

b. In 2007 and 2008, Teva rejected AstraZeneca's May 27, 2014 generic Nexium entry date.

Teva rejected AstraZeneca's offer of the May 27, 2014 entry date in 2007 and again in 2008. Mr. Pott confirmed that Teva's position in May 2008 was that it was "*planning to come to the market* [with its generic Nexium] prior to the expiration of our [Nexium] patents."[101] Teva told AstraZeneca that "they were going to keep moving" the Nexium litigation forward, and "in fact, did keep moving it."[102]

[99] 10/30/14 Tr. 28:15-18, 30:9-11, 33:14-17 (Julie); Exh. 66.

[100] 10/30/14 Tr. 41:6-15 (Julie).

[101] 10/27/14 Tr. 146:14-18 (Pott). *See also id.* at 147:12-14 ("yeah, they were saying they were going to litigate the case and try to invalidate or show noninfringement of the patents.") (Pott); 10/28/14 Tr. 64:20-65:14 (Pott); 10/28/14 Tr. 65:9-67:6 (Pott); 10/30/14 Tr. 38:20-39:1 (Julie).

[102] 10/27/14 Tr. 146:9-10 (Pott).

Litigating cases to get earlier entry dates is "[Teva's] business model as a generic drug maker."[103] Teva's goal was to get an *earlier* entry date than Ranbaxy.[104]

Ms. Julie testified that the position that Teva takes in all cases in which it is the second-filer (as in Nexium) is that Teva wants a "better" date than the first filer: "That was what we were trying for. That's why we litigate."[105] And this is what Teva told AstraZeneca: Teva intended to break the bottleneck and get a *better* entry date.[106]

c. In July 2009, Teva's position in the Nexium case was strong.

Teva made significant progress in the Nexium patent case. *AstraZeneca* wanted to postpone the *Markman* hearing to try to settle.[107] Ms. Julie tried to assert that Teva's position had been weakened by a stay of its declaratory judgment action, which would have slowed Teva's ability to trigger Ranbaxy's first-to-file exclusivity.[108] But she was forced to concede that her assertion regarding the "stay" was groundless.[109] A February 24, 2009 order vacated an earlier stay, ordered AstraZeneca to respond to Teva's declaratory judgment action within one week, and ordered Teva to serve contention interrogatories within one week.[110]

Teva next pointed to statements by the German inventors as a basis for quitting. But Teva itself acknowledged that "the testimony and documents sought from Mr. Senn-Bilfinger are irrelevant in determining whether the German '455 patent application inherently anticipates *or*

[103] 10/30/14 Tr. 44:1-4 (Julie).

[104] 10/28/14 Tr. 65:14-22 (Pott).

[105] 10/30/14 Tr. 43:10-12 (Julie).

[106] 10/28/14 Tr. 64:24-65:14-22 (Pott).

[107] Exh. 38; Exh. 39 (Email from Egosi (Teva) to Pott (AstraZeneca) stating "Just got a note from my counsel that your external counsel want to postpone the upcoming markman hearing so we have some time 'to discuss.'").

[108] 10/31/14 Tr. 62:15-21 (Julie).

[109] 10/31/14 Tr. 126:7-14; 127:16-128:2 (Julie) and Exh. 90.

[110] Exh. 90. *See also* 10/31/14 Tr. at 127:6-129:33 (Julie).

renders obvious the claims of the patents in suit"[111] since "[w]hat a prior art reference discloses and teaches to a person of ordinary skill in the art cannot be supplemented or clarified by testimony of the author."[112] Teva cited seven Federal Circuit cases dating from 1983 – 1998 in support.[113] Ms. Julie acknowledged that "[Teva's] position was that [the DE '455] anticipated the claim, and if not, in combination with other evidence would render it obvious."[114]

Noting the German inventor's declaration that his invention did not teach *how* to split omeprazole into the enantiomer esomeprazole,[115] Ms. Julie falsely testified, "In order to be prior art for obviousness, the prior art has to be enabled."[116] Ms. Julie was wrong on the law of enablement: While prior art must be enabling for an *anticipation* challenge, it need not be enabling for an *obviousness* challenge.[117] Even if the inventor's statement that he had not isolated the s-enantiomer of omeprazole had some conceivable relevance to anticipation, it was irrelevant to Teva's standalone argument that the enantiomer patents were invalid for obviousness.[118]

[111] Exh. 106, DMZ (emphasis added).

[112] *Id.*

[113] *Id.*

[114] 10/31/14 Tr. 149:1-3 (Julie).

[115] 10/31/2014 Tr. 18:3-5 (Julie).

[116] 10/31/14 Tr. 148:6-7 (Julie).

[117] *See, e.g.*, *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 314 F.3d 1313, 1357 (Fed. Cir. 2003) ("Under § 103 . . . a reference need not be enabled; it qualifies as a prior art, regardless, for whatever is disclosed therein."). Indeed, the AstraZeneca Defendants concede in their opposition brief that Dr. Davies' characterization of enablement as a prerequisite to obviousness was "erroneous." *See* AstraZeneca Defendants' Opposition to Class Plaintiffs' Motion to Exclude Certain Portions of the Expert Testimony of Stephen G. Davies ("Defs.' Opp."), ECF No. 757, at 7.

[118] Dr. Senn-Billfinger's testimony (1) is also completely irrelevant to infringement; and (2) its relevance even to anticipation is extremely attenuated, since the correct inquiry is enablement by *all* literature published before the first esomeprazole patent application in 1993, not whether the DE '455 "enables itself."

4. Teva resolved its material exposure in the Prilosec litigation for a non-material amount.

Teva settled the Prilosec litigation – a litigation that it disclosed in public securities filings as material[119] – for a non-material amount. The Supreme Court has held that a fact is material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[120]

The Prilosec litigation stemming from Teva's at-risk sales of Impax's generic omeprazole products was material to Teva as evidenced by its disclosure of the litigation in its Annual Reports (Form 20-F) from 2004 to 2008.[121]

When Teva settled the Prilosec litigation with AstraZeneca and agreed to pay $9 million in damages, however, Teva elected *not* to disclose the precise amount it paid to AstraZeneca ($9 million), which supports the conclusion that the settlement amount was not material to Teva.[122]

This qualitative evidence, and reasonable inferences therefrom, permit the jury to find that AstraZeneca made a large payment to Teva in exchange for its abrupt about-face.

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[119] As a public company, Teva is required under Item 103 of Regulation S-K to report pending litigation meeting certain criteria relating to materiality. 17 C.F.R. § 229.103 (Item 103 Legal Proceedings). The regulation states: "[d]escribe briefly any *material pending legal proceedings*, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject." *Id.* (emphasis added). Under Instruction number 5 to this regulation, litigation "is material to the business or financial condition of the registrant."

[120] *TSC Indus., Inc. v. Northway*, 426 U.S. 438, 449 (1976).

[121] Exh. 110, at F-32 (Teva 20-F for the period ending December 31, 2004). *See also id.* at F-30 ("if [the Prilosec case] were to result in judgment[] against Teva, such judgment[] could be material to its results of operation in a given period."). *See In re SeaChange Int'l, Inc.*, No. 02-12116-DPW, 2004 U.S. Dist. LEXIS 1687, at *33 (D. Mass. Feb. 6, 2004) (noting that disclosed litigation "supports the conclusion that [the public company's] patent infringing conduct was material").

[122] *See* Exh. 113, at F-34 (Teva Pharmaceutical Industries Limited for the fiscal year ending December 31, 2009) (stating only that "On January 7, 2010, the parties entered into a settlement agreement that resolved the matter. A provision for the settlement payment has been included in the financial statements.").

C. The quantitative evidence shows AstraZeneca's payment to Teva exceeded AstraZeneca's saved litigation costs.

The quantitative evidence, along with reasonable inferences therefrom and simple math, permits a jury to conclude that AstraZeneca paid Teva more than AstraZeneca's avoided litigation costs ($4-5 million). The jury could conclude – either by applying simple arithmetic to the primary evidence or through Dr. McCool and Dr. McGuire's testimony – that AstraZeneca's payment to Teva exceeded AstraZeneca's expected future litigation costs.

That said, the evidence adduced at trial makes plain that the defendants do not even pretend that the pay-off had anything to do with saving those costs. Neither AstraZeneca nor Teva settled the Nexium case based on an analysis of the damages in that case (whether a *Georgia Pacific* analysis or any other form),[123] an assessment of the patent merits,[124] or an

[123] 10/29/14 Tr. 135:10-17 (Pott); *Id.* 141:20-25. *See* Teva and Impax 30(b)(6) 8/8/13 Dep. Tr. 208:19-210:4 (Julie) (not yet in evidence).

[124] Ms. Julie testified that she did not recall whether Teva formulated a view as to the strengths and weaknesses of Teva's lawsuit with AstraZeneca regarding Nexium. 10/30/14 Tr. 90:17-21. When trying to get fair value in a settlement, Mr. Pott testified he looked at the nature of AstraZeneca's claim, the strengths and weaknesses of the claim, the size of damage claim, and he might consider the likelihood that he would be able to get willful infringement, enhanced damages, and attorneys' fees. 10/28/14 Tr. 71:10-72:3. But as to the Prilosec settlement, Mr. Pott admitted that he did not recall receiving any specific or general report about the strengths or weaknesses of AstraZeneca's infringement claims. 10/28/14 Tr. 54:14-55:22 (Pott) ("Q. So the question simply before you, sir, is did AstraZeneca weigh the strengths and weaknesses of its case against Teva involving Prilosec before you went to the meeting with, um -- before you participated in the teleconference with Mr. Egosi? A. I wasn't personally involved in any discussions to that effect. Q. Are you aware of what the results of it were? A. I'm aware that I had damages, um -- um, profitability information from Teva in a range that I could ultimately conclude a settlement in the context of. Q. My question is were you apprised about what the decision was regarding the strengths and weaknesses of AstraZeneca's case against Teva for Prilosec? A. I was knowledgeable about the underlying decision of infringement in the context of the kinds of claims that could be made in that context. Q. No, my question is simple. Were there people, yes or no, who weighed the strengths and weaknesses of AstraZeneca's case against Teva involving Prilosec? A. We're constantly evaluating those kinds of things in the context of litigation. Q. And were the results of those reported to you, yes or no? A. No, I don't recall a specific report on that. Q. Do you recall a general report regarding it? A. No, I don't recall it. Q. Okay. Isn't it fair to say that AstraZeneca thought that its claim against Teva involved in the Prilosec situation was incredibly strong? A. Yes, we had a strong -- we had an underlying finding of infringement and we had removed them from the marketplace. It was strong, yes.").

estimate of how much money it would have to pay lawyers to continue litigating the patent dispute to its conclusion.[125]

To quantify the payment from AstraZeneca to Teva, a jury can find a reasonable royalty rate and then apply that rate to sales or profit figures. But defendants have produced at least four sets of conflicting data concerning Teva's net sales and profits from generic Prilosec. First, Exhibit 57 is a set of reports from Teva to Impax showing net sales of $38.4 million and profits (net sales minus manufacturing costs) of $23.69 million.[126] Second, Exhibit 48, an attachment to an email that Teva sent to AstraZeneca when the two attempted to settle the Prilosec litigation in 2006, shows Teva/Impax total generic Prilosec profits of $21,466,273 for only 19 of the 33 months that Teva was on the market.[127] A reasonable extrapolation accounting for the remaining 14 months that Teva made infringing sales yields total profits of $32.7 million.[128] Third, the Berlanska declaration relied upon and testified to by Dr. McCool (and by defendants' expert Dr. Green) provides a net sales figures of $41,067,741 and a profits figure of $25,516,865.[129] Fourth, Teva transactional sales data that has been marked for identification but not yet admitted – and which is the subject of separate motion practice – shows Teva net sales of $50.6 million. Additionally, Teva's Ms. Julie testified on behalf of Teva she did not know which figures Teva

[125] 10/27/14 Tr. 130:23-25 ("Q. There were no discussions at any point regarding the merits of the underlying lawsuit; correct? A. No. There were no discussions on the merits. Q. There were no discussions regarding anybody's payments of any attorneys' fees; correct? A. I don't recall whether there was or not.") (Pott). Ms. Julie offered no testimony that she or Teva took its saved litigation costs into consideration in deciding to settle..

[126] Exh. 57. Profits are derived from Exh. 57 by subtracting total manufacturing costs ($14,791,477) from net sales ($38,482,374).

[127] Exh. 48.

[128] Teva's monthly profit ($21.4 million in profits divided by 19 months) of approximately $1.129 million per month multiplied by the entire 33 months of infringing sales totals profit of $37.2 million.

[129] *See* 11/6/14 Tr. 22; Defendants' proposed Exh. BGW, ¶ 2.

was using[130] and Mr. Pott claimed that he relied on a mysteriously non-existent memo that purportedly summarized two different sets of the data (the Teva-Impax reports and the Teva transactional sales data).[131] Defendants' production (and non-production) of conflicting, unreliable sales data allows the jury to select which set of data to believe or to reasonably rely on other, independent data like IMS data.

1. Teva was exposed to substantial damages in the Prilosec case.

a. Teva launched generic Prilosec at risk, in the face of courts deciding that other generics infringed AstraZeneca's Prilosec patent.

Teva sold Impax's generic Prilosec products "at risk" for 33 months, from September 2004 until May 2007.[132] Teva partnered with Impax to launch its generic Prilosec product.[133] But only Teva (not Impax) made at-risk sales of Prilosec.[134]

By the time Teva launched in 2004, courts had already found that other generic Prilosec products infringed AstraZeneca's Prilosec patents.[135] Teva recognized – back in 2004 – that it, Teva, could be held fully liable for damages in a Prilosec patent infringement lawsuit: "Were AstraZeneca ultimately to be successful in its allegation of patent infringement, *Teva* could be required to pay damages related to a portion of the sales of Impax's omeprazole capsules and be enjoined from selling that product."[136]

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[130] Teva and Impax 30(b)(6) 8/8/2013 Dep. Tr. at 226-27.

[131] *See* 10/28/14 Tr. 113-16.

[132] 10/30/14 Tr. 65:11-14 (Julie); 10/30/14 Tr. 75:24-76:2 (Teva stopped selling generic Prilosec in May 2007) (Julie). *See* 10/31/14 Tr. 26:13-19 (Ms. Julie testified that Teva's infringing generic Prilosec product was on the market from approximately September 2004 through May 2007).

[133] 10/30/14 Tr. 66:1-7 (Julie, describing at risk launch); 10/31/14 Tr. 27:13-19 (Julie).

[134] 10/30/14 Tr. 70:17-19 (Julie).

[135] Exh. 52 at 390 n.2. *See also Astra Aktiebolag v. Andrx Pharm., Inc.*, 222 F. Supp. 2d 423 (S.D.N.Y.2002), *aff'd*, 84 Fed. Appx. 76 (Fed. Cir. 2003) (finding that Genpharm, Cheminor, and Andrx infringed AstraZeneca's Prilosec patents).

[136] Exh. 110 at F-32 (emphasis added).

b. In 2009, when AstraZeneca and Teva settled, the only question in the Prilosec litigation was precisely how much Teva would have to pay in damages.

In May 2007, the district court ruled that AstraZeneca's Prilosec patents were valid and infringed by Teva's partner Impax,[137] forcing Teva to discontinue its sales of generic Prilosec. The Federal Circuit affirmed in August 2008.[138]

Whether Teva was technically bound or the judgment applied to it as a matter of *stare decisis*, the only real issue remaining in the Prilosec litigation was how much money Teva owed AstraZeneca.[139] Both AstraZeneca and Teva agree that AstraZeneca was only seeking damages from Teva, not Impax, for Teva's sale of Impax's infringing product.[140]

Teva and Impax's 30(b)(6) witness[141] explained that Teva and Ivax's position was "the appeal was resolved again in Astra's favor and Teva and Impax parties were found liable and the case was at the time of settlement pending before the district court to determine the appropriate amount of damages."[142]

[137] Exh. 52; 10/31/14 Tr. 34:17-35:6 (Julie).

[138] Exh. 53. As Mr. Pott testified, as of May 2008, "we had won the underlying case against Teva." 10/28/14 Tr. 40:4-42:10. *See also* 10/30/14 Tr. 90:6-15 (Julie); 10/31/14 Tr. 35:21- 36:1-2 (Julie).

[139] 10/28/14 Tr. 41:17-42:10 (Pott). *See* Exh. 53 (decision of the Federal Circuit issued Aug. 20, 2008).

[140] AstraZeneca "was only seeking damages from Teva." Tr. 36:7-10 (Julie). *See also* 10/29/14 Tr. 73:8-10 (Pott) (AstraZeneca dropped it damage claim against Impax years before negotiating with Teva); Exh. 45, at 823-46 (AstraZeneca's Responses to Defendant Teva's Third Set of Interrogatories (Nos. 18-20) to Plaintiffs) (Responses to Interrogatories 18, 19 explain why Teva was bound by the outcome of the Impax litigation).

[141] Teva and Ivax put up Ms. Julie as their joint 30(b)(6) witness in response to plaintiffs' 30(b)(6) deposition notice: "Q. …When you are here testifying for Teva today, are you testifying also on behalf of IVAX as a subsidiary of Teva? MS. WALKER: With respect to the -- MR. CHORUSH: The notice topics. MS. WALKER: -- the notice topics, yes. MR. CHORUSH: So then I'll ask my question about Teva broadly speaking, in other words, including the IVAX entities and whatever other Teva entities exist. MS. WALKER: For the record, that's fine, I just wanted to clarify the question." Teva and Impax 30(b)(6) 8/8/2013 Dep. Tr. 38:11-20.

[142] Teva and Impax 30(b)(6) 8/8/2013 Dep. Tr. 177:6-11.

c. Teva's position was that a reasonable royalty rate was somewhere between zero and 100%.

AstraZeneca was unquestionably entitled to "regular old" single damages for Teva's patent infringement. Teva and Impax's 30(b)(6) witness's position was that a reasonable royalty rate in the Prilosec litigation was "Somewhere between zero and 100[.]"[143]

Teva and Impax's 30(b)(6) witness (Teva's Ms. Julie) testified on behalf of Teva that she did not know which figures Teva was using.[144]

d. AstraZeneca's position was that it was entitled to a reasonable royalty rate plus enhanced damages, attorneys' fees and costs, and prejudgment interest.

AstraZeneca also sought additional sums for Teva's willful infringement, including enhanced damages (up to three times its single damages),[145] attorneys' fees and costs,[146] and prejudgment interest.[147] Mr. Pott testified that he would want the lawyers working for AstraZeneca to have in mind the notion of trying to recover interest if (as here) it has been years since AstraZeneca was damaged.[148] Mr. Pott testified that AstraZeneca is usually looking for about a 9% rate of return.[149]

[143] Teva and Impax 30(b)(6) 8/8/2013 Dep. Tr. 227:22-228:12.

[144] Teva and Impax 30(b)(6) 8/8/2013 Dep. Tr. at 226-27.

[145] 10/28/14 Tr. 27:9-14 (Pott); Exhs. 43-45.

[146] Exhs. 43 and 44. *See also* 10/28/14 Tr. 28:18-29:13; 31:13-32:9; 72:18-22 (Pott); 10/29/14 Tr. 131:13-17 (Pott).

[147] 10/28/14 Tr. 25:3-32:9 (Julie). Ms. Julie testified that AstraZeneca had a claim for willful infringement against both Teva and its partner Impax. 10/31/14 Tr. 38:14-17; *see also* Exh. 43, interrogatory 1 (AstraZeneca asserted that Teva's infringement was willful); 10/28/14 Tr. 26:16-17, 27:9-14 (Pott, testifying that it appears AstraZeneca claimed Teva's infringement was willful, allowing AstraZeneca to request treble damages); Exhs. 50, 51 (cover letter attaching data produced in response to AstraZeneca's discovery request to Teva relating to damages, willful infringement, and exceptional case determination).

[148] 10/29/14 Tr. 132:19-133:1 (Pott).

[149] 10/28/2014 Tr. 141:2-16 (Pott).

AstraZeneca attorneys' fees and expenses in the Prilosec litigation from inception through settlement in January 2010 were in the $14 million to $15 million range.[150]

AstraZeneca had a good faith belief that its claims for willful infringement were valid.[151] The likelihood that the court would grant AstraZeneca more money than "just" its single damages – still a significant sum, as described below – was strengthened by the fact that other generics had been found to infringe the Prilosec patents *before* Teva launched at risk.[152] AstraZeneca's position was that Teva was liable for an amount "*not less than* a reasonable royalty *and* enhanced damages . . . because Teva willfully infringed"[153] plus attorneys' fees.[154]

The Plaintiffs have adduced evidence from which the jury could infer that AstraZeneca's efforts to procure enhanced damages from Teva for launching generic Prilosec presented a real and substantial threat to Teva, such that settling Prilosec in conjunction with Nexium constituted a large payment that induced Teva to stay out of the generic Nexium market.

e. Teva considered the possibility of having to pay AstraZeneca more than a reasonable royalty rate devastating.

The evidence presented, and reasonable inferences therefrom, permit a jury to conclude that Teva considered the very real threat of having to pay AstraZeneca more than a reasonable royalty rate potentially devastating:

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[150] Exh. 107 (Bowman Declaration).

[151] 10/28/14 Tr. 25:3-32:9 (Pott). Ms. Julie testified that AstraZeneca had a claim for willful infringement against both Teva and its partner Impax. 10/31/14 Tr. 38:14-17; *see also* Exh. 43, interrogatory 1 (AstraZeneca asserted that Teva's infringement was willful); 10/28/14 Tr. at 26:16-17, 27:9-14 (Pott testified that it appears AstraZeneca claimed Teva's infringement was willful, allowing AstraZeneca to request treble damages); Exhs. 50, 51 (cover letter attaching data produced in response to AstraZeneca's discovery request to Teva relating to damages, willful infringement, and exceptional case determination).

[152] 10/28/14 Tr. 37:24-38:4.

[153] Exh. 44 at AZ-NX-MDL01016965 (emphasis added); 10/28/14 Tr. 31:13 - 32:9 (Pott).

[154] Exh. 43 at AZ-NX-MDL-01016203-04. AstraZeneca's position was that "Teva . . . is liable to the same extent as Impax." *Id*. at AZ-NX-MDL-01016197.

First, Teva understood – based on its attorneys' representation to the patent infringement court made under Rule 11 – that AstraZeneca was seeking damages with respect to Teva's generic Prilosec sales, plus trebling, plus attorneys' fees and costs.[155]

Second, Teva represented to the Prilosec court, under Rule 11, that the damages it indisputably owed AstraZeneca plus the enhanced damages and injunction AstraZeneca pressed left it in imminent peril: "And the Sword Of Damocles, in the form of Plaintiffs' claims seeking enhanced damages, attorney's fees, and an injunction, hangs over Teva and its ability to supply [generic Prilosec] and meet its commercial obligations."[156] Teva told its shareholders that its potential liability in the Prilosec case was a "material" risk.[157]

Third, Teva fought vigorously to include language in its Nexium settlement agreement that would eliminate any possibility of AstraZeneca pursuing enhanced damages if Teva launched its generic Nexium "at-risk."[158] Teva wanted "something explicit" in the agreement that ensured that Teva would not again be exposed to enhanced damages or attorneys' fees; Teva "pushed" this term, going back and forth with AstraZeneca several times.[159] The final

[155] Exh. 109, Teva's Memorandum in Support of Motion to Lift the Stay of Proceedings at 7; *see also* Exh. 44, at 965 ("[Astra] seeks at least the damages for not less than a reasonable royalty rate and enhanced damages. Astra is entitled to recover such damages under 35 U.S.C. 284 and because Teva willfully infringed the '505 and '230 patents by offering to sell and selling Impax omeprazole products while knowing of an objectively high risk that such products infringe the patents. Such conduct merits a finding of willful infringement and enhanced damages. Astra reserves its right seek additional categories of damages as discovery reveals a basis for seeking such categories of damages."); *See* 10/28/14 Tr. at 30:22-32:4 (Pott, confirming that AstraZeneca was seeking enhanced damages against Teva during the Prilosec litigation).

[156] Exh. 109, Teva's Motion to Lift the Stay of Proceedings at 7, Case No. 05-cv-00621 (S.D.N.Y.).

[157] Exh. 110, at F-32 (2004 20-F).

[158] *See* 11/4/14 Tr. at 148:23-149:6 (testimony from Hester that provisions in the Nexium settlement regarding an unlicensed launch were "very important to [Teva]" and that they "pushed" AstraZeneca on it).

[159] *See* 11/5/14 Tr. at 64:25-65:5; *see also* 11/5/14 Tr. at 65:23-66:1 ("Q: Well, it was important enough to Teva to go back – and you to go back and forth on this particular issue several times, correct? A: Yes, right, we were working on the language.").

Nexium agreement provides "Teva and its Affiliates shall not be liable for enhanced damages, willful infringement, or attorneys' fees"[160]

This evidence, and reasonable inferences therefrom, permit a jury to conclude that Teva's insistence on this language in the Nexium settlement agreement – which resolved the Nexium litigation and gave Teva a license under terms where Teva need not launch at risk[161] – was a direct response to having been so nearly burned by up to three times its single damages, attorneys' fees and costs, and prejudgment interest in the Prilosec litigation.

2. The jury can calculate the size of the payment in multiple ways.

The quantitative evidence, along with reasonable inferences therefrom and simple math or through the testimony of Dr. McCool and Dr. McGuire, permits a jury to conclude that AstraZeneca paid Teva more than AstraZeneca's avoided litigation costs ($4-5 million).

Applying the *Georgia-Pacific* factors is but one of many ways to calculate a reasonable royalty rate in a patent infringement case.[162]

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[160] Exh. 11 at 5.4(3) ("in determining whether any patent infringement damages have been caused by sales of Generic Esomeprazole product by Teva or its Affiliated during the Unlicensed Period, the fact-finder shall apply the normal rules of calculating damages applicable in patent infringement actions.").

[161] Teva, of course, accepted a delayed entry date.

[162] *See, e.g., Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1324 (Fed. Cir. 2009) ("Litigants routinely adopt several approaches for calculating a reasonable royalty. The first, the analytical method, focuses on the infringer's projections of profit for the infringing product. The second, more common approach, called the hypothetical negotiation or the 'willing licensor-willing licensee' approach, attempts to ascertain the royalty upon which the parties would have agreed had they successfully negotiated an agreement just before infringement began." (internal citations omitted)); *Lighting Ballast Control, LLC v. Philips Elecs. N. Am. Corp.*, 814 F. Supp. 2d 665, 692 (N.D. Tex. 2011) ("A reasonable royalty can be calculated from an established royalty, the infringer's profit projections for infringing sales, or a hypothetical negotiation between the patentee and infringer based on the factors in *Georgia-Pacific.*" (citation omitted)); *Standard Mfg. Co. v. United States*, 42 Fed. Cl. 748, 764 (Ct. Fed. Cl. 1999) ("a court should not feel constrained by the *Georgia-Pacific* factors, nor is it required to consider each of them if conflicting or inconclusive" (citation omitted)); *Brunswick Cmp. v. United States*, 36 Fed. Cl. 204, 211-12 (Ct. Fed. Cl. 1996) ("While the *Georgia-Pacific* factors are often probative of a reasonable royalty rate, the court is neither constrained by them nor required to consider each one where they are inapposite or inconclusive." (citation omitted)); *Energy Transp. Grp., Inc. v. William Demant AIS*, 697 F.3d 1342, 1357 (Fed. Cir. 2012) (affirming jury damage award and holding, "[o]nce again, this court does not endorse *Georgia-Pacific* as setting forth a test for royalty calculations, but only as a list of admissible factors informing a reliable economic analysis."); *Whitserve, LLC v. Computer Packages, Inc.*, 694 F.3d 10, 31 (Fed. Cir. 2013) ("We do not require that witnesses use any or all of the *Georgia-Pacific* factors when testifying about damages in patent cases.").

a. *Dr. McCool's reasonable royalty rate:* Teva owed AstraZeneca at least $42 million.

Dr. McCool opined that a reasonable royalty would be at least 55% of net sales and an upfront payment of $10 million,[163] and that anything less would not make AstraZeneca "whole." Dr. McCool's opinion, well-grounded in his extensive experience and primary evidence, permits the jury to conclude Teva would have owed AstraZeneca at least ***$32.5 million***[164] ***plus interest*** (about $42 million)[165]; and with attorneys' fees ($15 million) would be $57 million.

Dr. McCool[166] opined with respect to the reasonable royalty damages for Teva's infringing sales of Prilosec. He based his conclusion on over forty years of experience in the pharmaceutical industry, including his employment by two major brand manufacturers as well as smaller start-up companies and pharmaceutical consulting companies,[167] data[168] obtained from IMS, and analyst reports of expected sales and other materials including distribution deals carrying very high royalties.[169]

In reaching his conclusion, he considered that Prilosec was "the most successful single product in the history of the pharmaceutical industry" in the early 2000s,[170] and that the purpose of awarding reasonable royalty damages was to make sure that the patent holder was made whole from the infringer's sales.

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[163] 11/5/14 Tr. 124:9-11.

[164] 11/7/14 Tr. 29; 33.

[165] See discussion of interest below.

[166] For a summary of Dr. McCool's qualifications, *see generally* 11/5/14 Tr. 77-87 and Exh. 104 (McCool CV).

[167] Dr. McCool testified that he has performed licensing work from 1981 to the present and has used the *Georgia Pacific* factors to perform his work "all the time" in the dozens of deals he examined. 11/5/14 Tr. 96:9--98:5.

[168] 11/5/14 Tr. 91:22-92:8 (describing IMS data he used); *id*. 119:16-17 ("I've never been in one of these things [pharmaceutical licensing negotiation] that did not start and rely upon IMS data.").

[169] 11/5/14 Tr. 123:9-13 ("as part of the documents that I looked at , the analyst group, SG Cowen projected at this time period that Teva would get significant sales. In fact, more sales than what they, in fact, did get.").

[170] 11/5/14 Tr. 91:10-16.

Dr. McCool considered the fifteen *Georgia Pacific* factors for determining a reasonable royalty. He grouped the fifteen factors into three categories: (1) licensing factors focused principally on the license terms in comparable deals; (2) economic factors focused on the economic effects of any deal on the parties; and (3) technology factors related to the technology sought to be licensed.[171]

First, with respect to the licensing factors, Dr. McCool observed that there were few true comparable license deals because a deal like the hypothetical one between AstraZeneca and Teva would never have taken place in "normal real-life."[172] But he observed that that the split in other similar transactions was exceptionally high:

- Dr. McCool observed that Ranbaxy asserted, in a presentation that Ranbaxy did for Merck, that the industry norm for authorized generic deals was to split the profits 90% to the brand and 10% to the generic.[173]
- Dr. McCool discussed the 80/20 Prilosec and Plendil distribution arrangements, where Ranbaxy paid AstraZeneca's full costs of the product plus 80% of Ranbaxy's profits to AstraZeneca.[174]
- Dr. McCool identified a proposed deal for generic Prilosec between Andrx and AstraZeneca that involved a proposed profit split of 70% to the brand (AstraZeneca) and 30% to the generic (Andrx), which AstraZeneca did not accept presumably because it was too low.[175]
- Dr. McCool identified a number of deals from publicly available information that showed royalties reaching 50%, but which involved development deals as opposed to the license of an already developed technology such as Prilosec. A

[171] 11/5/14 Tr. 101:5-1, 101,14-25, 113:8-116:3, 116:8-14.

[172] 11/5/14 Tr. 99:7-100:9; Dr. McCool testified that a branded company like AstraZeneca simply would not license a proprietary product such as Prilosec to a generic company looking to cannibalize its market: "Branded companies and generic companies do not do licenses like this outside of litigation or something of this nature, outside a circumstance where a hypothetical license determination is required."

[173] 11/5/14 Tr. 107:13-23; Exh. 103.

[174] 11/7/14 Tr. 21-22. The Court found in its summary judgment opinion that reliance on the 80/20 distribution agreements is "sufficiently justifie[d]." SJ Order at 114.

[175] 11/5/14 Tr. 111:21-15. Dr. McCool testified that "virtually every significant deal commands an up-front payment." *Id.* 126:1-10.

> number of these deals contained *substantial upfront payments* of up to $125 million.[176] While none of these deals is 100% comparable to a deal for Prilosec, Dr. McCool used them as a cross-check or "sanity check" of his analysis.[177]

Second, Dr. McCool found further support for his conclusion in his consideration of the economic *Georgia Pacific* factors which also supported a high royalty in this case. Dr. McCool considered the economic facts that: (1) Teva as a large generic manufacturer would have wanted Prilosec so that it could offer a broad product line;[178] (2) AstraZeneca would not have to do this deal;[179] and (3) the generic Prilosec market was worth hundreds of millions of dollars.[180]

Finally, Dr. McCool considered the technology related factors. Prilosec was an innovative product from which AstraZeneca wanted to derive as much profit as possible.[181] The fact that AstraZeneca itself was still selling branded Prilosec while Teva would be taking sales away from it with its generic product would suggest a higher royalty rate to compensate AstraZeneca.[182]

Based on all of these factors, Dr. McCool concluded that a reasonable royalty would be at least 55% of net sales and an upfront payment of $10 million.[183] Anything less would not make AstraZeneca "whole."

Dr. McCool created a pro forma financial statement to demonstrate that Teva would have expected in 2004 that this deal would be profitable.[184] He also explained that if down the road

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[176] 11/7/14 Tr. 25-26.

[177] 11/5/14 Tr.102:19-25.

[178] 11/5/14 Tr. 113:23-114:15.

[179] 11/5/14 Tr. 114:19-115:9.

[180] 11/5/14 Tr. 115:10-17.

[181] 11/5/14 Tr. 116:8-14.

[182] 11/5/14 Tr. 118.

[183] 11/5/14 Tr. 124:9-11.

[184] 11/5/14 Tr. 118:12-119:6, 127:3-14.

the Teva generic generated fewer sales than had been projected and was unable to make a profit, that future would not have been known in 2004 when the license was negotiated and does not mean the royalty agreed to was unreasonable at the time of the hypothetical royalty negotiation.[185] Using his 55% plus $10 million royalty and one conservative set of Teva net sales figures,[186] McCool's opinion leads to a calculation that Teva owed AstraZeneca ***over $42 million including interest***.[187]

Following Dr. McCool's direct testimony, defendants cross examined him for a full trial day. As they did at Dr. McCool's deposition, they raised various issues on which they disagreed with Dr. McCool – disputes that the jury must resolve.

b. *Teva's license from Impax:* As a floor, Teva would have paid AstraZeneca more for a risk-free license than it paid Impax to launch at risk.

In 2004, Teva faced two options for launching a version of generic Prilosec. Teva could have asked – and paid – AstraZeneca for a license to its Prilosec patents. Or, Teva could have licensed a product from Impax that could be found to infringe one or more of AstraZeneca's patents covering Prilosec.

As a rational, profit-maximizing company, Teva chose the least expensive option: a license from Impax. But in pursing that strategy and launching "at risk," Teva knew that it would save a few dollars but almost certainly face a lawsuit for patent infringement (as it did)

[185] *See Hanson v. Alpine Valley Ski Area, Inc.*, 718 F.2d 1075, 1081 (Fed. Cir. 1983) ("The issue of the infringer's profit is to be determined not on the basis of a hindsight evaluation of what actually happened, but on the basis of what the parties to the hypothetical license negotiations would have considered at the time of the negotiations."); *Radio Steel & Mfg. Co. v. MTD Prods., Inc.*, 788 F.2d 1554, 1557 (Fed. Cir. 1986) ("The determination of a reasonable royalty, however, is based not on the infringer's profit, but on the royalty to which a willing licensor and a willing licensee would have agreed at the time the infringement began.").

[186] 11/6/14 Tr. 22.

[187] 11/7/14 Tr. 29; 33 (testifying that that application of a 55% royalty plus and upfront payment of $10 million equals $32 million in damages before adding interest).

and that it would face potentially substantial damages if its Impax-licensed product were found to infringe (as it was).

The evidence adduced at trial shows that Teva paid (i) Impax royalties starting at 35% and rising to 50% of profits during the period of Teva's infringing sales[188]; (ii) 100% of the litigation costs[189] associated with the Prilosec patent infringement litigation which – according to Ms. Julie – are "at least" $5 million in "the most simple case;"[190] and (iii) an unknown amount – potentially including interest, attorneys' fees, and/or treble damages – to AstraZeneca to settle the litigation.[191]

Given that Teva pursued its least expensive option back in 2004, it stands to reason that Teva would have paid *more* for a license from AstraZeneca that Teva knew would not lead to infringement litigation and potential damages.

The jury can reasonably conclude that Teva could have sought a license from AstraZeneca that would have eliminated Teva's expenses in defending an infringement lawsuit and any damages that might be awarded in such a case, but that doing so would have cost Teva *far more than* 35% to 50% of its profits plus litigation costs and an amount to settle the Prilosec infringement litigation.

c. *Ms. Julie's 2006 profit report:* Teva's Prilosec exposure ranged from $44 million to over $100 million.

Using Ms. Julie's 2006 profit report and conservative calculations, the evidence permits the jury to find Teva was exposed to a judgment of well over $100 million; even if one discounts

[188] Exh. 73.

[189] Exh. 73.

[190] 10/31/14 Tr. 130 (Julie) ("Q. Can you give us a general sense of the expense involved in litigating these patent cases? A. So I would say the most simple case, you're looking at probably $5 million, at least, to litigate. And the more complicated you go, the much more expensive it can be.").

[191] Though plaintiffs contend that the $9 million was too low, there is no dispute that Teva paid this amount.

entirely AstraZeneca's forceful efforts to collect treble damages, Teva's exposure was well over $50 million.

The financial data Ms. Julie sent AstraZeneca in 2006 shows Teva/Impax total generic Prilosec profits of $21,466,273 through the first quarter of 2006.[192] Teva withdrew from the market shortly after the district court's May 31, 2007 infringement opinion.[193] In total, Teva sold its infringing generic Prilosec for 33 months.

Exhibit 48 reflects 19 months of profits on infringing sales. Simple arithmetic permits the jury to calculate Teva's monthly profit ($21.4 million in profits divided by 19 months) of approximately $1.129 million per month and then add up that monthly profit forward across the entire 33 months of infringing sales ($1.129 million profit per month times 33 months) for a total profit of approximately $37.2 million.[194]

AstraZeneca agreed to accept an 80% royalty rate from Ranbaxy for its Plendil and Prilosec authorized generic agreements.[195] This is less than the "industry standard" of 90% of

[192] Exh. 48.

[193] 10/29/2014 Tr. 75:10-20 (Pott).

[194] Jurors are perfectly capable of doing math without the need for expert testimony. *See Parrish v. Nat'l Football League Players Inc.*, 2009 WL 88484, at *4 (N.D. Cal. Jan. 13, 2009) ("While the $7.1 million number was never testified to by any expert, such testimony is not a prerequisite. … Under our jury system, jury verdicts must be accorded great deference and a jury is permitted 'to do its own math.'") (quoting *City Solutions, Inc. v. Clear Channel Communications, Inc.*, 365 F.3d 835, 840–41 (9th Cir. 2004)); *Kruse, Inc. v. United States*, 213 F. Supp. 2d 939, 946 (N.D. Ind. 2002) ("Undoubtedly, the jury could do the math and determine that 52 times $25,000 would be a significant amount of money."); *see also Elliott v. Target Corp.*, 2013 WL 2153539, at *2 (D. Nev. May 16, 2013) (rejecting defendant's argument that "jury would not be able to do the math" and recognizing the jury will "be able to compute a damages figure as juries do across the country all the time"). *See also Jastremski v. United States*, 737 F.2d 666, 672-73 (7th Cir. 1984) ("Expert testimony in regard to damages is unnecessary when the trial court can ascertain to a reasonable certainty, from other evidence in the case and from reasonable inferences based thereon, an amount which will fairly compensate the plaintiff."); *Heyne v. Nick's Am. Pancake & Cafe, Inc.*, 2013 WL 6047553, at *14 (N.D. Ind. Nov. 15, 2013) ("nor were any experts … necessary to calculate damages given plaintiffs' own trial testimony provided a sufficient basis upon which to calculate damages").

[195] Exh. 95 at 7 ("The agreements provide Ranbaxy with a 20 percent share of the revenue from sales of these products, which is well within industry norms for this type of agreement."); Exh. 31 at 11 (Plendil: "3.4.1 Calculation of Deferred Purchase Price. In addition to the Base Purchase Price payments Distributor shall pay AstraZeneca eighty percent (80%) of profit ("Deferred Purchase Price") on the terms set forth below in this section 3.4 where: …"); Exh. 32 at 11 (Prilosec: "3.4.1 Calculation of Deferred Purchase Price. In addition to the Base

profits.[196] As Dr. McCool explained, there are no perfect comparators for the hypothetical license between AstraZeneca and Teva because such a deal would not have occurred.[197] Branded companies have no incentive to license generic competitors that will cannibalize their high-margin branded sales. The best comparators that do exist are authorized generic distribution agreements like the 90% of profits to the brand "industry standard"[198] and the 80% of profits to AstraZeneca in the Plendil and Prilosec agreements.[199] 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).Though the overall dollar size of the market may decline rapidly, there certainly can be enough of an opportunity for the brand to profit.[200] Though there are differences between an authorized generic distribution agreement and a license,

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Purchase Price payments Distributor shall pay AstraZeneca eighty percent (80%) of profit ("Deferred Purchase Price") on the terms set forth below in this section 3.4 where: …").

[196] Exh. 103 (Ranbaxy produced document, "Current industry standard for sharing Net Profits is 90% to the innovator company and 10% to the generic marketer."). And of course plaintiffs contend that the side deals between AstraZeneca and Ranbaxy were below a pay-for-delay vehicle.

[197] 11/5/14 Tr. 99:7-100:9; Dr. McCool testified: "A branded company like AstraZeneca simply would not license a proprietary product such as Prilosec to a generic company looking to cannibalize its market: "Branded companies and generic companies do not do licenses like this outside of litigation or something of this nature, outside a circumstance where a hypothetical license determination is required."

[198] Exh. 103 (Ranbaxy produced document, "Current industry standard for sharing Net Profits is 90% to the innovator company and 10% to the generic marketer.").

[199] Exh. 95 at 7 ("The agreements provide Ranbaxy with a 20 percent share of the revenue from sales of these products, which is well within industry norms for this type of agreement."); Exh. 31 at 11 (Plendil: "3.4.1 Calculation of Deferred Purchase Price. In addition to the Base Purchase Price payments Distributor shall pay AstraZeneca eighty percent (80%) of profit ("Deferred Purchase Price") on the terms set forth below in this section 3.4 where: …"); Exh. 32 at 11 (Prilosec: "3.4.1 Calculation of Deferred Purchase Price. In addition to the Base Purchase Price payments Distributor shall pay AstraZeneca eighty percent (80%) of profit ("Deferred Purchase Price") on the terms set forth below in this section 3.4 where: …").

[200] Indeed, Teva's Ms. King testified that Teva frequently assumed that brand companies would launch authorized generics once they faced generic competition. 10/29/14 Tr. 121:9-14 ("Q. Okay. Is the assumption of an authorized generic conservative for purposes of modeling? A. So, yes. Although back when this was run, back in, like, 2007, it was -- it occurred more often than it did not. So we typically put it in. Today's a little bit different.") (King).

the fundamental similarly 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. As the Court noted in its summary judgment opinion, the "use of distribution agreements as comparators" is "sufficiently justifie[d]."[201] Simple arithmetic permits the jury to calculate, based on these 80/20 deals, that 80% of $37.2 million is $29.76 million base recovery.

AstraZeneca sought enhanced damages up to three times single damages;[202] therefore the range of recovery reflecting treble damages is $29.76 million – $89.28 million, all before adding interest or attorneys' fees.

AstraZeneca also made a claim for attorneys' fees, which Ms. Bowman estimated at $15 million from the Teva Prilosec litigation.[203] The range of recovery reflecting treble damages and attorneys' fees is ***$44.76 million – $104.28 million***.

Even setting aside trebling, Mr. Pott testified that he would want the lawyers working for AstraZeneca to have in mind the notion of trying to recover interest if (as here) it has been years since AstraZeneca was damaged.[204] Interest calculated at the prime rate would increase the award by approximately 30% percent.[205] Teva would owe AstraZeneca ***at least $38 million***[206] and at least ***$53 million*** with attorneys' fees.

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[201] SJ Order at 114.

[202] Exh. 44.

[203] Exh. 107, ¶ 5.

[204] 10/29/14 Tr. 132:19-133:1.

[205] Interest at the prime rate, as reported by the Federal Reserve and compounded annually through 2010 adds between 28% and 32% to the base recovery, depending on when the revenues were realized. The average annual

The 2006 data from Ms. Julie showed Teva profits that are larger than defendants apparently now contend.[207] Ms. Julie testified that Teva knew and expected that AstraZeneca would rely on 2006 profits information.[208] Although Ms. Julie tried to back away from these figures,[209] the jury can decide what evidence to credit. The jury will consider this evidence in light of the incredible disappearing Heifetz memo (or phone call?) discussed during Mr. Pott's testimony,[210] and the missing summary of figures discussed by Ms. Julie.[211] Mr. Pott testified that he received a memo from outside counsel Mr. Heifetz setting forth a range of values that he (Pott) used for negotiating with Teva in Prilosec (a "tabulation" of some kind), but could not explain where Mr. Heifetz got the information in the memo,[212] where the mysterious memo is now, or why it wasn't produced in this litigation.[213] When questioned by AstraZeneca's counsel, Mr. Pott suddenly remembered a precise number for Teva's profits,[214] and claimed that he had

prime rate for the years at issue is: 4.34% (2004); 6.19% (2005); 7.96% (2006); 8.05% (2007); 5.09% (2008); 3.25% (2009); 3.25% (2010). *See* FRB FRED database, available at http://research.stlouisfed.org/fred2/series/MPRIME/downloaddata?cid=117. The Court can take judicial notice of the prime rate. *See Havens Steel Co. v. Randolph Engineering Co.*, 813 F.2d 186, 189 (8th Cir. 1987) ("We take judicial notice that in the year the court applied a 15% interest rate, the average prime rate was 14.8%.") (footnote and citation omitted); *Neel v. Mid-Atlantic of Fairfield, LLC*, No. 10-cv-405, 2012 U.S. Dist. LEXIS 111939, at *31 (D. Md. Aug. 9, 2012) ("In this case, the Court finds that the appropriate rate of prejudgment interest to properly compensate Ms. Neel is the prime interest rate, compounding annually. The Court takes judicial notice of the fact that the prime interest rate was 3.25% on December 2, 2009, the date of Ms. Neel's termination, and has not changed since that time.").

[206] $29.76 million times 1.30 equals ~$38 million. Interest calculated at the 9% rate that Mr. Pott testified to would be substantially greater.

[207] *Id.*; Exh. 48 (email from Ms. Julie of Teva to Mr. Heifetz of AstraZeneca dated April 18, 2006).

[208] 10/30/14 Tr. 73:12-15 (Julie).

[209] 10/30/14 Tr. 73:2-3 (Julie).

[210] 10/28/14 Tr. 44:1-22, 45:16-47:22 (Pott); 10/29/14 Tr. 152:22-153:14 (Pott).

[211] 10/31/14 Tr. 51:15-54:3 (Julie).

[212] 10/28/14 Tr. 47:7-22 (Pott).

[213] 10/28/14 Tr. 44:1-22, 45:16-47:22 (Pott); 10/29/14 Tr. 152:22-153:14 (Pott).

[214] 10/28/14 Tr. 117:18-119:2 (Pott).

this information when he negotiated with Teva in August 2009.[215] But on re-examination by plaintiffs' counsel, Mr. Pott testified that it might have been a phone conversation instead of a memo ("I just don't recall),[216] and admitted that he "remembered" the figure only because AstraZeneca's counsel *in this case* fed him that number over the weekend before he testified.[217] The Court then struck all of his testimony about the figure.[218]

d. *Teva's reports to Ivax and AstraZeneca's 80/20 deals:* Teva's Prilosec exposure ranged from over $30 million to about $70 million.

According to Exhibit 57, a compilation of Teva's reports to Impax introduced by the defendants, during the relevant period Teva's net sales were $38.4 million and Teva's profits were $23.69 million.[219] Exhibit 57, Teva's reports to Ivax, and a calculator reflect that Teva's net generic Prilosec sales totaled $38.4 million and Teva's profits totaled $23.69 million.[220] Using these figures, and the 80% profit royalty figure from AstraZeneca's Plendil and Prilosec agreements with Ranbaxy[221] (and including attorneys' fees, interest and trebling) results in Teva having an exposure of between $39.64 million to $71.86 million.

To add to the uncertainty surrounding Teva's sales, one of defendants' own proposed exhibits – the Declaration of Jaime Berlanska from Teva, not admitted into evidence – has yet another set of numbers: net sales of $41,067,741 and profits of $25,516,865.[222] Using that profit

[215] 10/28/14 Tr. 132:20-23 (Pott).

[216] 10/29/14 Tr. 153:13-14 (Pott).

[217] 10/29/14 Tr. 65:25-66:17, 67:21-68:15 ($22.7 million figure based on an expert report that Mr. Pott saw over the weekend).

[218] 10/29/14 Tr. 71:5-72:5 (Court explaining to the jury that it is striking Mr. Pott's testimony about $22.7 in Teva profits).

[219] Exh. 57. Profits are derived from Exh. 57 by subtracting total manufacturing costs ($14,791,477) from net sales ($38,482,374).

[220] *Id.*

[221] Exh. 31 at 11 (Plendil); Exh. 32 at 11 (Prilosec).

[222] *See* Defendants' proposed Exh. BGW, ¶ 2.

figure and an 80% royalty, and including attorneys' fees, interest and trebling results in a Teva exposure of ***$41.54 million – $76.24 million.***

e. *Dr. McGuire's avoided litigation costs:* AstraZeneca saved between $3 million - $5 million in litigation costs by settling the Nexium and Prilosec litigations.

Dr. McGuire explained that a payment from the brand to the generic is "large" if the payment exceeds the brand's expected future litigation costs.[223] "If you see a payment from the brand that exceeds its expected litigation costs, then there is strong economic evidence that the settlement constitutes a delay in the sense of harming consumers."[224]

Dr. McGuire estimated that AstraZeneca saved $3-4 million in litigation costs by settling the Nexium case.[225] Dr. McGuire also estimated that AstraZeneca would save up to a million dollars in litigation costs in the Prilosec litigation,[226] less than Ms. Bowman's estimated $4 million in saved litigation costs in the Prilosec litigation.[227] As Dr. McGuire explained, examining the literature in order to estimate saved litigation expenses is a better approach than looking at estimates provided by AstraZeneca and Ms. Bowman because people have a tendency to overestimate their own future expenses.[228] It is for the jury to weigh this conflicting testimony.

[223] 11/7/14 Tr. 89-91.

[224] 11/7/14 Tr. 91.

[225] 11/7/14 Tr. 130:1-10 (McGuire).

[226] 11/7/14 Tr. 130:11-16 (McGuire).

[227] Exh. 107 (Bowman Declaration). Though Mr. Pott offered a potentially different estimate of AstraZeneca's avoided litigation costs, Ms. Bowman was AstraZeneca's 30(b)(6) designee on this topic.

[228] 11/7/14 Tr. 103:10-104:23 (McGuire).

Based on both the qualitative and quantitative evidence, the jury is entitled to conclude that the Prilosec deal represented a "large" payment to Teva.[229] This payment, the jury may conclude, induced Teva to quit its effort to overcome the Nexium patents and instead join the AstraZeneca-Ranbaxy conspiracy to delay generic Nexium competition.

3. A quantitative comparison between the size of the payment and AstraZeneca's Nexium sales is irrelevant and improper.

Actavis explained that it is impermissible to judge payment size based on the revenues of the brand company. First, the Supreme Court said defendants could be liable even if the payment was small enough in relation to branded drug revenues to be easily recouped by the brand company:

> Solvay's patent, if valid and infringed, might have *permitted it to charge drug prices sufficient to recoup the reverse settlement payments it agreed to make to its potential generic competitors*. And we are willing to take this fact as evidence that the agreement's anticompetitive effects fall within the scope of the exclusionary potential of the patent. *But we do not agree that that fact, or characterization, can immunize the agreement from antitrust attack.*[230]

Second, the Supreme Court was crystal clear that the "earning potential" of the drug at issue is *not* a relevant comparator:

> In short, rather than measure the length or amount of a restriction solely against the length of the patent's term *or its earning potential* . . . this Court answered the antitrust question by considering traditional antitrust factors such as likely anticompetitive effects, redeeming virtues, market

[229] In comparing the size of the payment to Teva to AstraZeneca's saved litigation costs, one should consider not merely whether the payment to Teva alone exceeds avoided litigation costs (though it does), but whether the total payments to Teva and Ranbaxy together exceed avoided litigation costs. AstraZeneca's willingness to pay both Ranbaxy and Teva large sums shows that AstraZeneca had "serious doubts" about its ability to exclude generic competition to 2014 using its patents alone. *Actavis*, 133 S. Ct. at 2236. This is true regardless of Ranbaxy's later difficulties with the FDA and so the total payment size is properly considered as evidence *inter alia* of AstraZeneca's own "serious doubts" about its patents.

[230] *Actavis*, 133 S. Ct. at 2230 (citation omitted) (emphases added).

> power, and potentially offsetting legal considerations present in the circumstances, such as here those related to patents. [231]

Brand prices and profits are far larger than those of generic companies – that is precisely why brand companies can afford to pay generics to delay generic competition. Put another way: there is no dispute that brand companies have self-interested economic reasons to buy off their generic competitors, but that is not a defense.[232]

In any event, Teva executive Ms. King has already put this issue to bed. Teva's counsel had said in her opening statement that Teva anticipated that, if it got approval of its Nexium ANDA, it would capture "a huge part of [the Nexium] $3 billion a year market,"[233] suggesting that Teva would have required a much larger payment to quit its Nexium patent challenge. But after explaining the relevant economics to the jury, Ms. King, a Teva executive, rebutted Teva's own argument:

> Q. Okay. So if I were to stand here and say to this jury that, Well, the brand sales are $3 billion a year, Teva's economic opportunity was to compete to capture a huge portion of $3 billion, that would be wrong; isn't that right?
>
> A. Yes, that would be wrong.
>
> Q. I'd be seriously misstating?
>
> A. Yes.[234]

[231] *Id.* at 2229 (brand company's payments totaled a few percentages of the brand sales during the period of alleged delay).

[232] "We do not think it follows that because it is rational for the patentee to agree to an exclusion payment, that payment cannot be anticompetitive. Far from it." Hovenkamp, *Anticompetitive Settlement of Intellectual Property Disputes*, 87 MINN. L. REV. 1719, 1758 (2003).

[233] 10/21/14 Tr. 119:13-20 (opening statement by Teva's counsel).

[234] 10/29/14 106:22-107:4. *See also* 10/31/14 Tr. 65:21-66:6 (Julie) ("as a second filer the most you expect to get is maybe about 40% of that market share…but your price also goes down.").

V. CONCLUSION

In short, overwhelming qualitative and quantitative evidence permits the jury to conclude that AstraZeneca made a large payment to Teva. The defendants' Rule 50 Motion should be denied.

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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: November 10, 2014

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