EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KING DRUG COMPANY OF FLORENCE, Inc., *et al.*, On behalf of themselves and all others similarly situated, **Plaintiffs,** **v.** **CEPHALON, INC., *et al.*,** **Defendants.**	**Civil Action No.** **2:06-cv-01797-MSG** **Judge Mitchell S. Goldberg**

DECLARATION OF BRUCE E. GERSTEIN IN SUPPORT OF CLASS COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES AND INCENTIVE AWARDS TO CLASS REPRESENTATIVES

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I. INTRODUCTION

I, Bruce E. Gerstein, the managing partner at Garwin Gerstein & Fisher, L.L.P. ("GGF"), the law firm appointed by the Court as Lead Counsel for the Direct Purchaser Class Plaintiffs ("DPCPs"), respectfully submit this declaration in support of Class Counsel's application for:

(1) an award of attorneys' fees totaling 27.5% of DPCPs' settlement with the Cephalon Defendants ("the Settlement");[1]

(2) reimbursement of expenses that were incurred in the prosecution of DPCPs' claims against the Cephalon Defendants; and

(3) incentive awards to the named class representatives.[2]

GGF has been involved in all material aspects of this litigation from the pre-complaint investigation and filing of DPCPs' initial complaint in April 2006 through the time of DPCPs' settlement with the Cephalon Defendants in April 2015 (and continuing), and I am therefore fully familiar with the facts set forth below.

[1] The Cephalon Defendants are Cephalon, Inc., Teva Pharmaceutical Industries, Ltd., Teva Pharmaceuticals USA, Inc. and Barr Pharmaceuticals, Inc. Defendants Mylan Pharmaceuticals, Inc. and Mylan, Inc. ("Mylan"), and Ranbaxy Laboratories, Ltd. and Ranbaxy Pharmaceuticals, Inc. (collectively "Ranbaxy") are not part of the Settlement. Solely for purposes of referring to the history of the litigation, the Cephalon Defendants, Mylan and Ranbaxy are herein collectively referred to as "Defendants" where applicable.

[2] The Class Representatives are King Drug Company of Florence, Inc. ("King Drug"), Rochester Drug Co-Operative, Inc. ("RDC"), Burlington Drug Co., Inc. ("Burlington"), J.M. Smith Corp. d/b/a Smith Drug Co. ("Smith Drug"), Meijer, Inc. and Meijer Distribution, Inc. ("Meijer"), and SAJ Distributors, Inc. and Stephen L. LaFrance Holdings, Inc. ("SAJ").

II. HISTORY OF THE LITIGATION

A. Commencement of the Case and Initial Proceedings

1. On April 27, 2006, after a detailed investigation, Class Counsel,[3] on behalf of DPCPs, filed the present antitrust lawsuit on behalf of a putative class of direct purchasers challenging Defendants' conduct as violative of the antitrust laws. *See* Dkt No. 1-1. This lawsuit was the first such lawsuit alleging an unlawful delay in generic competition for Provigil, and subsequently similar lawsuits were filed by the Federal Trade Commission ("FTC"), Apotex Corporation ("Apotex"), a putative class of end-payor plaintiffs ("EPPs"), and several direct purchaser "opt-out" retailer plaintiffs.[4]

[3] Class Counsel refers to Lead Counsel, the law firms appointed by court order as counsel for the direct purchaser class (*see* Dkt No. 196), and the other law firms that participated in the litigation. Those firms are: Berger & Montague, P.C. (Liaison Counsel and Member of the Executive Committee); Odom & Des Roches, LLP (Member of the Executive Committee); The Smith Foote Law Firm (now Smith Segura & Raphael, LLP) (Member of the Executive Committee); Heim Payne & Chorush, LLP (patent counsel); Faruqi & Faruqi, LLP; RodaNast, P.C. (now NastLaw LLC) (Member of the Executive Committee); The Roberts Law Firm; and Phelps Dunbar, LLP.*

* Named plaintiff Meijer has changed firm affiliation three times during this litigation. On May 27, 2010, Meijer (then represented by Kaplan Fox & Kilsheimer, LLP) filed a notice of change of firm affiliation to Nussbaum, LLP. On September 1, 2010, Meijer filed a notice of change of firm affiliation to Grant & Eisenhofer, P.A, and subsequently served a motion to amend the organization of counsel for the limited purpose of substituting Grant & Eisenhofer, P.A., as a Member of the Executive Committee in place of Kaplan Fox & Kilsheimer, LLP. *See* Dkt No. 329. That request was granted on October 8, 2010. *See* Dkt No. 337. On April 29, 2015, Meijer filed a notice of change of firm affiliation to Nussbaum Law Group, P.C. *See* Dkt No. 802. Additional counsel that participated in the case on behalf of Meijer are Cohen Milstein Sellers & Toll PLLC, Vanek Vickers & Masini, P.C., and Sterling & Slater, P.C.

[4] The EPPs' complaint was filed on May 1, 2006. *See* Case No. 2:06-cv-01833 (Dkt No. 1). The Apotex complaint was filed on June 26, 2006. *See* Case No. 2:06-cv-02768 (Dkt No. 1). The FTC complaint was filed on February 13, 2008. *See* Case No. 2:08-cv-02151 (Dkt No. 1). The first of the various "opt-out" plaintiffs' complaints was filed on August 20, 2009. *See* Dkt No. 199.

2. DPCPs' initial complaint alleged that Defendants had entered into unlawful "reverse payment" settlement agreements by which Cephalon had compensated Barr, Teva, Mylan and Ranbaxy (collectively, the "Generic Defendants") in exchange for their agreements to delay entering the market with their respective generic versions of Cephalon's brand-name prescription drug Provigil in violation of Sections 1 and 2 of the Sherman Act, causing DPCPs to suffer overcharge damages as a result. *See* Dkt No. 1-1. DPCPs also alleged that Cephalon had intentionally withheld information from, and made misrepresentations to, the United States Patent and Trademark Office ("PTO") in connection with the prosecution of Cephalon's patent covering Provigil ("the RE '516 Patent"), and that such misrepresentations and omissions were material to patentability. DPCPs' complaint detailed how the Generic Defendants, who had been sued by Cephalon for alleged patent infringement, had claimed in court filings that the RE '516 Patent was both invalid and unenforceable due to inequitable conduct. DPCPs' complaint also detailed how the Generic Defendants had sought summary judgment of non-infringement. In addition, DPCPs alleged that each Generic Defendant knew (or should have known) that it was highly likely that Cephalon would have lost the Provigil patent litigation, and thus Cephalon would have to convey something of value to the Generic Defendants in order to induce them to drop their patent challenges and refrain from entering the market with generic versions of Provigil, and that the unlawful reverse payment settlements followed. *Id.*

3. On August 8, 2006, all direct purchaser actions were consolidated by Judge R. Barclay Surrick of the Eastern District of Pennsylvania for coordinated pre-trial proceedings with End-Payor plaintiffs. *See* Dkt No. 16.[5] Concurrently, Judge Surrick made appointments concerning the organization of counsel for the direct purchaser class. *Id.*

[5] On the same date, Judge Surrick ordered that the Apotex litigation be coordinated with the aforementioned actions. *See* Case No. 2:06-cv-02768 (Dkt No. 65). The FTC action and the Opt-

4. In November 2006, when Defendants filed their initial motions to dismiss, federal case law on the appropriate standard for antitrust review of reverse payment agreements was in a state of flux. *Compare, e.g., In re Cardizem*, 332 F. 3d 896 (6th Cir. 2003) (deeming reverse payment agreement *per se* illegal) *with In re Tamoxifen Citrate Antitrust Litig.*, 429 F. 3d 370 (2d Cir. 2005) (reverse payment settlements lawful unless the patent litigation is a sham or the patent was procured by fraud). Consequently, the parties' briefing presented competing arguments on the fundamental issue of how to evaluate reverse payment settlements. This included opening, opposition, reply and sur-reply briefing that extended through February 2007. *See* Dkt Nos. 44, 49, 66, 70-71, 80-82. A few months later, during June and July 2007, the parties engaged in further briefing on supplemental authority pertaining to the pending motions to dismiss, including but not limited to the United States Supreme Court's then-recent decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), and the United States Supreme Court's denial of *certiorari* in *Tamoxifen*. *See* Dkt Nos. 92, 93, 95, 96. *See also Joblove v. Barr Labs., Inc.*, 551 U.S. 1144 (June 25, 2007) (denying *certiorari*).

5. On February 28, 2008, subsequent to the filing of the FTC complaint, DPCPs filed a motion for leave to file a supplemental memorandum in opposition to Defendants' motions to dismiss, arguing that the FTC's complaint, which was filed with the benefit of discovery that DPCPs did not have access to, bolstered the sufficiency of DPCPs' allegations. *See* Dkt No. 99. Defendants opposed any further briefing on the motions. *See* Dkt Nos. 101, 102.

6. In April 2009 the case was reassigned to this Court for all further proceedings. *See* Dkt No. 121.

Out plaintiff cases were subsequently similarly coordinated when later filed. *See* Case No. 2:08-cv-02141 (Dkt No. 37); Dkt Nos. 199, 203, 325.

7. Upon docketing the litigation, this Court vacated the two case management orders that had been entered by Judge Surrick, and ordered that a status conference be held in July 2009. *See* Dkt Nos, 122, 123. After the status conference, the Court denied without prejudice all pending motions to dismiss that had been filed in all four of the consolidated cases, and set a schedule for the filing of consolidated amended complaints and the filing of renewed motions to dismiss. *See* Dkt No. 191.

8. On August 10, 2009, DPCPs filed their First Consolidated Amended Complaint. *See* Dkt No. 193. In addition to DPCPs' already-existing theories of liability, this complaint included the additional allegation of an intergeneric conspiracy among the Generic Defendants and a separate count to that effect. *Id.* Class Counsel also submitted, per the Court's instructions at the aforementioned status conference, Class Counsel's proposal as to the organization of counsel. *See* Dkt No. 194. Shortly thereafter, the Court entered a corresponding order, including the appointment of GGF as sole Lead Counsel for the direct purchaser class, as well as Liaison Counsel and an Executive Committee. *See* Dkt No. 196.

B. Renewed Motions to Dismiss and the Interim Filing of DPCPs' Second Consolidated Amended Complaint

9. On August 31, 2009, when Defendants filed their renewed motions to dismiss, the case law on the appropriate standard for antitrust review of reverse payment settlements was still in flux. The Third Circuit had not yet addressed the issue, although the Federal Circuit, applying Second Circuit law, had upheld dismissal of claims under the so-called "scope of the patent" test. *See, e.g., In re Ciprofloxacin Hydrochloride Antitrust Litig.,* 544 F. 3d 1323 (Fed. Cir. 2008). Consequently, Defendants' principal argument for dismissal during renewed briefing was that Defendants' agreements were lawful under the "scope of the patent" test. Defendants argued, *inter alia*, that under that standard, DPCPs' allegations concerning the weakness of the RE '516

Patent and the parties' subjective views concerning same were irrelevant. *See* Dkt Nos. 200, 201. Separately, Defendants argued that DPCPs' allegations concerning an intergeneric conspiracy failed under *Twombly*. *Id.*

10. On September 14, 2009, DPCPs filed a combined 75-page opposition to the motions to dismiss. *See* Dkt No. 218. DPCPs argued, *inter alia*, that decisions adopting a "scope of the patent" standard should not be followed because such decisions failed to recognize that the grant of a patent does not provide an unqualified right to exclude, but rather, only the right to try to exclude vis-à-vis patent litigation, that Cephalon had used its money (not its patent) to exclude the Generic Defendants, and that because the RE '516 Patent was so weak, it had no power to exclude generic competition. Instead, DPCPs advocated for the application of longstanding, fundamental antitrust principles in analyzing Defendants' settlements. Additionally, DPCPs argued that their allegations of an intergeneric conspiracy among the Generic Defendants stated a viable claim separate from, and independent of, DPCPs' reverse payment claims pursuant to cases such as *United States v. Masonite Corp.*, 316 U.S. 265 (1942). *Id.*

11. On September 24, 2009, this Court ordered Defendants to provide DPCPs with all materials previously provided to the FTC (including investigational hearing transcripts and exhibits thereto) and all materials produced in the Provigil patent litigation (including deposition transcripts and exhibits thereto), by late October 2009. *See* Dkt No. 219. This production included, *inter alia*, unredacted copies of the settlement agreements, which DPCPs had not previously had access to.

12. On October 21 and 22, 2009, oral argument was held on Defendants' motions to dismiss. *See* Dkt No. 221. On November 13, 2009, the Court e-mailed counsel for all parties with four follow-up questions relating to the pending motions to dismiss. All parties' responses were submitted by November 27, 2009, pursuant to the Court's e-mail directive.

13. On November 27, 2009, as a result of Defendants' production of materials and DPCPs having had access to the settlement agreements for the first time, DPCPs moved for leave to file a Second Amended Consolidated Complaint in order to more specifically identify additional allegedly anticompetitive aspects of the settlement agreements. *See* Dkt No. 233. Defendants opposed DPCPs' motion, arguing that DPCPs' proposed amendments were both futile and unduly delayed. *See* Dkt Nos. 243, 244.

14. On January 5, 2010, this Court granted DPCPs' motion for leave to file their Second Amended Consolidated Complaint. *See* Dkt No. 247.[6] The Court also permitted Defendants to elect whether the Court should treat the pending motions to dismiss as effective against the Second Amended Consolidated Complaint, or whether Defendants wished to submit further limited briefing to address any new/additional matter contained in DPCPs' new complaint. *Id.* On January 26, 2010, Defendants filed supplemental briefing. *See* Dkt Nos. 251, 252.

15. On March 29, 2010, the Court denied Defendants' motions to dismiss. *See* Dkt No. 260. The Court elected to analyze DPCPs' claims under the "scope of the patent" framework, and then proceeded to examine the ways in which Defendants' settlements were alleged to have exceeded the scope of the RE '516 Patent. The Court concluded that "sufficient facts [were] alleged to establish that the agreements in question grant greater rights than those conferred under the patent….the complaints allege fraud and misrepresentations to the PTO, non-infringement, patent invalidity, 'sham litigation,' the creation of a bottleneck, antitrust conspiracy and agreements between Cephalon and the Generic Defendants regarding products

[6] The Second Amended Consolidated Complaint has since remained as DPCPs' operative complaint.

not protected by Cephalon's patent." *Id.* The Court then directed Defendants to file answers to DPCPs' complaint. *See* Dkt No. 261.

C. Discovery

i. Document Discovery from Defendants

16. As noted above, in October 2009, the DPCPs received a substantial production of documents from the Defendants. *See supra* at ¶11. Such production constituted over one million pages of documents, which Class Counsel reviewed in a highly-organized, focused process using database searches targeting specific concepts and custodians. This culminated in the DPCPs creating an extensively organized database that proved invaluable in identifying key issues, documents, deponents, and future discovery.

17. In June 2010, DPCPs served the first of four sets (collectively) of document requests on Defendants. In July 2010, after DPCPs reviewed and analyzed Defendants' responses to DPCPs' document requests, the parties began an extensive meet and confer process to address the Defendants' numerous objections and to pinpoint which supplemental materials were necessary beyond what had already been produced pursuant to the Court's September 2009 Order. During this process, Class Counsel for the DPCPs took a leading role in the meet and confer process, particularly with the Generic Defendants. Defendants thereafter began producing documents on a rolling basis starting in August 2010. By approximately early-to-mid 2011, Defendants completed their production of these materials, which totaled approximately 1.2 million additional pages. These document productions were also stored on the computerized database and reviewed by Class Counsel, who again spent significant time running targeted searches on the millions of pages of documents to efficiently identify and review the key documents. Throughout the litigation, Class Counsel continuously used the computerized

database to perform targeted searches as DPCPs developed and refined their theories of liability, causation and damages, and to prepare for depositions and motion practice.

18. Subsequently, in 2013, the parties engaged in additional fact discovery to take into account updated sales/transactional data regarding, *inter alia*, purchases of Provigil and generic modafinil, updated information relating to the Abbreviated New Drug Applications ("ANDAs") of the Generic Defendants for generic modafinil, and updated information concerning financial payments made pursuant to the settlement agreements challenged in this litigation. *See* Dkt. No. 637. This supplemental discovery was also stored and reviewed by Class Counsel.

19. In addition to document requests, Class Counsel served three sets (collectively) of interrogatories on Defendants, which covered a wide variety of topics. Class Counsel also served 54 requests for admissions on Cephalon, which focused on patent issues and Cephalon's annual revenues from Provigil. Class Counsel reviewed and analyzed Defendants' responses to this discovery.

ii. Discovery from the Named Plaintiffs

20. Beginning in June 2010, Defendants served DPCPs with one joint set of document requests and two sets of interrogatories.

21. Class Counsel served objections to Defendants' discovery, and met-and-conferred with defense counsel on the scope of this discovery. As those discussions occurred, Class Counsel worked with the named plaintiffs to gather potentially responsive documents and data for production. Class Counsel met and communicated with knowledgeable employees who collected, sorted and compiled documents and data for eventual production to Defendants. Class Counsel reviewed the named plaintiffs' documents for responsiveness and privilege, and then produced documents in response to Defendants' document requests (which included both hard-

copy files and transactional data in electronic format). Class Counsel also responded to both sets of interrogatories, including Defendants' contention interrogatories which required lengthy, detailed responses laying out the theories of the DPCPs' case, as well as the documents and testimony supporting those theories.

22. Additionally, Defendants deposed seven DPCP witnesses, and those depositions were defended by Class Counsel.

23. The following chart reflects the depositions that Defendants took of the named plaintiffs:

#	Name	Company	Date(s)	Location(s)
1	Brice, William	Smith Drug	2/8/2011	Greenville, SC
2	DeBruler, Jacquelyn	Meijer	1/27/2011	Grand Rapids, MI
3	Doud, Lawrence	RDC	12/16/2010	Rochester, NY
4	Elmore, Keith	King Drug	2/10/2011	Greenville, SC
5	Kerr, Mike	SAJ	3/17/2011	Little Rock, AR
6	LaFrance, Jason	SAJ	3/16/2011	Little Rock, AR
7	Mitiguy, Chris	Burlington	1/16/ 2011	Burlington, VT

iii. Document Discovery from Non-Parties

24. Class Counsel served more than a dozen subpoenas on third parties for production of documents on a wide variety of topics. Class Counsel met-and-conferred with counsel for these non-parties as to whether or not each non-party had responsive documents. Materials produced by third parties were stored on the same database as party discovery and reviewed by Class Counsel.

25. Third party discovery was helpful to Class Counsel in supporting DPCPs' claims. For example, Class Counsel obtained documents from and deposed ChemAgis/Perrigo, Barr's supplier of the active ingredient modafinil and 50% partner for the sale of its generic Provigil product. These documents and the associated deposition testimony were illuminating in terms of

Barr's preparations and readiness to launch generic Provigil "at risk" in 2006 and the intentions of the other Generic Defendants to do the same.

iv. Depositions of Fact Witnesses

26. In addition to Class Counsel's document-discovery efforts, Class Counsel took a leading role in identifying party and third-party fact witnesses and then deposing those witnesses. After serving notices of deposition, Class Counsel engaged in meet-and-confers with Defendants' counsel and/or representatives for third party witnesses about the timing and other logistics of those depositions, often coordinating with counsel for other plaintiff groups. In total, forty-one depositions were taken of Defendants' current and former employees, Defendants' corporate representatives, and/or third-party fact witnesses.

27. Class Counsel took a leading or substantial role in thirty-eight of these forty-one depositions. Witnesses were examined on a wide variety of topics including but not limited to: (1) Cephalon's omissions and misrepresentations during the prosecution of the RE '516 Patent; (2) the defenses raised in the Provigil patent litigation; (3) Defendants' respective projections and analyses concerning the timing and impact of generic competition for Provigil; (4) the negotiation, execution and performance of the settlement agreements at issue; (5) the structure of the pharmaceutical marketplace and the pricing of brand and generic drugs; (6) Cephalon's market power over modafinil; (7) Defendants' alleged justifications for the payments, *i.e.*, the agreements providing for Cephalon's purchase of modafinil API, modafinil IP and/or product development collaborations; (8) the ability of the Generic Defendants to receive final approval from FDA to their ANDAs for generic modafinil prior to April 2012 (the agreed-upon launch date); and (9) the willingness of the Generic Defendants to enter the market with generic modafinil earlier absent the agreements at issue.

28. The following chart reflects the fact witness depositions DPCPs took a leading or substantive role in, whether defendant, defendant corporate representative or third-party:

#	Name	Company	Date(s)	Location(s)
1	Barndt, Natalie	Cephalon, VP Bus. Dev.	1/10/2011	Philadelphia, PA
2	Bisaro, Paul	Barr, COO and President	2/8/2011	Morristown, NJ
3	Bogda, Mike	Barr, VP Manufacturing	12/14/2010	Blue Bell, PA
4	Bradway, Randy	Cephalon, VP Comm. Ops.	2/8/2010	Philadelphia, PA
5	Brookes, Lynn	Cephalon, VP Bus. Dev.	12/20/2010	Philadelphia, PA
6	Buchi, Kevin	Cephalon, COO, CFO, CEO	1/28/2011	Philadelphia, PA
7	Burgoon, Richard	Cephalon, Dir. of Patent Dept.	10/27/2010	San Diego, CA
8	Catlett, Tim	Barr, Sr. VP. Sales/Market.	2/2/2011	Park Ridge, NJ
9	Chapman, Robert	Cephalon, Dir. API Tech.	11/30/2010	Philadelphia, PA
10	Coonan, James	Cephalon, Dir. Supply Manag.	12/7/2010	Philadelphia, PA
11	Deiriggi, John	Mylan, COO	2/8/2011	Morgantown, WV
12	Downey, Bruce	Barr, CEO and Chairman	2/10/2011	Washington, DC
13	Egosi, Richard	Teva, General Counsel	1/31/2012	North Wales, PA
14	Eichmann, Edward	Barr, Dir. Regulatory Affairs	2/9/2011	Park Ridge, NJ
15	Erickson, Phillip	Teva, Regulatory Affairs	1/26/2011	Philadelphia, PA
16	Fiorelli, Ken	Cephalon, VP Global Manuf.	1/12/2011	Washington, DC
17	Gery, Laurie	Teva, New Product Manag.	2/10/2011	Allentown, PA
18	Grebow, Peter	Cephalon, VP Tech. Opps.	1/14/2011	Philadelphia, PA
19	Green, Patricia	Siegfried, API Manuf.	1/26/2011	Philadelphia, PA
20	Gulino, Richard	Cephalon, General Counsel	2/2/2011	Philadelphia, PA
21	Harper, Jason	Mylan, Dir. Portfolio Manag.	2/8/2011	Morgantown, WV
22	Heacock, Craig	Cephalon, VP Pharm. Dev.	1/27/2011	Philadelphia, PA
23	Hrubiec, Robert	Cephalon, Chief IP Counsel	1/5/2011	Philadelphia, PA
24	Killion, Fred	Barr, General Counsel	1/20/2011	Amsterdam, Neth.
25	Kochan, Sharon	Perrigo	2/3/2011	New York, NY
26	Mallamo, John	Cephalon, VP Chem. R&D	2/4/2011	Philadelphia, PA
27	MacLaughlan, Todd	Cephalon, Gen. Mgr. CIMA	11/5/2010	Bridgewater, NJ
28	Myers, Carolyn	Mylan, VP Bus. Dev.	2/11/2011	Basking Ridge, NJ
29	Osborn, John	Cephalon, General Counsel	12/15/2010	Washington, DC
30	Reasons, Brian	Cephalon, VP Finance	2/16/2011	Philadelphia, PA
31	Roman, Brian	Mylan, Asst. General Counsel	2/17/2011	Pittsburgh, PA
32	Schaefer, Robert	Chemagis, U.S. Pres.	9/23/2010	Saddle Brook, NJ
33	Stark, David	Teva, Sr. Dir. Legal Affairs	2/2/2011	Philadelphia, PA
34	Svokos, George	Teva, VP Ops. Plantex	1/28/2011	New York, NY
35	Talton, Wayne	Mylan, VP Regulatory Affairs	2/4/2011	New York, NY
36	Tomsky, Scott	Ranbaxy, Sr. Dir. Regulatory Affairs	3/4/2011	Princeton, NJ
37	Williams, Stuart	Mylan, Chief Legal Officer	1/1/2011	New York, NY
38	Zakreski, Randy	Cephalon, Assoc. General Counsel	1/14/2011	Philadelphia, PA

v. Expert Discovery

29. Class Counsel retained ten expert witnesses who provided reports and testimony that supported DPCPs' claims and rebutted Defendants' defenses. Class Counsel devoted significant time and resources in working with all of the retained experts in the preparation of opening and rebuttal reports, as well as preparing experts for depositions taken by Defendants' counsel.[7] Additionally, in December 2013, three of DPCPs' experts submitted substitute or supplemental reports to take into account the retirement of one of DPCPs' experts, supplemental fact discovery taken in 2013 and the issuance of the Supreme Court's opinion in *Federal Trade Commission v. Actavis, Inc.*, 133 S. Ct. 2223 (2013), and two further depositions were taken by defense counsel concerning these substitute/supplemental reports. DPCPs' experts included:

a. Harry G. Brittain, the Institute Director at the Center for Pharmaceutical Physics, a private consulting company. Dr. Brittain opined on issues pertaining to the validity, enforceability and/or infringement of the RE '516 Patent and certain patents and/or patent applications that formed the Teva IP.

b. John Doll, former PTO Acting Commissioner for Patents. Mr. Doll opined on issues pertaining to the validity and enforceability of the RE '516 Patent.

c. Jacques Warcoin, a now-retired European patent attorney with offices in France. Mr. Warcoin opined on issues pertaining to the Teva IP that Cephalon had licensed from Teva as part of the Cephalon/Teva settlement, including the likelihood that certain patent applications would ultimately issue in Europe and whether those patents, if issued, would survive challenges

[7] DPCPs jointly retained certain of these experts in cooperation with Apotex, the FTC, Opt-Out Plaintiffs and/or End Payor Plaintiffs. These experts were Harry G. Brittain, John Doll, Jacques Warcoin (replaced by Francis Ahner), Thomas Hoxie, W. Shannon McCool, Dr. Emmanuel Mignot and John Thomas.

at the European Patent Office, in national patent offices and/or in litigation. During the pendency of this litigation, Mr. Warcoin retired from practice, and was replaced by his partner, Mr. Francis Ahner.

d. Francis Ahner, a European patent attorney with offices in France. As noted above, subsequent to the retirement of Mr. Warcoin, Mr. Ahner replaced Mr. Warcoin and opined on the same issues.

e. Dr. Jeffrey J. Leitzinger, President of EconOne, a private economic consulting company. Dr. Leitzinger provided economic analysis, including analysis of Cephalon's market power over modafinil, classwide antitrust impact in the form of overcharges and quantification of class members' overcharges on Provigil purchases resulting from Defendants' unlawful conduct under a variety of scenarios. He also opined on the anticompetitive effects of reverse payment agreements.

f. Professor Einer Elhauge, Petrie Professor of Law at Harvard University and President of Legal Economics, LLC, a private consulting company. Professor Elhauge opined that patent litigation settlements that combine reverse payments that exceed the patent holder's anticipated litigation costs with an entry date prior to patent expiration will (without procompetitive justifications) always produce anticompetitive results. He opined further that where there are multiple fist-filers, contingent entry clauses facilitate anticompetitive results because they solve a collective action problem.

g. Thomas Hoxie, a patent attorney. Mr. Hoxie opined on issues pertaining to the value of the Teva IP that Cephalon had licensed from Teva as part of the Cephalon/Teva settlement, including whether the value of the Teva IP license could justify Cephalon's payment of $125 million to Teva under the Cephalon/Teva settlement.

h. W. Shannon McCool, President of The Fallon Group, LLC, a private consulting company. Mr. McCool opined on issues pertaining to the modafinil API supply agreements that Cephalon entered into with Teva, Barr, and Ranbaxy as part of Cephalon's settlements with those parties.

i. Dr. Emmanuel Mignot, a Professor of Psychiatry and Behavior Sciences and the Craig Reynolds Professor of Sleep Medicine at Stanford University. Dr. Mignot opined on the differences between modafinil and other drugs used to treat patients with sleep-related conditions.

j. John R. Thomas, former instructor at the United States Patent and Trademark Office and Professor of Law at Georgetown University. Mr. Thomas opined on pharmaceutical patent law and the Hatch-Waxman regulatory scheme.

30. Class Counsel also had to respond to nineteen experts retained by Defendants on a variety of subjects. Specifically, Class Counsel, with the assistance of DPCPs' experts, reviewed and analyzed the reports submitted by Defendants' experts, and submitted rebuttal reports in response to certain of the opinions offered by Defendants' experts. Class Counsel also prepared for and took a leading or substantial role in the depositions of Defendants' expert witnesses. Defendants' experts were:

a. Dr. Markus Antonietti, Director of the Max Planck Institute in Potsdam, Germany. Dr. Antonietti opined on issues pertaining to the alleged infringement of the RE '516 Patent.

b. Dr. Lynn Van Campen, consultant at the Zeeh Pharmaceutical Experiment Station at the University of Wisconsin-Madison School of Pharmacy. Dr. Van Campen submitted a report and provided modafinil API to Dr. David Bugay for purposes of the latter's expert report.

c. Dr. David Bugay, Chief Scientific Officer at Triclinic Labs, Inc. Dr. Bugay conducted particle size testing and opined on issues pertaining to the alleged infringement of the RE '516 Patent.

d. Dr. Robert O. Williams, Professor of Pharmaceutics at the College of Pharmacy, University of Texas at Austin. Dr. Williams opined on issues pertaining to the alleged infringement of the RE '516 Patent under the doctrine of equivalents.

e. Dr. Eugene Cooper, a pharmaceutics consultant and teacher. Dr. Cooper opined on issues pertaining to the claimed validity of the RE '516 Patent.

f. Bruce Stoner, a patent attorney. Mr. Stoner opined on patent issues including patent examination practice before the PTO and whether the RE '516 Patent was procured by inequitable conduct.

g. Dr. Joseph Baranski, Chief Scientist at Canada's Department of National Defence. Dr. Baranksi opined on issues pertaining to the claimed validity of the RE '516 Patent.

h. Paul Gardner, Academic Director at the Patent Resources Group. Mr. Gardner opined on the issue of whether a reasonable litigant could have expected the RE '516 Patent to survive Mylan's and Ranbaxy's summary judgment motions in the Provigil patent litigation and on the issue of whether it would have been prudent for a reasonable litigant in the positions of Mylan and Cephalon to settle the case based on the status of the litigation at the time of settlement.

i. Dr. Gerald Dahling, a patent attorney. Dr. Dahling opined on issues pertaining to (1) the alleged infringement, claimed validity and enforceability of the RE '516 Patent; and (2) the alleged value of the Teva IP license to Cephalon.

j. Dr. Allan S. Myerson, Professor of Chemical Engineering at the Massachusetts Institute of Technology. Dr. Myerson opined on issues pertaining to the validity and

infringement of the Teva IP that Cephalon had licensed from Teva as part of the Cephalon/Teva settlement.

k. Mr. Ian Karet, a European patent attorney with offices in England. Mr. Karet opined on issues pertaining to the Teva IP that Cephalon had licensed from Teva as part of the Cephalon/Teva settlement.

l. Dr. Bruce Stangle, Chairman and co-founder of Analysis Group, Inc., a private economic consulting company. Dr. Stangle opined in response to Dr. Leitzinger's economic analyses concerning DPCPs' damage claims.

m. Dr. Janusz Ordover, Professor of Economics at New York University and Special Consultant at Compass Lexecon, a private economic consulting company. Dr. Ordover opined on the issue of whether certain requirements for class certification were met and related issues.

n. Dr. Gregory K. Bell, Vice President of Charles River Associates, a private economics and management consulting firm. Dr. Bell opined on issues relating to relevant market, monopoly power, generic entry, damages, and certain aspects of the agreements at issue.

o. Dr. Edward Snyder, George Schultz Professor of Economics at the University of Chicago Booth School of Business. Dr. Snyder performed an evaluation of the settlement agreements and opined on various legal standards for evaluation of reverse payment settlement agreements.

p. Jerry Hausman, MacDonald Professor of Economics at the Massachusetts Institute of Technology. Mr. Hausman opined on various topics including whether reverse payment settlements are anticompetitive and the economics of the Hatch-Waxman regulatory scheme. Mr. Hausman also performed an evaluation of the settlement agreements at issue.

q. Louis P. Berneman, President of Texelerate, LLC, a private technology transfer firm. Mr. Berneman opined on licensing arrangements contained in the settlement agreements at issue.

r. S. Peter Ludwig, a patent attorney. Mr. Ludwig opined on the process for patenting inventions, Hatch-Waxman litigation generally and the Provigil patent litigation specifically, and how he would have counseled Ranbaxy regarding the evaluation and settlement of the Provigil patent litigation.

s. Mark Edwards, managing director of Bioscience Advisors Inc., a private consulting firm. Mr. Edwards opined on whether the agreements between Cephalon and Mylan concerning fentanyl and naltrexone were commercially reasonable.

vi. Discovery Disputes

31. Considering the complexity of the instant litigation and the large number of parties involved, Class Counsel successfully resolved most discovery issues through meet and confers with defense counsel. Nonetheless, there were numerous instances in which Class Counsel's efforts in obtaining discovery led to disputes with defense counsel, primarily concerning assertions of attorney-client privilege, that could not be resolved without motion practice.

a. DPCPs' Election Motion

32. After the Court denied Defendants' motions to dismiss and entered a discovery schedule, DPCPs asked Defendants multiple times via formal correspondence whether Defendants intended to assert a reliance-on-counsel defense with respect to any issue in the case or to present testimony or argument during summary judgment or at trial regarding privileged communications or any of the Defendants' subjective views concerning the merits of the underlying Provigil patent litigation. DPCPs' inquiry was the result of Defendants' assertions of

privilege to block discovery into Defendants' assessments of the merits of the Provigil patent litigation and their reasons for settling, and the Generic Defendants' assertions that concerns about liability for infringement would have detained them from launch at risk if settlement had not been achieved. DPCPs were concerned that once discovery had closed and the litigation was in the dispositive briefing and trial stage, Defendants would argue that the settlements were legitimate compromises that reflected the parties' subjective internal assessments of the merits of the patent litigation, in effect using as a "sword" against DPCPs evidence on topics that Defendants had "shielded" from discovery. Defendants all responded to DPCPs' inquiry by stating that they had no current intention of asserting a reliance-on-counsel defense, but all reserved their respective right to change their position at a later date. Accordingly, on October 7, 2010, DPCPs filed a motion requesting, *inter alia*, that Defendants make an election as to whether they intended to raise a reliance-on-counsel defense or assert any position that placed such advice at issue. *See* Dkt No. 334.

33. On November 4, 2010, Defendants filed opposition briefs. Defendants argued that they had neither asserted a reliance-on-counsel defense (or otherwise put the advice of counsel at issue) nor revealed privileged communications in defending against DPCPs' claims. Defendants argued that an advice of counsel defense is not implicated, nor put "at issue," just because an attorney's advice may affect the relevant subject of a party's "state of mind." *See* Dkt Nos. 359, 362.

34. On November 22, 2010, this Court denied DPCPs' motion as premature on the basis that no Defendant had yet formally asserted a reliance-on-counsel defense. *See* Dkt No. 374. However, the Court also "respectfully advise[d]" defense counsel that an "eleventh-hour change of strategies … at summary judgment and/or trial will not be permitted." *Id.* at p. 3. Thus,

the issue had been flagged for the Court and the Defendants put on notice that gamesmanship on this issue would not be allowed.

b. DPCPs' Motion to Compel Barr to Produce Documents

35. In response to DPCPs' discovery requests, Barr asserted that communications with its supplier of modafinil API and profit-sharing partner with respect to generic modafinil (Chemagis/Perrigo) concerning Barr's settlement discussions with Cephalon were protected from disclosure because Barr and Chemagis/Perrigo were in a joint-defense relationship. Relatedly, Barr produced documents that DPCPs believed demonstrated that Barr had disclosed to Chemagis/Perrigo certain of its attorneys' opinions concerning the patent litigation. DPCPs believed that Barr had not satisfied the legal prerequisites to establish a joint defense relationship, and that the documents for which Barr claimed protection were relevant to Barr's motives for entering into a settlement with Cephalon. DPCPs further believed that by disclosing its attorneys' opinions to third-party Chemagis/Perrigo, Barr had waived its attorney-client privilege claims for the communications underlying the disclosed opinions and its work-product privilege claims for such communications. Because the dispute could not be resolved by meeting and conferring, on October 29, 2010, DPCPs filed a motion to compel. *See* Dkt No. 350.

36. On November 22, 2010, Barr opposed DPCPs' motion, arguing that a joint defense relationship existed, and that in any event, Barr had not disclosed any privileged communications, but rather, that the statements at issue concerning the patent litigation were made by business people and not made for the purpose of conveying or obtaining legal advice. *See* Dkt No. 378. On December 6, 2010, DPCPs filed their reply. *See* Dkt Nos. 384, 391. Oral argument was held on December 9, 2010. *See* Dkt No. 395.

37. On March 18, 2011, the Court ordered Barr to produce certain documents to the Court for *in camera* review. *See* Dkt No. 417. On July 5, 2011, the Court concluded that no joint

legal strategy existed between Barr and Chemagis/Perrigo, and ordered the production to DPCPs of eighteen documents for which Barr had claimed joint defense protection, On the issue of attorney-client privilege waiver, the Court ruled in Barr's favor. Nevertheless, the DPCPs had succeeded in: (a) establishing that communications between Barr and ChemAgis/Perrigo were not subject to the attorney-client privilege or the work product doctrine, and thus ensured that Barr's disclosed opinions on the weakness of the RE '516 patent would remain in the case; and (b) obtained documents that Barr was otherwise shielding behind the cloak of privilege.

c. DPCPs' Crime-Fraud Motion

38. After this Court's November 7, 2011 opinion holding Cephalon's RE '516 Patent unenforceable for inequitable conduct, *Apotex, Inc. v. Cephalon, Inc.*, 2011 U.S. Dist. LEXIS 125859 (E.D. Pa. Oct. 31, 2011) (as amended Nov. 7, 2011), the Federal Circuit emphatically affirmed this Court's rulings. *See Apotex, Inc. v. Cephalon, Inc.*, 2013 U.S. App. LEXIS 7018 (Fed. Cir. Apr. 8, 2013).

39. In *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F. 3d 1276, 1289 (Fed. Cir. 2011), the *en banc* Federal Circuit noted that "a finding of inequitable conduct may also prove the crime or fraud exception to the attorney-client privilege." Consistent with *Therasense*, and this Court's and the Federal Circuit's conclusion that Cephalon committed a fraud and that Cephalon's counsel and executives were key perpetrators of that fraud, DPCPs moved to compel documents that Cephalon had withheld on privilege grounds pursuant to the crime-fraud exception to the attorney-client privilege and work product doctrine. *See* Dkt No. 509. DPCPs sought to discover all communications between Cephalon and its counsel, and its counsel's opinions, relating to the prosecution, issuance and reissuance of the RE '516 Patent, the listing of the RE '516 Patent in the Orange Book, the filing and maintenance of the Provigil patent infringement actions and the resulting settlements of those actions. *Id.*

40. On September 9, 2013, Cephalon filed its opposition to DPCPs' motion, arguing that DPCPs could not demonstrate that any of the documents or communications they sought to discover were made in furtherance of a fraud, and that in any event, mere allegations of fraud in DPCPs' complaint were not a sufficient basis to claim that the crime-fraud exception was even applicable. *See* Dkt No. 512.

41. The Court held oral argument on the motion on November 18, 2013. *See* Dkt No. 535. On January 14, 2014, the Court denied DPCPs' motion, concluding that there was not adequate evidence that the communications sought to be discovered were made in furtherance of the alleged fraud. *See* Dkt No. 580.

d. DPCPs' Motion to Strike or Compel Due to At-Issue Waiver

42. In opposing DPCPs' motion for partial summary judgment on the patent issues (discussed below) Cephalon argued that DPCPs could not show that the individuals responsible for enforcing the RE '516 knew it had been procured by fraud years earlier, and cited certain statements of the individuals responsible for enforcing the patent concerning their subjective beliefs about its strength. *See* Dkt No. 560. Such statements implicated the very issue that DPCPs had foreseen in bringing their prior discovery motions; that Cephalon had blocked DPCPs from exploring Cephalon's subjective beliefs concerning, *inter alia*, the strength of the RE '516 Patent during discovery, and then sought to affirmatively rely on those subjective beliefs during summary judgment. Accordingly, on December 20, 2013, DPCPs filed a motion requesting that the statements in Cephalon's summary judgment opposition be stricken from the record, and that Cephalon be precluded from offering any further evidence concerning its subjective beliefs about the strength of the RE '516 Patent. Alternatively, DPCPs requested that the Court order that Cephalon disclose any documents that discussed such subjective beliefs and permit DPCPs to depose the person(s) who made the statements contained in Cephalon's brief.

43. On January 13, 2014, Cephalon filed its opposition briefs, again arguing that privileged communications are not put "at issue" just because an attorney's advice may affect the relevant subject of a party's "state of mind." *See* Dkt No. 584.

44. On January 27, 2014, DPCPs filed their reply brief. *See* Dkt No. 587.

45. On July 29, 2014, the Court denied DPCPs' motion as moot for the reasons that had been stated in the Court's opinion of the same day in the FTC case concerning collateral estoppel. *See* Dkt No. 715. In that opinion, the Court stated that because consideration of the statements that DPCPs sought to strike had not been necessary to the Court's decision on DPCPs' preclusion motion (discussed *infra* at ¶63), nor necessary for purposes of resolving the FTC's motion, DPCPs' motion was moot. *See* Case No. 2:08-cv-02141 (Dkt No. 322).[8]

46. Class Counsel's privilege motions were part of Class Counsel's continuous effort to ensure that Defendants did not use evidence that DPCPs were blocked from obtaining during discovery as a sword during the remainder of the litigation, particularly during the dispositive briefing stage. Class Counsel's efforts necessitated closely scrutinizing Defendants' privilege logs, performing substantial legal research on all aspects of the attorney-client privilege and work product doctrine, and drafting each of DPCPs' motions and analyzing, researching and responding to Defendants' privilege counter-arguments. Even as to the motions which DPCPs did not prevail upon, Class Counsel was able to highlight for the Court improper attempts to use the attorney-client privilege as both a shield and a sword to the detriment of the DPCPs. This

[8] DPCPs subsequently informed the Court via letter that DPCPs respectfully disagreed that the motion was moot, *i.e.*, that even if the Court believed the motion was moot in the context of DPCPs' motion for partial summary judgment on the patent issues, the motion was still relevant to other issues in the case, specifically, Defendants' attempt to introduce evidence about their subjective beliefs about the patent as a defense to the *Actavis* portion of the case. *See* DPCP Letter to Court dated Aug 28, 2014 at n. 10.

continued to be an issue up until the case was settled with the Cephalon Defendants and continues to this day as an issue as the case progresses towards trial against Ranbaxy and Mylan.

D. Collateral Estoppel and Summary Judgment Briefing

47. As the parties began to contemplate the filing of dispositive motions, intervening events occurred which affected progress towards trial in the various coordinated antitrust cases. First, the Court issued key rulings in the patent portion of the *Apotex* case. Second, the Third Circuit Court of Appeals issued a decision concerning the appropriate legal standard for antitrust scrutiny of reverse payment settlements (*In re K-Dur Antitrust Litigation*), which contributed to the United States Supreme Court's decision to review reverse payment settlements, resulting in the decision in *Actavis*.

i. DPCPs' Collateral Estoppel Motion

48. As noted above, the *Apotex* litigation was coordinated with DPCPs' antitrust litigation in 2006. *See supra* at ¶ 3. In January 2010, this Court granted Apotex's motion seeking to bifurcate its patent claims from its antitrust claims, which permitted determinations on the RE '516 Patent's validity, enforceability and infringement (as to Apotex's ANDA product) to precede resolution of the various plaintiffs' antitrust claims. *See* Case No. 02-cv-02768 (Dkt No. 196). On March 29, 2011, the Court commenced an eight day bench trial on the issue of the validity and enforceability of the RE '516 Patent.

49. On October 31, 2011, the Court issued an opinion concluding that Cephalon's RE '516 Patent was invalid and was unenforceable due to Cephalon's inequitable conduct. *See Apotex, Inc. v. Cephalon, Inc.*, 2011 U.S. Dist. LEXIS 125859 (E.D. Pa. Oct. 31, 2011) (as amended Nov. 7, 2011). After setting forth 116 findings of fact, the Court concluded that the RE '516 Patent was invalid pursuant to the "on-sale bar," for derivation, for obviousness, and for lack of written description. *Id* at *39-74. The Court further concluded that Cephalon had

misrepresented or omitted certain key information in prosecuting the patent, and that the misrepresentations or omissions were made with specific intent to deceive. *Id.* at *75-85. Accordingly, the Court held the RE '516 Patent unenforceable for inequitable conduct.

50. On December 6, 2011, the Court held a status conference to discuss further proceedings. *See* Dkt No. 455. At the conference, discussion was held concerning scheduling of dispositive and other motion briefing. This included discussion relating to the Third Circuit's scheduling of oral argument the following week on December 12, 2011, on an appeal from a district court's grant of summary judgment for defendants based on the application of the "scope of the patent" test. *See In re K-Dur Antitrust Litig.*, 2010 U.S. Dist. LEXIS 28918 (D.N.J. March 24, 2010).

51. On December 9, 2011, the Court issued an order permitting DPCPs to file any motions requesting that its opinion in the Apotex litigation have preclusive effect against the Defendants in DPCPs' antitrust case. *See* Dkt No. 456. Accordingly, on January 20, 2012, DPCPs moved for an order precluding Defendants from relitigating the validity and unenforceability of the RE '516 Patent pursuant to the doctrines of collateral and judicial estoppel. *See* Dkt No. 459. In their motion, DPCPs' argued, *inter alia*, that all of the elements of collateral estoppel had been met, and that none of the Defendants could claim that its application would violate its Seventh Amendment rights to a jury trial in view of the fact that none of the Defendants had objected to bifurcation of Apotex's patent claims from the antitrust claims, even though all Defendants knew that the former were relevant to the latter, and that the Generic Defendants had declined to even participate in the bench trial on the patent claims. *Id.*

52. Defendants filed oppositions to DPCPs' motion on February 17, 2012. In its opposition, Cephalon argued that the issues in the patent case were not identical since the Court's post-settlement conclusions about the patent were allegedly irrelevant under the "scope of the

patent" test, and that the Court's inequitable conduct findings did not equate to a finding of *Walker Process* fraud. *See* Dkt No. 462. Cephalon further argued that even if the elements of collateral estoppel were met, preclusion would violate Cephalon's Seventh Amendment rights to a jury trial in the antitrust case, especially because at the time of the bench trial, there had been legal distinctions between inequitable conduct and *Walker Process* claims. The Generic Defendants made similar arguments, including that they had been expressly prohibited from participating in the patent case. *See* Dkt No. 461. Finally, all Defendants requested that the antitrust claims be stayed pending appeal of the Court's patent decision to the Federal Circuit.

53. DPCPs filed a reply brief on March 5, 2012 and Defendants filed surreply briefs on March 13 and March 16, 2012. *See* Dkt Nos. 463-468.

54. On April 9, 2012, the Court held a status conference. During the conference, after discussion, the Court informed the parties of its intention not to rule on DPCPs' collateral estoppel motion or issue a briefing schedule on dispositive motions until the Third Circuit had issued a ruling in *K-Dur*. *See* Dkt No. 469. Consequently, on April 12, 2012, the Court denied DPCPs' motion without prejudice. *See* Dkt No. 471.

55. On July 16, 2012, the Third Circuit issued its opinion in *K-Dur*, rejecting the "scope of the patent" test and finding that reverse payment settlements should be evaluated pursuant to a "quick look rule of reason" antitrust analysis. *See In re K-Dur Antitrust Litig.*, 686 F. 3d 197 (3d Cir. 2012), *vacated and remanded*, 133 S. Ct. 2849 (2013). Shortly thereafter, on August 7, 2012, the Court held a status conference. During the conference, the Court discussed further proceedings in light of an anticipated petition for *certiorari* to the United States Supreme Court in *K-Dur*. DPCPs requested that the Court decline to stay proceedings pending Supreme Court review in *K-Dur*, reinstate DPCPs' collateral estoppel motion, and issue a schedule for dispositive and class certification motions. Conversely, defense counsel requested that the Court

keep the case in suspense until the Supreme Court determined whether it would grant *certiorari* in either *K-Dur* and/or another reverse payment case that had just been ruled upon by the Eleventh Circuit in reverse payment litigation relating to the prescription pharmaceutical product Androgel, *Federal Trade Commission v. Watson Pharms., Inc.,* 677 F. 3d 1298 (11th Cir. 2012).

56. On August 29, 2012, the Court issued an order concerning the progress of the litigation. Although the Court noted that it was "sympathetic" to DPCPs' desire to move the case forward given that DPCPs' claims had been pending since 2006, it determined that proceeding towards trial in view of potential Supreme Court review would be inadvisable, and placed the litigation in suspense. *See* Dkt No. 479.

ii. DPCPs' Summary Judgment Motions

57. On June 17, 2013, the Supreme Court, which had proceeded to grant *certiorari* in the *Androgel* case, issued its *Actavis* opinion. The litigation was then removed from civil suspense, and the Court issued a schedule which provided for the filing of summary judgment and *Daubert* motions. *See* Dkt Nos. 502, 511.[9]

58. On September 20, 2013, DPCPs filed two motions for partial summary judgment.

59. DPCPs first motion was for partial summary judgment on the patent issues, in which DPCPs argued, in a detailed 45-page brief, that under both principles of collateral estoppel as well as under traditional Rule 56 standards, DPCPs were entitled to summary judgment that the RE '516 patent was invalid, unenforceable and procured by *Walker Process* fraud. *See* Dkt No. 518. More specifically, DPCPs argued, as they had in their previous motion for collateral estoppel, that under principles of issue preclusion, Cephalon was collaterally estopped from litigating the validity and unenforceability of the RE '516 Patent. DPCPs further argued that

[9] Subsequently, due to a government shutdown which resulted in another temporary move of the litigation into civil suspense, the deadline for the filing of summary judgment and *Daubert* motions was further extended. *See* Dkt Nos. 528-530.

even if collateral estoppel did not apply, the evidence on the invalidity, unenforceability and fraud issues was undisputed, entitling DPCPs to partial summary judgment as to same. In particular, DPCPs argued that no genuine issue of material fact existed as to: (1) the invalidity of the RE '516 Patent claims due to the on-sale bar and for derivation; (2) the but-for materiality of Cephalon's omissions and misrepresentations at the PTO; and (3) Cephalon's intent to deceive the PTO in making those omissions and misrepresentations. *Id.*

60. On November 18, 2013, Defendants submitted their oppositions to DPCPs' motion. *See* Dkt Nos. 538-540. All Defendants argued, as they had previously, that collateral estoppel did not apply and that the application of collateral estoppel would violate their Seventh Amendment rights. Cephalon argued that DPCPs had not pled *Walker Process* fraud. Cephalon also argued that genuine issues of material fact existed, but the Generic Defendants, including Mylan and Ranbaxy, did not.

61. On December 20, 2013, DPCPs filed reply briefing to all Defendants' oppositions. *See* Dkt No. 558. Responding to Cephalon's arguments, DPCPs explained that they had pleaded and pursued a *Walker Process* theory throughout the antitrust litigation and that Cephalon had actively litigated that claim. DPCPs also argued that Cephalon's argument that "inequitable conduct remains a lesser offense than *Walker Process* fraud," and thus presented a different issue, was indefensible in view of the Federal Circuit's *en banc* decision in *Therasense*. Finally, DPCPs explained why Cephalon and the Generic Defendants failed to raise a material fact issue precluding summary judgment. As to materiality, Cephalon essentially conceded that no such issue existed, and as to deceptive intent, since the Court had previously held that "the only reasonable inference to be drawn is that Cephalon made a deliberate choice to deceive the PTO," no reasonable juror could reach a different conclusion. DPCPs also argued that Cephalon's knowledge of the fraud was imputed as a matter of law and was indisputable

regardless based on the factual record. Responding to the Generic Defendants' arguments, DPCPs argued that their failure to identify any alleged issues of fact, or even respond to DPCPs' undisputed statement of facts, waived their right to submit any argument in response to DPCPs' motion. *Id.*

62. On January 23, 2014, the Court held oral argument on DPCPs' motion. See Dkt No. 590.

63. On March 13, 2014, the Court granted DPCPs' motion in part, focusing on the collateral estoppel portion of DPCPs' motion. *See* Dkt No. 600. As to Cephalon, the Court concluded that Cephalon's Seventh Amendment right to jury trial precluded application of collateral estoppel as to Cephalon's intent, and therefore precluded collateral estoppel as to the ultimate determination of inequitable conduct and *Walker Process* fraud. However, the Court held that, with respect to Cephalon, collateral estoppel did apply to the Court's finding of invalidity as well as the materiality element of *Walker Process* fraud and inequitable conduct. *Id.* As to the Generic Defendants, the Court concluded that they were not bound by the Court's findings under principles of collateral estoppel. *Id.*[10]

64. DPCPs' second motion was for partial summary judgment on their Section 1 claim that Cephalon orchestrated an intergeneric conspiracy between and among the Generic Defendants, in which DPCPs argued that, separate and independent of DPCPs' *Actavis* claims, it was unlawful for the four generic defendants to agree among themselves not to compete with

[10] Aspects of DPCPs' motion for summary judgment on the patent issues remain pending. As detailed in, *inter alia*, DPCPs' August 5, 2015 submission to the Court concerning pretrial scheduling, the Court's March 13, 2014 decision did not address whether Cephalon or the Generic Defendants had raised a genuine issue of material fact under Rule 56 sufficient to survive summary judgment as to whether: (1) the RE'516 patent is invalid; and (2) Cephalon's omissions and misrepresentations are "but for" material for purposes of inequitable conduct and *Walker Process* fraud.

each other until April 2012, and unlawful for Cephalon to broker such an agreement. *See* Dkt No. 519. DPCPs argued that because each of the four settlement agreements contained an identical "contingent launch" provision providing that if any generic manufacturer entered the modafinil market, then each of the Generic Defendants could enter the market, ensuring that all of the Generic Defendants could safely enter into the conspiracy without the risk that any one party could "cheat" by entering the market earlier, the agreements considered together are a *per se* unlawful market allocation and price-fixing conspiracy. *Id.*

65. On November 18, 2013, Defendants submitted their oppositions to DPCPs' motion. *See* Dkt Nos. 538, 540. Defendants argued that DPCPs had presented no direct evidence of conspiracy, and that DPCPs had failed to satisfy controlling law providing that even in instances where defendants are engaging in consciously parallel behavior there must be a showing that absent an overall agreement the behavior would be contrary to each's individual economic interest. The contingent launch provisions, Defendants argued, were requested by each Generic Defendant in order to preserve their own independent self-interests. *Id.*

66. On December 20, 2013, DPCPs filed reply briefing. *See* Dkt No. 559.

67. On June 23, 2014, the Court denied DPCPs' motion (and granted Defendants' own cross motions as to DPCPs' claim of intergeneric conspiracy, *see infra* at ¶ 70). *See* Dkt No. 705. The Court first concluded that DPCPs had not presented direct evidence of an agreement among the Generic Defendants. The Court then concluded that DPCPs could not demonstrate that the Generic Defendants' parallel conduct was contrary to each's economic self-interest, concluding instead that the evidence demonstrated that the contingent launch provisions were of value to the Generic Defendants. *Id.*

68. On July 7, 2014, DPCPs moved for reconsideration of the Court's decision on DPCPs' conspiracy motion. *See* Dkt No. 707. In their motion, DPCPs argued that the Court

made two errors of law by: (1) evaluating the Generic Defendants' economic incentives under the agreements (staying off the market) rather than evaluating their unilateral economic incentives (going to market as soon as possible); and (2) misreading a key case involving identical evidence of an intergeneric conspiracy. *Id.*

69. On July 10, 2015, the Court denied DPCPs' motion for reconsideration, concluding that DPCPs' had not set forth "proper bases for reconsideration," and that "whether [the Court's] conclusion is right or wrong is an issue for appeal, not reconsideration." *See* Dkt No. 711. DPCPs have relied on the contingent launch provisions (which the Court found held "significant value for the Generic Defendants" (*see* Dkt No. 705 at 25)) in formulating their argument that each agreement (even if not separately deemed unlawful) was the proximate cause of the entirety of the damages, and that it was foreseeable that each generic, by entering into its agreement with Cephalon, would be jointly and severally liable for all damages suffered by DPCPs. The issue has been preserved for appeal, if necessary, as to Ranbaxy and Mylan.

iii. Defendants' Summary Judgment Motions

70. On September 20, 2013, Defendants filed their own motions for partial summary judgment on DPCPs' Section 1 claim that Cephalon orchestrated a horizontal conspiracy between and among the Generic Defendants. *See* Dkt Nos. 520-523. Defendants' arguments in support of their motions were the same as those presented in Defendants' oppositions to DPCPs' own motion for summary judgment on the issue, and DPCPs' arguments in opposition to Defendants' motions were the same as those presented in DPCPs' own motion for summary judgment on the issue. *See supra* at ¶ 64-65. As noted above, the Court granted Defendants' motions for summary judgment and denied DPCPs' motion for reconsideration. *Id.* at ¶¶ 67, 69.

71. On April 4, 2014, Defendants filed a total of three motions for summary judgment on DPCPs' *Actavis* claims (one on behalf of the Cephalon Defendants and one each on behalf of

Mylan and Ranbaxy, respectively). *See* Dkt Nos. 612, 621, 626. The Cephalon Defendants argued that under *Actavis*, DPCPs had a "threshold" burden of proving that Cephalon made a payment to each generic defendant that was both "large" and "unexplained," and that only then should a court inquire whether the settlement was anticompetitive under a rule of reason analysis. The Cephalon Defendants then argued that DPCPs had not met this "threshold" burden because: (1) each payment by Cephalon was for either fair value for services and/or saved litigation costs (both of which, the Cephalon Defendants argued, were permissible under *Actavis*); and (2) even if DPCPs could show that the payments were "unexplained," DPCPs could not show that the payments were "large" because the relevant inquiry was a comparison of any "unexplained" portions of the payments against Cephalon's expected profits in the absence of generic competition, and that DPCPs had neither performed that inquiry nor made such a showing. Mylan and Ranbaxy both adopted the Cephalon Defendants' arguments and separately argued why Cephalon's payments to each of them were not "unexplained" and instead made pursuant to legitimate business transactions and/or for avoided litigation costs. Ranbaxy also argued that even if DPCPs could establish a large, unexplained payment to Ranbaxy, Ranbaxy was still entitled to summary judgment because there was no evidence that the Cephalon/Ranbaxy settlement caused Ranbaxy to delay launching its generic Provigil product. *Id.*

72. On May 9, 2014, DPCPs submitted a consolidated 54-page brief opposing all of Defendants' *Actavis* motions, along with a 462-paragraph statement of facts (submitted with the other plaintiffs) accompanied by 305 exhibits. *See* Dkt Nos. 643. DPCPs argued that Defendants had misinterpreted *Actavis* by improperly attempting to recast potential defenses under *Actavis* (*i.e.*, that payments are not unexplained and large) into "threshold burdens" for DPCPs. DPCPs then argued that the payments were in excess of avoided litigation costs and were not fair value

for services, but instead pretexts as compensation for agreements to delay generic competition for Provigil, and that such evidence prevented a grant of summary judgment for Defendants. DPCPs also argued that a jury finding of *Walker Process* fraud against Cephalon coupled with evidence that the Generic Defendants knew of the fraud at the time they entered into the settlements, yet agreed to delay market entry, would render the settlements *per se* unlawful. Finally, DPCPs argued that Ranbaxy's causation argument presented disputed issues of fact and that a jury could reasonably conclude that Ranbaxy would have in fact launched its generic Provigil product in 2006 absent its settlement with Cephalon.

73. The 462-paragraph statement of fact contained a highly detailed narrative recitation of the evidence in the case demonstrating that Defendants' motions for summary judgment should be denied. Specifically, the statement of fact extensively outlined evidence concerning: (a) the Provigil patent litigation; (b) the applicable Hatch-Waxman regulatory background; (c) the history of the Generic Defendants' ANDAs; (d) Generic Defendants' plans to launch at risk; (d) each of the Defendants' settlement agreements and "side deals" and why the "side deals" were vehicles by which Cephalon paid the Generic Defendants for delay; and (e) the economic and market effects of delayed entry of generic Provigil.

74. On June 6, 2014, Defendants filed reply briefing. *See* Dkt Nos. 678, 679, 687, 689.

75. On November 6, 2014, the Court held oral argument on Defendants' *Actavis* motions. *See* Dkt No. 726.

76. On January 28, 2015, the Court denied all of Defendants' *Actavis* motions. *See* Dkt No. 736. First, the Court concluded that *Actavis* did not set forth any "threshold burden," but rather, that DPCPs had to (and did) present evidence of a large payment as part of their initial burden of proving anticompetitive effects under the rule of reason. In doing so, the Court

concluded that a payment is "large" if it exceeds the brand's saved litigation costs and a reasonable jury could find that it could induce the patent challenger to abandon its patent defenses. The Court then concluded that DPCPs had presented sufficient evidence to rebut Defendants' justifications that the payments were for avoided litigation costs or fair value for services, concluding that a reasonable jury could find that the payments were in exchange for delayed generic entry and that Defendants' justifications were pretextual. In doing so, the Court cited to DPCPs' evidence that all parties knew of Cephalon's fraud at the time the settlements were entered into, but otherwise declined to address the issue of whether settlement of patent litigation concerning a patent known to be procured by fraud constituted a *per se* antitrust violation, as DPCPs alleged. Finally, the Court concluded that disputed issues of material fact existed with respect to Ranbaxy's causation argument.

77. On February 11, 2015, Mylan filed a motion for reconsideration of the Court's opinion denying Defendants' motions, arguing that the Court made a mistake of fact by accepting DPCPs' allegedly misconstrued interpretation of a Mylan document containing a financial projection, and that once properly construed, the document demonstrated that the agreement that the projection related to was not a reverse payment agreement but a *bona fide* business transaction. *See* Dkt No. 744.

78. On February 19, 2015, DPCPs opposed Mylan's motion for reconsideration on numerous grounds, including but not limited to that the document in question was only one of numerous pieces of evidence sufficient to defeat summary judgment against Mylan, and that Mylan's motion did not challenge the Court's finding that Cephalon's fraud, and the generic defendants' knowledge of it, could support a jury finding that Defendants' claims of fair value were pretexts to disguise their unlawful conduct. *See* Dkt No. 748.

79. On March 3, 2015, Mylan sought leave to file a reply brief in support of its motion for reconsideration. *See* Dkt No. 752.

80. On March 4, 2015, the Court denied Mylan's motion for leave to file a reply brief. *See* Dkt No. 756. On March 27, 2015, the Court denied Mylan's motion for reconsideration, concluding that, *inter alia*, even if the document in question could theoretically only be interpreted as Mylan contended it should be, there was other evidence from which a jury could conclude that Cephalon and Mylan had entered into a reverse payment settlement. *See* Dkt No. 786.

81. Class Counsel devoted significant time and resources on collateral estoppel and summary judgment motion practice. With respect to its collateral estoppel motion, Class Counsel's efforts in preparing its motion and responding to Defendants' oppositions were extensive and time-consuming. All Defendants vehemently protested any application of collateral estoppel, and raised defenses which implicated technical patent issues, constitutional (Seventh Amendment) issues, and legally complex issues such as whether the Court's finding of inequitable conduct was equivalent to a finding of *Walker Process* fraud.

82. With respect to summary judgment briefing, Class Counsel's efforts in filing or responding to a total of seven summary judgment motions (as well as two motions for reconsideration of the Court's decisions on summary judgment) were also extensive and time-consuming. With respect to DPCPs' motion for partial summary judgment motion on the patent issues, the issues involved were complex, both in terms of the technical and scientific issues as well as legal issues lying at the intersection of patent and antitrust law. DPCPs' statement of material facts in support of their motion for partial summary judgment on the patent issues contained 220 paragraphs and appended 96 exhibits. Its preparation involved collecting and distilling the contents of thousands of documents produced in discovery as well as pleadings,

briefs and transcripts of fact and expert depositions. Likewise, responding to Defendants' oppositions to DPCPs' patent motion was also a daunting task. Defendants filed two opposition briefs, and Cephalon responded to all 220 of DPCPs' statements of material facts and filed 112 counterstatements of material facts with 59 supporting exhibits. Class Counsel reviewed and analyzed all such material, and then filed two separate reply briefs and responses to all 112 of Cephalon's counterstatements of material facts. Separately, responding to Defendants' three *Actavis* motions for partial summary judgment also required significant time and resources. Collectively, Defendants' motions contained 142 statements of material facts and appended 118 exhibits. In addition to opposing Defendants' motions via one consolidated brief and responding to each of Defendants' 142 respective statements of material facts, Class Counsel also filed, as noted above, 462 counterstatements of material fact appending 305 exhibits.

E. Class Certification Briefing

83. On May 12, 2014, Class Counsel filed DPCPs' motion for class certification. *See* Dkt No. 662. DPCPs moved to certify a class of "[a]ll persons or entities in the United States and its territories who purchased Provigil in any form directly from Cephalon at any time during the period from June 24, 2006 through August 31, 2012." *Id.*

84. Defendants filed a joint opposition on June 19, 2014, vigorously opposing DPCPs' motion. In their opposition, Defendants argued that DPCPs failed to demonstrate that class treatment was appropriate as opposed to the vehicle of joinder, and that DPCPs could not satisfy the predominance element of Rule 23. *See* Dkt No. 704.

85. DPCPs filed their reply brief on July 25, 2014. *See* Dkt No. 713.

86. Oral argument was held on March 26, 2015. *See* Dkt No. 783. At that point in time, because DPCPs had reached a settlement in principle with the Cephalon Defendants, only counsel for Mylan and Ranbaxy presented argument. During argument, Mylan and Ranbaxy, for

the first time, suggested that the Court's June 2014 summary judgment ruling on DPCPs' intergeneric conspiracy claim had created a potential "*Comcast*" issue, *i.e.,* that DPCPs' damage model no longer "fit" the remaining liability theories as discussed in *Comcast Corp. v. Behrend,* 133 S. Ct. 1426 (2013). Consequently, at oral argument, the Court directed that the parties engage in letter briefing on the issue. *See* Dkt No. 783. Such letter briefing occurred in April 2015.

87. Class Counsel's preparation of its class certification papers and supplemental briefing was intense and time-consuming. Class Counsel performed legal research concerning all aspects of class certification, consulted with DPCPs' economic experts and, as noted above, were required to engage in supplemental letter briefing.

88. On July 27, 2015, the Court granted DPCPs' motion for class certification, concluding that DPCPs had satisfied all of the requirements of Rule 23. *See* Dkt No. 829.

89. On August 5, 2015, DPCPs filed a motion requesting that the Court permit Class Counsel to give notice of the Court's grant of class certification to class members at the same time that class members would be given notice of the Court's preliminary approval of the settlement with the Cephalon Defendants and certification of a settlement class, and set a synchronized schedule for both the settlement class and the litigation class in terms the period for class members to decide whether to opt out of one or both class. [11] Class Counsel also requested that the Court amend the definition of the litigation class to exclude the Opt Out Plaintiffs (who

[11] As noted in Class Counsel's accompanying brief, Class Counsel's application requests expenses through July 27, 2015 (the date that the Court granted preliminary approval to the Settlement) and is supported with attorney time billed up to July 27, 2015, as well as time billed after that date pertaining only to the Settlement. *See* Br. at n. 5. Class Counsel's application does not include expenditures that Class Counsel has made since July 27, 2015 in continuing to litigate the case against Mylan and Ranbaxy. Nonetheless, Class Counsel includes here in a description of the post-July 27, 2015 events pertaining to Mylan and Ranbaxy for the sake of completeness in detailing the history of the litigation.

would in any event, opt out of the litigation class) in order to make the definitions of both classes identical and avoid a source of possible confusion. *See* Dkt Nos. 832, 833.

90. On August 10, 2015, Mylan and Ranbaxy filed a petition with the Third Circuit Court of Appeals seeking permission to appeal from this Court's order granting class certification. *See* Case No. 15-8084 (3d Circuit). On the same day, the Court held a status conference to discuss class notice. *See* Dkt No. 826. At the conference, the Court directed Mylan and Ranbaxy to file any objections to DPCPs' motion on class notice by August 12, 2015. On August 12, 2015, Mylan and Ranbaxy filed a motion to stay the issuance of class notice pending the Third Circuit's decision on whether to grant the Rule 23(f) petition. *See* Dkt Nos. 838, 839. On August 13, 2015, DPCPs opposed Mylan and Ranbaxy's motion seeking to stay class notice. *See* Dkt No. 840. On August 13, 2015, the Court declined to stay class notice and ordered the parties to meet and confer concerning the content of the class notice, and that if the parties could not reach an agreement on same, that DPCPs should file a renewed motion to approve notice. *See* Dkt No. 841.

91. After meeting and conferring, the parties were unable to reach agreement concerning the content of class notice.

92. On August 24, 2015, DPCPs filed their brief opposing Mylan and Ranbaxy's 23(f) petition. *See* Case No. 15-5084 (3d Circuit).[12] On the same day, DPCPs also filed their renewed motion to approve notice to the litigation class and to clarify the class definition. *See* Dkt No. 844.

[12] On September 3, 2015, Mylan and Ranbaxy requested permission from the Third Circuit to file a reply brief in support of their 23(f) petition. *Id.* On September 8, 2015, DPCPs formally opposed Mylan and Ranbaxy's request. *Id.*

93. On August 27, 2015, Mylan and Ranbaxy filed their opposition to the portion of DPCPs' motion requesting approval of notice to the litigation class. *See* Dkt No. 827. On September 10, 2015, Mylan and Ranbaxy filed their opposition to the portion of DPCPs' motion requesting that the Court clarify the class definition. *See* Dkt No. 848. On September 11, 2015, DPCPs sought leave to file a reply brief in further support of their motion to approve notice to the litigation class and to clarify the class definition. *See* Dkt No. 849. On September 15, 2015, Mylan and Ranbaxy opposed DPCPs' motion to file a proposed reply brief. *See* Dkt No. 850.

94. On September 15, 2015, the Court granted DPC Plaintiffs' motion for leave to file a reply and DPCPs' reply brief was accordingly docketed. *See* Dkt Nos. 851, 852.

F. DPCPs' Emergency Motions

95. On or about March 2, 2015, shortly before oral argument on class certification was set to occur, a dispute arose between Class Counsel and Teva concerning communications between Teva and absent class members without the knowledge of Class Counsel. Class Counsel and counsel for Teva were unable to resolve this dispute and thus the very next day, on March 3, 2015, DPCPs filed an emergency motion. In that motion, DPCPs argued that the communications that occurred were coercive and misleading, and requested various forms of relief including that the Court order that such communications stop, that the Cephalon Defendants provide discovery and that the Court hold an evidentiary hearing concerning the communications that had occurred. *See* Dkt No. 755. Three days later, the Cephalon Defendants filed their opposition to DPCPs' emergency motion, arguing that the communications with absent class members were lawful and not coercive or misleading, and opposing any discovery and/or an evidentiary hearing. *See* Dkt No. 761.

96. On March 9, 2015, DPCPs filed a motion to submit a reply brief, annexing the latter. *See* Dkt No. 762. On the same day, DPCPs also filed an emergency motion to compel the

Cephalon Defendants to produce certain documents (as well as witnesses for deposition) relating to the communications with absent class members, and a separate motion for the establishment of an escrow fund due to DPCPs' learning that the Cephalon Defendants might have entered into "in principle" settlements with two absent class members. *See* Dkt No. 764. On March 11, 2015, the Cephalon Defendants opposed both motions, and filed a cross-motion seeking to strike DPCPs' discovery requests. *See* Dkt Nos. 769-771.

97. On March 17, 2015, due to DPCPs and the Cephalon Defendants having agreed to enter into a settlement in principle on March 16, 2015, DPCPs withdrew all three of their motions pertaining to communications with absent class members. *See* Dkt No. 778.

98. Collectively, Class Counsel filed a total of four briefs (and reviewed the Cephalon Defendants' three responsive briefs/cross-motions) in an effort to protect the rights of the class and to ensure that class members received the type of recovery that Class Counsel felt class members were entitled to considering the strength of DPCPs' claims. This briefing required Class Counsel to work around the clock over a nine day period.

G. *Daubert* Briefing

99. On April 4, 2014 (the same date on which Defendants filed their motions for summary judgment under *Actavis*), DPCPs filed five motions pursuant to *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993) pertaining to ten defense experts. DPCPs moved to exclude certain opinions and testimony offered by: (a) economists Dr. Gregory Bell, Professor Jerry Hausman, Dean Edward Snyder, Dr. Janusz Ordover and Dr. Bruce Stangle; (b) "infringement" experts Drs. David Bugay, Robert Williams, Lynn Van Campen, and Markus Antonietti; and (c) "validity" experts Dr. Eugene Cooper, Dr. Joseph Baranski and Mr. Bruce Stoner. *See* Dkt Nos. 603-605, 611, 617.

100. DPCPs' *Daubert* challenges had numerous detailed bases. With respect to the "infringement" experts, DPCPs moved to exclude their opinions as unreliable because the analytical testing was inherently unreliable and because Dr. Williams' opinions were based on incorrect law. With respect to the "validity" experts, based upon this Court's ruling in the *Apotex* case finding the RE '516 patent invalid and unenforceable and its grant of partial summary judgment of invalidity and "but for" materiality in DPCPs' case, DPCPs also moved to exclude their opinions relating to validity, materiality or intent to deceive as unreliable and that they did not "fit" with the facts of the case. DPCPs also argued that one "validity" expert, Mr. Stoner, lacked the qualifications to opine on the issue of Cephalon's intent to deceive the PTO.

101. With respect to Defendants' economist Dr. Bell, DPCPs argued that he was not qualified to opine on certain patent and pharmaceutical operational issues, that his generic launch opinions did not "fit" the facts of the case in that they were diametrically opposed to the Defendants' own contemporaneous documents, and that certain of his opinions were inconsistent with *Actavis* and certain stipulations reached with Defendants in the litigation. With respect to Professor Hausman and Dean Snyder, DPCPs argued that their opinions were unreliable, not a "fit" with the facts of the case, were not the result of any reliable methodology, improperly supplanted the jury's role in determining intent, and were an attempted backdoor effort to circumvent privilege elections. DPCPs further challenged the opinions of Dr. Bell, Professor Hausman and Dean Snyder for collectively offering testimonial speculation on Defendants' intentions and motives concerning settlement, and as to whether the Generic Defendants would have launched at risk. The issue of what testimony is permissible regarding the subjective intent of the parties goes directly to the dispute over the implications of the assertion of attorney client privilege. Finally, with respect to Defendants' "lost profits" experts, DPCPs argued that their opinions were legally irrelevant and improper. *Id.*

102. Additionally, DPCPs adopted the FTC's *Daubert* motion to exclude certain opinions of Dr. Allan Myerson, Cephalon's expert on issues pertaining to the Teva IP that Cephalon had licensed as part of the settlements, and the FTC's *Daubert* motion to exclude the opinions of Cephalon's ten RE '516 Patent experts. *See* Dkt Nos. 614, 615.

103. Defendants in turn filed four *Daubert* motions seeking to exclude certain opinions and testimony pertaining to four of DPCPs' experts. Defendants moved to exclude certain opinions and testimony offered by: (a) economists Dr. Jeffrey Leitzinger and Professor Einer Elhauge; (b) Mr. Thomas Hoxie, DPCPs' expert on issues pertaining to the Teva IP that Cephalon had licensed as part of the settlements; and (c) Professor John Thomas, DPCPs' expert on pharmaceutical patent law and the Hatch-Waxman regulatory scheme. *See* Dkt Nos. 606, 608, 618, 619, 622, 624.

104. With respect to DPCPs' expert on pharmaceutical patent law and Hatch-Waxman, Defendants argued that he was not qualified and that his testimony was unreliable. With respect to DPCPs' expert on the Teva IP that Cephalon had licensed, Defendants argued that he was not qualified, that his opinion misinterpreted evidence and was based on incorrect legal assumptions and was irrelevant under *Actavis*. With respect to DPCPs' economic experts, Defendants set forth multiple alleged bases for attempting to exclude their opinions concerning DPCPs' damage calculations and the anticompetitive impact of Defendants' settlement agreements. *Id.*

105. Preparation of DPCPs' *Daubert* motions involved considerable effort on Class Counsel's part. Class Counsel reviewed all of Defendants' experts' opinions, as well as their publications and deposition testimony, in formulating targeted *Daubert* challenges. Likewise, defending against Defendants' *Daubert* motions also involved considerable effort. As noted above, Defendants made numerous arguments in support of their *Daubert* motions, particularly with respect to DPCPs' economists. Additionally, as noted below, Class Counsel also reviewed

and analyzed the offers of proof Defendants submitted concerning certain of their experts, and prepared DPCPs' offers of proof on DPCPs' economists. *See infra* at ¶¶ 109-110.

106. On September 24, 2015, the Court granted the FTC's motion to exclude Cephalon's ten patent experts as to the FTC only, due to the fact that the Court's prior ruling on inequitable conduct prohibited Cephalon from defending against the FTC's antitrust claim on grounds of litigation uncertainty. *See* Dkt No. 331. The Court reserved decision on the motion as to DPCPs. *See* Dkt No. 331.

107. On September 30, 2014, because the Court had both summary judgment briefing and class certifications motions pending, the Court denied all *Daubert* motions without prejudice to be reinstated at a later date. *See* Dkt No. 721.

108. On March 23, 2015, subsequent to the issuance of its opinion denying summary judgment on Defendants' *Actavis* motions, the Court held oral argument on, *inter alia*, four of DPCPs' five *Daubert* motions, as well as the FTC's motion to exclude Cephalon's ten patent experts as to DPCPs. *See* Dkt No. 780.

109. On March 27, 2015, as the Court had indicated at oral argument, the Court issued an order directing Defendants to submit offers of proof as to the experts that were the subject of the March 23 *Daubert* hearing. *See* Dkt No. 784. Defendants' offers of proof were submitted on April 23, 2014. *See* Dkt No. 797. On June 2, 2015, the Court issued an order stating that DPCPs would be permitted to challenge Defendants' offers of proof via *motions in limine* once a trial date had been set. *See* Dkt No. 807.

110. On June 4, 2015, the Court issued an order directing DPCPs to submit offers of proof as to their economic experts challenged in two of Defendants' *Daubert* motions (Dr. Jeffrey Leitzinger and Professor Einer Elhauge). *See* Dkt No. 808. DPCPs' offers of proof were submitted on July 2, 2015. *See* Dkt No. 819, 823.

111. On September 15, 2015, the Court held oral argument on, *inter alia*, Defendants' *Daubert* motions as to DPCPs' economists Dr. Jeffrey Leitzinger and Professor Einer Elhauge.

H. Prior Settlement Conferences/Mediations

112. On June 17, 2010, a little over a year after the Court assumed the docket in this litigation, Class Counsel participated in a settlement conference with Magistrate Judge Restrepo. *See* Dkt No. 305-306. Pursuant to Magistrate Judge Restrepo's order, (*see* Dkt No. 278), Class Counsel submitted via e-mail an *ex parte* settlement conference memorandum which answered five questions posed by Magistrate Judge Restrepo. The settlement conference occurred at the federal courthouse in Philadelphia. The settlement conference did not result in any settlement of DPCPs' claims with any Defendant. After the settlement conference, Magistrate Judge Restrepo ordered the parties to make an updated submission concerning settlement on November 12, 2010. *See* Dkt No. 307. Class Counsel submitted via e-mail their *ex parte* updated submission on November 12, 2010. The updated submission process did not result in any settlement of DPCPs' claims with any Defendant.

113. Additionally, Class Counsel prepared for and participated in a total of three mediation sessions.

114. The first attempt at mediation occurred in Spring 2013 and was presided over by Mr. Jonathan Marks, a well-respected mediator with extensive experience in mediating settlements in pharmaceutical cases. The parties to the mediation were DPCPs and the Cephalon Defendants. Prior to the mediation, Class Counsel submitted various case-related materials for mediator review and prepared and submitted *ex parte* a detailed 50-page mediation statement which included the relevant factual background, the various theories of liability that DPCPs were pursuing, DPCPs' causation theories, and an explanation of DPCPs' damage theories.

115. Mr. Marks thereafter conducted separate all day sessions with DPCPs and the Cephalon Defendants. During mediation, Class Counsel made extensive presentations across all issues and elements of the case. Ultimately, however, the mediation was deemed premature.

116. The second mediation session occurred in January 2014 and was presided over by Magistrate Judge Strawbridge. Further, all parties mutually agreed to retain Mssrs. Lloyd Constantine and Robert Heim, both of whom are nationally known antitrust litigators, to assist Magistrate Judge Strawbridge. Prior to the mediation, pursuant to a Settlement Conference Order issued by Magistrate Judge Strawbridge, DPCPs sent good-faith demand letters to each Defendant, reviewed Defendants' respective responses to those demand letters, submitted *ex parte* a 25-page settlement memorandum which addressed eleven questions/issues set forth by Magistrate Judge Strawbridge, and submitted a proposed list of questions for defense counsel. Class Counsel devoted significant time to preparing for the mediation. *See* Dkt No. 557. DPCPs evaluated DPCPs' claims in view of the state of the law, the status of the litigation and the evidence obtained in discovery, and conferred with the named plaintiffs. DPCPs' letters did more than simply put forth numerical demands; the letters explained in detail the bases for DPCPs' respective demands. Similarly, DPCPs spent significant time preparing their settlement memorandum and list of questions for defense counsel, ensuring that Magistrate Judge Strawbridge and Mssrs. Constantine and Heim had all of the requested information and more.

117. The mediation occurred at the federal courthouse in Philadelphia and lasted three days. In addition to Class Counsel, representatives from King Drug, RDC, Smith Drug and Burlington all travelled to attend and participate in the mediation. Class Counsel participated in numerous sessions with the mediators, which included live presentations with demonstratives and engaging in discussions concerning all aspects of the litigation. Additionally, during the last

day of the mediation, the Court held oral argument on DPCPs' motion for summary judgment on the patent issues. *See* Dkt No. 590. Ultimately, however, this mediation was also unsuccessful.

118. The third mediation occurred on March 16, 2015 in New York City, and was presided over by Mr. Jonathan Marks, who had overseen the first mediation. The parties to the mediation were DPCPs and the Cephalon Defendants. The mediation commenced in the morning and ran well into the late evening, and involved extensive negotiations. The mediation concluded with the parties finally reaching a settlement in principle, drafting and executing a detailed Memorandum of Understanding outlining the key provisions of settlement. Thereafter, Class Counsel and the Cephalon Defendants negotiated a formal settlement agreement.

III. THE SETTLEMENT WITH THE CEPHALON DEFENDANTS

A. Preliminary Approval of the Settlement and Notice to the Class

119. On April 17, 2015, DPCPs filed their settlement agreement with the Cephalon Defendants with the Court. The settlement provides for the payment of $512 million dollars into an interest-bearing escrow account for the benefit of direct purchaser class members. The Settlement is the largest ever in a Hatch-Waxman delayed generic entry case brought on behalf of direct purchasers.

120. In their filing, Class Counsel requested that the Court certify a settlement class, appoint Class Counsel as counsel for the settlement class, preliminarily approve the settlement, approve notice to the Class, and set a schedule leading up to and including a Fairness Hearing. *See* Dkt No. 795. In preparation for filing the motion, Class Counsel engaged a proposed escrow agent for maintenance of the settlement funds and entered into an escrow agreement with same, and engaged a proposed claims administrator to assist with the notice process and drafted proposed notice to the class. Class Counsel also prepared briefing explaining the terms of the

settlement and how the requirements for certification of a settlement class and preliminarily approval had all been satisfied, consistent with applicable case law.

121. On July 27, 2015, this Court found that that the settlement between DPCPs and the Cephalon Defendants was arrived at by arms'-length negotiations by highly experienced counsel after years of litigation and fell within the range of possibly approvable settlements, and preliminarily approved it. *See* Dkt No. 831. Concurrently, this Court certified a settlement class, appointed Class Counsel as counsel for the settlement class, appointed an escrow agent and claims administrator, approved a form of notice to the class and set a schedule.

122. On August 6, 2015, Defendants deposited $512,000,000 into an escrow account held in trust by Morgan Stanley Smith Barney LLC that is earning interest for the benefit of the Class. *See* Ex. 1 (September 10, 2015 Affidavit of Theodora Portelos re: Escrow Account).

123. On August 17, 2015, the claims administrator, Berdon, duly mailed the written notice to Class Members. *See* Ex. 2 (September 14, 2015 Affidavit of Michael Rosenbaum re: Mailing of Notice). Class Counsel then posted the written notice on the GGF website.

124. As of the date of this Declaration, no objections to the settlement with the Cephalon Defendants or any of its terms have been received. Class members have until October 1, 2015 to elect whether they will opt out of the settlement. Any such opt-outs will be noted as part of DPCPs' upcoming submission for final approval of the settlement which is due on October 8, 2015.

B. Summary of Attorney's Fees and Unreimbursed Expenses

125. Class Counsel have litigated DPCPs' claims against Defendants for almost a decade (and continue to do so against Mylan and Ranbaxy). Class Counsel are highly experienced and nationally respected law firms that have over seventeen years of extensive experience prosecuting and trying Hatch-Waxman antitrust cases on behalf of the same core

class of direct purchaser plaintiffs, and have been involved in many critical decisions made by various courts in this area of antitrust law.

126. At all junctures of this litigation, Class Counsel faced risk. As an initial matter, when Class Counsel initiated the litigation back in 2006, Class Counsel were aware of the risks of prosecuting the case and bringing it to trial in view of the state of the law on reverse payment agreements at the time. From before the time DPCPs' initial complaint was filed up in this litigation up until the Supreme Court's *Actavis* decision, Class Counsel (who has also served, and continues to serve, as class counsel on behalf of direct purchases cases in numerous other delayed generic entry cases) litigated the case in step with rapidly evolving law on the issue of the proper standard for evaluating reverse payment agreements.

127. Once past the motion to dismiss stage, DPCPs presented a case unique in several respects from the other plaintiff groups. First, DPCPs alone pursued the liability theory that Cephalon orchestrated an intergeneric conspiracy between and among Barr, Teva, Mylan and Ranbaxy, on which DPCPs ultimately moved for summary judgment, and DPCPs' independent expert presented a unique economic analysis of the settlement agreements that no other plaintiff's expert presented. That the Court ultimately denied summary judgment on the issue (and indeed granted summary judgment to Defendants) underscores the risk Class Counsel took in developing their various liability theories. This issue is preserved for appeal. Second, Class Counsel engaged Prof. Elhauge to engage in an antitrust economic analysis unlike any other in this case. Prof. Elhauge developed an economic proof establishing that the agreements at issue are anticompetitive and harmed consumer welfare. Third, Class Counsel for the DPCPs took the leading role in establishing that "but for" the agreements at issue, all four of the Generic Defendants would have launched "at risk" at the earliest possible moment in 2006 (an element not required of the FTC). Fourth, Class Counsel worked extensively with Dr. Leitzinger the

develop a method for calculating damages for the DPCPs on a class wide basis, as well as gathered the factual record to backup and support those calculations and develop a record and analysis on Cephalon's market power. Fifth, Class Counsel pursued and procured certification of the Direct Purchaser Class. Sixth, because DPCPs were not parties to the bifurcated patent portion of the Apotex litigation but had a clear interest in the outcome in view of DPCPs' *Walker Process* fraud theory and invalidity theories, DPCPs had to continuously keep abreast of proceedings in the Apotex patent litigation. This included attending depositions in the bifurcated patent portion of the Apotex case and pursuing rulings concerning the preclusive effect of findings in that litigation as such pertained to DPCPs' antitrust claims. Furthermore, at Apotex's request, Class Counsel provided Apotex input at the claim construction and trial phase of the Apotex patent litigation.

128. Further, as concerns risk: (a) DPCPs' claims could have been dismissed in their entirety at summary judgment stage; (b) the Court could have denied class certification; and (c) absent the settlement with the Cephalon Defendants, Class Counsel still would have had to prepare for and go to trial against the Cephalon Defendants. At such a trial, Class Counsel would have sought to prove, among other theories of liability, that Cephalon committed *Walker Process* fraud (specifically, the "intent" element of same). Moreover, based on the history of the litigation, it is highly likely that Class Counsel would have engaged in further protracted disputes with the Cephalon Defendants concerning any attempts to introduce at trial the subjective beliefs of the Cephalon Defendants concerning the RE'516 Patent. And ultimately, if a jury had found in favor of the Cephalon Defendants at trial, Class Counsel's near decade-long efforts, undertaken at great time and expense, would have been for naught. Even if successful before a jury, appellate risks would remain.

129. Despite the risks outlined above, Class Counsel has litigated this case for almost a decade. In doing so, Class Counsel: (a) reviewed over two million pages of documents; (b) twice briefed motions to dismiss; (c) took thirty-eight fact depositions and defended the named plaintiffs in seven depositions; (d) retained ten experts who rendered reports concerning various subjects, defended those experts in depositions and against *Daubert* motions, and took the depositions of nineteen defense experts; (e) filed four discovery motions pertaining to Defendants' assertions of attorney-client privilege; (f) filed three summary judgment/dispositive motions and defended against four of Defendants' summary judgment motions; (g) filed five *Daubert* motions seeking to strike certain testimony of defense experts; (h) filed emergency briefing seeking to restrict communications between Teva and absent class members; (i) briefed, argued and obtained class certification; (j) participated in one settlement conference and three mediation sessions; and (k) commenced trial preparation on multiple occasions when trial dates appeared imminent.

130. All Defendants, including the Cephalon Defendants, have been represented by some of the country's leading law firms and have vigorously defended against DPCPs' claims. In addition to opposing all of DPCPs' own motions, Defendants moved to dismiss DPCPs' complaint twice, took discovery of DPCPs, filed five *Daubert* motions seeking to strike the testimony of DPCPs' experts, and brought five motions for summary judgment against DPCPs.

131. Class Counsel believed, and continues to believe, that the settlement with the Cephalon Defendants represents an outstanding victory for the Class.

132. The following chart summarizes the aggregate time and necessary and incidental expenses of all Class Counsel, as set forth in more detail in the separate firm declarations of Class Counsel, appended here as Exhibits 3-17:

Ex.	Firm Name	Hours	Lodestar	Expenses
3	Garwin Gerstein & Fisher LLP	13,740.36	$10,091,572.50	$633,586.48
4	Berger & Montague, P.C.	14,425.82	$7,860.922.75	$654,374.91
5	Faruqi & Faruqi LLP	1,863.50	$1,314,743.00	$224,979.08
6	Smith Segura & Raphael LLP	8,977.50	$3,843,868.00	$511,035.23
7	Odom & Des Roches LLP	11,075.50	$5,788,410.00	$545,142.12
8	Heim Payne & Chorush LLP	4,107.00	$2,631,465.75	$321,537.56
9	NastLaw LLC	1,866.90	$808,225.00	$366,535.83
10	The Roberts Law Firm	237.60	$104,492.50	$28.81
11	Cohen Milstein Sellers & Toll PLLC	63.25	$31,930.00	$498.60
12	Kaplan Fox & Kilsheimer LLP	1,050.75	$579,286.25	$1,815.29
13	Nussbaum LLP	326.25	$186,373.75	$254.48
14	Grant & Eisenhofer P.A.	1,339.96	$712,111.00	$319,044.91
15	Vanek Vickers & Masini, P.C.	248.73	$114,099.95	$2,064.86
16	Sterling & Slater, P.C.	39.25	$36,100.00	$0.00
17	Phelps Dunbar LLP	101.70	$30,357.50	$193.03
	TOTAL	**59,464.07**	**$34,133,957.95**	**$3,581,091.19**

133. Based upon the lodestar set forth above, the requested 27.5% fee results in a multiplier of 4.12.

134. Additionally, detailed time records and expense vouchers/receipts are available to the Court *in camera* should the Court wish to examine them.

135. Professor Charles Silver, a legal ethics expert, has opined that Class Counsel's requested fee is ethically proper. *See* Report of Professor Charles Silver (attached as Ex. 18).

136. The Class here is unique in that it is mainly comprised of wholesalers, many of whom have been involved in prior class cases challenging unlawful delays in generic competition and many of whom closely monitored the litigation and provided their continued support to Class Counsel based on their familiarity with Hatch-Waxman cases and the numerous risks involved in such litigation. A number of class members have written to the Court to express their affirmative support both for the settlement and Class Counsel's request for attorneys' fees of 27.5% of the Settlement Fund.[13]

137. All three national wholesalers have submitted letters affirmatively supporting the Settlement and Class Counsel's request for attorneys' fees.

138. Attached as Ex. 19 is a letter from David A. Schumacher on behalf of AmerisourceBergen Corporation to the Court dated September 11, 2015.

139. Attached as Ex. 20 is a letter from Robert J. Tucker on behalf of Cardinal Health, Inc. to the Court dated September 14, 2015.

140. Attached as Ex. 21 is a letter from Steven W. Winick on behalf of McKesson Corporation to the Court dated September 11, 2015.

141. Class Representatives Burlington, King Drug, Smith Drug and RDC also affirmatively support the Settlement and Class Counsel's request for attorneys' fees.

142. Attached as Ex. 22 is the Declaration of Margaret M. Glazer on behalf of Burlington dated August 25, 2015.

[13] Because the notice sent to class members on August 17, 2015 advising them of the settlement stated that Class Counsel intended to seek attorneys' fees of no more than one-third, some class members' letters state their support for attorneys' fees in the amount of one-third. For the avoidance of confusion, Class Counsel is seeking attorneys' fees in the amount of 27.5% of the Settlement (including 27.5% of accrued interest on the settlement fund).

143. Attached as Ex. 23 is the Declaration of W. Keith Elmore on behalf of King Drug dated August 18, 2015.

144. Attached as Ex. 24 is the Declaration of Ken Couch on behalf of Smith Drug dated August 25, 2015.

145. Attached as Ex. 25 is the Declaration of Laurence F. Doud III on behalf of RDC dated September 14, 2015.

146. Other absent class members similarly affirmatively support the Settlement and Class Counsel's request for attorneys' fees.

147. Attached as Ex. 26 is a letter from G.K. Richards on behalf of Capital Wholesale Drug Company dated August 14, 2015.

148. Attached as Ex. 27 is a letter from Matthew Kipp on behalf of Dakota Drug, Inc. dated August 25, 2015.

149. Attached as Ex. 28 is a letter from Anthony v. Rattini on behalf of Miami-Luken, Inc. dated August 25, 2015.

150. Attached as Ex. 29 is a letter from Jacquelyn J. Harbauer on behalf of Prescription Supply, Inc. dated August 25, 2015.

151. Attached as Ex. 30 is a letter from Gregory Drew on behalf of Value Drug Co. dated August 25, 2015.

152. Attached as Ex. 31 is a letter from Juan Carlos Hernandez on behalf of Drogueria Betances, Inc., dated September 9, 2015.

C. The Efforts of the Class Representatives on Behalf of the Class

153. The Class Representatives have each made a significant contribution in prosecuting DPCPs' claims against the Cephalon Defendants for the benefit of DPCP members. They actively protected the Class's interests by filing the suit on behalf of the Class and

undertaking all the responsibilities involved in being a named plaintiff, including responding to document requests and interrogatories, monitoring the progress of the case, testifying at depositions, and attending mediation sessions. The Class representatives were required to expend time and effort that was not compensated over the near decade that DPCPs pressed their claims against the Cephalon Defendants (and will continue to do so regarding DPCPs' continuing claims against Mylan and Ranbaxy).

154. In recognition of their time and effort expended for the benefit of the Class, Class Counsel have requested an incentive award of $100,000 for each of King Drug, RDC, Burlington and Smith Drug, and $50,000 for each of Meijer and SAJ.

I, Bruce E. Gerstein, declare under penalty of perjury that the above is true and correct.

Dated: September 17, 2015

Bruce E. Gerstein