No. _____

In the
# Supreme Court of the United States

PFIZER INC., PFIZER IRELAND PHARMACEUTICALS, WARNER-LAMBERT COMPANY, WARNER-LAMBERT COMPANY LLC, RANBAXY INC., RANBAXY PHARMACEUTICALS, INC., AND RANBAXY LABORATORIES LTD.,

*Petitioners*,

v.

RITE AID CORPORATION, et al., WALGREEN COMPANY, et al., GIANT EAGLE, INC., MEIJER INC., et al., ROCHESTER DRUG CO-OPERATIVE, INC., et al., AFL-AGC BUILDING TRADES WELFARE PLAN, et al.,

*Respondents*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## PETITION FOR WRIT OF CERTIORARI


ROBERT A. MILNE
RAJ S. GANDESHA
BRYAN D. GANT
SHERYN GEORGE
WHITE & CASE LLP
1221 Sixth Avenue
New York, NY 10020
(212) 819-8200
*Counsel for Pfizer Inc., et al.*

JAY P. LEFKOWITZ, P.C.
*Counsel of Record*
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
(212) 446-4800
lefkowitz@kirkland.com
*Counsel for Ranbaxy Inc., et al.*

(*Additional Counsel Listed on Inside Cover*)


November 20, 2017

JOHN C. O'QUINN
MICHAEL D. SHUMSKY
JONATHAN D. JANOW
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
655 Fifteenth Street NW
Washington, DC 20005

*Counsel for Ranbaxy Inc., et al.*

## QUESTION PRESENTED

In *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2233 (2013), this Court held that settlement agreements in which patentees make "large" and "unjustified" reverse payments to patent challengers "purely" to induce them to "give up the patent fight" may violate the antitrust laws. But *Actavis* explained that "commonplace" and "traditional" patent settlements should *not* be subject to antitrust scrutiny, specifically identifying settlements where parties resolve competing damages claims through compromise or where a patentee grants a patent challenger early entry into a market. In the decision below, the Third Circuit held that a settlement agreement resolving multiple disputes between a patentee and patent challenger, including the mutual compromise of an infringement claim and counterclaim for damages, should be subject to antitrust scrutiny. In the Third Circuit's view, it was enough that *a single term* in the agreement, viewed in isolation, purportedly transferred value from the patentee to the patent challenger—regardless of consideration that was concededly also transferred in the opposite direction (to patentee) as part of the same settlement.

The question presented is:

Whether an antitrust complaint alleging a "large" and "unjustified" reverse payment settlement agreement states a plausible claim for relief when it cherry-picks among pieces of a larger agreement to conjure a purported transfer of value from a patentee to patent challenger, but does not account for the net flow of consideration.

## PARTIES TO THE PROCEEDING

Petitioners, the Appellees below, are Pfizer Inc., Pfizer Ireland Pharmaceuticals, Warner-Lambert Co. LLC, Ranbaxy Inc., Ranbaxy Pharmaceuticals, Inc., and Ranbaxy Laboratories Ltd.

Respondents, the Appellants below, are Rite Aid Corp., Rite Aid Hdqtrs. Corp., Maxi Drug Inc., Eckerd Corp., JCG (PJC) USA LLC, Walgreen Co., Kroger Co., Safeway Inc., Supervalu, Inc., HEB Grocery Co. LP, Giant Eagle, Inc., Meijer, Inc., Meijer Distribution, Inc., Rochester Drug Co-Operative, Inc., Stephen L. Lafrance Pharmacy, Inc., SAJ Distributors, Burlington Drug Co., Value Drug Co., AFL-AGC Building Trades Welfare Plan, Mayor and City Council of Baltimore, Maryland, New Mexico United Food and Commercial Workers Union's and Employer's Health and Welfare Trust Fund, Louisiana Health Service Indemnity Co., Bakers Local 433 Health Fund, Twin Cities Bakery Workers Health and Welfare Fund, Fraternal Order of Police, Fort Lauderdale 31, Insurance Trust Fund, International Brotherhood of Electrical Workers Local 98, New York Hotel Trades Counsel & Hotel Association of New York City, Inc., Health Benefits Fund, Edward Czarnecki, Emilie Heinle, Frank Palter, Andrew Livezey, Edward Ellenson, Jean Ellyne Dougan, and Nancy Billington, on behalf of themselves and all others similarly situated.

## CORPORATE DISCLOSURE STATEMENT

Petitioner Ranbaxy Pharmaceuticals, Inc. is a wholly-owned subsidiary of Ranbaxy Inc., which is a wholly-owned subsidiary of Ranbaxy Holdings (UK) Ltd., which is a wholly-owned subsidiary of Ranbaxy (Netherlands) B.V., which is a wholly-owned subsidiary of Sun Pharmaceuticals Industries Ltd. Effective March 24, 2015, Ranbaxy Laboratories Ltd. merged with Sun Pharmaceutical Industries Ltd. Sun Pharmaceutical Industries Ltd. is the sole surviving entity of that merger.

Petitioner Pfizer Inc., Pfizer Ireland Pharmaceuticals, and Warner-Lambert Company LLC (f/k/a Warner-Lambert Company) (collectively "Pfizer") state that Pfizer Inc. is the ultimate parent company of Pfizer Ireland Pharmaceuticals and Warner-Lambert Company LLC, and no publicly held corporation owns 10% or more of Pfizer Inc.'s stock.

## TABLE OF CONTENTS

APPENDIX

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Other Authorities**

## PETITION FOR WRIT OF CERTIORARI

This case presents an important question of law that affects every patentee in the Nation: whether plaintiffs may cherry-pick isolated terms in otherwise routine patent litigation settlement agreements and thereby subject those agreements to scrutiny under the antitrust laws. In *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013), this Court held that antitrust scrutiny should apply only to a limited subset of patent settlements—namely, settlements in which a patentee pays a "large" and "unjustified" reverse payment to a patent challenger solely to induce the latter to stay out of the market. But the Third Circuit concluded below that otherwise "commonplace" and "traditional" patent settlements are now fair targets for rule-of-reason review so long as antitrust plaintiffs can identify an isolated term in the settlement that transfers "value" from the patentee to the patent challenger. The appellate court's approach is not faithful to *Actavis*, and it will impose immense financial costs, prevent virtually any patent case from being settled without trial (much less resolved before expensive discovery), chill litigants' efforts to achieve "global peace" by settling multiple patent cases concurrently, and ultimately harm the very consumers the court claimed it was protecting. This Court's review is imperative.

Petitioners Pfizer Inc. ("Pfizer") and Ranbaxy Inc. ("Ranbaxy") are manufacturers of brand-name and generic drugs, respectively, that had squared off in patent litigation around the world for years. But in 2008, Petitioners reached a global settlement agreement that was designed to resolve an array of

pending disputes in multiple jurisdictions in the United States and abroad. Among other terms, both companies agreed to release competing damages claims against each other in a dispute involving the drug at issue (Pfizer's Accupril), with Ranbaxy also paying Pfizer $1 million in cash, and Pfizer and Ranbaxy resolved their U.S. patent litigation concerning Pfizer's Lipitor through a non-exclusive license permitting entry years in advance of patent expiry. As this Court explained in *Actavis*, patent settlements that include such terms are entirely "commonplace," and "settlements taking these commonplace forms have not been thought for that reason alone subject to antitrust liability." 133 S. Ct. at 2233. By its terms, *Actavis* "d[id] not intend to alter that understanding," but rather clarified that antitrust law may have a role to play when patentees pay a "large" and "unjustified" reverse payment to patent challengers "purely" to induce them to "give up the patent fight." *Id.*

Respondents sued Petitioners on the ground that *one* of the settlements comprising the global resolution (the damages compromise as to Accupril, in which Ranbaxy paid Pfizer) should qualify as a "large" and "unjustified" reverse payment *to Ranbaxy* that induced Ranbaxy to agree to delay its entry as to one of the other settled cases (the U.S. case involving Pfizer's Lipitor product). The District Court dismissed the complaints with prejudice, reasoning that the "lack of any reliable foundation" for the allegations "pervades the entire Complaint." App.168. But the Third Circuit reversed. Observing that this Court had "offered limited guidance as to when such settlements should be subject to antitrust scrutiny," App.27, and

criticizing *Actavis* as "opaque," App.36, the appellate court nonetheless held that Respondents had adequately alleged the existence of a "large" and "unjustified" reverse payment. The Third Circuit found it was sufficient that plaintiffs alleged Pfizer had transferred value to Ranbaxy in the compromise of competing damages claims in the Accupril case and that, in settling the U.S. Lipitor case, Pfizer had not accorded Ranbaxy immediate entry for its generic Lipitor in that jurisdiction.

The court reached that conclusion even though *Ranbaxy had agreed to release its own damages counterclaim against Pfizer* in the Accupril case, and even though the U.S. Lipitor settlement allowed Ranbaxy to enter one of Pfizer's patent-protected markets *years* before the expiration of Pfizer's last patent as to Lipitor. Thus, this case stands in direct contrast to the situation in *Actavis*, where the patentee allegedly provided an overt payment in return for delay in generic entry. Yet the Third Circuit allowed these claims to proceed solely because a *single isolated slice* of the consideration in but one component of the global settlement arguably flowed from the patentee to the patent challenger.

The Third Circuit's decision warrants this Court's review. *Actavis* made clear that patent settlements should trigger antitrust scrutiny only when a patent challenger "*with no claim for damages*" walks away with large amounts of money "simply so it will stay away from the patentee's market." 133 S. Ct. at 2233 (emphasis added). There was no such one-way flow of money in the Accupril case. The Third Circuit concluded to the contrary only by blinding itself to the

consideration being exchanged—a legally impermissible approach. Indeed, Ranbaxy had a massive damages counterclaim against Pfizer that it agreed to release as part of the settlement, thereby conferring value *on Pfizer*. In fact, Pfizer previously had been required to post *a $200 million* injunction bond to cover its potential liability. App.91. Nor did Ranbaxy agree to "stay away from [Pfizer's] market." *Actavis*, 133 S. Ct. at 2233. To the contrary, Ranbaxy entered the market years before patent expiry. If *Actavis*' pledge that traditional settlements are not subject to antitrust scrutiny is to mean anything, then courts cannot sensibly ignore or refuse to account for both sides of the equation. The Third Circuit's holding that antitrust plaintiffs can pick apart such settlements and attack one isolated component is impossible to square with this Court's instruction in *Actavis*—or commonsense. Here, the Third Circuit cherry-picked one component of the Accupril settlement and turned a blind eye to the rest.

It would be one thing if the Third Circuit's decision were limited to one case or one industry. But the Third Circuit's holding would subject scores of patent settlements to antitrust scrutiny if *any single component* of the settlement (or set of integrated settlements) could be said to reflect an implicit transfer of value from the patentee to the patent challenger. Yet the very reason parties enter into traditional patent settlements involving mutual consideration is because each party naturally wants to walk away with something to show for it. Thus, if antitrust plaintiffs may simply cherry-pick isolated settlement terms that transfer "value" from a patentee to a patent challenger, then no patent settlement can

escape rule-of-reason review—a form of scrutiny that "produces notoriously high litigation costs and unpredictable results." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2411 (2015). Antitrust defendants may bear those costs initially, but consumers ultimately will feel the pain as rational businesses pass the costs of uncertainty and needless litigation down to them.

This Court should grant certiorari before the Third Circuit's decision causes any more damage. Indeed, this Court's intervention is particularly urgent because of the unique provisions of antitrust law: Antitrust plaintiffs may file suit anywhere in the country, 15 U.S.C. §22, and plaintiffs quite understandably will make the Third Circuit "Ground Zero" for virtually every significant antitrust case challenging a patent settlement. Given the Third Circuit's *de facto* nationwide holding that even "commonplace" and "traditional" patent settlements are fair targets for antitrust review, this Court's review is imperative.

## OPINIONS BELOW

The opinion of the Third Circuit below is reported at 868 F.3d 231 and reproduced at App.1-79. An earlier opinion of the Third Circuit finding appellate jurisdiction is reported at 855 F.3d 126 and reproduced at App.80-121. The District Court's opinion is reported at 46 F. Supp. 3d 523 and reproduced at App.122-77.

## JURISDICTION

The Third Circuit issued its opinion on August 21, 2017. This Court has jurisdiction under 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 2 of the Sherman Act, 15 U.S.C. §2, provides in relevant part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony[.]

## STATEMENT OF THE CASE

### A. Legal Background

A brand-name manufacturer that seeks to market a new drug must submit a new drug application ("NDA") to the FDA demonstrating that the drug is safe and effective. *See* 21 U.S.C. §355. This is "a long, comprehensive, and costly testing process." *Actavis*, 133 S. Ct. at 2228. The Drug Price Competition and Patent Term Restoration Act of 1984, Pub L. No. 98-417, 98 Stat. 1585 (as amended), which is commonly known as the Hatch-Waxman Act, governs that process.

In addition to regulating the approval of new brand-name drugs, the Hatch-Waxman Act also was designed to "speed the introduction of low-cost generic

drugs to market." *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 405 (2012). To accomplish that result, the Hatch-Waxman Act allows a generic manufacturer to "piggy-back" on the brand-name manufacturer's efforts and to obtain approval for a generic drug without submitting a lengthy NDA. *Actavis*, 133 S. Ct. at 2228. Instead, the generic need only submit an abbreviated new drug application ("ANDA") certifying that the generic drug has the "'same active ingredients as'" and is "'biologically equivalent to'" the previously approved brand-name drug. *Caraco*, 566 U.S. at 405.

Brand-name drugs often are protected by one or more patents, and "the Hatch-Waxman Act sets forth special procedures for identifying, and resolving, related patent disputes." *Actavis*, 133 S. Ct. at 2228. First, the brand-name manufacturer must list each relevant patent in its NDA. *Id.* Then, each ANDA filer who wishes to enter the market before patent expiry must "assure the FDA that the generic will not infringe the brand-name's patents." *Id.* (quoting *Caraco*, 566 U.S. at 405 (internal quotation marks omitted)). The generic manufacturer can do so by filling a "paragraph IV" certification, which states "that any listed, relevant patent 'is invalid or will not be infringed by the manufacture, use, or sale'" of the generic drug. *Id.* (quoting 21 U.S.C. §355(j)(2)(A)(vii)(IV)).

Once a generic files an ANDA with a paragraph IV certification, "[t]he patent statute treats such a filing as itself an act of infringement, which gives the brand an immediate right to sue." *Caraco*, 566 U.S. at 407; *see also* 35 U.S.C. §271(e)(2). The Hatch-Waxman

Act encourages brands to file suit promptly: Where a patentee sues within 45 days of the paragraph IV certification, "the FDA generally may not approve the ANDA until 30 months pass or the court finds the patent invalid or not infringed." *Caraco*, 566 U.S. at 407 (citing 21 U.S.C. §355(j)(5)(B)(iii)). While that provision favors brand-name manufacturers, the Hatch-Waxman Act also provides a "special incentive" for a generic manufacturer to be the first to file an ANDA with a paragraph IV certification. *Actavis*, 133 S. Ct. at 2228-29. So long as the FDA approves the ANDA, the first-filer is entitled to a 180-day period of exclusivity, during which the FDA may not approve additional ANDAs to compete against the first-filer in the generic market. *Id.*

### B. Factual Background

Petitioner Pfizer[1] is the brand-name manufacturer of Lipitor, a drug designed to regulate levels of cholesterol in the bloodstream. App.8. Pfizer received its first patent on Lipitor in 1987 and eventually obtained seven patents covering the product. App.88-89; *see also* J.A. 16-17, 237-38, 310, 1436.[2] The last of these patents expired in January 2017. J.A.1436. During the period relevant to this petition, Pfizer also owned the patent on a separate drug, Accupril, which is used to treat high blood

[1] "Pfizer" refers collectively to Pfizer Inc., Pfizer Manufacturing Ireland, and Warner-Lambert Company, LLC (f/k/a Warner-Lambert Company).

[2] "J.A." refers to the Joint Appendix filed with the Third Circuit.

pressure. App.12. Pfizer's Accupril patent expired in February 2007.

Petitioner Ranbaxy[3] is a manufacturer of generic drugs. In 2002, Ranbaxy filed the first ANDA for a generic version of Lipitor. App.10. Ranbaxy's ANDA also included a paragraph IV certification asserting that its product would not infringe any valid Pfizer patent. *Id.* Pfizer responded by timely suing Ranbaxy for infringing two of the Lipitor patents, leading the FDA to withhold approval of Ranbaxy's ANDA for a 30-month period under the Hatch-Waxman Act. *Id.* A district court concluded that both of the relevant Lipitor patents were valid, and the Federal Circuit affirmed that ruling as to one of the patents and concluded that a scrivener's error invalidated the at-issue claim on the other patent. App.11. The upshot of that decision was that Ranbaxy's ANDA for a generic version of Lipitor could not be approved until at least 2010, when the valid patent expired. *Id.* Pfizer later applied for a reissuance of the invalid patent to cure the scrivener's error, and it ultimately obtained that reissuance in 2009. App.12.

While the Lipitor litigation was unfolding, Pfizer and Ranbaxy also were litigating fifteen other patent cases at home and abroad: in the United States, a separate patent dispute involving Accupril and another involving Caduet; elsewhere around the world, they were also litigating multiple disputes involving foreign counterpart patents protecting Lipitor, and one concerning Pfizer's Viagra.

---

[3] "Ranbaxy" refers collectively to Ranbaxy Inc., Ranbaxy Pharmaceuticals, Inc., and Ranbaxy Laboratories Ltd.

As to Accupril, Pfizer in 2004 filed a patent-infringement suit against Ranbaxy after Ranbaxy launched an FDA-approved generic version of Accupril.[4] App.13. After Ranbaxy's generic version of Accupril had been on the market for 105 days, Pfizer obtained a preliminary injunction that prevented Ranbaxy from selling any more of its generic product. Because the court issued the injunction based on only a limited record, it required Pfizer to post a $200 million bond in case the court later determined that it had granted the injunction improvidently—in which case Pfizer would be liable to Ranbaxy for damages for the duration of any period that Ranbaxy improperly was prevented from selling its product. *Id.* In 2007, following the expiration of the Accupril patent, the injunction eventually lifted. But the parties still had to resolve "Pfizer's claims for past damages" stemming from the period during which Ranbaxy had sold its generic version of Accupril, and the parties likewise had to resolve "Ranbaxy's counterclaim as secured by the injunction bond" for the more than 800-day span between 2004 and 2007 in which it was enjoined from selling generic Accupril. *Id.*

The next year, in 2008, Pfizer initiated a new patent infringement suit against Ranbaxy in the United States, alleging the infringement of two more Lipitor patents. *Id.* But before that lawsuit proceeded much further, Pfizer and Ranbaxy entered into a global litigation settlement that resolved virtually all of their disputes. In addition to bringing an end to the

---

[4] Ranbaxy partnered with another generic drug manufacturer, Teva Pharmaceuticals, which enjoyed first-filer status under the Hatch-Waxman Act with respect to Accupril. *See* App.12-13.

Lipitor and Accupril litigation, the settlement also resolved fourteen other disputes in both the United States and jurisdictions around the world. App.14; *see also* J.A. 82-84, 222, 257, 1524, 1529.

No term in any of the settlements involved a payment from Pfizer to Ranbaxy. As to the U.S. Lipitor litigation, Pfizer granted Ranbaxy a non-exclusive license to launch its generic version of Lipitor beginning in November 2011, which was more than five years prior to the January 2017 expiration of the last of the seven Lipitor patents.[5] App.14; *see also* J.A. 82-83, 265-66, 1524, 1529-30. As to the Accupril litigation, Ranbaxy paid Pfizer $1 million to settle the parties' claims, and (a) Ranbaxy agreed to release its counterclaim for damages (thereby reverting the $200 million bond to Pfizer), which was predicated on the 800-plus-day period between 2004 and 2007 when it was precluded from selling generic Accupril, and (b) Pfizer agreed to release its claim for past patent-infringement damages against Ranbaxy, which was predicated on the 105-day period between 2004 and 2005 when Ranbaxy had sold generic Accupril. App.14.

Finally, as to the other settlements comprising the global resolution, Petitioners settled them in a traditional fashion as well, with Pfizer granting licenses allowing Ranbaxy to enter before the patent expired in the relevant jurisdictions. *Id.*; *see also Actavis*, 133 S. Ct. at 2234, 2237 (settling by

---

[5] Accordingly, Pfizer did not impermissibly extend the duration of its patent monopoly beyond the life of the patent through the settlement agreement. *See, e.g.*, *Kimble*, 135 S. Ct. at 2406-07.

agreement on entry date before patent expiry is lawful and procompetitive).

### C. District Court Proceedings

Respondents are a putative class of direct purchasers of brand-name Lipitor, a putative class of end payors, and a handful of individual retailers, all of whom allege they overpaid for Lipitor. App.15. In 2011, Respondents filed suit against Pfizer and Ranbaxy under §1 of the Sherman Act, 15 U.S.C. §1, or purported state-law equivalents, alleging that the 2008 settlements unlawfully restrained trade. App.15-16. Respondents also filed suit against Pfizer under §2 of the Sherman Act, 15 U.S.C. §2, alleging *inter alia* that Pfizer had engaged in an anticompetitive scheme to delay entry of generic Lipitor in the United States. App.16.

In 2013, following *Actavis*, the District Court granted leave for Respondents to "incorporate changes" in their pleadings. App.124. After Respondents filed an amended complaint, Petitioners moved to dismiss it for failure to state a claim, and the District Court agreed. App.125. At the outset, the court observed that, in order to fall under the *Actavis* framework, antitrust plaintiffs alleging a "large" and "unjustified" reverse payment settlement in violation of the Sherman Act must satisfy several basic prerequisites: (1) "there must be a 'payment'"; (2) "it must be a 'reverse' payment, *i.e.*, the payment must be from the alleged patentee to the alleged infringer"; (3) "it must be 'large'"; and (4) "the large reverse payment is 'unexplained.'" App.149 (quoting *Actavis*, 133 S. Ct. at 2336-37).

As the court noted, however, "there are types of settlements that do not fall within the *Actavis* rationale," including when a patentee suing for patent infringement accepts less than its full demand, or when a patentee pays a patent challenger to settle a "counterclaim for damages" lodged against the patentee itself. App.150. Moreover, if the alleged reverse payment is premised on a non-monetary exchange of value, "the non-monetary payment must be converted to a reliable estimate of its monetary value so that it may be analyzed against the *Actavis* factors." App.162. If antitrust plaintiffs fail to put forward some plausible "foundation for estimating the alleged reverse payment," their complaint must be dismissed. App.163.

Applying those principles, the District Court concluded Respondents had not plausibly alleged an anticompetitive reverse payment under *Actavis*. As the court stated, "[t]he lack of any reliable foundation pervades the entire Complaint." App.168. Although Respondents claimed that Pfizer's decision to release its damages claim against Ranbaxy in the Accupril litigation constituted an anticompetitive reverse payment, the court concluded that Respondents had relied only on "broad characterizations" in making that argument, App.167, thereby rendering it impossible to determine the purported "monetary value of Pfizer's claim at the time of the settlement," App.165. Offering an example, the court observed that Respondents' complaint "characterizes Pfizer's [Accupril] claim as 'slam dunk' and Pfizer had Ranbaxy 'over the barrel,'" but did not put forward any relevant "facts." App.167.

The District Court also faulted Respondents for ignoring the flow of robust consideration *from Ranbaxy to Pfizer*, including Ranbaxy's decision to give up a damages claim that previously had been secured by a $200 million bond, as well as the $1 million payment Ranbaxy agreed to make to Pfizer. Under *Actavis,* the court reasoned, "a reverse payment occurs [only] when a net positive payment flows from the patentee to the alleged infringer." App.168. Thus, "any traditional settlement considerations or services provided by the generic" must be "deducted to determine whether there is a net positive payment flowing from the patentee to the alleged infringer." App.168-69. Here, the court concluded, the complaint made no effort to account for the significant value represented by Ranbaxy's abandonment of a massive counterclaim for damages. Rather, Respondents "rel[ied] only on certain sections … of the Settlement Agreement"—in particular, Pfizer's release of its damages claim in the Accupril litigation—while "disregard[ing] other sections." App.173. The court found that to be "not a reasonable analysis." *Id.* When antitrust plaintiffs "fail[] to consider the Settlement Agreement as a whole, and [fail] to account for a variety of factors," the court concluded that the complaint is "implausible." App.174 (quotation marks, alterations, and citation omitted).

Finally, the court considered whether to grant Respondents yet another opportunity to amend their complaint. But the court deemed that to be of little value, as the amended complaint had "changed little from the original Complaint" and Respondents "have not argued that they should be given leave to re-plead facts." App.176. Accordingly, the District Court

dismissed Respondents' complaint with prejudice. App.177.

### D. Third Circuit Proceedings

On appeal, the Third Circuit expressed concern that this Court had "offered limited guidance as to when such settlements should be subject to antitrust scrutiny," App.27, and lamented that this Court had been "opaque about the parameters of reverse payment antitrust claims," App.36. Nonetheless, the Third Circuit held that Respondents' complaint plausibly alleged an anticompetitive reverse payment settlement under *Actavis* simply because one isolated sub-component of the consideration in the larger settlement flowed from the patentee to the patent challenger.[6]

In reaching that result, the court relied almost exclusively on Pfizer's decision to release its damages claim against Ranbaxy in the Accupril litigation, explaining that Respondents' "allegations sufficiently allege that Pfizer agreed to release the *Accupril* claims against Ranbaxy, which were likely to succeed and worth hundreds of millions of dollars, in exchange for Ranbaxy's delay in the release of its generic version of Lipitor." App.33. The court thus ignored the proposition that resolution of the Accupril litigation—by compromise of competing damages claims—was "no more than a commonplace settlement." App.43.

---

[6] Before reaching the merits, the Third Circuit concluded that it, not the Federal Circuit, was the proper forum to hear the appeal. App.80-121. Both that jurisdictional ruling and the ruling on the merits were consolidated with separate appeals involving a different drug, Effexor XR, which was manufactured by separate drug companies. *See* App.18.

To be sure, the court did take note of a small part of the consideration that had flowed from Ranbaxy to Pfizer—namely, the $1 million payment Ranbaxy made to Pfizer. The court, however, found that payment insufficient to alter its analysis: "[T]he exchange of Ranbaxy's $1 million payment to Pfizer for Pfizer's release of the claim in the *Accupril* action (allegedly worth hundreds of millions of dollars)" could not "constitute[] a lawful compromise warranting no antitrust scrutiny." *Id.* But the court paid no heed to the fact that Ranbaxy had *also* released its competing damages counterclaim against Pfizer for its inability to sell generic Accupril for over 800 days, which previously had been secured by a $200 million bond. In the court's view, it was enough that the plaintiffs claimed a sliver of an otherwise "commonplace" and "traditional" form of settlement transferred value from the patentee to the patent challenger, without acknowledging the net flow of consideration arising from the mutual compromise of competing claims, because *Actavis* "does not require antitrust plaintiffs to come up with possible explanations for the reverse payment and then rebut those explanations in response to a motion to dismiss." App.41. According to the Third Circuit, it is sufficient to allege a fraction of the equation.

## REASONS FOR GRANTING THE PETITION

The Third Circuit's decision provides *carte blanche* for private plaintiffs' lawyers to subject virtually any patent settlement to antitrust scrutiny—including the kind of "commonplace" and "traditional" settlements *Actavis* expressly would not subject to antitrust scrutiny—by picking apart its pieces,

igniting burdensome and costly litigation that ultimately will harm the very consumers the antitrust laws are designed to protect. This Court's intervention is imperative to restore *Actavis*' promise that patentees may settle on the same terms that they traditionally have without facing an unbounded collateral review process backed by the threat of treble damages.

*Actavis* made clear that antitrust scrutiny applies only to those patent settlements involving "large" and "unjustified" reverse payments flowing from patentees to patent challengers "purely" to induce the latter to "give up the patent fight." 133 S. Ct. at 2233. And *Actavis* is equally clear that it did "not intend to alter th[e] understanding" that patentees may reach "commonplace" and "traditional" settlements without being subject to antitrust scrutiny. *Id*. This Court clearly identified at least two forms of "commonplace" settlements: (a) resolving damages claims through a compromise of those claims, *id.*, and (b) allowing patent challengers to enter the market prior to the expiration of the patent term (*i.e.*, entry date-only settlements), *id.* at 2237. The settlements Petitioners reached in 2008 fall squarely within those categories. Pfizer and Ranbaxy each agreed to release their competing damages claims in the Accupril litigation, with Ranbaxy giving up its counterclaim against Pfizer (secured by a $200 million injunction bond) and paying Pfizer $1 million, and Pfizer releasing its Accupril damages claim. With respect to the Lipitor settlement, Pfizer allowed Ranbaxy to enter with its generic Lipitor product in the United States several years prior to the expiration of its last Lipitor patent.

The Third Circuit's conclusion that Petitioners' settlement nonetheless might amount to a "large" and "unjustified" reverse payment is founded on a legally improper methodology that looks at only *part* of the consideration being provided rather than the *net* consideration. The court found the transactions here actionable only by myopically focusing on the "payment" Pfizer allegedly made to Ranbaxy by releasing some of its claim for infringement damages (which, incidentally, is what virtually every patent settlement agreement does). But if *Actavis* was serious that traditional settlements are not subject to antitrust scrutiny, then antitrust plaintiffs must at least plausibly allege that any facially lawful settlement is nonetheless suspect or a sham and, if so, that the *net* value transferred by the patentee to the patent challenger was "large" and "unjustified"—not that some individual component of the larger compromise, isolated from the remaining portions of the parties' agreement, was valuable to the challenger. Otherwise, it is impossible to determine whether any alleged reverse payment is "large" *or* "unjustified," or most importantly, whether the deal is even a reverse payment settlement at all. One must look at both sides of the ledger to determine whether there was actually a "payment," and to whom. If plaintiffs cannot meet that modest burden, and if the larger settlement is otherwise perfectly consistent with traditional settlement considerations, the complaint falls woefully "short of the line between possibility and plausibility." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

The Third Circuit's decision stands to have a significant impact on settlement practice. "Like most

litigation, patent litigation is settled all the time." *Actavis*, 133 S. Ct. at 2239 (Roberts, C.J., dissenting). It is settled all the time on terms just like those here, where the parties dismiss their respective damages claims and counterclaims against each other and the patent challenger is allowed to enter a patent-protected market on licensed terms at some point between the date of settlement and the date of patent expiry (here, years before the patent was set to expire). The Third Circuit's decision renders all such patent settlements subject to attack under the antitrust laws, because every one of those settlements at least in part could be said to transfer "value" from the patentee to the patent challenger. Moreover, companies routinely seek global peace by settling multiple litigations, which often involve different products, patents, and jurisdictions.

The Third Circuit's decision gives plaintiffs the green light to claim that some sliver of (an otherwise lawful) "settlement A" was overly "valuable" to the alleged infringer and that it therefore should be viewed as a payment for delay in respect of (an otherwise lawful) "settlement B."

The damage unleashed by the appellate court's willingness to subject virtually all patent settlements to rule-of-reason review is clear. "The elaborate inquiry into the reasonableness of a challenged business practice entails significant costs." *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 343 (1982). When any business faces unexpected costs, those costs will inevitably filter down to consumers themselves.

This case is the right vehicle to resolve the important federal question it presents. The parties

have exhaustively briefed whether traditional patent settlements like Petitioners' should be subject to antitrust scrutiny, and the District Court and Third Circuit produced thorough opinions that present the competing views. Nor is there any reason to think that this issue will continue to percolate in the lower courts. Just the opposite: Antitrust plaintiffs may select any district court in the Nation in which to file suit, 15 U.S.C. §22, and no rational plaintiff asserting a claim under *Actavis* will stray beyond the Third Circuit now. Before the Third Circuit's rule becomes entrenched as the *de facto* law of the land, this Court should grant the petition to reiterate that a traditional "settlement by agreement, rather than litigation, is not precluded by the [Sherman] Act"—and that cherry-picking isolated terms in the settlement does not change the calculus. *Standard Oil Co. (Indiana) v. United States*, 283 U.S. 163, 171 (1931).

## I. The Methodology Approved By The Third Circuit Directly Conflicts With *Actavis*.

The issue presented in this petition is whether parties will continue to be able to settle their patent disputes in the same ways they traditionally have, or whether plaintiffs may subject those settlements to antitrust scrutiny simply by picking them apart into component terms and alleging that one part in isolation constitutes a "reverse payment" under *Actavis*. To be sure, the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States," 15 U.S.C. §1, as well as "monopoliz[ation], or attempt[s] to monopolize, or combin[ations] or conspir[acies] ... to monopolize

any part of the trade or commerce among the several States," *id.* §2. And as this Court has explained, "Congress designed the Sherman Act as a 'consumer welfare prescription.'" *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting Robert H. Bork, *The Antitrust Paradox* 66 (1978)); *id.* (Sherman Act developed "as a means of protecting consumers from overcharges resulting from price fixing" (citing 21 Cong. Rec. 2457, 2460, 2558 (1890)).

But "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). Thus, even though "[t]he patent laws—unlike the Sherman Act—do not aim to maximize competition (to a large extent, the opposite)," *Kimble*, 135 S. Ct. at 2413, those two areas of the law can coexist in harmony. Patent settlements are prime examples. Ever since the early days of antitrust law, it has been well established that litigants may settle patent litigation even if such settlements may ultimately have an adverse effect on at least near-term consumer welfare. *See, e.g.*, *Standard Oil Co. (Indiana)*, 283 U.S. at 171 ("Where there are legitimately conflicting claims or threatened interferences, a settlement by agreement, rather than litigation, is not precluded by the [Sherman] Act."); *see also Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 816 (1945) (patent law stands as "exception to the general rule against monopolies and to the right to access to a free and open market").

That rule aligns with this Court's longstanding support for settlement agreements more generally. As this Court has noted, "settlements of matters in litigation or in dispute without recourse to litigation

are generally favored" and should generally "be upheld." *St. Louis Mining & Milling Co. v. Mont. Mining Co.*, 171 U.S. 650, 656 (1898); *see also Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910) ("Compromises of disputed claims are favored by the courts."); *Hennessy v. Bacon*, 137 U.S. 78, 85 (1890) ("[A] settlement ought not to be overthrown, even if the court should now be of opinion that the party complaining of it surrendered rights that the law, if appealed to, would have sustained.").

In *Actavis*, this Court stressed that patentees may continue to reach traditional settlement agreements, particularly the kind identified specifically in the Court's opinion itself, without becoming subject to a massive rule-of-reason inquiry. Indeed, *Actavis* made clear that antitrust scrutiny applies only to a limited subset of patent settlements that pose sufficiently serious anticompetitive concerns—namely, "reverse payment settlement agreements," which "require[] the patentee to pay the alleged infringer, rather than the other way around." 133 S. Ct. at 2227. The Court framed that issue by way of example: "Company A sues Company B for patent infringement. The two companies settle under terms that require (1) Company B, the claimed infringer, not to produce the patented product until the patent's term expires, and (2) Company A, the patentee, to pay B many millions of dollars." *Id.* As the Court emphasized, such settlements are "quite different" from standard settlement practice. *Id.* at 2233. In these agreements, the Court explained, the patentee pays the alleged infringer "purely so [the infringer] will give up the patent fight." *Id.* Put another way, "a party *with no claim for damages* … walks away with money simply

so it will stay away from the patentee's market." *Id.* (emphasis added).

*Actavis* in turn stressed that "commonplace" and "traditional" patent settlements are entirely different: In those cases, where, for instance, "Company A sues Company B for patent infringement and demands, say, $100 million in damages, it is not uncommon for B (the defendant) to pay A (the plaintiff) some amount less than the full demand as part of the settlement—$40 million, for example." *Id.* And, critically for present purposes, *Actavis* made crystal clear that such a settlement would *not* trigger antitrust scrutiny even if it technically "includes 'an implicit net payment' from A to B of $60 million." *Id.* (quoting Marc G. Schildkraut, *Patent-Splitting Settlements and the Reverse Payment Fallacy*, 71 Antitrust L.J. 1033, 1046 (2004)).

So, too, with other traditional forms of settlement, as when "B has a *counterclaim* for damages against A, the original infringement plaintiff, [such that] A might end up paying B to settle B's counterclaim." *Id.* (emphasis added). *Actavis* further stressed that patentees remain free to reach settlements in still other ways—for example, by "allowing the generic manufacturer to enter the patentee's market prior to the patent's expiration, without the patentee paying the challenger to stay out prior to that point." *Id.* at 2237. As the Court once again explained, "settlements taking these commonplace forms have not been thought for that reason alone subject to antitrust liability." *Id.* at 2233. Most importantly, the Court expressly noted that it "d[id] *not intend to alter that understanding*" moving forward. *Id.* (emphasis

added). Consequently, unlike in those cases in which a patentee pays a reverse payment to a patent challenger solely to prevent competition, antitrust law has no business prying into "commonplace" and "traditional" patent settlements.

The Third Circuit's decision effectively guts *Actavis*' express limitations by holding that antitrust scrutiny applies to the traditional settlement at issue here simply because Respondents alleged that an isolated term in the settlement constituted a "large" and "unjustified" reverse payment. A holistic view reveals just the opposite. In the Accupril litigation, Petitioners reached a mutual compromise in which the parties released their competing claims for damages against each other, with Ranbaxy (the patent challenger) paying Pfizer (the patentee) an additional $1 million on top of that. App.14. In other words, patent challenger Ranbaxy paid patentee Pfizer "some amount less than [Pfizer's] full demand as part of the settlement," and Pfizer accepted the amount it did because Ranbaxy "ha[d] a counterclaim for damages against" Pfizer that Pfizer previously had been forced to cover with a $200 million bond. *Actavis*, 133 S. Ct. 2233. And in the Lipitor litigation, Pfizer resolved its dispute with Ranbaxy by "allowing the generic manufacturer to enter the patentee's market" in November 2011—or more than five years "prior to the patent's expiration"—"without the patentee paying the challenger to stay out prior to that point." *Id.* at 2237; *see also* App.14; J.A. 82-83, 265-66, 1524, 1529-30. And although Respondents chose to ignore the other disputes covered under Petitioners' global settlement agreement, each one of them was similarly resolved without any reverse payments. As the Third

Circuit correctly noted, "Pfizer and Ranbaxy negotiated similar market entry dates for generic Lipitor in several foreign jurisdictions," App.92—exactly as *Actavis* permits, 133 S. Ct. at 2237. Viewed in its entirety, the notion that Petitioners' settlement represents a "large" and "unjustified" reverse payment settlement agreement under *Actavis* cannot withstand scrutiny.

The Third Circuit arrived at the contrary conclusion only by slicing the parties' settlements into isolated slivers and then ignoring those parts that undercut its analysis. According to the Third Circuit, Respondents adequately alleged an anticompetitive reverse payment *solely* because Pfizer "released its *Accupril* claims" "[d]espite the large expected damages arising from the *Accupril* suit." App.34. And because "the release of potential liability in *Accupril* far exceeded any of Pfizer's saved litigation costs or any services provided by Ranbaxy," the Third Circuit continued, "Pfizer's alleged agreement to release the *Accupril* claims … was an inducement—valuable to both it and Ranbaxy—to ensure a longer period of supracompetitive monopoly profits based on the Lipitor patent, which was at risk of being found invalid or not infringed." *Id.* (quotation marks, alterations, and citation omitted).

That reasoning is wrong at every turn. Most fundamentally, a "large" and "unjustified" reverse settlement payment can occur only when "a party with *no claim for damages* … walks away with money simply so it will stay away from the patentee's market." *Actavis*, 133 S. Ct. at 2233 (emphasis added). But Petitioners' settlement was no such thing. As

even the Third Circuit acknowledged elsewhere in its opinion, both Pfizer and Ranbaxy had *competing* claims for damages in the Accupril litigation at the time of settlement. *See* App.13 (noting that "Pfizer's claims for past damages and Ranbaxy's counterclaim" remained to be decided even after the expiration of the Accupril patent in 2007). Ranbaxy's damages claim, moreover, was no pushover: Pfizer had been required to post a *$200 million* bond to cover Ranbaxy's potential damages in the Accupril litigation, and Ranbaxy's generic version of Accupril was eventually held off the market for several years during which damages continued to accrue. *See* App.91.

Yet the Third Circuit turned a blind eye to all of this. Under the Third Circuit's view, "Ranbaxy's $1 million payment to Pfizer for Pfizer's release of the claim in the *Accupril* action (allegedly worth hundreds of millions of dollars)" would not "constitute[] a lawful compromise warranting no antitrust scrutiny." App.43. But that reasoning entirely ignores the undisputed fact (conceded in Respondents' complaints) that Ranbaxy *also* conferred value potentially "worth hundreds of millions of dollars" *on Pfizer* by agreeing to release its damages counterclaim against Pfizer. Needless to say, it simply cannot be the law that an antitrust complaint alleging a "large" and "unjustified" reverse payment settlement agreement under *Actavis* can survive a motion to dismiss simply by cherry-picking isolated terms out of a larger settlement (or set of settlements) and ignoring the rest of the parties' agreements. That approach is tantamount to a holding that every patent settlement is subject to rule-of-reason review if *any* consideration flows from the patentee to the patent challenger as to

*any* single part of the deal—which, of course, is what happens in every single patent settlement when the patentee agrees to release its claims.

At the very least, if antitrust plaintiffs like Respondents are to "nudge[] their claims across the line from conceivable to plausible," *Twombly*, 550 U.S. at 570, they must plausibly allege a significant *net flow* of consideration from the patentee to the patent challenger from a *non-traditional* settlement. That much follows directly from *Actavis* itself, which held that antitrust scrutiny applies only to the small universe of patent settlements involving "large" and "unjustified" reverse payments to patent challengers. 133 S. Ct. at 2237. But determining whether any alleged reverse payment is "large" requires consideration of *quantitative* value considered in relevant industry context, as *Actavis* makes clear. *See id.* at 2234-35 (discussing reverse payment in context of estimated "full patent" monopoly return and the amount "the generic would gain in profits if it won the paragraph IV litigation and entered the market"). As explained above, however, *Actavis* is equally clear that antitrust plaintiffs may *not* rely on "commonplace" and "traditional" forms of settlement to state a claim under *Actavis*. As a result, in order to survive a motion to dismiss, plaintiffs alleging an anticompetitive reverse payment must plausibly allege that the *net value* that a patentee transfers to a patent challenger is "large" and "unjustified"—*i.e.*, plaintiffs must deduct "traditional" and "commonplace" exchanges of value from any assessment. *See* App.169 ("any traditional settlement considerations" must be "deducted to determine whether there is a net positive payment flowing from

the patentee to the alleged infringer"). Were it otherwise, *Actavis*' instruction that "commonplace" forms of settlement are not "subject to antitrust liability" would effectively be rendered nugatory. 133 S. Ct. at 2233.

Respondents here did not even attempt to fulfill this elementary pleading requirement. Instead, they opted to "characterize Pfizer's [Accupril] claim as 'slam dunk'" and alleged that "Pfizer had Ranbaxy 'over the barrel.'" App.167. Remarkably, the Third Circuit accepted those plainly inadequate allegations, concluding that requiring any additional allegations beyond what Respondents put forward would amount to an impermissible heightened pleading standard. App.56. Indeed, according to the Third Circuit, *Actavis* "does not require antitrust plaintiffs to come up with possible explanations for the reverse payment and then rebut those explanations in response to a motion to dismiss." App.41. But that reasoning violates first principles. Under *Actavis*, *plaintiffs* bear the burden of plausibly alleging that a settlement includes a reverse payment that is "large" and "unjustified," and as the District Court found, there simply cannot be a plausible claim under *Actavis* when the allegations entirely disregard relevant and known procedural facts regarding settled litigation. *See* App.173 ("To rely only on certain sections … of the Settlement Agreement and disregard other sections … is not a reasonable analysis."). Here, those facts establish beyond doubt that any so-called "payment" from Pfizer to Ranbaxy was offset by Ranbaxy's "payment" to Pfizer. That Respondents made literally zero effort to account for such traditional settlement

considerations, and that the Third Circuit thought nothing of it, is inexcusable.

* * *

The Third Circuit, despite openly acknowledging it had "limited guidance" to do so, has unilaterally proclaimed that otherwise "commonplace" and "traditional" patent settlements can become subject to antitrust scrutiny if a clever plaintiff can pull out isolated aspects of one settlement, match it up with another, and assert that there was a "payment" to the patent challenger, without looking at the *net* flow of consideration. That cannot be the law, and no decision of this Court supports the novel decision below. This Court should grant review and reverse the Third Circuit's extraordinary assault on litigating parties' ability to enter into routine patent settlements.

## II. The Third Circuit's Decision Will Expose Numerous Traditional Patent Settlements To Antitrust Attack.

This Court repeatedly has observed that subjecting litigants to rule-of-reason review under the antitrust laws is exceptionally costly, time-consuming, and often unsuccessful. *See, e.g.*, *Kimble*, 135 S. Ct. at 2411 ("[W]hatever its merits may be for deciding antitrust claims, that 'elaborate inquiry' produces notoriously high litigation costs and unpredictable results."); *Twombly*, 550 U.S. at 558 ("[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive." (citation omitted)); *Maricopa Cty.*, 457 U.S. at 332 ("Litigation of the effect or purpose of a practice often is extensive and complex. Judges often

lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition." (citation omitted)); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609-10 (1972) ("Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated per se rules."). Indeed, "litigating a rule of reason case is 'one of the most costly procedures in antitrust practice.'" *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 917 (2007) (Breyer, J., dissenting) (quoting H. Hovenkamp, *The Antitrust Enterprise* 105 (2005)).

At the same time, this Court and other courts have consistently offered support for the "wise" and longstanding public policy that favors the settlement of litigation, save for extremely narrow circumstances as in *Actavis* itself. *See McDermott, Inc. v. AmClyde*, 511 U.S. 202, 215 (1994) ("public policy wisely encourages settlements"); *Blonder Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 334-35 (1971) (noting benefits of "avoiding 'the necessity of defending an expensive infringement action'" (citation omitted)); *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008) ("[T]here is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned."); *Hensley v. Alcon Labs., Inc.*, 277 F.3d 535, 540 (4th Cir. 2002) (noting value of settlements "in providing an orderly and peaceful resolution of controversies"); *Am. Sec. Vanlines, Inc. v. Gallagher*, 782 F.2d 1056, 1060 (D.C. Cir. 1986) ("Few public policies are as well established as the principle that courts should favor voluntary

settlements of litigation by the parties to a dispute."); *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) ("There are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation."); *D. H. Overmyer Co. v. Loflin*, 440 F.2d 1213, 1215 (5th Cir. 1971) ("Settlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and uncertainties and preventing lawsuits.").

The Third Circuit nonetheless held that an otherwise "commonplace" and "traditional" set of patent settlement agreements should be subjected to costly rule-of-reason review by picking and choosing discrete elements that, when married together, allegedly formed a "reverse payment." That is reason enough for alarm. But the Third Circuit's reasoning is particularly dangerous because there is no principled basis for limiting its application to just this case or just the pharmaceutical context. Under the Third Circuit's theory, *any* patent settlement that does not result in *immediate* entry into the market for a patent challenger can move into discovery so long as the patentee can be said to have sacrificed, and the patent challenger to have received, anything of significant "value," regardless of whether the patentee receives anything of value from the patent challenger. Liability under this approach thus is limitless, because every single patent settlement transfers something of "value"—that, by definition, is what happens when a plaintiff releases his or her claims.

Because of the risks inherent in the appellate court's radical approach, few patent challengers will

ever be able to settle their litigation now: Every deal now will come with the hefty price tag associated with rule-of-reason review, especially settlements resolving more than just a single patent. *See, e.g.*, *Asahi Glass Co. v. Pentech Pharms., Inc.*, 289 F. Supp. 2d 986, 994 (N.D. Ill. 2003) (Posner, J.) ("*any* settlement agreement can be characterized as involving 'compensation' to the defendant, who would not settle unless he had something to show for the settlement. If any settlement agreement is thus to be classified as involving a forbidden 'reverse payment,' we shall have no more patent settlements."). Every plaintiff can assert that the parties could have settled on better terms and that the patentee transferred something of value it should not have. In other words, private plaintiffs' lawyers now have a blank check to subject any settlement in any industry to antitrust scrutiny if the settlement allows for licensed future entry into a patent-protected market and also resolves damages claims between patentees and patent challengers. This is so even if a patent settlement allows a patent challenger to enter a patent-protected market at a future date that is *years* before the expiration of the patent term, and even if the *net* "payment" that the patentee makes to the patent challenger is *zero* after accounting for traditional settlement considerations. Yet that is exactly what *Actavis* says should *not* be subject to antitrust scrutiny. 133 S. Ct. at 2233.

It would be one thing if patent litigation did not often result in settlement agreements and if the Third Circuit's judgment below was a one-off problem. But it is quite another when over 90% of patent lawsuits today result in a settlement agreement. John R. Allison, Mark A. Lemley, & David L. Shwartz,

*Understanding the Realities of Modern Patent Litigation*, 92 Tex. L. Rev. 1769, 1780 (2014). And as this Court has already explained, it is entirely "commonplace" and "traditional" to settle on terms exactly like those described above. *See Actavis*, 133 S. Ct. at 2233. Under the Third Circuit's reasoning, all of those "commonplace" and "traditional" settlement agreements are now threatened with the "notoriously high litigation costs and unpredictable results" of rule-of-reason review. *Kimble*, 135 S. Ct. at 2411. That not only will create tremendous business uncertainty when the whole point of settling is to create certainty; it will needlessly clog district court dockets. *See Maricopa Cty.*, 457 U.S. at 332. Making matters worse, the alternative path is not any better. If parties to a patent dispute refuse to settle in order to avert the disastrous consequences of the decision below, then they will only be greeted by more litigation, more legal fees, and an uncertain endgame.

This Court's intervention thus would be warranted even if the decision below affected only those *Actavis*-inspired antitrust complaints that naturally would be filed within the Third Circuit, which is home to one of the highest concentrations of pharmaceutical companies (and pharmaceutical patents) in the country. But in the antitrust context, when any circuit court lays down a new, plaintiff-friendly rule, that circuit tends to become a magnet for disputes that may not have otherwise been filed there. That is because the Clayton Act permits antitrust plaintiffs to file suit in any federal district court in the country. *See* 15 U.S.C. §22.

Given that rule, the Third Circuit's anti-patent antitrust doctrines are likely to become the *de facto* standards nationwide, with plaintiffs flocking there from around the country in a hunt for treble damages. *See id.* §15 (antitrust plaintiff "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee"). All the while, antitrust defendants will be powerless to do anything about it. *See United States v. Nat'l City Lines*, 334 U.S. 573, 580 (1948) (noting that defendant corporation cannot "defeat the plaintiff's choice of venue as given, by asking for and securing dismissal of the suit, either on the ground that the venue selected within the statutory limits is inconvenient for the defendant or that another authorized venue is more convenient for it").

In short, no matter whether they are pharmaceutical companies incorporated in a Third Circuit state or not, patentees and patent challengers that settle their disputes in ways long considered "commonplace," "traditional," and not a basis for antitrust scrutiny may now have each one of those settlements collaterally attacked in the Third Circuit and subjected to rule-of-reason review as a result of the decision below. And although antitrust defendants may initially bear the brunt of "one of the most costly procedures" known to law, *Leegin*, 551 U.S. at 917, it would be naïve to believe the financial burden will be neatly contained to corporate antitrust defendants alone. Ultimately, companies under attack in the Third Circuit will have to transfer their increased costs to consumers. Thus, rather than maximizing consumer welfare as Congress intended through the Sherman Act, *see Reiter*, 442 U.S. at 343,

the decision below—which purports to enforce that law—will have just the opposite effect.

In these circumstances, it is no wonder why this Court expressly "recognize[d] the value of settlements" in the patent context. *Actavis*, 133 S. Ct. at 2234. The Third Circuit's illogical and settlement-busting approach cannot be allowed to remain the law.

* * *

For all the reasons noted above, this is the right time, and this is the right case, to resolve the exceptionally important question whether an antitrust complaint alleging a "large" and "unjustified" reverse payment settlement agreement states a plausible claim for relief when it cherry-picks among pieces of a larger agreement to conjure a purported transfer of value from a patentee to patent challenger, but does not account for the net flow of consideration. Neither law nor logic remotely suggests the answer is yes. And the Third Circuit reached the opposite conclusion even while openly acknowledging that it lacks any confidence in how to interpret *Actavis*. For a court that regularly adjudicates *Actavis*-inspired litigation (and is now destined to be Ground Zero for such litigation), *see, e.g.*, *Wyeth, LLC v. Rite Aid Corp.*, No. 17-___; *SmithKline Beecham Corp. v. King Drug Co. of Florence, Inc.*, No. 15-1055, that result is intolerable. The Court should grant the petition.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

ROBERT A. MILNE
RAJ S. GANDESHA
BRYAN D. GANT
SHERYN GEORGE
WHITE & CASE LLP
1221 Sixth Avenue
New York, NY 10020
(212) 819-8200

*Counsel for Pfizer Inc., et al.*

JAY P. LEFKOWITZ, P.C.
*Counsel of Record*
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
(212) 446-4800
lefkowitz@kirkland.com

JOHN C. O'QUINN
MICHAEL D. SHUMSKY
JONATHAN D. JANOW
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
655 Fifteenth Street NW
Washington, DC 20005

*Counsel for Ranbaxy Inc., et al.*

November 20, 2017