

APPENDIX

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App. 1

APPENDIX A

NOT PRECEDENTIAL

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 14-4632

[Filed January 3, 2018]

IN RE: LIPITOR ANTITRUST LITIGATION	)
	)
RP HEALTHCARE, INC.; CHIMES PHARMACY,	)
INC.; JAMES CLAYWORTH, R.Ph., d/b/a	)
Clayworth Pharmacy; MARIN APOTHECARIES,	)
INC., d/b/a Ross Valley Pharmacy; GOLDEN	)
GATE PHARMACY SERVICES, INC., d/b/a	)
Golden Gate Pharmacy; PEDIATRIC CARE	)
PHARMACY, INC.; MEYERS PHARMACY, INC.;	)
TONY MAVRANTONIS R. PH., d/b/a Jack's	)
Drugs; TILLEY APOTHECARIES INC,	)
d/b/a Zweber's Apothecary,	)
Appellants	)

On Appeal from United States District Court
for the District of New Jersey
(D.N.J. No. 3-12-cv-05129) / (MDL 2332) /
(D.N.J. No. 12-cv-02389)
District Judge: Honorable Peter G. Sheridan

App. 2

Argued September 27, 2016
Before: AMBRO, SMITH* and FISHER,**
Circuit Judges.

(Filed: January 3, 2018)

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** Honorable D. Michael Fisher, United States Circuit Judge for the Third Circuit, assumed senior status on February 1, 2017.

App. 3

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App. 5

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OPINION*

PER CURIAM

The present matter is one part of the complex antitrust litigation involving the pharmaceutical product Lipitor and a settlement agreement between Pfizer Inc. and Ranbaxy Inc. This Court has already issued two precedential opinions in this case. *Lipitor III* was jurisdictional in focus and we concluded that the Plaintiffs’ antitrust claims did not “arise under” patent law.¹ Consequently, we denied the Defendants’ motions for transfer to the Federal Circuit.² In the subsequent merits opinion, *Lipitor IV*, we reversed the District Court’s dismissal of the Plaintiffs’ consolidated complaints.³

The present Plaintiffs—a group of California pharmacists collectively referred to as RP Healthcare—constitute a distinct party within the broader Lipitor litigation, and their complaint presents unique legal questions, both substantive and jurisdictional. In contrast to the other Plaintiffs, RP

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

¹ *In re: Lipitor Antitrust Litig.*, 855 F.3d 126, 145 (3d Cir. 2017). We continue the same numbering scheme used in our previous opinions. *Lipitor I* and *Lipitor II* are opinions of the District Court.

² *Id.*

³ *In re: Lipitor Antitrust Litig.*, 868 F.3d 231 (3d Cir. 2017).

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Healthcare bases its claim exclusively on California's antitrust statute, the Cartwright Act.⁴ Therefore, whether we may exercise jurisdiction turns on the diversity of the parties.⁵ In *Lipitor III*, we held that the record lacked sufficient evidence to determine the citizenship of each Defendant, so we directed the District Court to conduct limited discovery on that issue.⁶ Of course, with the jurisdictional question undecided, we could not reach the merits of RP Healthcare's complaint in *Lipitor IV*. On remand, the District Court found that there was complete diversity amongst the parties and upheld jurisdiction on that basis. We will affirm.

Turning to the merits, we will also affirm the District Court's dismissal of RP Healthcare's complaint, but for different reasons. Finally, we will affirm the District Court's ruling that it lacked personal jurisdiction over one of the Defendants, Daiichi Sankyo Company, Ltd.

I.

Diversity Jurisdiction

RP Healthcare filed its initial complaint in California state court. Following removal—and transfer by the Judicial Panel on Multidistrict Litigation—the District Court declined to remand the case back to

⁴ Cal. Bus. & Prof. Code § 16700 *et seq.*

⁵ The parties agree that the amount in controversy exceeds \$75,000.

⁶ *Lipitor III* 855 F.3d at 134.

state court, grounding its finding of federal jurisdiction in potential patent defenses of the Defendants. Because federal “arising under” jurisdiction must be based on a plaintiff’s complaint, not possible defenses, we observed in *Lipitor III* that this ruling was in error.⁷ That did not end our analysis, however, because after the District Court declined to send the case back to state court, but prior to final judgment, RP Healthcare voluntarily dismissed what appeared to be each of the remaining non-diverse Defendants, with the “appeared to be” resulting from the aforementioned uncertainty over the citizenship of several Defendants. Our Order in *Lipitor III* asked the District Court to resolve this uncertainty.⁸

Back in the District Court, the parties stipulated that at the time of final judgment all of the Plaintiffs were citizens of California and none of the Defendants were citizens of California. Complete diversity being established, the District Court held that it had jurisdiction under 28 U.S.C. § 1332. We agree. As discussed in *Lipitor III*, a District Court may exercise jurisdiction if, at the time of final judgment, there is a proper basis.⁹ This is the case even if, at an earlier point in the proceedings, there was no basis for federal jurisdiction.¹⁰ RP Healthcare’s original remand motion should have been granted for lack of jurisdiction, but,

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 150 (citing *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 64 (1996)).

¹⁰ *Caterpillar*, 519 U.S. at 64.

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by the time of final judgment, there was complete diversity between the parties. Therefore, the District Court's jurisdiction was ultimately proper, notwithstanding the prior erroneous decision.

II.

RP Healthcare's Complaint

Having established jurisdiction over RP Healthcare's complaint, we may now turn to its merits. Put very briefly, a reverse settlement occurs (almost exclusively in the pharmaceutical sector) when a patent holder sues an alleged infringer and the suit is settled with a large payment from the patent holder to the infringer. Such a settlement is usually accompanied by a promise from the infringer to exit the market for a certain length of time. A distinguishing feature of a reverse settlement is that the bargained-for abstention period falls within the term of the patent at issue, when the patent holder would normally enjoy a government-conferred monopoly. Absent the patina of patent protection, the agreement would be nakedly anti-competitive. In this case, Pfizer sued Ranbaxy for infringement of a Lipitor patent and the parties entered into an agreement bearing many of the now-familiar hallmarks of a reverse settlement. RP Healthcare's complaint alleges that this agreement constituted a per se antitrust violation under the Cartwright Act.

The District Court previously dismissed the RP Healthcare complaint under Rule 12(b)(6) for the same reason it dismissed those of the other Plaintiffs: its failure to calculate the reasonable value of the alleged "reverse payment" between Pfizer and Ranbaxy. As to

those other Plaintiffs, we reversed this dismissal in *Lipitor IV*, concluding that in reverse settlement cases “[t]he Supreme Court did not require the advanced valuations . . . required by the District Court.”¹¹ Throughout this litigation, however, RP Healthcare has been at pains to stress that it is alleging a per se antitrust violation, not a reverse settlement claim under *FTC v. Actavis*,¹² so the same reasoning ought not to apply. We agree, and this distinction is fatal to its claim. Under California antitrust law, a reverse settlement may not be attacked on a per se basis, so the District Court’s dismissal was proper.

As we observed in *Lipitor IV*, “[p]rior to [the Supreme Court’s decision in] *Actavis*, several courts had held that [reverse settlement] agreements were immune from antitrust scrutiny so long as the asserted anticompetitive effects fell within the scope of the patent.”¹³ In *Actavis*, the Court rejected this categorical rule and held that, in general, “patent and antitrust policies are both relevant”¹⁴ in determining the proper level of antitrust immunity conferred by a patent, and, in particular, reverse settlements implicate antitrust concerns when their payments are “large and unjustified.”¹⁵

¹¹ *Lipitor IV*, 868 F.3d at 255.

¹² 133 S. Ct. 2223 (2013).

¹³ 868 F.3d at 250 (internal citations and quotations omitted).

¹⁴ *Actavis*, 133 S. Ct. at 2231.

¹⁵ *Id.* at 2237.

The California Supreme Court applied the reasoning of *Actavis* to the Cartwright Act in *In re Cipro Cases I & II*.¹⁶ Of particular importance to the RP Healthcare complaint, the California Supreme Court first determined what degree of antitrust scrutiny should apply to a reverse settlement. Under California law, “certain categories of agreements or practices that can be said to always lack redeeming value . . . [are] per se illegal.”¹⁷ However, reverse settlements do not fall within the per se category and must instead be scrutinized under a structured rule of reason analysis.¹⁸ Because the agreement between Pfizer and Ranbaxy was a reverse settlement, RP Healthcare’s claim of a per se violation of the Cartwright Act necessarily fails under *Cipro*.

Perhaps cognizant of this unremarkable application of California law, RP Healthcare attempts to escape *Cipro*’s reach by arguing that the agreement between Pfizer and Ranbaxy was not a reverse settlement at all. Whereas reverse settlements regulate activity within the term of a disputed patent, it argues, the agreement in this case only covered the time period following the expiration of the Lipitor patent. RP Healthcare dates this expiration to June 28, 2011, but this is simply inaccurate. To be sure, *a* Lipitor patent expired on that date, but RP Healthcare conspicuously ignores the fact that Lipitor was covered by at least five other patents that expired between 2013 and 2017, well outside the

¹⁶ 61 Cal. 4th 116, 142-43 (2015).

¹⁷ *Id.* at 146.

¹⁸ *Id.* at 148.

period contemplated by the settlement agreement. Whether Ranbaxy could have designed around these later-expiring patents—thus producing a generic version of Lipitor without infringing upon them—is relevant under a rule of reason analysis.¹⁹ But questions about the practical durability of a patent have no bearing on its presumed validity. The settlement agreement’s basic attributes, which cannot be ignored, reveal that it was a straightforward reverse settlement under *Cipro*. This forecloses any claim of a per se antitrust violation.

III.

Personal Jurisdiction Over Defendant Daiichi Sankyo Company, Ltd.

One final matter remains from our Order in *Lipitor III*. When the District Court originally dismissed the present complaint, it did so under Rule 12(b)(6). One Defendant, however, Daiichi Sankyo Company, Ltd., had asserted an alternative basis for dismissal under Rule 12(b)(2) for want of personal jurisdiction. The District Court never addressed Daiichi Limited’s personal jurisdiction motion, which should have logically preceded any decision under Rule 12(b)(6).²⁰

¹⁹ The ease with which a generic manufacturer could design around such patents would serve as a relevant indicator of the overall strength of Pfizer’s position in negotiating the settlement. The weaker a patent holder’s position, the more likely a reverse settlement will be found anti-competitive. *Actavis*, 133 S. Ct. at 2236-37.

²⁰ *Sinocem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 430-31 (2007).

Following our limited remand in *Lipitor III*, the District Court found that it lacked personal jurisdiction and modified its dismissal order to reflect Rule 12(b)(2) as the proper basis. We will affirm.

As the District Court found, Daiichi Limited (1) is a Japanese corporation; (2) is not incorporated or registered to do business in California; (3) has no offices or other company facilities in California; (4) has no employees in California; and (5) has no appointed agent for service of process in California. RP Healthcare claims that personal jurisdiction exists because Daiichi Limited allegedly conditioned its purchase of stock from Ranbaxy, an Indian company, upon Ranbaxy entering into the present agreement with Pfizer. Following a motion for dismissal under Rule 12(b)(2), the burden is on the plaintiff to prove personal jurisdiction by a preponderance of the evidence.²¹ We agree with the District Court that RP Healthcare has failed to allege, let alone prove, any facts that would support a California court's exercise of personal jurisdiction. Even if the allegations regarding the sale of stock are true, such an agreement would not show that Daiichi Limited "purposefully availed itself of the privilege of conducting activities within" California, as would be required to support personal jurisdiction.²²

IV.

The Order of the District Court will be AFFIRMED.

²¹ *IMO Indus. v. Kiekert AG*, 155 F.3d 254, 257 (3d Cir. 1998) (citations omitted).

²² *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985).

App. 14

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 14-4632

[Filed January 3, 2018]

IN RE: LIPITOR ANTITRUST LITIGATION	)
	)
RP HEALTHCARE, INC.; CHIMES PHARMACY,	)
INC.; JAMES CLAYWORTH, R.Ph., d/b/a	)
Clayworth Pharmacy; MARIN APOTHECARIES,	)
INC., d/b/a Ross Valley Pharmacy; GOLDEN	)
GATE PHARMACY SERVICES, INC., d/b/a	)
Golden Gate Pharmacy; PEDIATRIC CARE	)
PHARMACY, INC.; MEYERS PHARMACY, INC.;	)
TONY MAVRANTONIS R. PH., d/b/a Jack's	)
Drugs; TILLEY APOTHECARIES INC,	)
d/b/a Zweber's Apothecary,	)
Appellants	)

On Appeal from United States District Court
for the District of New Jersey
(D.N.J. No. 3-12-cv-05129) / (MDL 2332) /
(D.N.J. No. 12-cv-02389)
District Judge: Honorable Peter G. Sheridan

Argued September 27, 2016

App. 15

Before: AMBRO, SMITH* and FISHER,**
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on September 27, 2016. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the order of the District Court dismissing the complaint entered November 5, 2014, and the order regarding jurisdiction entered September 29, 2017, be and the same are hereby AFFIRMED. All of the above in accordance with the opinion of this Court.

Costs taxed against appellants.

ATTEST:

s/ Patricia S. Dodszuweit,
Acting Clerk

Dated: January 3, 2018

* Honorable D. Brooks Smith, United States Circuit Judge for the Third Circuit, assumed Chief Judge status on October 1, 2016.

** Honorable D. Michael Fisher, United States Circuit Judge for the Third Circuit, assumed senior status on February 1, 2017.

APPENDIX B

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

Civil Action No.: 12-5129 (PGS)

[Filed September 29, 2017]

RP Healthcare, Inc., et al.,	)
Plaintiff,	)
	)
v.	)
	)
Pfizer, Inc., et al.	)
Defendant.	)

OPINION

This matter comes before the Court on remand from the United States Court of Appeals for the Third Circuit for the limited purpose of deciding two questions pertaining to *In Re: Lipitor Antitrust Litigation*. First; determining “whether diversity jurisdiction existed at the time judgment was entered;” and second, “whether the District Court had the power to reach the merit of the Plaintiffs’ claims against the Daiichi Sankyo Defendants.” (Order at 1, Case No. 12-cv-05129, ECF No. 95) (3d Cir. 2017).

I.

On November 7, 2011, Plaintiffs (RP Healthcare, et al) filed a complaint against Defendants in U.S.

District Court of Northern California. (Memorandum and Order at 1, ECF No. 212.)¹ In the original case, the Plaintiffs alleged anti-trust law violations arising out of a reverse-settlement transaction between Pfizer and Ranbaxy Pharmaceuticals, Inc. (“Ranbaxy”), a pharmaceutical company in India, pertaining to the drug Lipitor. *See generally, FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013) (Original State Complaint at 3-4, Case 3:12-cv-05129, ECF No. 3) (hereinafter “Original State Complaint”).

On December 6, 2011, Defendants moved before the Judicial Panel on Multidistrict Litigation (“MDL”) to centralize this case with other similar filed cases that arose out of the Lipitor transaction. (Memorandum and Order at 1, ECF No. 212.)

On or around January 20, 2012, Plaintiffs apparently disliked the MDL procedures and dismissed without prejudice their complaint from the District Court of Northern California. *Id.*

On January 31, 2012, Plaintiffs then proceeded to re-file the complaint in the Superior Court of California, County of Sonoma alleging state law claims. *Id.* *See also* Original State Complaint at 1.

On March 2, 2012, the collective Defendants removed the case to the U.S. District Court for the District of Northern California on grounds of federal

¹ Several additional parties were also named as defendants in the complaint, but the present matter pertains only to the aforementioned named parties. The case, originally titled *Chimes Pharmacy, Inc. v. Pfizer*, was later renamed *RP Healthcare v. Pfizer*. *Id.*

question pursuant to 28 U.S.C. §§ 1331, 1338, 1441, 1446, and 1454. (Notice of Removal at 1, 4-5, Case No. 3:12-cv-05129, ECF No. 1) (hereinafter “Notice of Removal”) (claiming it involved “an abuse of the Hatch-Waxman Act,” “fraudulent procurement and enforcement of a patent in violation of the Sherman Act,” and “commercial bribery” in violation of the Robinson Patman Act.”). The grounds for removal did not include diversity jurisdiction (28 U.S.C. § 1332) because at least two Defendants, California Physician Services, Inc. and CVS, were principally located in California. *See* Notice of Removal at 3.

On August 3, 2012, the MDL transferred the case to the District of New Jersey.

On October 25, 2012, the Plaintiffs’ motion to remand the case back to the Superior Court of California was denied. (Alioto Letter at 1-2, ECF No. 659.)

On November 15, 2012, Defendants Daiichi Sankyo Company, Limited (“Daiichi Limited”) and Daiichi Sankyo, Inc. (Daiichi, Inc.) (and sometimes collectively referred to as “Daiichi Defendants”) filed motions to dismiss. Daiichi Limited filed a motion based upon lack of personal jurisdiction (Fed. R. Civ. P. 12(b)(2)) and failure to state a claim upon which relief may be granted (Fed. R. Civ. P. 12(b)(6)). Daiichi, Inc. asserted only a 12(b)(6) defense. (Daiichi Defendants’ Brief at 2, ECF No. 242-1). On this remand, both Daiichi Defendants rely on the same materials that were

submitted in the November, 2012 motion;² hence, Daiichi Inc. never asserted a lack of jurisdiction.

On May 8, 2013, Defendant California Physician Services, Inc. (Blue Shield) settled with Plaintiffs and was voluntarily dismissed from this case. (Stipulation of Dismissal – Blue Shield at 1, ECF No. 384.)

On July 22, 2013, Defendants Pfizer, Pfizer Ireland, and Warner raised diversity jurisdiction, for the first time, as grounds for the subject matter jurisdiction, when the Plaintiffs moved to remand the case back to the California state court. (Memorandum in Opposition at 31-33, ECF No. 427).

On August 31, 2013, CVS was also voluntarily dismissed. (Stipulation of Dismissal – CVS at 1, ECF No. 445.)

On September 12, 2014, this Court issued a Memorandum and Order, granting Defendant Pfizer's motion to dismiss the Plaintiffs' complaint with prejudice. (Memorandum, ECF No. 566.) The Plaintiffs appealed on October 10, 2014.

On November 5, 2014, this Court issued an Order dismissing Plaintiffs RP Healthcare's amended complaint with prejudice, finding that RP Healthcare did not allege the criteria set forth in the *FTCV v. Actavis* complaint concerning the reverse settlement. (Order, ECF No. 610).

² In early June, 2017, Daiichi Defendants attorney did not submit any additional facts surrounding personal jurisdiction because all of the facts were submitted in November, 2012.

On April 13, 2017, the Third Circuit remanded the case back to this Court for the limited purpose of determining jurisdiction, and whether the jurisdictional decision impacts the prior dismissal under Federal Rules of Civil Procedure 12(b)(6).

The jurisdiction issue has two aspects: whether diversity jurisdiction existed at the time judgment was entered³; and whether the Daiichi Limited is subject to the personal jurisdiction of this Court.

In late May, 2017, the Court held two telephone conferences, and subsequently Plaintiff's counsel and Pfizer's counsel submitted a document entitled "Stipulation on Diversity."

On June 20, 2017, Mr. Alioto corresponded with regard to the diversity issue. Evidently, Mr. Alioto's clients changed their position with regard to the Stipulation on Diversity, and argued that diversity was not timely set forth as a reason for removal by Pfizer (28 U.S.C. § 1446(c)); and therefore diversity was waived by Defendants (Alioto Letter, ECF No. 659).

³ On the diversity issue, all the parties agree that the dispute exceeds \$75,000 in damages, and as such only state citizenship is in question. (Stipulation Regarding Diversity at 3, ECF No. 652.)

II.

Personal Jurisdiction over Daiichi Limited

Daiichi Limited asserts a lack of personal jurisdiction defense under Fed. R. Civ. P. 12(b)(2). (Daiichi Defendants' Brief at 2, ECF No. 242-1)⁴.

Factually, Defendant Daiichi Limited is a Japanese pharmaceutical company with its head office at 3-5-1 Nihonbashi-honcho, Chuo-ku, Tokyo, 103-8426, Japan. (Declaration of Yoshihiro Aoyagi at 2, ECF No. 242.) Their principle place of business is in Japan.

Daiichi Limited asserts that (1) it is a Japanese corporation; (2) it is not incorporated or registered to do business in California; (3) it has no offices or other company facilities in California; (4) it has no employees in California; and (5) it has no appointed agent for service of process in California. *See* (Declaration of Yoshihiro Aoyagi at 1-2, ECF No. 242.).

In their opposition, RP Healthcare argues that Daiichi Limited may be subject to personal jurisdiction if the Court allows jurisdictional discovery; and/or the Court adopts the facts of a decision by Judge Kugler based upon judicial notice. *See, In Re Benicar (Olmesartan)*, Case No. 1:15-md-2606 (wherein a recently settled product liability case found jurisdiction over both Daiichi Limited and Daiichi, Inc.) Notably, Plaintiffs do not argue any of the facts set forth within

⁴ As Daiichi Inc. did not assert a lack of personal jurisdiction defense and Daiichi, Inc. relies on the same facts as submitted with the initial motion, this Court finds no reason to engage in further analysis in this matter with respect to Daiichi, Inc. and will therefore limit its analysis to Daiichi Limited

In Re Benicar within their complaint. (Alioto Letter at 1-2, ECF No. 650).

With regard to the discovery issue, Plaintiff's counsel seeks to depose an appropriate executive of Daiichi Limited to determine whether there was an agreement between Ranbaxy and Daiichi Limited which conditioned the purchase of Ranbaxy stock by Daiichi Limited upon entering the underlying contract with Merck. The discovery request is denied because it is more akin to facts about liability rather than discovery about the personal jurisdiction issue.

Plaintiff's second argument is that the Court should accept facts established in *In Re Benicar* with regard to jurisdiction over both Daiichi Defendants. RP Healthcare highlights that within *In Re Benicar*, both Daiichi Limited and Daiichi Inc. admit that Daiichi Inc. serves as the home office and corporate headquarters for Daiichi Limited in the United States. (*See* Master Answer of Daiichi Sankyo, Inc. at 5, Case No. 1:15-md-2606, ECF No. 82) ("The Daiichi U.S. Defendants admit that Daiichi Sankyo, Inc. operates as the U.S. commercial home office and corporate headquarters of Daiichi Sankyo Company, Ltd."); (Master Answer of Daiichi Sankyo Company, Ltd. at 4, Case No. 1:15-md-2606, ECF No. 126). RP Healthcare then cites again to Daiichi Inc.'s master answer where the company admits to having sales of pharmaceutical products in New Jersey and the United States. *See* (Master Answer of Daiichi Sankyo, Inc. at 2, Case No. 1:15-md-2606, ECF No. 82). RP Healthcare then argues that Daiichi Inc.'s master answer wherein the company admits to having sales of pharmaceutical products in New Jersey and the United States. (*See* Master Answer of Daiichi

Sankyo, Inc. at 2, Case No. 1:15-md-2606, ECF No. 82) RP Healthcare asserts that these admissions in the *In Re Benicar* matter, along with the facts present in the First Amended Complaint, are sufficient to establish personal jurisdiction over Daiichi Limited.

As noted above, Plaintiffs argue that the Court should adopt the facts set forth in the *In Re Benicar* law suit by way of judicial notice. This argument is unpersuasive. The Federal Rules of Evidence 201(b) provide that judicial notice of facts outside of the trial record can only be taken when the facts are “not subject to reasonable dispute.” A judicially noticed fact must either be generally known within the jurisdiction of the trial court, or be capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *See id.*; *Werner v. Werner*, 267 F.3d 288, 295 (3d Cir. 2001). Facts determined in a separate case fall short of this standard since “taking judicial notice of the truth of the contents of a filing from a related action could reach, and perhaps breach, the boundaries of proper judicial notice.” *Werner*, 267 F.3d at 295; *see also Liberty Mutual Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384 (2d Cir. 1992). Facts adjudicated in a prior case may not meet either test of indisputability contained in Rule 201(b) because they are not ones of common knowledge that can be applied to this case.

The facts cited in the First Amended Complaint are significantly more limited than the facts alleged in the *In Re Benicar* suit. For example, in the First Amended Complaint, Plaintiffs merely state how Daiichi Limited is a Japanese corporation and that Daiichi Inc. is incorporated in Delaware with its principle place of

business in New Jersey. It is not generally known that the facts set forth in *In Re Benicar* are the same in this case. For example, the allegations in this case were filed in 2012, whereas the allegations against the Daiichi Defendants in *In Re Benicar* were filed in 2015. Obviously, corporate relationships may have changed in those three years. In addition, the fact that a defendant has admitted to personal jurisdiction in one case does not necessarily mean that the same defendant is subject to personal jurisdiction in another, separate case. See *Pausch LLC v. Pausch Med. GmbH*, 2015 U.S. Dist. LEXIS 18665, at *4 (D.N.J Feb. 17, 2015) (the mere fact that [a defendant] has admitted that the District of New Jersey has personal jurisdiction over it in another case . . . does not mean that this Court has personal jurisdiction over [defendant] in this case, as specific jurisdiction is claim specific.) (*Remick v. Manfredy*, 238 F.3d 248, at 255 (3d Cir. 2001). Moreover, *In Re Benicar* refers to jurisdiction within New Jersey. There may not be sufficient facts to show specific contacts of Daiichi Limited in California that support personal jurisdiction. For the reasons set forth above, the Court will not take judicial notice of the facts of *In Re Benicar*.

Whether personal jurisdiction exists over a non-resident defendant involves two inquiries: whether a forum state's long-arm statute permits service of process, and whether assertion of jurisdiction violates Fourteenth Amendment Due Process. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-476 (1985). In the State of California, the inquiry is collapsed into a single step because the long-arm statute permits the exercise of personal jurisdiction to the fullest limits of

due process as defined under the Constitution. *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800–01 (9th Cir. 2004); *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 259 (3d Cir. 1998).

The Fourteenth Amendment permits a state to exercise jurisdiction over an out-of-state defendant only where “the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” *Burger King Corp.*, 471 U.S. at 475. To prove that the defendant has purposefully availed itself of that state, a plaintiff may rely upon a defendant’s specific contacts with the forum state. It is the plaintiffs’ burden to allege facts giving rise to personal jurisdiction. *See Gray & Co. v. Firstenberg Machinery Co., Inc.*, 913 F.2d 758, 760 (9th Cir. 1990).

Personal jurisdiction may be either general, when the cause of action arises out of the foreign corporation’s activities in the forum, or specific, when the defendant’s contacts with the forum give rise to the cause of action. For a foreign corporation to be subject to general jurisdiction in a forum state, its contacts with the state must be “so continuous and systematic as to render [it] essentially at home in the forum State.” *Good Year Dunlop Tires Operations, S.A., v. Brown*, 131 S. Ct. 2846, 2851 (2011). To find specific jurisdiction, a court must determine whether the defendant had minimum contacts with the forum necessary for the defendant to have “reasonably anticipate[d] being haled into court there.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). The defendant’s actions must have been

“purposefully directed toward the forum state.” *Asahi Metal Industry Co.*, 480 U.S. 102, 112 (1987).

Given minimum contacts, a court may inquire whether the assertion of personal jurisdiction would comport with “fair play and substantial justice.” *Burger King Corp.*, 471 U.S. at 476. To comport with “fair play and substantial justice,” it must be reasonable to require the defendant to defend the suit in the forum state. *World-Wide Volkswagen. Corp.*, 444 U.S. at 292. To determine reasonableness, a court considers the following factors: (1) the burden on the defendant, (2) the forum state’s interest in adjudicating the dispute, (3) the plaintiffs’ interest in obtaining convenient and effective relief, (4) the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several States in furthering substantive social policies. *Id.* Only in “rare cases [does] ‘fair play and substantial justice’...defeat the reasonableness of jurisdiction.” *Asahi Metal Indus. Co.*, 480 U.S. at 116.

Although a single contact may be enough to permit a finding of jurisdiction, a contract with an out-of-state party does not automatically establish minimum contacts. *Burger King*, 471 U.S. at 478. Rather, the court must examine “prior negotiations and contemplated future consequences, along with the terms of the contract and the parties’ actual course of dealing” to determine whether the defendant purposefully established minimum contacts with the forum. *Id.* at 479. Further, a relationship between a parent company and its subsidiary is not sufficient to establish personal jurisdiction over the parent based on the subsidiary’s contacts with the forum. *Doe v. Unocal*

Corp., 248 F.3d 915, 925 (9th Cir. 2001); *Transure, Inc. v. Marsh and McLennan, Inc.*, 766 F.2d 1297, 1299 (9th Cir. 1985). Only when an agency relationship where the parent controls the subsidiary's internal affairs and daily operations may courts subject a parent corporation to general jurisdiction based on the activities of a subsidiary. *Doe*, 248 F.3d at 926.

"Motions to . . . dismiss for lack of jurisdiction are . . . routinely considered by courts to which multidistrict litigation has previously been transferred." *In re Gypsum Wallboard*, 302 F. Supp. 794, 794 (J.P.M.L. 1969). In doing so, a transferee court considers whether the defendant has established the necessary minimum contacts with the transferor forum.

Daiichi Limited argues that this Court lacks personal jurisdiction and as such move to dismiss the complaint under Rule 12(b)(2). Due process requires that a "defendant purposefully established 'minimum contacts' in the forum State." *Asahi Metal Industry Co.*, 480 U.S. at 108–09. Plaintiffs do not allege any facts that would support a California court's exercise of specific personal jurisdiction over Daiichi Limited.

Having denied the requests for discovery and also having denied the judicial notice request, RP Healthcare has provided little evidence proving the personal jurisdiction issue. When a defendant moves to dismiss due to lack of personal jurisdiction, it becomes the plaintiff's burden to prove otherwise. *See Pausch*, 2015 U.S. Dist. LEXIS 18665, at *2 (*see also*, *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 97 (3d Cir. 2004). Given that RP Healthcare relies on a scant few

lines in the First Amended Complaint, their burden is not met.

RP Healthcare also does not address the issue raised by Daiichi Limited that the existence of a relationship between a parent company and its subsidiary is insufficient to establish personal jurisdiction over the parent on the basis of the subsidiary's contacts with the forum. *See*, 248 F.3d at 925. Plaintiff also does not argue any agency relationship. *Id.* at 926. RP Healthcare fails to allege any basis for subjecting Daiichi Limited to general jurisdiction based on exerting control over its subsidiaries. The complaint provides no factual allegations that Daiichi Limited controls any subsidiary's internal affairs or daily operations or has otherwise purposefully injected itself into California by any means. *Doe*, 248 F.3d at 925.

Finally, Daiichi Limited's contacts with California cannot likely be described as "continuous," "substantial" or "systematic" sufficient to give rise to general jurisdiction. *See Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1169 (9th Cir. 2006) (citing *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 318 (1945)). Courts routinely dismiss suits against foreign corporations like Daiichi Limited for lack of general jurisdiction. *See Young v. Actions Semiconductor Co., Ltd.*, 386 Fed. App'x 623 (S.D. Cal. 2010). In *Young*, the suit was dismissed because the defendant "[was] not registered to do business in California, . . . never had any offices or other company facilities in California, . . . never employed any individuals in California, and . . . never appointed an agent for service of process in California." *Id.* The same rationale applies here. *See*

also Phillips v. Worldwide Internet Solutions, No. C 05-5125 SBA, 2006 WL 1709189, at *5 (N.D. Cal., June 20, 2006). The complaint does not make a specific allegation regarding Daiichi Limited's contacts with California, and it is the plaintiffs' burden to allege facts giving rise to personal jurisdiction once Defendant moves to dismiss a complaint for lack of personal jurisdiction. *See Grey* 913 F.2d at 760. *See also O'Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 317 (3d Cir. 2007).

Exercising specific personal jurisdiction over Daiichi Limited and thereby requiring a Japanese corporation—whose operations, witnesses and records all exist in Japan—to defend this suit in California or New Jersey is arguably unreasonable. *See Declaration of Yoshihiro Aoyagi* at 2. (ECF No. 242). Reasonableness of the forum depends, inter alia, on the extent of purposeful interjection and the burden on the defendant to defend the suit in the chosen forum. *Gray*, 913 F.2d at 761 As a Japanese corporation, Daiichi Limited faces “the unique burdens placed upon one who must defend oneself in a foreign legal system” and this “should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.” *Asahi*, 480 U.S. at 112.

Because Daiichi Limited is subject to neither specific nor general jurisdiction in California, the suit is dismissed. Fed. R. Civ. P. 12(b)(2). As such, my prior Order dismissing Daiichi Limited for failure to state a claim upon which relief may be granted is vacated (Fed. R. Civ. P. 12(b)(6)). (ECF No. 482).

III.

Diversity Jurisdiction

The second issue concerns whether diversity jurisdiction exists over the parties.

The facts set forth within the Stipulation on Diversity, and supported by an affidavit of Darren Welsh are as follows:

The parties hereby stipulate to the following facts relating to diversity of citizenship in this action:

1. Plaintiffs Chimes Pharmacy, Inc.; Marin Apothecaries, Inc. d/b/a Ross Valley Pharmacy; Golden Gate Pharmacy Services, Inc. d/b/a Golden Gate Pharmacy; Pediatric Care Pharmacy, Inc.; James Clayworth; Meyers Pharmacy, Inc.; Tony Mavrantonis; Tilley Apothecaries, Inc.; and RP Healthcare, Inc. (collectively, "Plaintiffs") are all citizens of California.

2. Based upon the Affidavit of Darren M. Welsh, Senior Corporate Governance Specialist of Pfizer Inc., a true copy of which is attached as Exhibit A, at all times since January 2012, including on November 5, 2014, the date judgment was entered dismissing Plaintiffs' Complaint in this matter, none of the Pfizer entities who are Defendants in this case, *i.e.*, Pfizer Inc., Warner-Lambert Company, Pfizer Ireland Pharmaceuticals, Warner-Lambert Export, Ltd., has been a citizen of California.

3. Plaintiffs agree that none of the other Defendants in this action have been a citizen of California during the pendency of the action, with the exception of the Defendants CVS Caremark Corporation and California Physicians Service, Inc., both of which settled with Plaintiffs and were dismissed from this action prior to the date judgment was entered.

Within Mr. Welsh's affidavit, he further noted the following facts:

1. Defendant Pfizer Inc. ("Pfizer") is a corporation organized in Delaware and has its principle place of business in New York. (Affidavit of Darren M. Welsh at 2, ECF No. 652.)

2. Defendant Pfizer Ireland Pharmaceuticals ("Pfizer Ireland") is an unlimited company organized and existing under the laws of Ireland with its registered office at the OSG Building, Ringaskiddy, County Cork, Ireland. (Affidavit of Darren M. Welsh at 2, ECF No. 652.)

3. Defendant Warner-Lambert Company, LLC ("Warner") is a limited liability company organized and existing in the State of Delaware and with its principle place of business in the State of New York. (Affidavit of Darren M. Welsh at 2, ECF No. 652.)

As directed, the Court examines whether diversity jurisdiction existed at the time of judgment on September 12, 2014, pursuant 28 U.S.C. § 1332. The district courts of the United States are courts of limited jurisdiction. *Exxon Mobil Corp. v. Allapattah Servs.*,

545 U.S. 546, 552 (2005). The district courts are authorized to hear cases where the subject matter pertains to a federal question, cases where the United States government is a party, or in matters between parties of different states where the amount in controversy exceeds \$75,000. *Id.* If even one plaintiff shares citizenship with a single defendant in a case with multiple plaintiffs and defendants, diversity jurisdiction does not exist. The Supreme Court noted that “a case with multiple plaintiffs and multiple defendants, the presence in the action of a single plaintiff from the same State as a single defendant deprives the district court of original diversity jurisdiction over the entire action.” *Id.* at 553. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 375 (1978)).

Plaintiffs point out that removal of an action dependent on diversity jurisdiction must be made within one year of commencement of the suit, and Defendant did not raise diversity as a reason for removal for nineteen months. (Alioto Letter at 1-2, ECF No. 659.) Plaintiffs’ argument makes little sense because the action as originally filed could not have been removed or dismissed since the Plaintiffs and the Defendants CVS and Physician Services were citizens of the State of California. (Stipulation Regarding Diversity at 2, ECF No. 652.) *See Exxon Mobil Corp.*, 545 U.S. at 553. Ordinarily, “diversity must have existed both at the time . . . the plaintiffs’ state court complaint was filed and at the time of removal.” *In re Lipitor Antitrust Litig.*, 855 F.3d 126, 150-51 (3d Cir. 2017) (citing *Pullman Co. v. Jenkins*, 305 U.S. 534, 537 (1939); *Johnson v. SmithKline Beecham Corp.*, 724 F.3d 337, 346 (3d Cir. 2013). However, there is a narrow

exception (as pointed out by the Third Circuit) to the rule that allows cases proceeding on flawed diversity to continue if certain conditions are met. *See Grupo Dataflux v. Atlas Global Grp.*, 541 U.S. 567 (2004).

In *Grupo*, the Supreme Court held that in the event of a “jurisdictional defect,” the defect can be “cured by the dismissal of the party that had destroyed jurisdiction.” *Id.* at 570. In addition, the Supreme Court also held that improperly removed cases can still proceed, even if the district court erred in failing to remand the case. *See Caterpillar Inc. v. Lewis*, 529 U.S. 61, 64 (1996) (finding that “a district court’s error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered.”).

By the time this Court entered judgment on September 12, 2014, CVS and Physician Services, the two Defendants that had destroyed diversity jurisdiction, had been voluntarily dismissed. (Stipulations of Dismissals, ECF No. 384, 445.) Accordingly, as these were the only two Defendants from the State of California, their dismissal may have “cure[d] [the] jurisdictional defect.” *See Grupo*, 541 U.S. at 570.

The Third Circuit was uncertain about the citizenship of Defendants Pfizer Ireland and Warner. *In re Lipitor Antitrust Litig.* 855 F.3d at 151-52. The Third Circuit therefore remanded the case to this Court in order to determine the citizenship of these two parties and, pending determination, whether diversity exists at this time. *Id.* As noted above, neither Pfizer Ireland nor Warner are citizens of the State of

California. (Stipulation Regarding Diversity at 2, ECF No. 652.) Rather, Pfizer Ireland's citizenship is in Ireland and Warner is incorporated in Delaware. (Affidavit of Darren M. Welsh at 2, ECF No. 652.) Moreover, Daiichi, Inc. is a Delaware Corporation headquartered in New Jersey. As such, it is diverse from Plaintiffs. The Court finds that the Plaintiffs and Defendants are diverse. 28 U.S.C. § 1332.

In conclusion, in accordance with the remand:

- (1) The Court finds there is diversity jurisdiction;
- (2) There is a lack of personal jurisdiction over Daiichi Limited, so Daiichi Limited is dismissed from the lawsuit on that basis;
- (3) Wherein the Court previously dismissed the lawsuit against Daiichi Limited and Daiichi, Inc. based on Fed. R. Civ. P. 12(b)(6), the Court vacates that portion of the Order (ECF No. 482) as it applied to Daiichi Limited, but the other portion of the Order, as it applies to Daiichi, Inc. remains in effect.

s/Peter G. Sheridan
PETER G. SHERIDAN, U.S.D.J.

September 28, 2017

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

Civil Action No.: 12-5129 (PGS)

[Filed September 29, 2017]

RP Healthcare, Inc., et al.,	)
Plaintiff,	)
	)
v.	)
	)
Pfizer, Inc., et al.	)
Defendant.	)
	)

ORDER

This matter comes before the Court on remand from the United States Court of Appeals for the Third Circuit for the limited purpose of deciding two questions pertaining to In Re: Lipitor Antitrust Litigation. First; determining “whether diversity jurisdiction existed at the time judgment was entered;” and second, “whether the District Court had the power to reach the merit of the Plaintiffs’ claims against the Daiichi Sankyo Defendants.” (Order at 1, Case No. 12-cv-5129, ECF No. 95) (3d Cir. 2017); and

The Court having considered the submissions of the parties, and for the reasons set forth in the Opinion of this date;

IT IS on this 28th day of September, 2017;

ORDERED, that in accordance with the remand:

(1) The Court finds there is diversity jurisdiction;

(2) There is a lack of personal jurisdiction over Daiichi Limited, so Daiichi Limited is dismissed from the lawsuit on that basis;

(3) Wherein the Court previously dismissed the lawsuit against Daiichi Limited and Daiichi, Inc. based on Fed. R. Civ. P. 12(b)(6), the Court vacates that portion of the Order (ECF No. 482) as it applied to Daiichi Limited, but the other portion of the Order, as it applies to Daiichi, Inc. remains in effect.

s/Peter G. Sheridan

PETER G. SHERIDAN, U.S.D.J.

APPENDIX C

PRECEDENTIAL

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

**Nos. 14-4202, 14-4203, 14-4204,
14-4205, 14-4206, 14-4602 & 14-4632**

[Filed April 13, 2017]

IN RE: LIPITOR ANTITRUST LITIGATION	)
	)
Rite Aid Corporation; Rite Aid Hdqtrs.	)
Corporation; JC (PJC) USA, LLC; Maxi Drug, Inc.	)
d/b/a Brooks Pharmacy; Eckerd Corporation,	)
Appellants in No. 14-4202	)
	)
Walgreen Company; The Kroger Co.; Safeway,	)
Inc.; Supervalu, Inc.; HEB Grocery Company L.P.,	)
Appellants in No. 14-4203	)
	)
Giant Eagle, Inc.,	)
Appellant in No. 14-4204	)
	)
Meijer, Inc.; Meijer Distribution, Inc.,	)
Appellants in No. 14-4205	)
	)
Rochester Drug Co-Operative, Inc.; Stephen	)
L. LaFrance Pharmacy, Inc. d/b/a SAJ	)
Distributors; Burlington Drug Company, Inc.;	)
Value Drug Company; Professional Drug	)

App. 38

Company, Inc.; American Sales Company LLC,)
Appellants in No. 14-4206)

)
A.F.L.-A.G.C. Building Trades Welfare Plan;)
Mayor and City Council of Baltimore, Maryland;)
New Mexico United Food and Commercial Workers)
Union's and Employers' Health and Welfare Trust)
Fund; Louisiana Health Service Indemnity)
Company, d/b/a Blue Cross/Blue Shield of)
Louisiana; Bakers Local 433 Health Fund; Twin)
Cities Bakery Workers Health and Welfare Fund;)
Fraternal Order of Police, Fort Lauderdale)
Lodge 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)
Dogan; Nancy Billington, on behalf of themselves)
and all others similarly situated,)
Appellants in No. 14-4602)

)
RP Healthcare, Inc.; Chimes Pharmacy, Inc.;)
James Clayworth, R.Ph., d/b/a Clayworth)
Pharmacy; Marin Apothecaries, Inc., d/b/a Ross)
Valley Pharmacy; Golden Gate Pharmacy Services,)
Inc., d/b/a Golden Gate Pharmacy; Pediatric Care)
Pharmacy, Inc.; Meyers Pharmacy, Inc.; Tony)
Mavrantonis R. Ph., d/b/a Jack's Drugs; Tilley)
Apothecaries Inc., d/b/a Zweber's Apothecary,)
Appellants in No. 14-4632)

App. 39

Nos. 15-1184, 15-1185, 15-1186, 15-1187, 15-1274,
15-1323 & 15-1342

IN RE: EFFEXOR XR ANTITRUST LITIGATION	)
	)
Walgreen, Co.; The Kroger, Co.; Safeway, Inc.;	)
Supervalu, Inc.; HEB Grocery Company LP;	)
American Sales Company, Inc.,	)
Appellants in No. 15-1184	)
	)
Rite Aid Corporation; Rite Aid Hdqtrs.,	)
Corporation; JCG (PJC) USA, LLC; Maxi Drug,	)
Inc. d/b/a Brooks Pharmacy; Eckerd Corporation;	)
CVS Caremark Corporation,	)
Appellants in No. 15-1185	)
	)
Giant Eagle, Inc.,	)
Appellant in No. 15-1186	)
	)
Meijer, Inc.; Meijer Distribution, Inc.,	)
Appellants in No. 15-1187	)
	)
Professional Drug Company, Inc.; Rochester Drug	)
Co-Operative, Inc.; Stephen L. LaFrance Holdings,	)
Inc.; Stephen L. LaFrance Pharmacy, Inc. d/b/a	)
SAJ Distributors; Uniondale Chemist, Inc.,	)
Appellants in No. 15-1274	)
	)
Painters District Council No. 30 Health &	)
Welfare Fund; Medical Mutual of Ohio,	)
Appellants in No. 15-1323	)
	)
A.F.L.-A.G.C. Building Trades Welfare Plan;	)
Daryl Deino; IBEW-NECA Local 505 Health &	)
Welfare Plan; Louisiana Health Service Indemnity	)

Company d/b/a Blue Cross/Blue Shield of)
Louisiana; Man-U Service Contract Trust Fund;)
MC-UA Local 119 Health & Welfare Plan; New)
Mexico United Food and Commercial Workers)
Union's and Employers' Health and Welfare Trust)
Fund; Plumbers and Pipefitters Local 572 Health)
and Welfare Fund; Sergeants Benevolent)
Association Health and Welfare Fund; Patricia)
Sutter (together "End-Payor Class Plaintiffs") on)
behalf of themselves and all others similarly)
situated,)
Appellants in No. 15-1342)

On Appeal from the United States District Court
for the District of New Jersey

(MDL 2332) / (D.N.J. No. 3-12-cv-02389) /
(D.N.J. No. 3-12-cv-02478) / (D.N.J. No. 3-12-cv-
02519) / (D.N.J. No. 3-12-cv-04115) / (D.N.J. No. 3-
12-cv-04537) / (D.N.J. No. 3-12-cv-05129) / (D.N.J.
No. 3-12-cv-06774) / (D.N.J. No. 3-12-cv-07561)
(D.N.J. No. 3-11-cv-05479) / (D.N.J. No. 3-11-cv-
05590) / (D.N.J. No. 3-11-cv-05661) / (D.N.J. No. 3-
11-cv-06985) / (D.N.J. No. 3-11-cv-07504) / (D.N.J.
No. 3-12-cv-03116) / (D.N.J. No. 3-12-cv-03523)

District Judge: Honorable Peter G. Sheridan

Argued: September 27, 2016

App. 41

Before: AMBRO, SMITH* and FISHER,**
Circuit Judges.

(Filed: April 13, 2017)

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** Honorable D. Michael Fisher, United States Circuit Judge for the Third Circuit, assumed senior status on February 1, 2017.

App. 42

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App. 46

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OPINION OF THE COURT

FISHER, *Circuit Judge*.

A pharmaceutical company holding the patent on a drug sues the manufacturer of a generic version of that drug for patent infringement. The patent-holder and the generic manufacturer later settle, with the former paying the latter not to produce a generic until the patents at issue expire. In *FTC v. Actavis, Inc.*, 133 S. Ct. 2233 (2013), the Supreme Court recognized that such a settlement—commonly known as a “reverse payment”—where large and unjustified, can sometimes unreasonably diminish competition in violation of the

antitrust laws. To answer the antitrust question, *Actavis* explained, “it is not normally necessary to litigate patent validity” because “the size of the unexplained reverse payment can provide a workable surrogate for a patent’s weakness.” *Id.* at 2236-37.

These two sets of consolidated appeals involve allegations that the companies holding the patents for Lipitor and Effexor XR delayed entry into the market of generic versions of those drugs. The companies did so, plaintiffs say, by engaging in an overarching monopolistic scheme that involved fraudulently procuring and enforcing the underlying patents and then entering into a reverse-payment settlement agreement with a generic manufacturer. With a single exception, every complaint asserts one of these monopolization claims against the patent-holders. The cases were assigned to the same district judge, who ultimately dismissed the bulk of plaintiffs’ claims.

In this opinion, we address two questions of federal jurisdiction. First, do plaintiffs’ allegations of fraudulent procurement and enforcement of the patents require us to transfer these appeals to the Court of Appeals for the Federal Circuit? That court has exclusive jurisdiction over appeals from civil actions “rising under” patent law. 28 U.S.C. § 1295(a)(1). But not all cases presenting questions of patent law necessarily arise under patent law. See *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1986). Where, as here, patent law neither creates plaintiffs’ cause of action nor is a necessary element to any of plaintiffs’ well-pleaded claims, jurisdiction lies in this Court, not the Federal Circuit.

The second jurisdictional question we confront is confined to one of the *Lipitor* appeals, *RP Healthcare, Inc. v. Pfizer, Inc.*, No. 14-4632. That case, brought by a group of California pharmacists, involves claims solely under California law and was filed in California state court. Following removal the District Court declined to remand the case to state court, citing potential patent defenses. That was error, as federal jurisdiction depends on the content of the plaintiff's complaint, not a defendant's possible defenses. Before final judgment, however, the remaining non-diverse defendants were voluntarily dismissed, thus raising the possibility that, notwithstanding the District Court's failure to remand the case, it possessed diversity jurisdiction before the time it entered judgment. See *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996). But because the state of the record before us is unclear with regard to the citizenship of the parties, we cannot reach the merits of this appeal until that question is resolved. We will accordingly remand the *RP Healthcare* appeal to the District Court so it can conduct jurisdictional discovery and address the matter in the first instance.

I

It is necessary to begin by discussing the regulatory framework that forms the foundation for the issues presented by these appeals.

A

“Apparently most if not all reverse payment settlement agreements arise in the context of pharmaceutical drug regulation, and specifically in the context of suits brought under statutory provisions allowing a generic drug manufacturer (seeking speedy

marketing approval) to challenge the validity of a patent owned by an already-approved brand-name drug owner.” *Actavis*, 133 S. Ct. at 2227. With the Drug Price Competition and Patent Term Restoration Act, 98 Stat. 1585, as amended, known as the Hatch-Waxman Act, Congress “attempted to balance the goal of ‘mak[ing] available more low cost generic drugs’ with the value of patent monopolies in incentivizing beneficial pharmaceutical advancement.” *King Drug Co. v. SmithKline Beecham Corp.*, 791 F.3d 388, 394 (3d Cir. 2015) (alteration in original) (quoting H.R. Rep. No. 98-857, pt. 1, at 14-15 (1984)), *cert. denied*, 137 S. Ct. 446 (2016). “the Act seeks to accomplish this purpose, in part, by encouraging ‘manufacturers of generic drugs . . . to challenge weak or invalid patents on brand name drugs so consumers can enjoy lower drug prices.’” *Id.* (alteration in original) (quoting S. Rep. No. 107-167, at 4 (2002)). In *Actavis*, the Supreme Court identified four relevant features of Hatch-Waxman’s regulatory framework. 133 S. Ct. at 2227-29; *see also King Drug*, 791 F.3d at 394-96.

First, a drug manufacturer seeking to market a new, “pioneer” prescription drug must obtain approval from the Food and Drug Administration (FDA). *See* 21 U.S.C. § 355(b)(1). This approval process involves testing that is “long, costly, and comprehensive.” *Actavis*, 133 S. Ct. at 2228.

Second, following FDA approval of a brand-name drug, a generic manufacturer can file an Abbreviated New Drug Application (ANDA) indicating that the generic “as the same active ingredients as, and is biologically equivalent to, the brand-name drug.” *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 566

U.S. 399, 405 (2012) (citing 21 U.S.C. § 355(j)(2)(A)(iv)). The ANDA process furthers drug competition “by allowing the generic to piggy-back on the pioneer’s approval efforts.” *Actavis*, 133 S. Ct. at 2228.

Third, the Hatch-Waxman Act “sets forth special procedures for identifying, and resolving, related patent disputes.” *Id.* The new drug applicant is required to list any patents issued relating to the drug’s composition or methods of use. *See* 21 U.S.C. § 355(b)(1). If the FDA approves the new drug, it publishes this patent information, without verification, in its Orange Book (officially known as Approved Drug Products with Therapeutic Equivalence Applications). *King Drug*, 791 F.3d at 395 & n.5 (citing *Caraco*, 566 U.S. at 405-06). In its ANDA, the generic manufacturer must “assure the FDA that its proposed generic drug will not infringe the brand’s patents.” *Caraco*, 566 U.S. at 406. One method of assurance is known as “paragraph IV certification,” whereby the generic may assert that the relevant listed patents are “invalid or will not be infringed by the manufacture, use, or sale of the [generic] drug.” 21 U.S.C. § 355(j)(2)(A)(vii)(IV). The filing of a paragraph IV certification “means provoking litigation,” *Caraco*, 566 U.S. at 407, as the patent statute treats it as an act of automatic infringement, *see* 35 U.S.C. § 271(e)(2)(A). If the brand-name patentee brings an infringement suit within 45 days, the FDA is required to withhold approving the generic for a 30-month period. If the courts decide the matter during that period, the FDA will follow that determination; if not, the FDA may move forward on its own. *See* 21 U.S.C. § 355(j)(5)(B)(iii).

Fourth, “Hatch-Waxman provides a special incentive for a generic to be the first to file an [ANDA] taking the paragraph IV route.” *Actavis*, 133 S. Ct. at 2228-29. From the time it begins marketing its generic, the first-filer enjoys a 180-day exclusivity period during which no other generic can compete with the brand-name drug. *See* 21 U.S.C. § 355(j)(5)(B)(iv). This exclusivity period “can prove valuable, possibly ‘worth several hundred million dollars.’” *Actavis*, 133 S. Ct. at 2229 (quoting C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 81 N.Y.U. L. Rev. 1553, 1579 (2006)). The right to exclusivity belongs to the first-filer alone and is nontransferable. *See* 21 U.S.C. § 355(j)(5)(D). However, Hatch-Waxman does not preclude the underlying patent-holder from marketing a brand-generic version of its drug—known as an “authorized generic”—during the 180-day exclusivity period. *See Mylan Pharm., Inc. v. FDA*, 454 F.3d 270, 276-77 (4th Cir. 2006); *Teva Pharm. Indus. Ltd. v. Crawford*, 410 F.3d 51, 55 (D.C. Cir. 2005); *see also King Drug*, 791 F.3d at 393; *Sanofi-Aventis v. Apotex Inc.*, 659 F.3d 1171, 1174-75 (Fed. Cir. 2011).

B

In *Actavis*, the Supreme Court addressed whether reverse-payment settlements in the Hatch-Waxman context are subject to antitrust scrutiny. The Court concluded that such settlements “can sometimes violate the antitrust laws.” 133 S. Ct. at 2227. That is so, the Court held, because “[a]n unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent’s survival,” thus “suggest[ing] that the payment’s objective is to

maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market.” *Id.* at 2237.

Actavis rejected an approach known as the “scope of the patent” test, a near-categorical rule that “absent sham litigation or fraud in obtaining the patent, a reverse payment settlement is immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent.” *FTC v. Watson Pharm., Inc.*, 677 F.3d 1298, 1312 (11th Cir. 2012), *rev’d sub nom. Actavis*, 133 S. Ct. 2223. The Court concluded that it would be “incongruous to determine antitrust legality by measuring the settlement’s anticompetitive effects solely against patent law policy, rather than by measuring them against procompetitive antitrust policies as well.” *Actavis*, 133 S. Ct. at 2231. Instead, the Court’s precedents “indicated that patent and antitrust policies are both relevant in determining the ‘scope of the patents monopoly’—and consequently antitrust law immunity—that is conferred by a patent.” *Id.* The Court viewed these cases as “seek[ing] to accommodate patent and antitrust policies, finding challenged terms and conditions unlawful unless patent law policy offsets the antitrust law policy strongly favoring competition.” *Id.* at 2233; *see id.* at 2244 (Roberts, C.J., dissenting) (“The majority seems to think that *even if* the patent is valid, a patent holder violates the antitrust laws merely because the settlement took away some chance that his patent would be declared invalid by a court.”). Finally, the Court observed, among other things, that “it is normally not necessary to litigate patent validity to answer the antitrust question (unless, perhaps, to determine whether the

patent litigation is a sham).” *Id.* at 2236 (majority opinion). Such antitrust questions are to be addressed under the traditional rule-of-reason analysis. *See id.* at 2237-38.

II

A

In *In re Lipitor Antitrust Litigation*, Nos. 14-1402 *et al.*, plaintiffs are a putative class of direct-purchasers of branded Lipitor, a putative class of end-payors, and four individual-retailers asserting direct-purchaser claims. We will refer to these three groups of plaintiffs collectively as the “*Lipitor* plaintiffs.” Defendants are Pfizer Inc., Ranbaxy Inc., and their respective corporate affiliates; they will be referred to collectively as the “*Lipitor* defendants.” There is also a fourth group of plaintiffs—several California-based pharmacists raising claims under California law—that we will refer to independently as the “*RP Healthcare* plaintiffs.” In addition to suing the *Lipitor* defendants, the *RP Healthcare* plaintiffs also named additional parties as defendants whose relevance we will explore in Part V, *infra*.

1

Warner-Lambert Co. developed atorvastatin, the active ingredient in its blockbuster brand-name drug Lipitor. One of the best-selling pharmaceutical products of all time, Lipitor reduces the level of bad LDL cholesterol in the bloodstream. Warner-Lambert, in partnership with Pfizer, launched Lipitor in 1997. The two companies merged in 2002, and we will refer to them collectively as “Pfizer.”

In 1987, Pfizer obtained the original patent for Lipitor. That patent—designated U.S. Patent No. 4,681,893 (the ‘893 Patent)—claims protection for atorvastatin. Initially scheduled to expire in May 2006, Pfizer eventually secured extensions on the ‘893 Patent’s term through March 24, 2010. Pfizer obtained additional, follow-on patent protection for Lipitor in December 1993, when the Patent and Trademark Office (PTO) issued U.S. Patent No. 5,273,995 (the ‘995 Patent). That patent claims atorvastatin calcium, the specific salt form of the active atorvastatin molecule in Lipitor. The *Lipitor* plaintiffs assert that Pfizer committed fraud with regard to the procurement and enforcement of the ‘995 Patent. In particular, the *Lipitor* plaintiffs allege that Pfizer submitted false and misleading data to the PTO to support its claim that the cholesterol-synthesis inhibiting activity of atorvastatin calcium was surprising and unexpected. The ‘995 Patent expired on June 28, 2011. Following Lipitor’s 1997 launch, Pfizer obtained five additional patents, all of which, according to the *Lipitor* plaintiffs, could not block further generic versions of the drug from coming to market. Pfizer listed all Lipitor patents in the FDA’s Orange Book, with the exception of the process patents, which cannot be listed. The *Lipitor* plaintiffs allege fraud only with regard to the procurement and enforcement of the ‘995 Patent.

After obtaining ANDA first-filer status for generic Lipitor in August 2002, Ranbaxy notified Pfizer of its paragraph IV certifications, which contended that none of the valid patent claims that covered Lipitor would be infringed by the sale, marketing, or use of its generic. Pfizer sued Ranbaxy in the District Court for the District of Delaware within the 45-day period

prescribed by Hatch-Waxman, alleging that Ranbaxy's generic would infringe the '893 and '995 Patents. Pursuant to Hatch-Waxman, the filing of Pfizer's lawsuit stayed FDA approval of Ranbaxy's ANDA for 30 months.

After a bench trial, the district court ruled that Pfizer's patents were valid and enforceable and would be infringed by Ranbaxy's generic. *Pfizer Inc. v. Ranbaxy Labs. Ltd.*, 405 F. Supp. 2d 495, 525-26 (D. Del. 2005). On appeal, the Federal Circuit largely agreed, affirming the district court's ruling that the '893 Patent would be infringed. *Pfizer Inc. v. Ranbaxy Labs. Ltd.*, 457 F.3d 1284, 1286 (Fed. Cir. 2006). The Federal Circuit reversed in part, however, holding that claim 6 of the '995 Patent was invalid due to what amounted to a scrivener's error in the drafting of the claim. *Id.* at 1291-92. On remand, the district court enjoined FDA approval of Ranbaxy's ANDA until March 24, 2010, the date of the '893 Patent's expiration. Also in response to the Federal Circuit's ruling, Pfizer applied for a reissuance of the '995 Patent to cure the drafting error. Ranbaxy filed an objection to the reissuance with the PTO.

In July 2005, as the 30-month statutory window halting Ranbaxy's generic market entry was closing, Pfizer filed a citizen petition with the FDA stating that the amorphous noncrystalline form of atorvastatin used in generic Lipitor (including Ranbaxy's, as identified in its ANDA) may be "inferior in quality" to branded Lipitor's crystalline form. *Lipitor* J.A. 1851. The *Lipitor* plaintiffs claim that this citizen petition was a sham. In May 2006, the FDA informed Pfizer that it had not yet reached a decision, citing the need for further review

and analysis. The FDA denied the petition in a 12-page decision issued on November 30, 2011.

Around the same time as their Lipitor patent dispute, Pfizer and Ranbaxy were also locked in patent-infringement litigation regarding a separate drug called Accupril. After Ranbaxy received ANDA approval and began marketing a generic Accupril product in conjunction with Teva Pharmaceuticals, Pfizer sued Ranbaxy and Teva in the District of New Jersey. On March 25, 2005, the district court issued a preliminary injunction halting Ranbaxy's sales of generic Accupril, subject to Pfizer posting a \$200 million bond to cover Ranbaxy's damages in the event the injunction was improvidently granted. The Federal Circuit affirmed without prejudice to an ultimate resolution of the merits. *Pfizer Inc. v. Teva Pharm. USA, Inc.*, 429 F.3d 1364, 1383 (Fed. Cir. 2005). On June 13, 2007, in light of the disputed patent's expiration, the district court vacated the preliminary injunction. The only issues that remained contested were Pfizer's limited claims for past damages and Ranbaxy's counterclaim as secured by the preliminary injunction bond.

In March 2008, Pfizer again sued Ranbaxy in the District of Delaware, this time claiming that Ranbaxy's generic Lipitor would infringe Pfizer's two Lipitor-related process patents. Not long after, on June 18, 2008, Pfizer and Ranbaxy publically announced that they had reached a near-global litigation settlement—which the *Lipitor* plaintiffs allege constituted an unlawful reverse payment—regarding scores of patent litigations around the world, including the Lipitor and Accupril disputes. In particular, the settlement ended

the Accupril litigation with prejudice, all domestic patent infringement litigation between Pfizer and Ranbaxy pertaining to Lipitor, and all foreign litigation between the two companies over Lipitor. As a result of the settlement, Ranbaxy received a licensed entry date of November 30, 2011 for generic Lipitor, Pfizer and Ranbaxy negotiated similar market entry dates for generic Lipitor in several foreign jurisdictions, Ranbaxy paid \$1 million to Pfizer in connection with the Accupril litigation, and Pfizer's \$200 million injunction bond from the Accupril litigation was cancelled. Ranbaxy also withdrew its objection to the '995 Patent's reissuance. The PTO reissued the '995 Patent in March 2009.

As part of the agreement, Ranbaxy delayed entry of its generic to March 2010, when the '983 Patent was set to expire. Due to its ANDA first-filer status, Ranbaxy was entitled to 180 days of market exclusivity. The Pfizer-Ranbaxy agreement consequently had the effect of maintaining a bottleneck over the entry of generic Lipitor from later ANDA filers. Any other would-be generic manufacturer that wanted the 180-day period to begin earlier than November 2011 would need a court to hold that all of Pfizer's Orange Book-listed patents were invalid or not infringed. Pfizer helped to forestall this possibility, the *Lipitor* plaintiffs say, through a combination of several lawsuits against subsequent ANDA filers. The FDA approved Ranbaxy's Lipitor ANDA on November 30, 2011, the day Ranbaxy's license to the unexpired Lipitor patents commenced.

Beginning in November 2011, the *Lipitor* direct-purchasers and end-payors, as well as the *RP Healthcare* plaintiffs, filed separate antitrust actions in various federal jurisdictions. The cases were referred to the Judicial Panel on Multidistrict Litigation (JPML) for coordination. In January 2012, the *RP Healthcare* plaintiffs withdrew their federal suit and refiled in California state court raising claims solely under California law. That suit was removed to federal court two months later.

The JPML transferred each case to the District of New Jersey, and assigned the matters to Judge Peter G. Sheridan. See *In re Lipitor Antitrust Litig.*, 856 F. Supp. 2d 1355 (J.P.M.L. 2012); *In re Lipitor Antitrust Litig.*, 2012 WL 4069565 (J.P.M.L. Aug. 3, 2012). Thereafter, the direct-purchaser and end-payor plaintiffs filed amended class action complaints; the individual-retailer plaintiffs likewise filed complaints joining the consolidated proceedings. The complaints are substantively identical, raising the same two claims: First, a monopolization claim under section 2 of the Sherman Act (15 U.S.C. § 2) or a state analogue against Pfizer, asserting that the company engaged in an overarching anticompetitive scheme that involved fraudulently procuring the ‘995 Patent from the PTO (*Walker Process* fraud), enforcing the ‘995 Patent and certain process patents through sham litigation, filing a sham citizen petition with the FDA, and entering into a reverse-payment settlement with Ranbaxy. Second, the *Lipitor* plaintiffs raise a claim under section 1 of the Sherman Act (15 U.S.C. § 1) or a state analogue against both Pfizer and Ranbaxy, challenging the

reverse-payment settlement as an unlawful restraint of trade. We will refer to these claims, respectively, as the “section 2 monopolization claim” and the “section 1 restraint of trade claim.”

The *RP Healthcare* plaintiffs’ amended complaint raises an altogether different claim under California’s antitrust statute, the Cartwright Act, Cal. Bus. & Prof. Code § 16700 *et seq.* They allege that Pfizer, Ranbaxy, a Japanese company called Daiichi Sankyo (and an affiliate), and two large pharmacies entered into a *per se* unlawful market allocation agreement regarding Lipitor. This agreement, according to the *RP Healthcare* plaintiffs, extended the life of Pfizer’s Lipitor-related patents and fixed prices for Lipitor and its generic equivalents at supracompetitive levels.

The *Lipitor* defendants filed motions to dismiss all complaints under Federal Rule of Civil Procedure 12(b)(6). On October 19, 2012, the District Court denied the *RP Healthcare* plaintiffs’ motion to remand to California state court, reasoning that “there may be many patent issues raised as defenses in this case which would engender federal jurisdiction.” *Lipitor* J.A. 2. And on May 16, 2013, the District Court stayed proceedings pending the Supreme Court’s decision in *Actavis*. In light of *Actavis*, the District Court reopened the case and permitted the parties to file supplemental briefs on the pending motions to dismiss.

On September 5, 2013, the District Court dismissed the *Lipitor* plaintiffs’ complaints to the extent they were based on anything other than the reverse-payment settlement. *In re Lipitor Antitrust Litig.*, 2013 WL 4780496 (D.N.J. Sept. 5, 2013). In particular, the District Court rejected the *Walker Process*, sham

litigation, and sham FDA citizen petition aspects of the *Lipitor* plaintiffs' monopolization claims. *Id.* at *15-23. The court also granted leave to file amended complaints focused solely on the Pfizer-Ranbaxy reverse payment. *Id.* at *25-27.

The *Lipitor* plaintiffs filed amended complaints in October 2013. The direct-purchasers and end-payors attached their prior complaints as exhibits to their new complaints to preserve for appeal the allegations that had been dismissed. For their part, the independent-retailers stated in the first paragraph of their new complaints that they were also preserving the previously dismissed claims.

In November 2013, the *Lipitor* defendants once again moved to dismiss. On September 12, 2014, the District Court dismissed with prejudice the *Lipitor* direct-purchasers' remaining argument that the Pfizer-Ranbaxy settlement was unlawful under *Actavis*. *In re Lipitor Antitrust Litig.*, 46 F. Supp. 3d 523 (D.N.J. 2014). The complaints of the end-payor, individual-retailer, and *RP Healthcare* plaintiffs were subsequently dismissed with prejudice in light of the District Court's opinion.

The direct-purchasers filed a motion to amend the judgment and for leave to file an amended complaint, arguing that the District Court applied a novel pleading standard. That motion was denied on March 17, 2015. *Lipitor* J.A. 151-52. These timely appeals followed.

B

In *In re Effexor XR Antitrust Litigation*, Nos. 15-1184 *et al.*, plaintiffs are a putative class of direct-

purchasers of branded Effexor XR, a putative class of end-payors, two individual third-party payors, and four individual-retailers asserting direct-purchaser claims. We will refer to these parties collectively as the “*Effexor* plaintiffs.” Defendants are Wyeth, Inc., Teva Pharmaceutical Industries Ltd., and their respective corporate affiliates. We will likewise refer to these parties collectively as the “*Effexor* defendants.”

1

In 1985, the PTO issued a patent for the compound venlafaxine hydrochloride. That patent was assigned to American Home Products, Wyeth’s predecessor. Eight years later, in 1993, the FDA granted Wyeth approval to begin marketing Effexor, a drug used to treat major depression. Effexor’s active ingredient is venlafaxine hydrochloride; the patent for that compound expired on June 13, 2008. In 1997, Wyeth introduced Effexor XR, an extended release, once-daily version. Wyeth obtained three patents for Effexor XR, all of which expired on March 20, 2017. The *Effexor* plaintiffs contend that Wyeth obtained the Effexor XR patents through fraud on the PTO, improperly listed those patents in the FDA’s Orange Book, and enforced those patents through serial sham litigation.

On December 10, 2002, Teva filed a paragraph IV certification challenging the validity of Wyeth’s Effexor XR patents. As the first company to file an ANDA with a paragraph IV certification for generic Effexor XR, Teva was entitled to Hatch-Waxman’s 180-day period of marketing exclusivity. Wyeth brought suit against Teva for patent infringement in the District of New Jersey.

In October 2005, shortly after the district court held a *Markman* hearing on claim construction, Wyeth and Teva reached a settlement. Under the settlement, which the *Effexor* plaintiffs allege constitutes an unlawful reverse payment, Wyeth and Teva reached an agreed-upon entry date of July 1, 2010 for generic Effexor XR, nearly seven years before the expiration of Wyeth's patents related to that drug. Wyeth further agreed that it would not market an authorized-generic Effexor XR during Teva's 180-day exclusivity period. In return, Teva would pay Wyeth royalties for the license, beginning at 15% during the 180-day period. If Wyeth chose not to introduce an authorized-generic after 180 days and no other generic entered the market, Teva was required to pay Wyeth 50% royalties for the next 180 days and 65% thereafter for up to 80 months. Moreover, in accordance with the settlement, Wyeth granted Teva a license to begin selling generic immediate release Effexor (Effexor IR) for two years prior to the June 2008 expiration of the original venlafaxine hydrochloride patent and agreed that it would not compete with Teva's marketing of generic Effexor IR during that two-year period. Teva, for its part, would pay Wyeth 28% royalties during the first year and 20% during the second year.

Wyeth and Teva filed the settlement agreement with the district court presiding over the patent infringement litigation. In accordance with a 2002 consent decree, the Federal Trade Commission (FTC) had the right to weigh in on Wyeth's settlements and to raise objections in advance. It offered no objection. The settlement was also submitted to the FTC and the U.S. Department of Justice pursuant to section 1112 of the Medicare Prescription Drug, Improvement, and

Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066, 2461-63 (2003) (codified at 21 U.S.C. § 355 note). The district court thereafter entered orders vacating its prior *Markman* rulings, dismissing the case, and adopting the terms of the settlement as a consent decree and permanent injunction. *Effexor* J.A. 1298.

Following the Wyeth-Teva settlement, between April 2006 and August 2011, Wyeth brought patent infringement suits against sixteen other companies that sought to market a generic Effexor XR. All suits settled under terms stipulating that Wyeth's patents were valid and infringed.

2

Beginning in May 2011, several direct-purchasers of Effexor XR filed class action complaints in the Southern District of Mississippi challenging the lawfulness of the Wyeth-Teva settlement agreement. The cases were consolidated and, on September 21, 2011, the court transferred the action to the District of New Jersey.

After transfer, the direct-purchasers filed an amended consolidated class action complaint, a group of end-payors joined the case with a consolidated class action complaint of their own, four individual-retailers filed complaints, and two individual third-party payors together filed their own complaint. The complaints are substantially similar: Each alleges a monopolization claim against Wyeth under section 2 of the Sherman Act or analogous state statutes, asserting that Wyeth fraudulently induced the PTO to issue the three patents covering Effexor XR (*Walker Process* fraud),

wrongfully listed those patents in the Orange Book, enforced those patents through serial sham litigation, and entered into a reverse-payment settlement with Teva. The complaints also raise a claim under section 1 of the Sherman Act or a state analogue against both Wyeth and Teva, challenging the reverse-payment settlement as an unlawful restraint of trade. As with the *Lipitor* appeals, we will refer to these claims, respectively, as the “section 2 monopolization claim” and the “section 1 restraint of trade claim.” (Though otherwise similar to the other complaints, the individual third-party payors’ complaint names only Wyeth and its affiliates as defendants. They also raise additional claims not relevant to these appeals.)

The *Effexor* defendants filed motions to dismiss under Rule 12(b)(6), but the District Court stayed proceedings pending the Supreme Court’s decision in *Actavis*. After *Actavis* was issued, the District Court vacated the stay, reopened the case, and called for supplemental briefing on the pending motions to dismiss. On October 23, 2013, the direct-purchasers (but no other party) filed an amended complaint.

On October 6, 2014, the District Court granted in part and denied in part the *Effexor* defendants’ motions to dismiss. *In re Effexor XR Antitrust Litig.*, 2014 WL 4988410 (D.N.J. Oct. 6, 2014). It rejected the *Effexor* plaintiffs’ challenges to the Wyeth-Teva reverse-payment settlement and dismissed with prejudice the section 1 restraint of trade claims. *Id.* at *19-24. However, the District Court declined to dismiss the *Effexor* plaintiffs’ *Walker Process* allegations against Wyeth. *Id.* at *24-26. At the *Effexor* plaintiffs’ request, the court granted final judgment on the restraint of

trade claims under Federal Rule of Civil Procedure 54(b).

These timely appeals followed. On February 27, 2015, the *Effexor* defendants moved this Court to transfer the *Effexor* appeals to the Federal Circuit on the ground that the *Effexor* plaintiffs' complaints assert claims that arise under patent law. We denied the motion without prejudice to the *Effexor* defendants raising the jurisdictional argument in their merits briefs.

III

The District Court possessed subject-matter jurisdiction, at a minimum, under the following statutes: With respect to the *Lipitor* and *Effexor* direct-purchasers and independent-retailers, the District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1337(a). With respect to the *Lipitor* and *Effexor* end-payors, the District Court had jurisdiction under 28 U.S.C. § 1332(d). And with respect to the *Effexor* independent third-party payors, the District Court had jurisdiction under 28 U.S.C. § 1332(a)(1) and (3).

The *Lipitor* and *Effexor* defendants contend that the District Court also had jurisdiction over each of these cases under 28 U.S.C. § 1338(a), thus necessitating transfer of these appeals to the Federal Circuit. The *RP Healthcare* plaintiffs, for their part, argue that the District Court did not possess subject-matter jurisdiction at all; they say their case properly belongs in California state court.

Though our jurisdiction to reach the merits of these appeals is disputed, "it is familiar law that a federal court always has jurisdiction to determine its own

jurisdiction.” *United States v. Ruiz*, 536 U.S. 622, 628 (2002); *see also Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 542 (1986); *Brown v. Keene*, 33 U.S. (8 Pet.) 112, 116 (1834). We therefore, for purposes of this opinion, have jurisdiction under 28 U.S.C. § 1291. Our review of the jurisdictional questions at issue is plenary. *In re NFL Players Concussion Injury Litig.*, 775 F.3d 570, 576 (3d Cir. 2014).

IV

Like all other federal courts, we are a court of limited jurisdiction, possessing “only that power authorized by Constitution and statute.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). As an Article III court established by Congress, our appellate jurisdiction is “purely statutory.” *Heike v. United States*, 217 U.S. 423, 428 (1910).

The United States Courts of Appeals have general appellate jurisdiction over “appeals from all final decisions of the district courts of the United States.” 28 U.S.C. § 1291. But carved out of §1291’s jurisdictional grant is the Court of Appeals for the Federal Circuit. Congress vested that court with “exclusive jurisdiction of an appeal from a final decision of a district court of the United States . . . in any civil action *arising under* . . . any Act of Congress relating to patents.” *Id.* § 1295(a)(1) (emphasis added). The federal district courts, in turn, “have original jurisdiction of any civil action arising under any Act of Congress relating to patents.” *Id.* § 1338(a). “Thus, the Federal Circuit’s jurisdiction is fixed with reference to that of the district court, and turns on whether the action arises under federal patent law.” *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 829 (2002). So if

the District Court here had jurisdiction over at least one claim in a particular case under § 1338(a), the Federal Circuit has exclusive jurisdiction of that appeal. *See Apotex, Inc. v. Thompson*, 347 F.3d 1335, 1342 (Fed. Cir. 2003); *see also* 19 James Wm. Moore & George C. Pratt, *Moore's Federal Practice* § 208.10[2], p. 208-16 (3d ed. 2017) (“the minimum jurisdictional requirement is the existence of at least one claim under the patent . . . statutes, and in a mixed case, the Federal Circuit has jurisdiction to decide all of the issues involved in the appeal.”(footnote omitted)). In that circumstance, we would lack jurisdiction and be required to transfer these appeals to the Federal Circuit. *See* 28 U.S.C. § 1631; *In re Arunchalam*, 812 F.3d 290, 293-94 (3d Cir. 2016) (per curiam).

The discussion that follows applies to both sets of appeals. Consequently, unless otherwise indicated, we will refer to the *Lipitor* and *Effexor* plaintiffs collectively as the “plaintiffs” and the *Lipitor* and *Effexor* defendants collectively as the “defendants.”

A

The Supreme Court’s pathmarking decision addressing the Federal Circuit’s patent-law jurisdiction is *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1986). At the time, the Federal Circuit’s jurisdictional statute vested that court with “exclusive jurisdiction of an appeal from a final decision of a district court of the United States . . . if the decision of a district court was based, in whole or in part, on [28 U.S.C.] § 1338.” 28 U.S.C. §1295(a)(1). Then, as now, § 1338(a) granted the district courts “original jurisdiction of any civil action arising under any Act of Congress relating to patents.” Section 1338(a) uses the

same operative language as 28 U.S.C. § 1331, the statute that gives the district courts “original jurisdiction of all civil actions *arising under* the Constitution, laws, or treaties of the United States.” (Emphasis added.).

Christianson held that “[l]inguistic consistency” requires that courts apply the same jurisdictional test to determine whether a case arises under § 1331 as it would under § 1338(a). 486 U.S. at 808. Under § 1338(a), then, jurisdiction extends “only to those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims.” *Id.* at 809. As in the § 1331 context, the determination whether a claim “rises under” patent law must be made in accordance with the time-honored well-pleaded-complaint rule. And as “appropriately adapted to §1338(a),” that rule provides that the answer to whether a claim “arises under” patent law “must be determined from what necessarily appears in the plaintiff’s statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.” *Id.* (quoting *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 10 (1983)).

For those cases in which federal patent law does not create the cause of action, it is not “necessarily sufficient that a well-pleaded claim alleges a single theory under which resolution of a patent-law question

is essential.” *Id.* at 810. Rather, if “on the face of a well-pleaded complaint there are . . . reasons completely unrelated to the provisions and purposes of [the patent laws] why the [plaintiff] may or may not be entitled to the relief it seeks,’ then the claim does not ‘arise under’ those laws.” *Id.* (alterations in original) (quoting *Franchise Tax Bd.*, 463 U.S. at 26). “Thus,” *Christianson* explained, “a claim supported by alternative theories in the complaint may not form the basis for § 1338(a) jurisdiction unless patent law is essential to each of those theories.” *Id.*

The complaint in *Christianson* contained an antitrust count that the Court understood as raising a monopolization claim under section 2 of the Sherman Act and a group-boycott claim under section 1. *See id.* Even though the claims included allegations of patent invalidity, the Court held that the Federal Circuit lacked jurisdiction because the “patent-law issue, while arguably necessary to at least one theory under each claim, [was] not necessary to the overall success of either claim.” *Id.*

As to the complaint’s section 2 monopolization claim, the Court first identified the “thrust” of the allegations, namely, that Colt, the defendant, “embarked on a course of conduct to illegally extend its monopoly position with respect to the described patents and to prevent” plaintiffs from competing. *Id.* But because the well-pleaded-complaint rule “focuses on claims, not theories,” the Court emphasized that “just because an element that is essential to a particular theory might be governed by federal patent law does not mean that the entire monopolization claim ‘arises under’ patent law.” *Id.* at 811. One such theory

involved allegations that certain Colt trade secrets were not protected under state law because their underlying patents were invalid. But after parsing the complaint, the Court observed that this monopolization theory was “only one of several, and the only one for which the patent-law issue is even arguably essential.” *Id.* Because there were “reasons completely unrelated to the provisions and purposes’ of federal patent law why [the plaintiffs] ‘may or may not be entitled to the relief they [sought]’ under their monopolization claim, the claim [did] not ‘arise under’ patent law.” *Id.* at 812 (quoting *Franchise Tax Bd.*, 463 U.S. at 26).

The same result obtained with regard to the plaintiffs’ section 1 group-boycott claim. That claim involved allegations that Colt engaged in a group-boycott to protect its trade secrets. And like the section 2 monopolization claim, one theory of recovery involved assertions that Colt’s patents protecting its trade secrets were invalid. “Whether or not the patent-law issue was an ‘essential’ element of that group-boycott *theory*,” the Court noted, plaintiffs “could have supported their group-boycott *claim* with any of several theories having nothing to do with the validity of Colt’s patents.” *Id.* at 813. Instead, “the appearance on the complaint’s face of an alternative, non-patent theory compel[led] the conclusion that the group-boycott claim [did] not ‘arise under’ patent law.” *Id.*

Four working principles underlie the Court’s decision in *Christianson*. First, whether a claim “arises under” federal patent law is made by reference to the well-pleaded complaint. *See Holmes Grp.*, 535 U.S. at 829-30. Second, for jurisdictional purposes, regardless of how a complaint labels its claims or counts, courts

are to look to the complaint and its allegations as a whole to identify the plaintiff's claims and any theories undergirding those claims. Third, in the antitrust context, courts must attend to the thrust of the plaintiff's allegations and then determine the theories that explain why certain alleged conduct was anticompetitive. And finally, after distinguishing between claims and theories, courts then must ascertain whether each theory supporting a claim necessarily requires the resolution of a substantial question of patent law. If one theory does not, the Federal Circuit lacks appellate jurisdiction. *See ClearPlay, Inc. v. Abecassis*, 602 F.3d 1364, 1369 (Fed. Cir. 2010) (“*Christianson* embraces a distinctly non-holistic approach to ‘arising under’ jurisdiction. It is not enough that patent law issues are in the air. Instead, resolution of a patent law issue must be necessary to *every theory of relief* under at least one claim in the plaintiff's complaint.” (emphasis added)).

B

Applying these principles, we conclude that the actions brought by the *Lipitor* and *Effexor* plaintiffs do not “arise under” patent law. We note at the outset a clear and undisputed aspect of our jurisdictional inquiry. Federal and state *antitrust* law, not federal patent law, creates plaintiffs' claims. This case, like *Christianson* itself, turns on the second head of “arising under” jurisdiction. And so we must decide whether plaintiffs' well-pleaded complaints state at least one claim upon which their “right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary

element of one of the well-pleaded claims.” *Christianson*, 486 U.S. at 809.

Defendants do not argue that plaintiffs’ section 1 restraint of trade claims arise under patent law. Those claims relate only to the Pfizer-Ranbaxy and Wyeth-Teva reverse-payment settlements. Defendants instead home in on plaintiffs’ section 2 monopolization claims. Recall that the thrust of those claims is that Pfizer and Wyeth each engaged in an overall scheme to monopolize the markets for their respective branded Lipitor and Effexor XR drugs. Those schemes, plaintiffs allege, were furthered in part by the companies’ fraudulent procurement and enforcement of certain patents relating to the drugs. But the schemes were also furthered by the reverse-payment settlements (and, in the *Lipitor* appeals, the filing of a sham FDA citizen petition).

The fraudulent procurement of a patent—known as *Walker Process* fraud, see *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965) (recognizing that patentee’s knowing and willful misrepresentation of facts to the PTO can strip the patentee of immunity under the antitrust laws)—requires a plaintiff to show, among other things, that the patentee committed fraud before the PTO, that the fraud caused the patent to issue, and that the patentee enforced the fraudulently procured patent, *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 375 F.3d 1341, 1355 (Fed. Cir. 2004), *rev’d on other grounds*, 546 U.S. 394 (2006). *Walker Process* fraud has for some time been considered by courts to present a substantial question of patent law. See *In re DDAVP Antitrust Litig.*, 585 F.3d 677, 685 (2d Cir. 2009); *In re*

Ciprofloxacin Antitrust Litig., 544 F.3d 1323, 1330 n.8 (Fed. Cir. 2008) (“[T]he determination of fraud before the PTO necessarily involves a substantial question of patent law.”); *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1068 (Fed. Cir. 1998) (en banc in relevant part) (“[W]hether conduct in procuring or enforcing a patent is sufficient to strip a patentee of its immunity from the antitrust laws is to be decided as a question of Federal Circuit law.”). And to the extent plaintiffs’ sham litigation and false Orange Book listing theories depend on a successful showing of *Walker Process* fraud, they too could present substantial questions of patent law. *See DDAVP*, 585 F.3d at 685; *Nobelpharma*, 141 F.3d at 1071-72. We recognize as well that the substantiality of these theories may be open to debate following *Gunn v. Minton*, 133 S. Ct. 1059 (2013). That case held, in the context of a state legal malpractice claim, that hypothetical, backward-looking, case-within-a-case questions of patent law that do not change the real-world result of prior federal patent litigation do not present a substantial patent-law issue. *Id.* at 1067-68. We need not definitively address the substantiality of plaintiffs’ *Walker Process*, sham litigation, and false Orange Book listing theories in light of *Gunn*. For even assuming that these theories do present substantial questions of patent law, plaintiffs’ right to relief on their section 2 monopolization claims does not depend upon them.

Here, plaintiffs could obtain relief on their section 2 monopolization claims by prevailing on an alternative, non-patent-law theory, namely, that Pfizer and Wyeth monopolized the market in their respective branded drugs by engaging in a reverse-payment settlement. And in *Lipitor* the plaintiffs could also prevail on the

additional non-patent law theory that Pfizer filed a sham citizen petition with the FDA. *See DDAVP*, 585 F.3d at 686 (“[W]hether [a FDA] petition was a sham is an issue independent of patent law.”); *see also Apotex Inc. v. Acorda Therapeutics, Inc.*, 823 F.3d 51, 59 (2d Cir. 2016).

Actavis teaches that reverse-payment antitrust claims do not present a question of patent law. *See* 133 S. Ct. at 2236-37 (“[T]he size of the unexplained reverse payment can provide a workable surrogate for a patent’s weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself.”). The Court did acknowledge, however, that questions of patent validity may still arise from time to time. *See id.* at 2236 (“[I]t is normally not necessary to litigate patent validity to answer the antitrust question (unless, perhaps, to determine whether the patent litigation is a sham).”). But even where patent-law questions are presented, it does not follow that patent law is necessary for relief on every theory of liability supporting an antitrust claim. In the present appeals, “[s]ince there are reasons completely unrelated to the provisions and purposes of federal patent law why [plaintiffs] may or may not be entitled to the relief they seek under their monopolization claim, the claim does not ‘arise under’ federal patent law.” *Christianson*, 486 U.S. at 812 (brackets, citation, and some internal quotation marks omitted). These considerations lead us to conclude that the presence of non-patent-law theories of liability supporting the *Lipitor* and *Effexor* plaintiffs’ monopolization claims vests jurisdiction over their appeals in this Court, not the Federal Circuit.

C

Defendants do not quarrel with any of the principles that guide our analysis. They instead assert that plaintiffs' reverse-payment settlement allegations constitute monopolization claims separate and apart from the *Walker Process* fraud, sham litigation, and false Orange Book listing theories. The allegations of fraudulent procurement and enforcement of the Lipitor and Effexor patents, in defendants' view, involve distinct anticompetitive conduct that occurred years before the reverse-payment settlements (and, in *Lipitor*, the sham FDA citizen petition).

We reject this divide-and-conquer approach to "arising under" jurisdiction. Defendants in effect ask that we rewrite plaintiffs' complaints, which plead patent-law related theories as aspects of an overall monopolistic scheme. A monopolization claim under section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power. *LePage's Inc. v. 3M*, 324 F.2d 141, 146 (3d Cir. 2003) (en banc) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). But to be condemned as exclusionary, a monopolist's anticompetitive conduct must have an anticompetitive effect. "The relevant inquiry," we have held, "is the anticompetitive effect of [a defendant's] exclusionary practices considered together." *Id.* at 162. Thus, "courts must look to the monopolist's conduct taken as a whole rather than considering each aspect in isolation." *Id.* (citing *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)); see *id.* ("[I]t would not be proper to focus on specific individual acts of an accused

monopolist while refusing to *consider their overall combined effect* We are dealing with what has been called the ‘synergistic effect’ of the mixture of the elements.” (alterations in original) (internal quotation marks omitted)).

Defendants contend that the patent-law theories of monopolization liability in plaintiffs’ complaints are distinct “claims.” But that runs headlong into traditional antitrust principles. Plaintiffs’ monopolization claims encompass the totality of the allegedly anticompetitive conduct—from defendants’ fraudulent procurement and enforcement of their patents on through to the reverse-payment settlements. We will not permit the defendants to commandeer these complaints, of which plaintiffs are master.

Nor do we accept the argument that certain statements made by the *Effexor* plaintiffs in the District Court somehow estop them from arguing that the patent-law allegations constitute theories of relief. Principles of estoppel cannot confer jurisdiction where it otherwise does not exist. *See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *Semper v. Gomez*, 747 F.3d 229, 247 (3d Cir. 2014). And in any event, our jurisdictional inquiry is confined solely to the plaintiffs’ well-pleaded complaints, not subsequent events. *See Christianson*, 486 U.S. at 814 (“Since the district court’s jurisdiction is determined by reference to the well-pleaded complaint, not the well-tried case, the referent or the Federal Circuit’s jurisdiction must be the same.”).

D

Our jurisdictional holding is consistent, we think, with two of the Second Circuit's pre-*Actavis* reverse-payment cases. In one case, the court transferred an appeal to the Federal Circuit and retained jurisdiction over others. The Second Circuit explained: "The indirect purchaser plaintiffs amended their complaint to add state-law, *Walker Process* antitrust claims Because the *Walker Process* claims are preempted by patent law, we transferred the indirect purchaser plaintiffs' appeal to the Federal Circuit, while retaining jurisdiction over the direct purchaser plaintiffs' appeals." *Arkansas Carpenters Health & Welfare v. Bayer AG*, 604 F.3d 98, 103 n.10 (2d Cir. 2010); see *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 2007 U.S. App. LEXIS 30732, at *1 (2d Cir. Nov. 7, 2007) (order transferring indirect purchaser plaintiffs' appeal to the Federal Circuit). The Second Circuit and the Federal Circuit therefore each independently assessed the lawfulness of the same reverse-payment settlement. See *Arkansas Carpenters*, 604 F.3d at 103 & n.10; *Ciprofloxacin*, 544 F.3d at 1333. But unlike the *Lipitor* and *Effexor* appeals before us, the appeal transferred from the Second Circuit to the Federal Circuit involved stand-alone *Walker Process* claims. See *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 363 F. Supp. 2d 514, 544 (E.D.N.Y. 2005) ("[I]ndirect plaintiffs' Count V [raising state-law *Walker Process* claims] not only arises out of patent law, but rests entirely on patent law" (emphasis added)), *aff'd*, 544 F.3d 1232 (Fed. Cir. 2008), and *aff'd sub nom. Arkansas Carpenters*, 604 F.3d 98.

And in *DDAVP*, 585 F.3d 677, the Second Circuit retained jurisdiction over a reverse-payment case. The *DDAVP* plaintiffs alleged four theories of liability in a Sherman Act monopolization claim against a branded drug manufacturer based upon theories nearly identical to those the *Lipitor* and *Effexor* plaintiffs bring against Pfizer and Wyeth: *Walker Process* fraud, sham Orange Book listing, sham litigation against generic competitors, and a sham FDA citizen petition. *Id.* at 685. The Second Circuit acknowledged that, while the plaintiffs' first three theories turned on substantial questions of patent law, the fourth theory—the filing of a sham FDA citizen petition—did not. *Id.* at 685-86. Because the citizen-petition theory did not raise any question of patent law, the court exercised jurisdiction over the entirety of the plaintiffs' monopolization claim. *Id.* at 686.

A final, prudential consideration tips in favor of our Court exercising jurisdiction over these appeals. Under the Federal Circuit's choice-of-law rules, it would apply *Third Circuit* antitrust jurisprudence—including our recent decision in *King Drug*, 791 F.3d 388—when reviewing whether plaintiffs' complaints state plausible claims for relief under *Actavis*. See *Nobelpharma*, 141 F.3d at 1059 (Federal Circuit “appl[ies] the law of the appropriate regional circuit to issues involving other elements of antitrust law such as relevant market, market power, damages, etc., as those issues are not unique to patent law”). Now that the Supreme Court has confirmed that it is usually unnecessary to litigate these patent-law issues to determine antitrust liability, the development of post-*Actavis* jurisprudence is, in the ordinary case, left to the regional Courts of Appeals.

Christianson establishes that not all cases involving patent law fall within the Federal Circuit’s jurisdiction. Congress has left a role for our Court to play in adjudicating patent-law issues over which we possess jurisdiction. Our holding requires us to fulfill that role in these appeals.

V

The appeal of the *RP Healthcare* plaintiffs requires a separate jurisdictional inquiry. That case was filed by a group of California pharmacists in the Superior Court of California, Sonoma County, but Pfizer removed it to federal district court, citing federal-question jurisdiction under 28 U.S.C. § 1331 and patent-law jurisdiction under § 1338(a). *RP Healthcare* J.A. 26-27; see 28 U.S.C. § 1441(a). In denying the *RP Healthcare* plaintiffs’ remand motion, the District Court reasoned that “there may be patent issues raised as defenses in this case which would engender jurisdiction.” *Lipitor* J.A. 2. We disagree. “Under the well-pleaded complaint rule . . . whether a claim ‘arises under’ patent law ‘must be determined from what necessarily appears in the plaintiff’s statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.’” *Christianson*, 486 U.S. at 809 (quoting *Franchise Tax Bd.*, 463 U.S. at 8); see *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1914); *N.J. Carpenters v. Tishman Constr. Corp. of N.J.*, 760 F.3d 297, 302 (3d Cir. 2014) (“The existence or expectation of a federal defense is insufficient to confer federal jurisdiction.”).

Pfizer and Ranbaxy nevertheless argue that the *RP Healthcare* case belongs in federal court because it

“arises under” patent law pursuant to § 1338(a). They also say the District Court possessed diversity jurisdiction before final judgment entered as a result of the *RP Healthcare* plaintiffs’ voluntary dismissal of the only two non-diverse defendants. We reject the first argument but find the record insufficient to decide the second.

A

The *RP Healthcare* plaintiffs do not challenge the Pfizer-Ranbaxy settlement as an unlawful reverse payment. Rather, they allege that the settlement constitutes a *per se* unlawful market allocation agreement in violation of California’s Cartwright Act. Two years after *Actavis*, the California Supreme Court held that reverse-payment settlements can be challenged under that Act and are to be analyzed under a structured rule-of-reason. *In re Cipro Cases I & II*, 348 P.3d 845 (Cal. 2015). But the California court has yet to recognize the kind of *per se* market allocation claim proposed by the *RP Healthcare* plaintiffs.

To the extent their claim exists under California law (a question we do not decide), as pled by the *RP Healthcare* plaintiffs that claim would not “arise under” federal patent law. Pfizer and Ranbaxy latch onto a single sentence in the *RP Healthcare* plaintiffs’ state court complaint making an express allegation of *Walker Process* fraud. See *RP Healthcare* Pls.’ Compl. ¶ 114, *RP Healthcare* .A. 57 (“The Agreement between Defendants extending the length of the Lipitor patents constitutes fraudulent procurement and enforcement of a patent” (citing *Walker Process*, 382 U.S. 172)). But like the complaints of the *Lipitor* and *Effexor* plaintiffs discussed above, we conclude that there are

alternative non-patent-law theories through which the *RP Healthcare* plaintiffs could prevail on their state-law antitrust claim. See *Christianson*, 486 U.S. at 809-10. The *RP Healthcare* plaintiffs' complaint includes theories of liability other than *Walker Process* fraud. See *id.* ¶ 105, *RP Healthcare* J.A. 56 ("The Agreements between the Defendants, which artificially extended the length of the Lipitor-related patents, *allocated markets between them, artificially postponed price reductions, and restrained trade in the provision of Lipitor and its generic alternatives*, are a violation of the Cartwright Act" (emphasis added)). Thus, the *RP Healthcare* plaintiffs could obtain relief on the market allocation claim all without addressing the validity of Pfizer's Lipitor patents. The oblique mention of *Walker Process* fraud in their complaint does not land this case in the "special and small category" of state-law claims "in which arising under jurisdiction still lies." *Gunn*, 133 S. Ct. at 1064 (internal quotation marks omitted).

B

While the District Court did not possess jurisdiction over the *RP Healthcare* case under § 1338(a), the possibility exists that the court had diversity jurisdiction by the time it entered final judgment. Article III of the Constitution provides that "[t]he judicial Power [of the United States] shall extend . . . to Controversies . . . between Citizens of different States; . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." Beginning with the Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78, Congress has authorized the federal courts to exercise jurisdiction based on the parties' diversity of

citizenship. In its current form, the diversity statute vests in the federal district courts original jurisdiction of “all civil actions where the matter in controversy exceeds the sum or value of \$75,000, . . . and is between . . . citizens of different States and in which citizens or subjects of a foreign state are additional parties.” 28 U.S.C. § 1132(a)(3). Since *Strawbridge v. Curtis*, 7 U.S. (3 Cranch) 267 (1806), the Supreme Court has interpreted the diversity statute to require “complete diversity” of citizenship: “[i]n a case with multiple plaintiffs and multiple defendants, the presence in the action of a single plaintiff from the same State as a single defendant deprives the district court of original diversity jurisdiction over the entire action,” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 553 (2005).

Though “[i]t had long been the case that ‘the jurisdiction of the court depends upon the state of things at the time of the action brought,’” *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 570 (2004) (quoting *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824)), this time-of-filing rule is subject to a few discrete exceptions. One such “method of curing a jurisdictional defect [that has] long been an exception to the time-of-filing rule” is when a jurisdictional defect is “cured by the dismissal of the party that had destroyed diversity.” *Id.* at 572. As the Supreme Court recognized in *Caterpillar Inc. v. Lewis*, “a district court’s error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered.” 529 U.S. 61, 64 (1996).

Pfizer and Ranbaxy urge us to apply that exception here. After all, the *RP Healthcare* plaintiffs voluntarily dismissed the only two non-diverse defendants prior to entry of final judgment. Before this Court, however, the parties expressed uncertainty regarding the state of the record as it pertains to the citizenship of two parties—defendants Pfizer Ireland Pharmaceuticals and Warner-Lambert Co., LLC, both unincorporated entities and wholly owned subsidiaries of Pfizer. See *Lipitor* Tr. of Oral Arg. 23-24, 44-47; *RP Healthcare* Pls.’ Reply Br. 17-18. Like all unincorporated entities, partnerships and limited liability companies (LLCs) bear the citizenship of each of their members. See *Americold Realty Trust v. ConAgra Foods, Inc.*, 136 S. Ct. 1012, 1016-17 (2016); *Carden v. Arcoma Assocs.*, 494 U.S. 185, 195-96 (1990); *Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 420 (3d Cir. 2010).

As the parties asserting diversity jurisdiction, Pfizer and Ranbaxy bear the burden of proving diversity of citizenship by a preponderance of the evidence. See *Freidrich v. Davis*, 767 F.3d 374, 377 (3d Cir. 2014). Since this case was removed to federal court, diversity must have existed both at the time the *RP Healthcare* plaintiffs’ state court complaint was filed and at the time of removal. See *Pullman Co. v. Jenkins*, 305 U.S. 534, 537 (1939); *Johnson v. SmithKline Beecham Corp.*, 724 F.3d 337, 346 (3d Cir. 2013). But no changes in citizenship after the time of filing (and, as relevant here, the time of removal) can create or destroy diversity. See *Grupo Dataflux*, 541 U.S. at 574-75; *Conolly v. Taylor*, 27 U.S. (2 Pet.) 556, 565 (1829).

In calling for diversity jurisdiction Pfizer and Ranbaxy made no effort before this Court or the

District Court to demonstrate that complete diversity was in fact present before final judgment. That is especially puzzling, since an unincorporated association “is in the best position to ascertain its own membership,” *Lincoln Benefit Life Co. v. AEI Life, LLC*, 800 F.3d 99, 108 (3d Cir. 2015), and the entities in question are Pfizer subsidiaries. While we have previously observed that, “where the unincorporated association is the proponent of diversity jurisdiction, there is no reason to excuse it of its obligation to plead the citizenship of each of its embers,” *id.* at 108 n.36, that statement was made in the context of an unincorporated association asserting diversity *as a plaintiff*. It does not address the situation in this case, where the removing parties are asserting diversity as a result of the plaintiffs’ own voluntary post-removal actions. We therefore consider it premature to direct that the *RP Healthcare* case be sent back to California state court. Rather, we will remand the matter to the District Court to give the parties the opportunity to clarify the record with regard to diversity of citizenship. The District Court should also ensure that the amount in controversy alleged in the *RP Healthcare* plaintiffs’ state-court complaint exceeds \$75,000. *See* 28 U.S.C. § 1332(a); *Angus v. Shiley*, 989 F.2d 142, 145-46 (3d Cir. 1993).

Our remand applies as well to the Daiichi Sankyo defendants. Before the District Court, they moved to dismiss the *RP Healthcare* plaintiffs’ complaint on three grounds: lack of Article III standing, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted. The District Court dismissed the Daiichi Sankyo defendants under Rule 12(b)(6) for failure to state a plausible claim. *Lipitor*

J.A. 65, 3543-44. But “a federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction) and the parties (personal jurisdiction).” *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 430-31 (2007); see *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 93-102 (1998). The District Court should have resolved the standing and personal jurisdictional arguments before dismissing Daiichi Sankyo on the merits. In the event that the District Court concludes on remand that the parties were completely diverse at the time of judgment, it should address those arguments to determine whether it had the power to reach the merits of the *RP Healthcare* plaintiffs’ claim against Daiichi Sankyo.

It is a common practice among the Courts of Appeals to retain jurisdiction over an appeal while making a limited remand for additional findings or explanations. Basic illustrations include a “controlled remand to determine whether there is federal subject-matter jurisdiction” as well as “remands to determine justiciability or personal jurisdiction” 16 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice & Procedure* § 3937.1, pp. 847-48 (3d ed. 2012) (footnote omitted); see, e.g., *Friery v. Los Angeles Unified Sch. Dist.*, 448 F.3d 1146, 1150 (9th Cir. 2006) (limited remand for Article III standing determination); *Fort Knox Music Inc. v. Baptiste*, 203 F.3d 193, 197 (2d Cir. 2000) (limited remand for personal jurisdiction determination); *Jason’s Foods, Inc. v. Peter Eckrich & Sons, Inc.*, 768 F.2d 189, 190-91 (7th Cir. 1985) (limited remand for diversity-of-citizenship determination). We will follow that practice and retain jurisdiction over the

RP Healthcare plaintiffs' appeal. It is expected that the District Court and the parties will move expeditiously on remand to resolve the diversity-of-citizenship issue and, if necessary, jurisdiction over the Daiichi Sankyo defendants.

VI

For the reasons stated, we conclude that, with a single exception, we have jurisdiction to reach the merits of these appeals. In one of the *Lipitor* appeals, *RP Healthcare, Inc. v. Pfizer, Inc.*, No. 14-4632, because it is unclear whether the District Court had jurisdiction at the time judgment was entered, we will order a limited remand for the parties to clarify the record in this regard. Any further proceedings in these appeals will be heard by this panel.

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**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 14-4632

[Filed April 13, 2017]

IN RE: LIPITOR ANTITRUST LITIGATION	)
	)
RP Healthcare, Inc.; Chimes Pharmacy, Inc.;	)
James Clayworth, R.Ph., d/b/a Clayworth	)
Pharmacy; Marin Apothecaries, Inc., d/b/a Ross	)
Valley Pharmacy; Golden Gate Pharmacy Services,	)
Inc., d/b/a Golden Gate Pharmacy; Pediatric Care	)
Pharmacy, Inc.; Meyers Pharmacy, Inc.; Tony	)
Mavrantonis R. Ph., d/b/a Jack's Drugs; Tilley	)
Apothecaries Inc., d/b/a Zweber's Apothecary,	)
Appellants	)

(D.N.J. No. 3-12-cv-05129, MDL-2332
and 3-12-cv-02389)

Present: * AMBRO, ** SMITH and FISHER, Circuit
Judges

* Honorable D. Brooks Smith, United States Circuit Judge for the Third Circuit, assumed Chief Judge status on October 1, 2016.

** Honorable D. Michael Fisher, United States Circuit Judge for the Third Circuit, assumed senior status on February 1, 2017

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ORDER

In accordance with the Opinion of the Court entered in this case on April 13, 2017, it is hereby ORDERED that this matter is remanded to the District Court for the limited purposes of determining whether diversity jurisdiction existed at the time judgment was entered and, if necessary, whether the District Court had the power to reach the merits of plaintiffs' claims against the Daiichi Sankyo defendants. This Court shall retain jurisdiction pending the District Court's decision.

By the Court,

s/ D. Michael Fisher
Circuit Judge

Dated: April 13, 2017
mlr/cc: all counsel

[SEAL]

A True Copy: Marcia M. Waldron, Clerk

APPENDIX D

PRECEDENTIAL

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

**Nos. 14-4202, 14-4203, 14-4204,
14-4205, 14-4206, 14-4602 & 14-4632**

[Filed April 19, 2017]

IN RE: LIPITOR ANTITRUST LITIGATION	)
	)
Rite Aid Corporation; Rite Aid Hdqtrs.	)
Corporation; JC (PJC) USA, LLC; Maxi Drug, Inc.	)
d/b/a Brooks Pharmacy; Eckerd Corporation,	)
Appellants in No. 14-4202	)
	)
Walgreen Company; The Kroger Co.; Safeway,	)
Inc.; Supervalu, Inc.; HEB Grocery Company L.P.,	)
Appellants in No. 14-4203	)
	)
Giant Eagle, Inc.,	)
Appellant in No. 14-4204	)
	)
Meijer, Inc.; Meijer Distribution, Inc.,	)
Appellants in No. 14-4205	)
	)
Rochester Drug Co-Operative, Inc.; Stephen	)
L. LaFrance Pharmacy, Inc. d/b/a SAJ	)
Distributors; Burlington Drug Company, Inc.;	)
Value Drug Company; Professional Drug	)

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Company, Inc.; American Sales Company LLC,)
Appellants in No. 14-4206)

)
A.F.L.-A.G.C. Building Trades Welfare Plan;)
Mayor and City Council of Baltimore, Maryland;)
New Mexico United Food and Commercial Workers)
Union's and Employers' Health and Welfare Trust)
Fund; Louisiana Health Service Indemnity)
Company, d/b/a Blue Cross/Blue Shield of)
Louisiana; Bakers Local 433 Health Fund; Twin)
Cities Bakery Workers Health and Welfare Fund;)
Fraternal Order of Police, Fort Lauderdale)
Lodge 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)
Dogan; Nancy Billington, on behalf of themselves)
and all others similarly situated,)
Appellants in No. 14-4602)

)
RP Healthcare, Inc.; Chimes Pharmacy, Inc.;)
James Clayworth, R.Ph., d/b/a Clayworth)
Pharmacy; Marin Apothecaries, Inc., d/b/a Ross)
Valley Pharmacy; Golden Gate Pharmacy Services,)
Inc., d/b/a Golden Gate Pharmacy; Pediatric Care)
Pharmacy, Inc.; Meyers Pharmacy, Inc.; Tony)
Mavrantonis R. Ph., d/b/a Jack's Drugs; Tilley)
Apothecaries Inc., d/b/a Zweber's Apothecary,)
Appellants in No. 14-4632)

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Nos. 15-1184, 15-1185, 15-1186, 15-1187, 15-1274,
15-1323 & 15-1342

IN RE: EFFEXOR XR ANTITRUST LITIGATION	)
	)
Walgreen, Co.; The Kroger, Co.; Safeway, Inc.;	)
Supervalu, Inc.; HEB Grocery Company LP;	)
American Sales Company, Inc.,	)
Appellants in No. 15-1184	)
	)
Rite Aid Corporation; Rite Aid Hdqtrs.,	)
Corporation; JCG (PJC) USA, LLC; Maxi Drug,	)
Inc. d/b/a Brooks Pharmacy; Eckerd Corporation;	)
CVS Caremark Corporation,	)
Appellants in No. 15-1185	)
	)
Giant Eagle, Inc.,	)
Appellant in No. 15-1186	)
	)
Meijer, Inc.; Meijer Distribution, Inc.,	)
Appellants in No. 15-1187	)
	)
Professional Drug Company, Inc.; Rochester Drug	)
Co-Operative, Inc.; Stephen L. LaFrance Holdings,	)
Inc.; Stephen L. LaFrance Pharmacy, Inc. d/b/a	)
SAJ Distributors; Uniondale Chemist, Inc.,	)
Appellants in No. 15-1274	)
	)
Painters District Council No. 30 Health &	)
Welfare Fund; Medical Mutual of Ohio,	)
Appellants in No. 15-1323	)
	)
A.F.L.-A.G.C. Building Trades Welfare Plan;	)
Daryl Deino; IBEW-NECA Local 505 Health &	)
Welfare Plan; Louisiana Health Service Indemnity	)

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Company d/b/a Blue Cross/Blue Shield of)
Louisiana; Man-U Service Contract Trust Fund;)
MC-UA Local 119 Health & Welfare Plan; New)
Mexico United Food and Commercial Workers)
Union's and Employers' Health and Welfare Trust)
Fund; Plumbers and Pipefitters Local 572 Health)
and Welfare Fund; Sergeants Benevolent)
Association Health and Welfare Fund; Patricia)
Sutter (together "End-Payor Class Plaintiffs") on)
behalf of themselves and all others similarly)
situated,)
Appellants in No. 15-1342)

On Appeal from the United States District Court
for the District of New Jersey

(MDL 2332) / (D.N.J. No. 3-12-cv-02389) /
(D.N.J. No. 3-12-cv-02478) / (D.N.J. No. 3-12-cv-
02519) / (D.N.J. No. 3-12-cv-04115) / (D.N.J. No. 3-
12-cv-04537) / (D.N.J. No. 3-12-cv-05129) / (D.N.J.
No. 3-12-cv-06774) / (D.N.J. No. 3-12-cv-07561)
(D.N.J. No. 3-11-cv-05479) / (D.N.J. No. 3-11-cv-
05590) / (D.N.J. No. 3-11-cv-05661) / (D.N.J. No. 3-
11-cv-06985) / (D.N.J. No. 3-11-cv-07504) / (D.N.J.
No. 3-12-cv-03116) / (D.N.J. No. 3-12-cv-03523)

ORDER AMENDING OPINION

At the direction of the Court, the opinion filed on
April 13, 2017 is amended as follows:

Page 21, first full paragraph, third line: <four
individual-retailers asserting direct-purchaser claims>

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is changed to <several individual-retailers asserting direct-purchaser claims>.

Page 21, first full paragraph, ninth line: delete <several> before <California-based pharmacists>.

Page 25, only full paragraph, second line: <'983 Patent> is changed to <'893 Patent>.

Page 28, fourth paragraph, fourth line: <four individual-retailers asserting direct-purchaser claims> is changed to <several individual-retailers asserting direct-purchaser claims>.

Page 31, second paragraph, fourth line: <four individual-retailers filed complaints> is changed to <several individual-retailers filed complaints>.

Page 43, first full paragraph, first line: <Our jurisdictional holding is consistent, we think, with two of the Second Circuit's pre-Actavis reverse-payment cases.> is changed to <Our jurisdictional holding is consistent, we think, with two of the Second Circuit's pre-Actavis cases.>.

Page 43, first full paragraph, tenth line: <(per curiam)> is added after <Arkansas Carpenters Health & Welfare v. Bayer AG, 604 F.3d 98, 103 n.10 (2d Cir. 2010)>.

Page 44, first full paragraph, first line: <And in DDAVP, 585 F.3d 677, the Second Circuit retained jurisdiction over a reverse-payment case.> is changed to <And in DDAVP, 585 F.3d 677, the Second Circuit retained jurisdiction over an antitrust case presenting patent-law issues.>.

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For the Court,
/s/ Marcia M. Waldron
Marcia M. Waldron, Clerk
Date: April 19, 2017

mlr/cc: all counsel

APPENDIX E

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

Civil Action No. 3:12-cv-02389 (PGS)

[Filed November 5, 2014]

In re LIPITOR ANTITRUST LITIGATION	)
	)
This Document Relates To:	)
	)
RP Healthcare, Inc. v. Pfizer, Inc.	)
3:12-cv-5129	)

ORDER

THIS MATTER has been opened before the Court on motions filed by defendants Ranbaxy, Ranbaxy Laboratories Limited, and Ranbaxy Pharmaceuticals Inc., for an Order pursuant to Fed. R. Civ. P. 12 [ECF No. 290], and defendants Pfizer Inc., Pfizer Ireland Pharmaceuticals, Warner-Lambert Co., and Warner-Lambert Company, LLC, for an Order pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) [ECF No. 288] to dismiss the First Amended Complaint of Plaintiffs. RP Healthcare, Inc. Chimes Pharmacy. Inc., James Clayworth, R. Ph. d/b/a Clayworth Pharmacy, Marin Apothecaries, Inc. d/b/a Ross Valley Pharmacy, Golden Gate Pharmacy Services, Inc., d/b/a Golden Gate Pharmacy, Pediatric Care Pharmacy, Inc., Meyers Pharmacy, Inc., Tony Mvarantonis, R. Ph. d/b/a Jack's

Drugs, and Tilley Apothecaries, Inc. d/b/a Zweber's Apothecary ("the RP Healthcare Plaintiffs"). The Court has considered the papers and arguments submitted by the parties.

In a prior memorandum [ECF No. 566], the Court dismissed the Complaint of the direct purchasers for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), and the Court requested further briefing by the parties on the memorandum in this case.

The Court finds that in RP Healthcare's complaint, the Plaintiffs did not calculate the reasonable valuation of the Pfizer/Ranbaxy alleged reverse payment. Instead, RP Healthcare relied on one or two statements by Pfizer's executives regarding the facts underlying their cause of action. In the Memorandum, the Court indicated that these facts were insufficient to plausibly show a claim. As such, RP Healthcare's complaint and its attempt to prove its *per se* market allocation theory under California law are implausible in light of the Court's prior ruling.

IT IS on this 5th day of November, 2014,

ORDERED that the Motion of Defendants Ranbaxy, Ranbaxy Laboratories Limited, and Ranbaxy Pharmaceuticals Inc. is GRANTED as to the RP Healthcare Plaintiffs; and it is further

ORDERED that the Motion of Defendants Pfizer Inc., Pfizer Ireland Pharmaceuticals, Warner-Lambert Co., and Warner-Lambert Company, LLC, for an Order pursuant to Fed. R. Civ. P. 12(b)(6) is GRANTED as to the RP Healthcare Plaintiffs; and it is further

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ORDERED that the First Amended Complaint of plaintiff the RP Healthcare Plaintiffs [ECF No. 262] be and is hereby DISMISSED WITH PREJUDICE.

Dated: November 5, 2014

s/_____
PETER G. SHERIDAN, U.S.D.J

APPENDIX F

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

Civil Action No. 3:12-cv-02389 (PGS)

[Filed September 12, 2014]

In re LIPITOR ANTITRUST LITIGATION	)
	)
This Document Relates To:	)
	)
Direct Purchase Class Actions	)
	)

MEMORANDUM

This matter comes before the Court on two motions to dismiss the Amended Complaint for failure to state a claim. Fed. R. Civ. P. 12(b)(6). It is an antitrust action which concerns the legality of a settlement between two drug manufacturers, Pfizer and Ranbaxy, regarding the pharmaceutical drug atorvastatin calcium under the brand name Lipitor® (“Lipitor”). Plaintiffs are direct purchasers of Lipitor seeking recovery of overcharges that were allegedly caused by the delayed entry provision of the settlement. In their amended complaint (ECF No. 472), Plaintiffs allege that a Settlement and License Agreement (“Settlement Agreement”) was entered between the defendants which involved a non-monetary “reverse payment” of absolving Ranbaxy from satisfying a claim of damages from the Accupril litigation in exchange for Ranbaxy’s

promise to stay out of the Lipitor market until an agreed-upon entry date (November 30, 2011). In addition, the Amended Complaint alleged that defendants blocked generic competition in the Lipitor market. Defendants Pfizer and Ranbaxy move to dismiss the Amended complaint. (ECF No. 493 and 490, respectively.)

This matter is part of multi-district litigation coordinated by this Court involving four groups of plaintiffs: (1) a proposed class of direct purchaser plaintiffs asserting claims under the Sherman Act (“Direct Purchaser Plaintiffs”); (2) several opt-out groups of direct purchaser plaintiffs asserting nearly identical claims to the direct purchaser class; (3) a proposed class of end-payor plaintiffs asserting claims under various states’ laws; and (4) the RP Healthcare plaintiffs, a group of pharmacist plaintiffs, asserting claims under California law. This memorandum addresses the Direct Purchaser Plaintiffs’ Amended Complaint only; however, portions of this memorandum including the legal analysis may pertain to the other groups of plaintiffs as they rely on the same allegations.

Procedural History

On April 23, 2012, the cases comprising the In Re: Lipitor Antitrust Litigation (MDL 2332) were transferred to this Court by the United States Judicial Panel on Multidistrict Litigation.

On May 16, 2012, this Court abstained from determining the motions to dismiss in anticipation of a decision by the Supreme Court of the United States in *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013), because

there was a split in the circuits as to what standard was to control (the scope of the patent test or the quick look test) in evaluating a reverse payment settlement agreement (RPSA). (ECF No. 397.)

On August 21, 2012, this Court granted in part and denied in part the Plaintiffs' Motion to Compel Documents, ordering limited discovery. (ECF No. 447.) Because of the Court's inclination to await the *Actavis* decision, the Court allowed limited discovery during the interim period.

On June 17, 2013, the *FTC v. Actavis*, 133 S. Ct. 2223 (2013), decision was published.

On September 5, 2013, this Court issued a Memorandum and Order dismissing some of the claims based on *Walker Process*,¹ sham litigation, and sham citizen petition theories of Plaintiffs' prior Complaint.² (See reference on pages 5 and 8). Allegations under Sherman Act's Section 2 were also dismissed insofar as they were based on Pfizer's alleged overarching anticompetitive scheme; hence, the only allegations of Plaintiffs that remain to be addressed are the reverse payment allegations. At the same time, the Court also granted Plaintiffs' Motion for Leave to Amend the Complaint. (ECF No. 455.) The rationale was that an amended complaint would update the facts of the complaint that were disclosed during discovery, and

¹ *Walker Process Eqpt., Inc. v. Food Machinery Corp.*, 382 U.S. 172 (1965).

² *In Re Lipitor Antitrust Litig.*, No. 3:12-cv-2389, 2013 U.S. Dist. LEXIS 126468 (D.N.J. Sept. 5, 2013).

would incorporate changes based upon the recently decided *Actavis* case.³

Plaintiffs filed the Consolidated Amended Class Action Complaint against the Defendants on October 14, 2013. (ECF No. 472.) The Amended Complaint consists of three causes of action; the first two counts are properly before this Court, while the third count has already been decided. Count I alleges a violation of Section 1 of the Sherman Act. (Am. Compl. ¶ 296-305 (“Agreement in restraint of trade against all defendants.”).) Count II alleges a violation of Section 2 of the Sherman Act. (Am. Compl. ¶ 306-312 (“Conspiracy to monopolize against all defendants.”).) Count III alleges a violation of “15 U.S.C. §§ 1 and 2,” but plaintiffs acknowledge “the Court dismissed this count” and that it was being “restated here for purposes of appellate rights.” (Am. Compl. ¶ 313-315.) As such, this memorandum only addresses the first two counts.

In November 2013, Ranbaxy and Pfizer each filed a Motion to Dismiss the Amended Complaint. (ECF Nos. 490 and 493.)

On January 17, 2014, Plaintiffs filed a Brief in Opposition to the Defendants’ Motions to Dismiss. (ECF No. 509; ECF No. 510 (redacted).)

On February 7, 2014, Defendants Pfizer and Ranbaxy filed a Reply Brief to Plaintiffs’ Opposition to Motion. (ECF No. 524; 533 (redacted).)

³ At this time, the Court also ordered monthly meetings to discuss ongoing case management issues.

The Court held oral argument regarding this matter on March 6, 2014 (ECF No. 532).

Parties

The following six direct purchaser plaintiffs are referred to collectively as the “Plaintiffs.”

Plaintiff Stephen L. LaFrance Holdings, Inc. is a corporation organized under the laws of Delaware and located in Pine Bluff, Arkansas. Plaintiff Stephen L. LaFrance Pharmacy, Inc. d/b/a SAJ Distributors (collectively with Stephen L. LaFrance Holdings, Inc., “SAJ”) is a wholly owned subsidiary of Stephen L. LaFrance Holdings, Inc., organized under the laws of Arkansas and located in Pine Bluff, Arkansas. During the class period, McKesson Corp., SAJ’s assignor, purchased Lipitor directly from Pfizer and alleges injury as a result of all of the defendants’ alleged unlawful conduct. McKesson Corp. resold, and will continue to resell, some of that Lipitor to SAJ. SAJ is the assignee of the claims of McKesson Corp. to the extent of those direct purchases from Pfizer. (Am. Compl. ¶ 14, ECF No. 472.)

Plaintiff Burlington Drug Co., Inc. is a corporation organized under the laws of the State of Vermont and located at 91 Catamount Drive, Milton, Vermont, 05468. During the class period, Burlington Drug Co. purchased Lipitor directly from Pfizer, and purchased generic Lipitor directly from Ranbaxy, and alleges injury as a result of all of the defendants’ alleged unlawful conduct. (Am. Compl. ¶ 15.)

Plaintiff Value Drug Company is a corporation organized under the laws of the Commonwealth of Pennsylvania and located at One Golf View Drive,

Altoona, Pennsylvania 16601. During the class period, Value Drug Company purchased Lipitor directly from Pfizer, and purchased generic Lipitor directly from Ranbaxy, and alleges injury as a result of all of the defendants' alleged unlawful conduct. (Am. Compl. ¶ 16.)

Plaintiff Professional Drug Company, Inc. is a corporation organized under the laws of the State of Mississippi with its principal place of business in Biloxi, Mississippi. During the class period, Professional Drug Company, Inc. purchased Lipitor directly from Pfizer. (Am. Compl. ¶ 17.)

Plaintiff Rochester Drug Co-Operative, Inc. ("RDC") is a stock corporation duly formed and existing under the New York Cooperative Corporations Law, with its principal place of business located at 50 Jet View Drive, Rochester, New York 14624. During the class period, RDC purchased branded Lipitor directly from Pfizer, and purchased generic Lipitor directly from Ranbaxy. (Am. Compl. ¶ 18.)

Plaintiff American Sales Company LLC is a Delaware corporation with its principal place of business located in Lancaster, New York. During the class period, Cardinal Health, Inc., American Sales Company's assignor, purchased Lipitor directly from Pfizer and alleges injury as a result of all of the defendants' alleged unlawful conduct. Cardinal Health, Inc. resold, and will continue to resell, some of that Lipitor to American Sales Company. American Sales Company is the assignee of the claims of Cardinal Health, Inc., to the extent of those direct purchases from Pfizer. (Am. Compl. ¶ 19.)

The defendants referenced in the following three paragraphs are referred to collectively or alternatively as “Pfizer.”

Defendant Pfizer, Inc. is a corporation organized and existing under the laws of the State of Delaware, and has a place of business at 235 East 42nd Street, New York, New York 10017. At all relevant times, Pfizer, Inc. sold branded Lipitor directly to the direct purchasers and/or their assignors, and to the other members of the Direct Purchaser Class. Pfizer, Inc. is also alleged to have engaged in the conduct challenged in this case and attributed to Pfizer, itself and/or through its various employees and/or other agents acting within the course and scope of their duties and/or with actual, apparent, or ostensible authority in connection therewith. (Am. Compl. ¶ 21.)

Defendant Pfizer Manufacturing Ireland, formerly known as Pfizer Ireland Pharmaceuticals, formerly known as Warner Lambert Export, Ltd., is a partnership organized and existing under the laws of Ireland, with registered offices at Pottery Road, Dun Laoghaire, Co. Dublin, Ireland. Pfizer Ireland Pharmaceuticals, a wholly-owned indirect subsidiary of defendant Pfizer, Inc., was the exclusive licensee of the '995 patent and other patents (need full cite of patent). At all relevant times, Defendant Pfizer Manufacturing Ireland engaged in the conduct challenged in this case and attributed to Pfizer, itself and/or through its various employees and/or other agents acting within the course and scope of their duties and/or with actual, apparent, or ostensible authority in connection therewith. (Am. Compl. ¶ 22.)

Defendant Warner-Lambert Company is a corporation formerly organized under the laws of the State of Delaware with offices for service of process at 235 East 42nd Street, New York, New York 10017. In 1997, Warner-Lambert and Pfizer began co-promotion of Lipitor. On June 19, 2000, Pfizer completed its merger with Warner-Lambert whereby Pfizer purchased all outstanding shares of Warner-Lambert common stock. Each share of Warner-Lambert stock was converted into 2.75 shares of Pfizer common stock. The merger qualified as a tax-free reorganization and was accounted for as a pooling of interests. Warner-Lambert Company became a wholly-owned subsidiary of Pfizer Inc. At the end of 2002, Warner-Lambert Company became a Delaware limited liability company and changed its name to Warner-Lambert Company LLC. (Am. Compl. ¶ 23.)

The Defendants named in the following three paragraphs are referred to collectively or alternatively as “Ranbaxy.”

Defendant Ranbaxy, Inc. is a corporation organized and existing under the laws of the State of Delaware, and has a place of business located at 600 College Road East, Princeton, New Jersey, 08540. (Am. Compl. ¶ 26.)

Defendant Ranbaxy Pharmaceuticals, Inc. is a corporation organized and existing under the laws of the State of Delaware, and has a place of business located at 600 College Road East, Princeton, New Jersey, 08540. (Am. Compl. ¶ 27.)

Defendant Ranbaxy Laboratories Limited is a corporation organized and existing under the laws of India, with a principal place of business located at Plot

90, Sector 32, Gurgaon - 122001 (Haryana), India. (Am. Compl. ¶ 28⁴.)

Facts

The facts provided herein are limited to those pertinent to the issues impacting an alleged reverse payment settlement agreement (RPSA).⁵ Noted above, the Complaint pleads that Pfizer made a reverse payment to Ranbaxy through forbearance of a claim of damages in the Accupril litigation and resolution of Lipitor patent claims in foreign jurisdictions. However, the Settlement Agreement resolved and terminated patent litigation on three drugs, Lipitor, Caduet and Accupril. Each is discussed below.

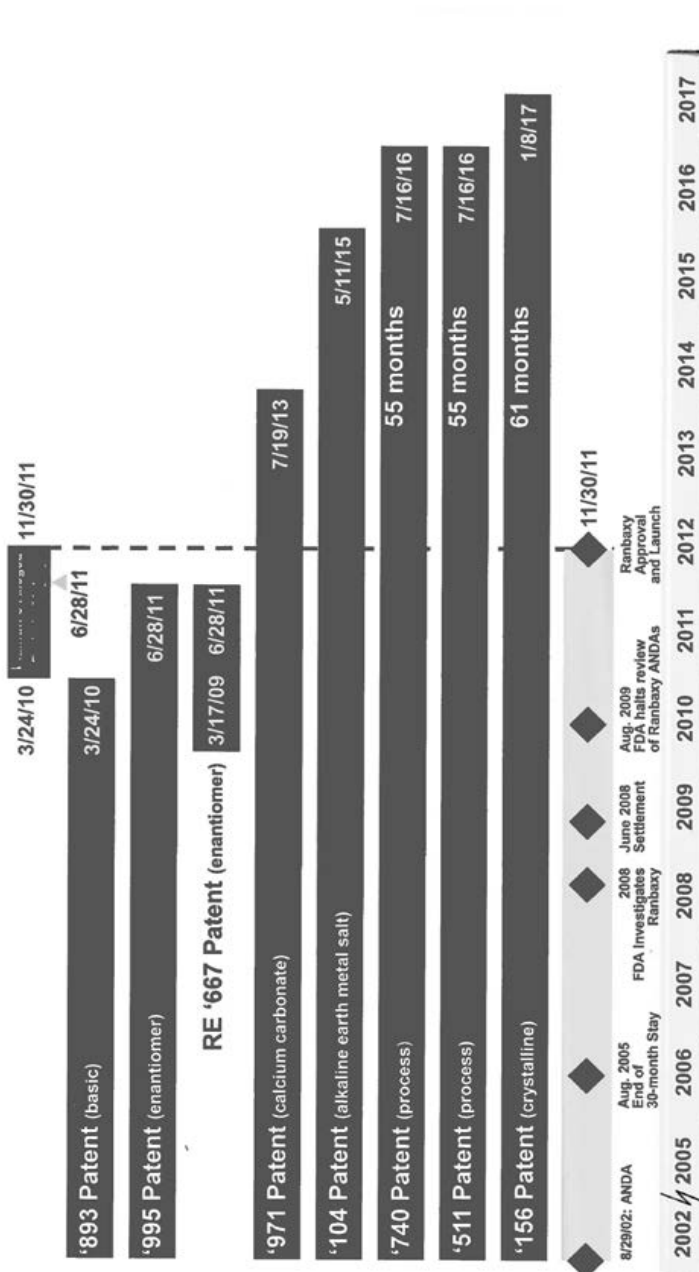
Lipitor

Lipitor was developed and launched by Pfizer in 1997. (Am. Compl. ¶ 70.) The active ingredient in Lipitor is called atorvastatin calcium. (Am. Compl. ¶ 46.) It belongs to a class of drugs called statins, which lower cholesterol by inhibiting a liver enzyme that controls the rate of the metabolic production of cholesterol. High cholesterol is widely recognized to be associated with coronary heart disease and atherosclerosis. *Id.* It is characterized as a “blockbuster” drug with sales of about \$1 billion per month.

⁴ Often, Pfizer and Ranbaxy are referred to collectively as defendants.

⁵ Additional information may be obtained from this Court’s September 5, 2013 opinion: *In re Lipitor Antitrust Litig.*, No. 3:12-cv-2389, 2013 U.S. Dist. LEXIS 126468 (D.N.J. Sept. 5, 2013).

Pfizer has obtained the following seven patents covering different aspects of the Lipitor product: U.S. Patent No. 4,681,893 (the “893 patent”); U.S. Patent No. 5,273,995 (the “995 patent,” reissued later as U.S. Reissue Patent No. 40,667); U.S. Patent No. 6,126,971 (the “971 patent”); U.S. Patent No. 5,686,104 (the “104 patent”); U.S. Patent No. 6,087,511 (the “511 patent”); U.S. Patent No. 6,274,740 (the “740 patent”); and U.S. Patent No. 5,969,156 (the “156 patent”). *See, e.g.,* Am. Compl. ¶¶ 68-69, 72-74. Presented below is a graph which shows the expiry of the seven patents, and how they relate to Ranbaxy’s launch date under the Settlement Agreement.



The '893 and '995 patents cover the active ingredient of Lipitor (atorvastatin calcium ingredient patents). The remaining five patents cover other aspects of Lipitor: the '156 patent covers the crystalline form of atorvastatin as used in Lipitor; the formulation of Lipitor is covered by the '971 and '104 patents (the "Formulation Patents"); and the '740 and '511 patents are directed to specific processes of making amorphous atorvastatin calcium using crystalline Form I atorvastatin as a starting material (the "Process Patents").

At the time of the 1997 launch of Lipitor, only the '893 and '995 patents were listed by Pfizer in the Food and Drug Administration's (FDA's) book of Approved Drug Products with Therapeutic Equivalence Evaluations (the "Orange Book"). (Am. Compl. ¶ 65.) Following the 1997 launch, Pfizer procured the remaining five patents. (Am. Compl. ¶ 71-74.) The Formulation Patents and the '156 patent were then listed in the Orange Book. (Am. Compl. ¶ 75.) However, the Process Patents are not listed in the Orange Book, because they are directed to processes of making amorphous atorvastatin, rather than a new drug.

On August 19, 2002, Ranbaxy filed an Abbreviated New Drug Application ("ANDA") to seek approval to sell a generic version of Lipitor. (Am. Compl. ¶ 76.) Ranbaxy was the first generic manufacturer to file an ANDA for generic Lipitor. (Am. Compl. ¶ 76-77.) By this time, all Lipitor patents except the Process Patents were listed in the Orange Book. (Am. Compl. ¶ 75, 78.) Beginning in late 2002, Ranbaxy sent four Paragraph

IV certifications⁶ based on an amorphous form of atorvastatin to Pfizer with respect to all patents listed in the FDA Orange Book (*i.e.*, the '893, '995, '156, '971 and '104 patents). (Am. Compl. ¶ 94.) In its Paragraph IV certifications, Ranbaxy certified that no valid patent claims covering Lipitor would be infringed by the sale, marketing, or use of Ranbaxy's amorphous ANDA product. (Am. Compl. ¶ 78, 94.) Ranbaxy was not required to — and did not — file any certification with respect to the non-listed Process Patents ('740 and '511 patents). (Am. Compl. ¶ 129.)

In response to Ranbaxy's Paragraph IV certifications for generic Lipitor, Pfizer filed an action in the United States District Court for the District of Delaware on February 21, 2003, alleging that Ranbaxy's ANDA product would infringe the '893 and '995 patents (Active Ingredient Patent). (Am. Compl. ¶ 79.) In pre-trial proceedings, Pfizer attempted to amend its complaint to add new patent infringement claims based on the Process Patents. (Am. Compl. ¶ 82.) However, the district court denied Pfizer's motion because claims under the Process Patents would be "premature." (Am. Comp. ¶ 82.) In 2005, the district court rejected all challenges to the validity and

⁶ Pursuant to the Hatch-Waxman Act, 21 U.S.C. § 301, *et. seq.*, in order to obtain FDA approval of an ANDA, a generic manufacturer must certify that the generic drug will not infringe any patents listed in the Orange Book. An ANDA must contain one of four certifications. A "Paragraph IV" certification must state "that the patent for the brand name drug is invalid or will not be infringed by the generic manufacturer's proposed product." (Am. Compl. ¶ 36.) The impact of Hatch-Waxman on a pharmaceutical patent is discussed at length in *Actavis*. As such, it is not discussed here in length.

enforceability of both the Active Ingredient Patents. (Am. Compl. ¶ 84.) On November 2, 2006, the Federal Circuit affirmed the district court's ruling that the '893 patent was valid and would be infringed by Ranbaxy's product. (Am. Compl. ¶ 86.) However, the Federal Circuit reversed the district court's ruling regarding the validity of the '995 patent, holding that claim 6 was invalid due to improper dependent claim structure. (35 U.S.C. § 112-14.) Claim 6 was the only claim Pfizer alleged was infringed by Ranbaxy's ANDA product. Based upon the Federal Circuit's mandate in late 2006, the district court amended its final judgment order to enjoin any approval of Ranbaxy's ANDA for generic Lipitor until March 24, 2010 (the expiration date of the '893 patent) and to remove from its final judgment order any prohibition of effective FDA approval of Ranbaxy's ANDA based on the '995 patent. (Am. Compl. ¶ 87.)

In January of 2007, Pfizer initiated reexamination proceedings with the United States Patent and Trademark Office ("PTO") by filing Reissue Patent Application No. 11/653,830 ("the reissue application") to rectify the error identified by the Federal Circuit in claim 6 of the '995 patent. (Am. Compl. ¶ 100.) In theory, this placed the entire '995 patent in jeopardy, because "a reissue application, including all the claims therein, is subject to 'be examined in the same manner as a non-reissue, non-provisional application.'" Manual of Patent Examining Procedure Ed. 8, Rev. 5, § 1445 (quoting 37 C.F.R. 1.176). "Accordingly, the claims in a reissue application are subject to any and all rejections which the examiner deems appropriate Claims in a reissue application enjoy no 'presumption of validity.'" *Id.* (citing *In re Doyle*, 482 F.2d 1385, 1392,

179 USPQ 227, 232-233 (CCPA 1973); *In re Sneed*, 710 F.2d 1544, 1550 n.4, 218 USPQ 385, 389 n.4 (Fed. Cir. 1983)). However, in light of the federal circuit decision, it did not appear to be a highly significant issue, as it was characterized as a scrivener's error. *Pfizer Inc. v. Ranbaxy Labs.*, 457 F.3d 1284, 1291-1292 (Fed. Cir. 2006).

Beginning in May 2007, Ranbaxy filed multiple protests against reissuance of the reissue application with the PTO. (Am. Compl. ¶ 102.) On April 24, 2008, the PTO issued a non-final rejection of claims 6, 13, and 14 of the reissue application based on obviousness. (Am. Compl. ¶ 108.) During the reissue process, Pfizer changed its rationale to overcome the obviousness rejection by arguing that the commercial success of Lipitor showed that the '995 patent could not have been obvious. (Am. Compl. ¶ 232.) On April 6, 2009, the PTO evidently agreed with Pfizer's commercial success rationale and reissued the '995 patent as U.S. Reissue Patent No. 40,667.

On March 24, 2008, Pfizer filed a declaratory judgment suit in the United States District Court for the District of Delaware alleging that Ranbaxy's generic Lipitor would infringe the Lipitor Process Patents on the same grounds that had resulted in dismissal of Lipitor's ANDA litigation. (Am. Compl. ¶ 138.) Because the process patents were not listed in the Orange Book, no automatic 30-month stay of FDA approval of Ranbaxy's pending ANDA occurred. (Am. Compl. p. 35, n. 6.) During the course of the litigation, the case was settled pursuant to the Settlement Agreement wherein the parties filed a Consent Order and Stipulated Injunction with Prejudice on or about

June 20, 2008, entered on June 24, 2008. Consent Order and Stipulated Injunction, *Pfizer Inc. v. Ranbaxy Laboratories Limited*, No. 1:08-cv-00164 (D. Del. June 24, 2008), ECF No. 20.

Accupril I Litigation (No.: 99-cv-922-DRD)

In January 1999, a generic manufacturer Teva Pharmaceuticals USA, Inc. (“Teva”) filed ANDA with Paragraph IV certification as the first filer to seek approval to market generic Accupril® (“Accupril”), another brand drug of Pfizer. (Am. Compl. ¶ 150.) On March 2, 1999, Pfizer responded by filing suit against Teva (“*Accupril I*” litigation). (Am. Compl. ¶ 151.) In December 2002, Ranbaxy filed an ANDA with Paragraph IV certification for generic Accupril. (Am. Compl. ¶ 150.) Pfizer did not take any action under the Hatch-Waxman Act with respect to Ranbaxy’s Paragraph IV certification letter. (Am. Compl. ¶ 151.⁷)

During the course of the *Accupril I* proceedings, Pfizer and Teva had contested the meaning of the term “saccharide” as used in the Accupril patent.⁸ (Am. Compl. ¶ 153.) Eventually, the parties stipulated that as used in the Accupril patent, the term “saccharide” means a “sugar” and includes only lower weight molecular carbohydrates. (Am. Compl. ¶ 153.)

In October 2003, Pfizer established on summary judgment that Teva’s generic Accupril product infringed numerous claims including claims 6 and 17 of Pfizer’s Accupril patent. (Am. Compl. ¶ 152 (citing

⁷ See page 13, *infra*, discussion of *Accupril II* litigation.

⁸ U.S. Patent No. 4,743,450.

Warner-Lambert Co. v. Teva Pharms. USA, Inc., 289 F. Supp. 2d 515, 520 (D.N.J. 2003).) Teva did not challenge on appeal the district court's grant of summary judgment for Pfizer regarding Teva's infringement of claims 16 and 17. (Am. Compl. ¶ 152, 165.) Teva did, however, challenge certain aspects of the district court's grant of summary judgment on infringement for other claims (*i.e.*, claims 1, 4-10, and 12), which the Federal Circuit remanded to the district court. (Am. Compl. ¶ 165.) On remand, the district court granted Pfizer's motion for summary judgment on infringement of those claims as well. *Id.*

On June 29, 2004, Judge Debevoise issued an opinion rejecting Teva's obviousness and anticipation arguments as to claims 16 and 17 and its enablement argument, as well as its allegations of inequitable conduct. (Am. Compl. ¶ 154.) On the same day, Judge Debevoise entered an injunction barring Teva from selling the generic quinapril product described in its ANDA.

In August 2005, the Federal Circuit affirmed the finding of enforceability and validity of the Accupril patent, except as to the enablement issue, aspects of which were remanded to the district court. (Am. Compl. ¶ 165.) On remand, the district court held in Pfizer's favor – *i.e.*, that all claims were enabled. *Id.* On January 18, 2008, Judge Debevoise entered a final judgment finding the Accupril patent valid. *Warner-Lambert Co. v. Teva Pharms. USA, Inc.*, No. 2:99-cv-922 (D.N.J. Jan. 18, 2008), ECF No. 343.

Accupril II Litigation

On August 26, 2004 — after the *Accupril* I court’s order enjoining Teva from launching generic Accupril — Teva and Ranbaxy entered into a distribution and supply agreement pursuant to which Teva was appointed as the exclusive distributor of *Ranbaxy’s* generic Accupril product. (Am. Compl. ¶ 155.) In return, Teva relinquished its 180-day exclusivity. Under the agreement, Ranbaxy would provide Teva with its FDA-approved product for sale, the profits of which would be shared by the parties equally. (Am. Compl. ¶ 156.) The agreement also provided that Ranbaxy would fully indemnify Teva for any liability related to Ranbaxy’s launch.

Ranbaxy’s position of noninfringement was that, in light Pfizer’s narrow claim construction in *Accupril* I and the stipulation entered into by the parties in that case (defining saccharide as a sugar, limited to mono- and disaccharides), the microcrystalline cellulose contained in Ranbaxy’s ANDA product did not constitute a “sugar” and therefore was outside the scope of the Accupril patent. (Am. Compl. ¶ 158.)

Ranbaxy obtained final approval of its ANDA product in December 2004 and launched at risk⁹ a generic version of Accupril in December 16, 2004. (Am.

⁹ “At risk” launch, in the context of Hatch-Waxman Act, occurs when a generic manufacturer launches a generic version of the branded drug while the patent(s) on the branded drug is in litigation. Such a launch is called “at risk” because the court could find that the launched generic drug infringes the patent(s), in which case the generic manufacturer would owe damages to the branded company.

Compl. ¶ 157.) Prior to this event, the Complaint alleges that Pfizer had sales in 2004 of approximately \$525 million for branded Accupril, but a year later in 2005, the sales of branded Accupril were \$71 million. (Am. Compl. ¶ 160.) Pfizer sued Ranbaxy and Teva for patent infringement on January 28, 2005, over which Judge Debevoise again presided (“*Accupril II*” litigation). (Am. Compl. ¶ 159; ECF No. 493 at 3.)

With respect to infringement of the Accupril patent, Ranbaxy conceded that if the court in *Accupril II* adopted the broader claim construction as Pfizer argued – namely that as used in the ’450 patent “saccharide” was *not* limited to “sugar” and encompassed polysaccharides – then it “absolutely” infringed. (Am. Compl. ¶ 162.) On March 31, 2015, about 105 days after the suit was commenced, Pfizer successfully obtained a preliminary injunction against Ranbaxy and Teva, as Judge Debevoise had adopted the broad claim construction, and halted all generic sales. (Am. Compl. ¶ 159-162; ECF No. 493.) The Court of Appeals for the Federal Circuit unanimously affirmed the district court’s preliminary injunction order (Am. Compl. ¶ 159) upon the condition that Pfizer post a \$200 million bond. (Am. Compl. ¶ 160.)

Teva informed the court that it would not seek to re-litigate the issues of validity and enforceability of the Accupril patent because of the previous rulings in *Accupril I*. (Am. Compl. ¶ 161.) Pfizer agreed that Teva had exhausted all of its validity and enforceability defenses and requested that the district court enhance the damages based on a willful infringement theory. (Am. Compl. ¶ 163, 172.) Prior to the preliminary injunction decision, Ranbaxy, on the other hand,

advised the court that it was relying entirely on its non-infringement position, and did not have any invalidity or unenforceability theory. (Am. Compl. ¶ 164.) But thereafter Ranbaxy asserted that it was entitled to present different variations of the same invalidity theories (including, *inter alia*, obviousness, anticipation, and non-enablement) on which Teva had lost in *Accupril* I. (Am. Compl. ¶ 166.) As of February 2008, when most of the discovery in *Accupril* II was complete (Am. Compl. ¶ 169) and Pfizer was denied summary judgment, the case was settled as part of the alleged Settlement and License Agreement with the filing of Consent Order on or about June 19, 2008. That Consent Order dismissed all claims and counterclaims of Ranbaxy, Pfizer, and Teva. *Pfizer, Inc. v. Teva Pharms. USA, Inc.*, No. 05-cv-620 (D.N.J. June 19, 2008), ECF No. 187.

Caduet ANDA and Process Litigations

The following two lawsuits are not mentioned in the Plaintiffs' Complaint, but they are germane because they were settled as part of the Settlement Agreement.¹⁰ (ECF No. 493 at 13.)

"Caduet ANDA" litigation was filed on March 9, 2007 by Pfizer in the United States District Court for the District of Delaware in response to Ranbaxy's Paragraph IV certifications for generic Caduet® ("Caduet"). (ECF No. 493, at 13.) Caduet is Pfizer's product which is a combination of atorvastatin and amlodipine. *Id.* Pfizer argued that Ranbaxy's generic

¹⁰ See page 26 for use of judicial proceedings as part of the record on a motion to dismiss.

Caduet would infringe the '893 patent and another U.S. patent not relevant to the case at bar.¹¹ *Pfizer Inc. v. Ranbaxy Laboratories Limited*, No. 1:07-cv-00138 (D. Del. Mar. 9, 2007), ECF No. 1. As part of the Settlement Agreement, a Consent Order dismissing the case was filed on June 20, 2008, entered on June 24, 2008. *Pfizer Inc. v. Ranbaxy Laboratories Limited*, No. 1:07-cv-00138 (D. Del. June 20, 2008), ECF No. 65.

“Caduet Process” litigation was a declaratory judgment suit filed on March 24, 2008 by Pfizer in the United States District Court for the District of Delaware, in which Pfizer alleged that Ranbaxy’s generic Caduet would infringe the Process Patents. *Pfizer Inc. et al v. Ranbaxy Laboratories Limited*, No. 1:08-cv-00162 (D. Del. Mar. 24, 2008), ECF No. 1. Similar to above, as part of the Settlement Agreement, a Consent Order dismissing the case was filed on June 20, 2008, entered on June 24, 2008. *Pfizer Inc. et al v. Ranbaxy Laboratories Limited*, No. 1:08-cv-00162 (D. Del. June 24, 2008), ECF No. 20.

Settlement Agreement

On June 17, 2008, Pfizer and Ranbaxy executed the Settlement Agreement. (Am. Compl. ¶ 145.) The Settlement Agreement identifies multiple legal proceedings within the United States as well as foreign jurisdictions as being resolved “without further litigation.” This includes the proceedings discussed in the previous pages. Settlement Agreement at 1. Specifically, the U.S. actions identified were *Accupril* II litigation, Lipitor Process litigation, Caduet ANDA

¹¹ U.S. Patent No. 6,455,574.

litigation, and Caduet Process litigation. (Am. Compl. ¶ 26.)

With respect to Lipitor Process litigation, Ranbaxy agreed to, *inter alia*, refrain from participating in the atorvastatin market until November 30, 2011. Settlement Agreement at 2, 24. Ranbaxy also agreed not to challenge, directly or indirectly, the validity or enforceability of the Process Patents (the '511 or the '740 patents). Settlement Agreement at 2.

In addition, Caduet ANDA litigation and Caduet Process litigation were dismissed on terms that, *inter alia*, Ranbaxy would be enjoined from offering for sale or selling in the United States any generic Caduet, until November 30, 2011. Settlement Agreement at 3, 24. Ranbaxy also allegedly promised not to challenge, directly or indirectly, the validity or enforceability of the patent specific to Caduet. Settlement Agreement at 3. Since there is very little mentioned about Caduet within the Amended Complaint, it cannot be discerned whether the Caduet portion of the Settlement Agreement is a substantive factor in the settlement, or whether it is a pro or anticompetitive factor.

Accupril II litigation was different because it was not a Hatch-Waxman suit and Ranbaxy was subject to damages for any infringement that may have occurred in the *Accupril* II case. As such, Ranbaxy paid \$1 million to Pfizer “in full and complete settlement of all past damages claimed by [Pfizer] in the [*Accupril* II litigation] as to all parties in that action.” The Settlement Agreement also stipulated that \$200 million bond posted by Pfizer was released to Pfizer. Settlement Agreement at 3.

In addition to the settlement of the above litigations in the United States, 23 proceedings in 13 foreign countries were also terminated as a result of this Settlement Agreement. *Id.*, at 1, 26-29. Many of the foreign settlement terms prohibited Ranbaxy from selling its generic atorvastatin products until an agreed upon date. *Id.*, at 4-10. Also in conjunction with the termination of proceedings in Canada, Ranbaxy agreed to appoint Pfizer as its exclusive supplier of the active ingredients of Ranbaxy's generic form of Lipitor until Ranbaxy notified Pfizer that it was capable of manufacturing the bulk active pharmaceutical ingredient, atorvastatin. *Id.*, at 8, Exhibit 9, at 11. The Settlement Agreement also contains royalty-free licensing provisions for patents related to Lipitor in several countries including U.S., Germany, Italy, Belgium, the Netherlands, Sweden, Australia, and Canada. *Id.* at 10-13.

On June 18, 2008, Ranbaxy publicly announced its Settlement Agreement with Pfizer, including the Ranbaxy's launch date of November 30, 2011 for generic Lipitor. (Am. Compl. ¶ 192.) Ranbaxy submitted this information to the FDA shortly thereafter. *Id.* Ranbaxy also informed the FDA its proposed generic product was now crystalline atorvastatin calcium, as opposed to the amorphous version, pursuant to a license from Pfizer. *Id.*

In short, the Plaintiffs contend that this Settlement Agreement was Pfizer and Ranbaxy's purposeful intent to restrain and monopolize trade by extending the Lipitor patent duration until November 30, 2011, when Ranbaxy's generic amorphous version would not have infringed the Lipitor process patents. Plaintiff allege

that this was accomplished by Pfizer forgiving its claim for infringement damages by settling the Accupril claim for \$1 million when the value of the Accupril claim was far higher; and allowing the defendants to market generic Lipitor in foreign markets. As a result, Ranbaxy agreed to delay entry of its generic until November 30, 2011. This delay injured the direct purchasers through the payment overcharges.

Supreme Court Decision in *Federal Trade Commission v. Actavis, Inc.*

Since this case revolves around the propriety of an alleged reverse payment settlement agreement (RPSA), and *Actavis* addresses the issue as it applies to pharmaceutical related patent litigation settlements, it is discussed below.

The Supreme Court has described a RPSA as “unusual” because “where only one party owns a patent, it is virtually unheard of outside of pharmaceuticals for that party to pay an accused infringer to settle a lawsuit.” *FTC v. Actavis, Inc.* 133 S. Ct. 2223, 2235 (2013) (quoting 1 H. Hovenkamp, M. Janis, M. Lemley, & C. Leslie, IP and Antitrust § 15.3, at 15–45, n. 161 (2d ed. Supp. 2011)). The Court explained that a RPSA occurs as follows:

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.

Actavis, 133 S. Ct. at 2227. “Because the settlement requires the patentee to pay the alleged infringer, rather than the other way around, it is often called a ‘reverse payment’ settlement agreement.” *Id.* Some of this atypical behavior occurs due to the workings of the Hatch-Waxman Act, wherein the first generic to file enjoys the 180 day exclusivity period during which the “vast majority of potential profits for a generic drug manufacturer materialize” *Id.* at 2229 (quoting Pet’r Br. 6)).

Prior to the *Actavis* decision, there was a dispute within the circuits as to the standard for analyzing a RPSA. Some circuits applied the scope-of-the-patent test, under which an antitrust attack will be dismissed so long as the anticompetitive effects fall within the exclusionary potential of the patent. *See, e.g., FTC v. Watson Pharms.*, 677 F.3d 1298 (11th Cir. 2012). In contrast, the Third Circuit implemented a “quick look” approach wherein a RPSA is considered *prima facie* evidence of unreasonable restraint of trade. *In re K-Dur Antitrust Litigation* (“*K-Dur*”), 686 F.3d 197 (3d Cir. 2012), *vacated*, *Merck & Co. v. La. Wholesale Drug Co.*, 133 S.Ct. 2849, (2013) (mem.), *Upsher-Smith Labs., Inc. v. La. Wholesale Drug Co.*, 133 S.Ct. 2849 (2013) (mem.). This in effect shifts to “a defendant the burden to show empirical evidence of [the settlement’s] procompetitive effects.” *Actavis*, 133 S. Ct. at 2237 (quoting *California Dental Assn. v. FTC*, 526 U.S. 756, 776 n. 12 (1999)).

In *Actavis*, the Supreme Court rejected both camps and in lieu thereof employed the rule-of-reason approach in order to strike a balance “between the lawful restraint on trade of the patent monopoly and

the illegal restraint prohibited broadly by the Sherman Act.” *Actavis*, 133 S. Ct. at 2231. The basic question before the Supreme Court was “whether . . . an agreement [between a patentee and a generic] can sometimes unreasonably diminish competition in violation of the antitrust laws.” *Id.* at 2227; *see also* 15 U.S.C. §1 (Sherman Act prohibition of “restraint[s] of trade or commerce”).

In *Actavis*, Solvay Pharmaceuticals initiated patent litigation against Actavis, Inc. and Paddock Laboratories, in response to their Paragraph IV certifications that Solvay’s listed patent for its drug AndroGel was invalid and not infringed. *Actavis*, 133 S. Ct. at 2229. Par Pharmaceutical did not file an ANDA with the FDA, but agreed to share the litigation costs with Paddock in exchange for a share of profits if Paddock gained approval for its generic drug. *Id.* FDA approved Actavis’ first-to-file generic product, but in 2006, within the 30 month litigation period, all the parties settled. *Id.* The terms of the settlement between Solvay and Actavis were that (a) Actavis agreed to not bring its generic to market 65 months before Solvay’s patent expired (unless someone else marketed a generic sooner); and (b) Actavis agreed to promote AndroGel to urologists. *Id.* The other two manufacturers made similar promises. *Id.* In return, Solvay agreed to pay millions of dollars to each generic—\$12 million in total to Paddock; \$60 million in total to Par; and an estimated \$19–\$30 million annually for nine years to Actavis. *Id.*

The Federal Trade Commission (FTC) filed suit against Solvay and the three generics alleging violation of § 5 of the Federal Trade Commission Act, 15 U. S. C.

§45, by unlawfully agreeing “to share in Solvay’s monopoly profits, abandon their patent challenges, and refrain from launching their low-cost generic products to compete with AndroGel for nine years.” *Id.* at 2229-30 (internal quotation and citation omitted). The District court, later affirmed by the Eleventh Circuit, applied the scope-of-the-patent test and found that FTC had no standing because “absent sham litigation or fraud in obtaining the patent, a [RPSA] is immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent.” *Watson Pharm.*, 677 F.3d at 1312.

In rejecting the Eleventh Circuit’s “scope-of-the-patent” test, the Supreme Court noted there was “reason for concern” that RPSAs “tend to have significant adverse effects on competition.” *Actavis*, 133 S. Ct. at 2231. While the court conceded that settlement on terms of permitting the patent challenger to enter the market before the expiration of the patent bring about competition, it also noted that a payment for staying out of the market causes anticompetitive harm. *Id.* at 2234-35. Such an arrangement “simply keeps prices at patentee-set levels” at the consumers’ expense, *i.e.*, the resulting benefit is shared only between the patentee and the challenger. *Id.*

The scope-of-the-patent test finds support in a general policy favoring settlements and thus, truncates any inquiry into patent validity or infringement regardless of the merits of the patent. *Id.* at 2230-31. The court cautioned that “whether a particular restraint lies beyond the limits of the patent monopoly

is a *conclusion* . . . not . . . its starting point.” *Id.* at 2231-32 (emphasis in original) (internal quotations omitted). An invalid patent confers its owner no right to exclude others from the market. Even if a patent is valid, it does not carry with it the power to exclude products or processes that do not infringe upon it. *Id.* at 2231. While recognizing that settling parties may have other reasons to prefer RPSA, the Supreme Court found that the scope-of-the-patent test overlooked the possibility that “the patentee has serious doubts about the patent’s survival” and “the payment’s objective is to maintain supracompetitive prices.” *Id.* at 2235, 2236-37. The majority opinion wrote:

In our view, these considerations, taken together, outweigh the single strong consideration—the desirability of settlements—that led the Eleventh Circuit to provide near-automatic antitrust immunity to reverse payment settlements.

Id. at 2237.

On the other hand, the Supreme Court was cognizant of the value of settlements and the strong interest in settling complex and expensive patent infringement litigations. *Id.* at 2234 (citing *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1074–1075 (11th Cir. 2005); *In re Tamoxifen Citrate*, 466 F.3d 187, 202 (2d Cir. 2006) (noting public’s “strong interest in settlement” of complex and expensive cases)). The Court made clear that “it is not normally necessary to litigate patent validity to answer the antitrust question.” *Actavis*, 133 S. Ct. at 2236. Rather, the court proposed to initially look at the size of a reverse payment. *Id.* According to the Supreme

Court, an “unexplained large reverse payment” may “provide strong evidence” of antitrust activity, because it “can provide a workable surrogate for a patent’s weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself.” *Id.* at 2235, 2236-37. The Court further noted that the size of a reverse payment can also serve as “a strong indicator of power” possessed by the patentee to bring about anticompetitive harm. *Id.* at 2236.

The Supreme Court in *Actavis* further rejected the presumptive illegality of the “quick look” approach. *Id.* at 2237. Because some reverse payments could be justified under antitrust analysis, the court held that a finding of reverse payment alone is insufficient to conclude its illegality. *Id.* The court reasoned that:

the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor’s anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification. The existence and degree of any anticompetitive consequence may also vary as among industries. These complexities lead us to conclude that the FTC must prove its case as in other rule-of-reason cases.

Id. Additionally, the Court commented that presumptive rules like the “quick look” approach are appropriate only where “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.”

Id. (internal quotation marks omitted). Since the complexity of a RPSA is far beyond “rudimentary,” the Court determined that the “quick-look” approach was not applicable. *Id.*

In formulating the rule of reason analysis, the Supreme Court enumerated several factors to consider: (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” which to the Supreme Court is a “surrogate for a patent’s weakness” and a “strong indicator of power” — namely, “the power to charge prices higher than the competitive level”; and (4) the large reverse payment is “unexplained.” *Id.* at 2236-37. Regarding the fourth factor, valid explanations include the cost of litigation, payments for other services promised to be rendered by the generic challenger and “any other convincing justification.” *Id.* at 2237.

Sometimes there are types of settlements that do not fall within the *Actavis* rationale. The Supreme Court provided two types of “commonplace forms” of settlement that are not subject to *Actavis* scrutiny. The first one is when A sues B for patent infringement and demands \$100 million in damages; and then B pays A \$40 million as settlement. *Actavis*, 133 S. Ct. at 2233. The “implicit net payment” or reduction in demand of \$60 million by A does not trigger antitrust scrutiny. *Id.* The second situation occurs when B has a counterclaim for damages against A, the patentee, and A pays B to settle B’s counterclaim. *Id.* Such settlements between a patentee and a generic manufacturer are permissible.

Furthermore, the Supreme Court specifically raised the following five sets of considerations to guide its rule

of reason analysis: (i) whether the restraint at issue has the “potential for genuine adverse effects on competition”; (ii) whether there are justifications for the anticompetitive consequences; (iii) whether the patentee has the market power to bring about the anticompetitive harm, which tends to be true when a reverse payment threatens to work unjustified anticompetitive harm; (iv) whether the size of the unexplained settlement payment suggests a workable surrogate for the patent’s weakness, which in turn suggests the intent of the patentee to maintain supracompetitive prices; and (v) whether the parties could have settled in a way that did not involve the use of reverse payment. *Id.* at 2234-2237.

The Supreme Court left “to the lower courts the structuring of the present rule-of-reason antitrust litigation.” *Id.* at 2238. With this new *Actavis* framework in mind, this Court will analyze the Defendants’ motion to dismiss under Fed. R. Civ. P. 12(b)(6).

Twombly and Iqbal

Under FED. R. CIV. P. 12(b)(6), a court may grant a motion to dismiss if the complaint fails to state a claim upon which relief can be granted. The Supreme Court explained the standard for addressing a motion to dismiss under Rule 12(b)(6) in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). The *Twombly* Court stated that, “[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, . . . a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.* at

555 (internal citations and quotations omitted); *see also Baraka v. McGreevey*, 481 F.3d 187, 195 (3d Cir. 2007) (stating that standard of review for motion to dismiss does not require courts to accept as true “unsupported conclusions and unwarranted inferences” or “legal conclusion[s] couched as . . . factual allegation[s]” (internal quotation marks omitted)). Therefore, for a complaint to withstand a motion to dismiss under 12(b)(6), the “[f]actual allegations must be enough to raise a right to relief above the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)” *Twombly*, 550 U.S. at 555 (internal citations quotations omitted).

In *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), the Court built upon its decision in *Twombly*. *Id.*, 556 U.S. at 684. The Court acknowledged that although a complaint need only contain a “short and plain statement of the claim showing that the pleader is entitled to relief” *id.* at 677-78 (quoting Fed. R. Civ. P. 8(a)(2)), this statement must nevertheless contain “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 678. *Iqbal* reiterated two benchmarks of *Twombly*. That is, “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Twombly*, 550 U.S. 544, 570 (2007)). Plausibility as explained by the court “is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* at 678 (quoting *Twombly*, 550 U.S. at 556).

Thus, when assessing the sufficiency of a complaint, a district court must distinguish factual contentions and “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.” *Id.* at 678. When evaluating a motion to dismiss for failure to state a claim, district courts must conduct a three-part analysis:

First, the court must “tak[e] note of the elements a plaintiff must plead to state a claim.” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1947, 173 L. Ed. 2d 868 (2009). Second, the court should identify allegations that, “because they are no more than conclusions, are not entitled to the assumption of truth.” *Id.* at 1950. Third, “whe[n] there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.” *Id.* This means that our inquiry is normally broken into three parts: (1) identifying the elements of the claim, (2) reviewing the complaint to strike conclusory allegations, and then (3) looking at the well-pleaded components of the complaint and evaluating whether all of the elements identified in part one of the inquiry are sufficiently alleged.

Malleus v. George, 641 F.3d 560, 563 (3d Cir. 2011) (alterations in original).

A complaint will be dismissed unless it “contain[s] sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). “Determining whether a complaint states a plausible

claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at 679. “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully”; mere consistency with liability is insufficient. *Id.* at 678. A plaintiff may not be required to plead every element of a *prima facie* case, but he must at least make allegations that “raise a reasonable expectation that discovery will reveal evidence of the necessary element.” *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (quoting *Twombly*, 550 U.S. at 556).

Significantly, the dilemma the Supreme Court faced in deciding *Twombly* is before the Court now, because as in *Twombly* the Court is concerned with an antitrust case. *Twombly*, 550 U.S. at 558-59. The Supreme Court explained “that something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with ‘a largely groundless claim’ be allowed to ‘take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.” *Id.* at 557-558 (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347, 125 S. Ct. 1627, 161 L.Ed.2d 577 (2005)). Most notably, “this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.” *Twombly*, 550 U.S. at 558 (alterations in original) (quoting 5 Wright & Miller, *Federal Practice & Procedure - Civil Rules: 2010 Quick Reference Guide*, Vol. 12B, § 1216, at 233-234). As one hornbook writer has noted, “this standard is best understood as a flexible pleading benchmark that varies depending on the type of claim chosen and the

type of allegations pleaded: a ‘plausible’ auto accident may be very concisely pleaded, whereas a ‘plausible’ antitrust or RICO case may demand a far fuller factual presentation.” Wright & Miller, 2010 Quick Reference Guide, Vol. 12B, at 152 (2014).

Here, Defendants allege, among other things, that Plaintiffs have not presented sufficient facts to show that Defendants’ Settlement Agreements violated antitrust laws. This Court applies the *Twombly* and *Iqbal* standards with the factors of *Actavis* in analyzing the Plaintiff’s Complaint. Specifically, where the anticompetitive effects of a settlement agreement which falls within the scope of the exclusionary potential of a patent, a court must determine whether there was a reverse payment that is large and unjustified.

The facts of this case are deduced from the Consolidated Amended Class Action Complaint (the “Complaint,” ECF No. 472), which was filed on Oct. 14, 2013 and after limited discovery was obtained including the Settlement Agreement between Pfizer and Ranbaxy. This Court also considers public records, including judicial proceedings and relevant patents. See, e.g., *Jean Alexander Cosmetics, Inc. v. L’Oreal USA, Inc.*, 458 F.3d 244, 256 n.5 (3d Cir. 2006) (citing *S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 426 (3d Cir. 1999)); *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196-97 (3d Cir. 1993). Based on same, the Court addresses the plausibility of Plaintiff’s complaint.

In *Actavis*, the Supreme Court dealt with only one patent for AndroGel which was the subject of the

Paragraph IV litigation involving three generic companies. Yet the Supreme Court declined to “measure the length or amount of a restriction solely against the length of the patent’s term or its earning potential.” *Actavis*, 133 S. Ct. at 2231. Here, the Defendants claim that Lipitor is protected by seven patents; and three of those expire in 2016 (the ‘511, ‘740, and ‘156 patents). (Am. Compl. ¶ 73, 74) (see chart on page 8). In the Court’s prior opinion, it found the expiration date of the ‘995 patent concerning the active ingredient atorvastatin calcium would have ended on June 28, 2011, but the Court made no judgment upon the five other patents.¹²

Here, Plaintiffs have set forth a plausible fact that the five “back up” patents — the ‘156 patent, the two Formulation Patents (the ‘971 and ‘104 patents), and the Process Patents (the ‘740 and ‘511 patents) — were designed around by Ranbaxy. This seems plausible because the Paragraph IV certifications of Ranbaxy, in and of themselves, are sworn statements of Ranbaxy’s management to a governmental agency (FDA) with specifications on how to do so.¹³ Moreover, courts often

¹² As held in *In re Lipitor Antitrust Litig.*, 2013 U.S. Dist. LEXIS 126468 (D.N.J. Sept. 5, 2013).

¹³ The Court had some difficulty with the Plaintiff’s rationale underlying plausibility. That is, Plaintiffs contend that Ranbaxy’s amorphous atorvastatin would have been approved by FDA because the FDA was “under immense pressure” to approve generic Lipitor. (Am. Compl. ¶ 194.) For example, Plaintiffs allege that Senate Health, Education, Labor, and Pensions Committee Chairman Tom Harkin and other public officials sent a letter to FDA on March 10, 2011, urging FDA to “clarify the relevant regulatory issues” so the public could afford generic atorvastatin.

find that companies are able to design around Process Patents. In one study, generic applicants prevailed seventy-three percent of the time in lawsuits involving patent infringement of drug products. See, *Generic Drug Entry Prior to Patent Expiration: An FTC Study*, p. 16 (July 2002). See also *In Re K-Dur Antitrust Litigation*, 686 F. 3d 197, 218 (3d Cir. 2012) vacated *Merck & Co. v. La. Wholesale Drug Co.*, 133 S. Ct. 2849 (2013) (mem.). Taking that fact as plausible, the Court focuses on the antitrust allegations.

The heart of the issue here is whether there was a settlement agreement between Pfizer and Ranbaxy that constituted a RPSA that warrants antitrust scrutiny. According to the Complaint, the parties entered into a RPSA on June 17, 2008 by signing the Settlement Agreement. (Am. Compl. ¶ 145.) The Settlement Agreement resolved multiple litigations pending worldwide, including law suits on three brand drugs pending in the United States. Settlement Agreement at 1 and Ex. 2; ECF No. 493, at 11. According to the Plaintiffs, the alleged RPSA constituted an unlawful contract, combination and conspiracy to allocate the entire United States market for atorvastatin calcium to Pfizer until November 30, 2011. (Am. Compl. ¶ 6.)

(Am. Compl. ¶ 195.) This statement does not meet the plausibility standard because a public statement by public officials about an active political issue is not a plausible conclusion without other support, especially when the statements, like Senator Harkin's letter, have no other legally binding effect. In addition, Ranbaxy's amorphous atorvastatin was never approved by the FDA because Ranbaxy amended with a crystalline version after the Settlement Agreement was entered.

Evidently, Pfizer sought the delay because it had a significant economic reason, which was that Lipitor grossed \$1 billion per month – the largest selling drug of all time.

In exchange for Ranbaxy's agreement to delay its launch of generic Lipitor until November 30, 2011, Pfizer allegedly gave substantial financial inducements to Ranbaxy, including: (a) Pfizer's "sweetheart" agreement to dismiss damages claims likely worth hundreds of millions of dollars in *Accupril* II litigation in exchange for a token "pretextual" payment of \$1 million; and (b) the right to market generic Lipitor in at least eleven foreign markets outside the United States. (Am. Compl. ¶¶ 7, 148.) The Plaintiffs assert that Pfizer and Ranbaxy characterized the Settlement Agreement as, in part, settling the "Lipitor Process" litigation in order to "disguise the [Agreement's] true anticompetitive purpose." (Am. Compl. ¶ 146.) Although not specifically addressed in the Complaint, the Settlement Agreement also resolved two other U.S. litigations: Caduet Process litigation, which involved the same Process Patents as Lipitor Process litigation; and Caduet ANDA litigation, which involved the '893 patent and another U.S. patent which Plaintiffs argue is not relevant to the case at bar and is not alleged in the Complaint. ECF No. 493 at 13; *see supra* note 9. Furthermore, the Settlement Agreement also settled twenty-three legal actions pending overseas. ECF No. 493 at 13; Settlement Agreement p. 26 Exhibit 2. Plaintiffs maintain that the financial inducements from Pfizer were "extraneous" to any possible results that Ranbaxy might achieve in any U.S. Lipitor patent disputes that were, or ever could, exist between Ranbaxy and Pfizer. (Am. Compl. ¶ 7.)

Ranbaxy allegedly agreed, in exchange for payments by Pfizer, that it would: (a) not enter the market or compete with Pfizer in the atorvastatin calcium market in the United States until November 30, 2011; (b) not relinquish or selectively waive its first-to-file 180-day marketing exclusivity such that any other ANDA filer would be unable to market a generic version of Lipitor in the United States before November 30, 2011 (which had the effect of creating a “bottleneck” that blocked FDA approval of any later would-be generic); (c) not contest the validity of process patents that Pfizer was allegedly misusing to delay the efforts of other would-be generic entrants; and (d) stop protesting Pfizer’s application for reissuance of the ‘995 patent that had been declared invalid, in part, by the Federal Circuit and pending before the PTO. (Am. Compl. ¶ 8.)

Obviously, use of the words “sweetheart agreement” and “pretextual” payment of “extraneous” inducements are characterizing rather than factually analyzing the settlement in order to meet the *Twombly/Iqbal* standard. But in light of *Actavis*, this Court examines whether the terms of the Settlement Agreement constitute a RPSA and violate antitrust laws. More specifically, the Court examines whether the factual allegations are sufficient to make plausible that Pfizer made a large and unexplained reverse payment to Ranbaxy in support of antitrust activities.

Payment

In providing the rule of reason analysis to a RPSA, *Actavis* does not define payment or provide any clarity as to whether a payment can be something other than a monetary payment. Since the *Actavis* decision, there has been much discussion by other courts, the parties,

and commentators regarding the question of what constitutes a payment.

The common use of the term payment is described as something given to discharge a debt or obligation and does not require the payment to be in the form of money. *See Hill v. United States*, 263 F.2d 885, 886 (3d Cir. 1959); *Staff Builders of Philadelphia, Inc. v. Koschitzki*, 989 F.2d 692, 695 (3d Cir. 1993). In Black's Law Dictionary, payment is defined as "performance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of the obligation." Black's Law Dictionary (9th ed. 2009). Payment may also be defined as "the discharge of a pecuniary obligation by money or what is accepted as the equivalent of a specific sum of money." 60 Am. Jur. 2d Payment § 1. Furthermore, it is widely held that a payment may refer to a transfer of something of value other than money. *See* 60 Am. Jur. 2d Payment § 26; *Sousa v. First Cal. Co.*, 101 Cal. App. 2d 533, 540, 225 P.2d 955, 960 (1950); *Dynair Electronics, Inc. v. Video Cable, Inc.*, 55 Cal. App. 3d 11, 18, 127 Cal. Rptr. 268, 272 (Cal. Ct. App. 1976). A non-monetary payment includes something of value that can be converted to a concrete, tangible or defined amount which yields a reliable estimate of a monetary payment. In this case, the Plaintiffs principally argue that the settlement of Pfizer's claim in Accupril is a non-monetary payment.

Other courts have reviewed whether *Actavis* requires that the payment must be cash. One court held that "[n]owhere in *Actavis* did the Supreme Court explicitly require some sort of monetary transaction to take place for an agreement between a brand and generic manufacturer to constitute a reverse payment."

In re Nexium (Esomeprazole) Antitrust Litig., 968 F. Supp. 2d 367, 392 (D. Mass. 2013).¹⁴ Another decision (by one of my esteemed New Jersey colleagues) found otherwise and held that “the Supreme Court considered a reverse payment to involve an exchange of money” and therefore did “not extend the holding of *Actavis* to the non-monetary facts before it.” *In re Lamictal Direct Purchaser Antitrust Litig.*, No. 12-CV-995 WHW, 2014 WL 282755, at 6-7 (D.N.J. Jan. 24, 2014).¹⁵ This Court

¹⁴ In *In re Nexium*, AstraZeneca and three generic defendants—Ranbaxy, Teva, and Dr. Reddy’s, were alleged to have entered into reverse payment agreements to keep a generic version of Nexium off the market. All three generic defendants agreed to refrain from selling generic versions of Nexium until May 27, 2014 when some (but not all) of the patents had expired, though this was years after the generic defendants were initially proposing in their Paragraph IV certifications and arguing in the resulting litigations. In return, AstraZeneca agreed to not to produce its own authorized generic version of Nexium during Ranbaxy’s 180-day exclusivity period, allegedly accruing a value to Ranbaxy of over \$1 billion. It is unclear from the opinion if there was a cash payment made to Ranbaxy. Also, AstraZeneca forgave contingent liabilities of both Teva and Dr. Reddy’s related to “at risk” launches of generic versions of non-related products. The generic defendants urged the court to read *Actavis* to apply only to monetary payments and the court declined. At the motion to dismiss stage, the *In re Nexium* court found the allegations sufficient to allege an antitrust violation. *In re Nexium (Esomeprazole) Antitrust Litig.*, 968 F. Supp. 2d 367, 392 (D. Mass. 2013). Later, at the summary judgment stage, the court denied summary judgment made on similar grounds. *In re Nexium (Esomeprazole) Antitrust Litig.*, 12-md-02409-WGY (D. Mass. Sept. 4, 2014), ECF No. 977.

¹⁵ In this case, GlaxoSmithKline (GSK) and the generic defendant Teva are alleged to have entered into reverse payment agreements to keep a generic version of Lamictal off the market. GSK allowed certain generic forms of Lamictal to enter the market before all

somewhat agrees with the analysis of both cases. That is, it is true that Actavis never indicated that a reverse payment had to be a cash payment; but it is also true that *Actavis* emphasized cash payments. In applying *Actavis* here, 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 such as whether it is “large” once the subtraction of legal fees and other services provided by generics occurs.

The Supreme Court’s general concern is to determine if there are “genuine adverse effects on competition.” *Actavis*, 133 S. Ct. at 2234 (quoting *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, at 460–461, 106 S.Ct. 2009 (citing 7 Areeda ¶ 1511, at 429 (1986))). Although *Actavis* addressed cash payments, reading the opinion as a whole, it is clear that the Supreme Court focuses on the antitrust intent of the settling parties rather than the manner of payment. For example, Justice Breyer stated: “the relevant antitrust question is: What are [the] reasons [for preferring reverse payment settlements]? If the basic reason is a desire to maintain and to share patent-generated monopoly profits, then, in the absence of

patent claims had expired, though later than Teva was initially proposing in the Paragraph IV certification and arguing in the resulting litigation. In return, GSK agreed not to produce its own authorized generic version of Lamictal during Teva’s 180-day exclusivity period. The court held that application of *Actavis* did require a monetary payment to have occurred in the settlement and the no-authorized generic agreement was not a payment within *Actavis*. The court concluded that “the settlement was reasonable and not the sort that requires *Actavis* scrutiny.”

some other justification, the antitrust laws are likely to forbid the arrangement.” *Actavis*, 133 S. Ct. at 2237.

The distinction between non-monetary and cash payments impacts the plausibility standard of Rule 12(b)(6). When Justice Breyer explained RPSA through the use of a simple hypothetical “Company A, the patentee, to pay [Company] B [the claimed infringer] many millions of dollars,” it is easy to identify the reverse payment; however, in a non-monetary payment it is not as easily recognized. *Actavis*, 133 S. Ct. at 2227. The pleading must show some reliable foundation for estimating the alleged reverse payment. *Cf.* IIA Phillip E. Areeda, Herbert Hovenkamp, *et al.*, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶397, at 417 (3d ed. 2007).

As noted previously, *Twombly* and *Iqbal* establish a flexible pleading benchmark, and in a case where a non-monetary payment is alleged in an antitrust suit, the pleading must demonstrate the reliable foundation showing a reliable cash value of the non-monetary payment through the use of more facts upon which Plaintiff depends. As the Third Circuit noted in an antitrust case:

[i]t is, of course, true that judging the sufficiency of a pleading is a context-dependent exercise. Some claims require more factual explication than others to state a plausible claim for relief. For example, it generally takes fewer factual allegations to state a claim for simple battery than to state a claim for antitrust conspiracy.

W. Penn Allegheny Health Sys., Inc. v. Univ. Pittsburgh Med. Ctr., 627 F.3d 85, 98 (3d Cir. 2010) (internal

citations omitted). It is not like changing plausibility to probability; it simply requires a showing of a reliable foundation used within the industry to convert the non-monetary payment to a monetary value. The Complaint here does not do so.

Plaintiffs allege that Pfizer made two “payments” to Ranbaxy in order to keep Ranbaxy off the atorvastatin market: (i) the forfeiture of Pfizer’s claim for damages in the *Accupril* II litigation in exchange for Ranbaxy’s payment of \$1 million; and (ii) foreign patent litigation settlements permitting Ranbaxy to launch generic Lipitor in at least eleven non-U.S. markets prior to patent expiration. (Am. Compl. ¶ 7, 148, 178, 182.) To this Court, Plaintiffs must plead a reliable foundation upon which to estimate the value of the compromise of Pfizer’s damages in the *Accupril* II litigation. In defining the payment prong of the *Actavis* rule of reason analysis, one commentator noted where the non-monetary payment is consideration, it must be valued. The commentator wrote:

The payment prong involves the following steps: (a) valuing any consideration flowing from the patentee to the claimed infringer, which may be made over time and may take forms other than cash; (b) deducting from that payment the patent holder’s avoided litigation costs; and (c) deducting from that payment the value of goods, services, or other consideration provided by the claimed infringer to the patent holder as part of the same transaction (or linked transactions)....

Valuing this consideration, step (a) above, is sometimes an intricate proposition. For example,

the payment could include forgiving a debt owed by the claimed infringer to the patent holder. The debt may include patent infringement damages. The claimed damages could pertain to the product whose infringing entry is at issue (if there has been entry) or another product.... Although sometimes intricate, handling this complexity is well within the competence of a district court. (emphasis added)

(quoting Aaron Edlin, et. al., *Activating Actavis*, 28 Antitrust 16, 18 (2013) (hereinafter “*Activating Actavis*”)). In this case, in order to approximate the amount of Pfizer’s alleged consideration to Ranbaxy, it is necessary to consider the monetary value of Pfizer’s claim at the time of the settlement. As the commentator stated, this can be “intricate” because Pfizer’s claim for damages was still contingent, i.e., Pfizer’s claim “[had] not yet accrued and [was] dependent on some future event that may never happen.” Black’s Law Dictionary (9th ed. 2009). In other words, the success of Pfizer’s full claim for damages in *Accupril II* was dependent upon the court’s judgment finding the Accupril patent valid and infringed, i.e., a “future event that may never happen.” Moreover, circumstances surrounding the parties often change as a litigation progresses. Because the parties settled before the actual judgment, it is unclear what Ranbaxy’s liability would have been if a trial occurred.

In considering the monetary value of a patent infringement claim Plaintiff must allege facts as if Plaintiff was standing in the shoes of the parties at the time of settlement. *Cf. Singh v. Bradford Regional Med. Center*, 752 F. Supp. 2d 602, 619-20 (W.D. Pa.

2010). That is, to value the claim for damages in *Accupril* II, one must demonstrate the evidence upon which Pfizer would have most likely relied upon at that time. In the *Accupril* matter, the claim was for an alleged award of profits lost because of diverted sales, price erosion and increased costs, or a royalty fee due to Ranbaxy's infringement. Patent Law and Practice § 8.11, p. 228-231 (*Fed. Jud. Center 6th Ed. 2008*). To prove profits lost, the patent owner must show he would have made some or all of the infringers' sales. In addition, the patent owner must show four major elements: (1) demand for the product; (2) absence of noninfringing substitutes; (3) manufacturing and marketing capability; and (4) the amount of profit. *Id.*; see also *Panduit Corp. v. Stahlin Bros. Fibre Works*, 575 F. 2d 1152, 1156 (6th Cir. 1978). Some of the major elements have subparts. For example, the fourth element, the amount of profit, has three components, including the number of sales the patentee would have made, the price change for those sales, and the cost to produce and market same. Patent Law and Practice, Sixth Edition (BNA), Herbert F. Schwartz; Robert J. Goldman § 8.11, p. 2 (2008) Here, the Complaint does not allege any such formulation. Plaintiffs generally argue that the non-monetary payment could be the same amount as the bond posted (\$200 million) or it could be the difference in gross sales (\$525 million to \$70 million); however, the Plaintiffs never attempt to value this non-monetary payment to a reliable measure of damages as articulated in the *Panduit* case. As noted above, neither of Plaintiff's figures easily plug into the lost profits criteria; hence, they are not plausible because they do not provide a reliable foundation or methodology to estimate the monetary value of Pfizer's claim for infringement damages.

Assuming Plaintiffs relied on a reliable foundation (which Plaintiffs did not), the amount of a settlement varies due to the mindset of the parties at the time of the settlement as to the risk of trial. Hence, the monetary value of the claim must include some evaluation of those risks. For example, the Third Circuit set forth factors the district court should use approving a class action. Some of those factors such as the risks of establishing liability or damages, the ability of the defendant to withstand a greater judgment and the range of reasonableness in light of the best possible recovery. *Girsh v. Jepsen*, 521 F. 2d 153, 157 (3d Cir. 1973). Although *Girsh* normally has a different application than here, the fact remains that some acknowledgement of settlement consideration must be plead. Here, the Complaint does not do so except that it characterizes Pfizer's claim as "slam dunk" and Pfizer had Ranbaxy "over the barrel." In a RPSA case, the facts rather than broad characterizations must be alleged. More specifically, one recent law review article listed some other settlement factors to be considered in an *Actavis* analysis. Such factors include: the branded company's perceived probability of winning the patent litigation; the branded company's monopoly profits and duopoly profits (if the generic were to enter the relevant market); the remaining lifetime of the patent at issue and the proposed market entry date for the generic manufacturer; and the branded company's litigation costs and the amount of payment from the brand to the generic. *Activating Actavis* at 14. As part of the conversion from a non-monetary payment to an estimate of the monetary payment for the claim, Plaintiff cannot bypass those settlement factors by declaring it was a "slam dunk" case. Most experienced

lawyers would acknowledge that most claims are discounted in order to achieve settlement. Again, Plaintiffs must plead the allegations of the Complaint as if they were standing in the shoes of the parties at the time the alleged wrong occurred. This means Plaintiffs must allege a measure of damages accepted within the industry and a discussion of the settlement factors relating to the claim of damages settled at that time. None of this is adequately alleged in the Complaint.

The lack of any reliable foundation pervades the entire Complaint. For example, Pfizer's second alleged payment to Ranbaxy is even more challenging. That is, Plaintiffs allege that Pfizer allowed Ranbaxy to market generic Lipitor in at least eleven foreign countries in the form of license agreements. (Am. Compl. ¶ 7, 148, 178.) These provisions allegedly "added to the financial inducements provided by Pfizer to Ranbaxy, and were not of a kind that Ranbaxy could ever expect to achieve through success in any litigation of U.S. Lipitor patents." (Am. Compl. ¶ 178.) Again, when looking at this from the *Actavis* rationale, the Complaint lacks any foundation to estimate the cash value of the alleged licenses granted in other countries. Since no such allegations were pled, the allegations are implausible¹⁶.

¹⁶ The Complaint seems to set forth "bottlenecking" as a separate cause of action. The Court views bottlenecking as an effect of the RPSA. Hence, the restraint of trade, if any, focuses on the RPSA rather than the bottlenecking. *See Actavis*, 133 S. Ct. 2223, 2231.

Legal Fees

Within *Actavis*, a reverse payment occurs when a net positive payment flows from the patentee to the alleged infringer. *Id.* Even if the reverse payment is shown, any traditional settlement considerations or services provided by the generic are deducted to determine whether there is a net positive payment flowing from the patentee to the alleged infringer. That is, Ranbaxy's prior litigation costs may be deducted from the total payment made by Pfizer. *Actavis* provides a rationale for this framework by stating: "[w]here a reverse payment reflects traditional settlement considerations, such as avoided litigation costs or fair value for services, there is not the same concern that a patentee is using its monopoly profits to avoid the risk of patent invalidation or a finding of noninfringement." *Actavis* at 2236; *see also generally Activating Actavis* at 18.

In this case, with the exception of paragraphs 180 and 255, the Complaint is devoid of any discussion about saved litigation costs to either party. This is far from fulfilling "a plaintiff's obligation to provide the grounds of his entitlement to relief that requires more than labels and conclusions." *Twombly*, 550 U.S. at 555 (citations omitted). Plaintiffs failed to cite to two published surveys regarding legal fees which may have constituted a reliable foundation within the industry. According to a survey reported in 2005, a median expense of patent litigation was \$4.5 million and the patentee is "likely to spend more, as it has more at stake in the case." C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement As A Regulatory Design Problem*, 81 N.Y.U. L. Rev. 1553, 1623 n. 89

(2006) (citing American Intellectual Property Law Association, Report of the Economic Survey). Another study cited by the dissenting Justices in *Actavis* suggests that the cost of patent infringement litigation for a *generic* challenging a brand name pharmaceutical patent can be as much as \$10 million per suit. *Actavis*, 133 S. Ct. at 2243-44 (Roberts, J., dissenting) (citations omitted). In light of the two surveys, it is readily conceivable that the cost of patent litigation for Ranbaxy may have been between \$4.5 million and \$10 million per suit. Considering that the Agreement settled three other U.S. patent infringement or ANDA litigations and 23 foreign legal actions, the saved cost of litigation for Ranbaxy may have been between \$117 million (26 suits at \$4.5 million) and \$260 million (26 suits at \$10 million each). Despite the value, the Complaint fails to consider the legal fees aspect of the case in such a light. Since Plaintiffs failed to adequately address this point, the Complaint is implausible.

Large Payment

The Supreme Court in *Actavis* did not define what constitutes “large.” Instead, the court noted that “[a]n unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent’s survival. And that fact, in turn, suggests that the payment’s objective is to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market.” *Actavis*, 133 S. Ct. at 2236. Therefore, “the size of the unexplained reverse payment can provide a workable surrogate for a patent’s weakness” (*Actavis*, 133 S. Ct. at 2236-37) as

well as “a strong indicator of power’ — namely, the power to charge prices higher than the competitive level. *Actavis*, 133 S. Ct. at 2236 (citation omitted).

One way to measure the “largeness” of a reverse payment is to assess whether the amount is larger than what the generic would gain in profits if it won the Paragraph IV litigation and entered the market. The *Actavis* majority found this to be “strong evidence” of anticompetitive activity. *Actavis* 133 S. Ct. at 2235 (citing See Hemphill, 81 N.Y.U. L.Rev. at 1581) *See also* Br. for 118 Law, Economics, and Business Professors et al. as *Amici Curiae* 25. Whatever the definition “large” is meant to represent, this Court looking at the Complaint is unable to perform the analysis, as the Plaintiffs failed to plausibly allege an estimate of the monetary value of the non-monetary payment, and the amount of legal fees of Ranbaxy should have been subtracted from same.

Statements by Pfizer’s Management

There are several statements of Pfizer’s management upon which Plaintiffs rely in order to show plausibility of their RPSA cause of action. The first concerns a statement by Hank McKinnell, Pfizer’s former Chairman and Chief Executive Officer (CEO) concerning the date on which the exclusivity period of the Lipitor patents ended. The quote is an excerpt from a book he authored and published in 2005. The quote reads:

There are dozens of generic drug manufacturing companies with a red circle around June 28, 2011. That’s the day the patent for our anti-cholesterol medication Lipitor expires. . . .

Shortly thereafter a number of generic alternatives to Lipitor will be introduced and consumers will have a choice of generic tablets containing atorvastatin calcium[.]

(Am. Compl. ¶ 205.) The Plaintiffs argue that the statement constitutes an admission by Pfizer's former CEO about the final expiration date (June 28, 2011). It shows Pfizer's mindset about the life of the Lipitor patents. Plaintiffs argue that the June 28, 2011 is a key date because it recognizes that the Formulation Patents, the Process Patents, and the '156 patent could not block generics from entering the market . (Am. Compl. ¶ 206 (see chart, page 8). This quote may constitute an admission under Federal Rule of Evidence 801(d)(2)(D), which provides that a statement is not hearsay if it "was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." *See also Davis v. Mobil Oil Exploration & Producing Se., Inc.*, 864 F.2d 1171 (5th Cir. 1989). In the Court's view, it is difficult to rely upon five lines from a book, or its context, without analyzing the gist of the entire book. As a result, the quote, on its own, cannot be the sole basis of a cause of action. It does not meet the plausibility standard or support Plaintiffs' argument that the five patents are irrelevant without further plausibility. Moreover, broad assumptions about the quote are not warranted because it was written three years before the Settlement Agreement was entered, and it was not directly connected with the negotiations concerning the Settlement Agreement.

The second statement was made by Pfizer's Chief Executive Officer Kindler to company shareholders

wherein he declared that “[Pfizer] had very, very substantial damages in the way of lost profits that we intend to recover from Ranbaxy” in the Accupril case. (Am. Compl. ¶ 170.) Since the statement does not disclose the monetary value of a non-monetary payment, it is of little impact as to its measurement within the *Actavis* rationale.

The third statement is by a Pfizer attorney who in a brief submitted to the Federal Circuit in the Accupril I litigation, wrote “Pfizer will be claiming hundreds of millions of dollars in damages in for the infringing sales that were made prior to the injunction.” Br. for Plaintiffs-Appellees at 5, *Warner-Lambert Co. v. Teva Pharms. USA, Inc.*, No. 08-1150-1190, 2008 WL 2444724 (Fed. Cir. May 28, 2008). This statement sounds more like a demand than a plausible value of the claim.

These statements are corroborative evidence, but plausibility requires some reasonable foundation to estimate the cash value of the non-monetary reverse payment.

Agreement Must be Considered as a Whole

As outlined, the Agreement concerns the settlement of patent litigation concerning three drugs – Lipitor, Accupril and Caduet. In order to analyze whether an alleged RSPA occurred to delay entry of generic Lipitor, as plaintiffs allege, the terms of the entire Settlement Agreement must be analyzed to determine plausibility. To rely only on certain sections (Accupril) of the Settlement Agreement and disregard other sections (Caduet) is not a reasonable analysis. The Complaint does not plead the Settlement Agreement as a whole.

In the rule of reason analysis, “the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint’s history, nature and effect.” *In re Tamoxifen Citrate Antitrust Litig.* 466 F.3d 187, 201 n. 13 (2d Cir. 2006), *cert. denied sub. nom., Joblove v. Barr Labs, Inc.*, 127 S.Ct. 3001 (2007) (*Tamoxifen II*) (quoting *State Oil Co. v. Kahn*, 522 U.S. 3, 10 (1997)). Generally, “the courts must look to the monopolist’s conduct taken as a whole rather than considering each aspect in isolation.” *LePage’s Inc. v. 3M*, 324 F.3d 141, 162 (3d Cir. 2003); *see also In re Niaspan Antitrust Litig.*, No. 13-MD-2460, 2014 WL 4403848, *11 and n.13 (E.D. Pa. Sept. 5, 2014) (holding, where three separate settlement agreements had been entered by the antitrust defendants, that defendants were not entitled to examine “each of the three settlement agreements in isolation,” but should be read as one agreement). Here, the Complaint fails to adequately address (1) the Caduet litigation; (2) the costs of all litigation; (3) the agreement to utilize Pfizer’s bulk active pharmaceutical ingredient, atorvastatin, in Canada. As such, the claim is implausible for failure to consider the Settlement Agreement as a whole, and to “account [for] a variety of factors.” *In Re Tamoxifen Citrate Antitrust Litigation*, 466 F. 3d at 201.

To the Court, the analysis of Caduet and the other terms which resolved other litigation globally appear critical to determining the monetary value of the settlement claim under *Actavis*. The contention that other provisions of the Agreement do not matter (like

Caduet) makes little sense. At the very least, those factors must be plead to show why they do not alter Plaintiffs antitrust claims. Hovenkamp, *Sensible Antitrust Rules for Pharmaceutical Competition*, 39 U. S. F. L. Rev. 11, 24 (2004). Moreover, there is a sliding scale in appraising reasonableness. *California Dental Assn.*, 526 U. S. at 780. As such, this selective look at certain provisions of the agreement and bypassing others renders the complaint implausible.¹⁷ The Court must look at the Settlement Agreement as a whole and cannot extricate individual provisions. *In re: The Prudential Insurance Company of America Sales Practice Litigation*, 962 F. Supp. 459 (D.N.J.

¹⁷ Similarly, Defendants argue that Pfizer's forbearance of Ranbaxy's potential liability did not constitute a "payment" because *Accupril II* settlement falls within an exception to *Actavis* and is a "safe harbor" from RPSA liability. ECF No. 490, p. 19-20; *see also* ECF No. 493, p. 20. That is, the *Accupril II* resolution stands on its own and is not related to Lipitor Process settlement or the Caduet settlement. The Court disagrees. The Agreement was signed at one single time, and the corporate management of each party most likely comingled the facts to determine the settlement's adequacy. To divide the Settlement Agreement into segments, as defendants propose, is opposite of what most likely occurred. Here, the facts give rise to the conclusion that the *Accupril II* settlement was likely reviewed in conjunction with the other litigations, and other terms of the Agreement. The settlements of three branded drugs in one Agreement circumstantially combines all three drugs into one contemporaneous settlement. Settlement Agreement at 26 This is an obvious indication that the parties negotiated each settlement with other cases in mind, it is implausible to analyze the agreement unless it is considered as a whole. *See Weiss v. Mercedes-Benz of North America*, 899 F. Supp. 1297, *aff'd* 66 F. 3d 314 (D.N.J. 1995). Thus, Pfizer's safe harbor argument does not hold water.

1997), *aff'd* 148 F. 3d 283, *cert. denied*, *Krell v. Prudential Ins. Co. of America*, 525 U.S. 1114, 119 S.Ct. 890 (1999).

Re-Pleading the Matter

Plaintiffs have failed to plead their Amended Complaint with the plausibility required by the Federal Rules of Civil Procedure and the relevant case law. The Amended Complaint constitutes the plaintiffs' second attempt to plead the relevant facts. However, the pleading itself has changed little from the original Complaint filed in this matter. The plaintiffs have not argued that they should be given leave to re-plead facts in a second Amended Complaint, nor have they asserted any facts that would meet the required standard of pleading. Therefore, the Amended Complaint is dismissed with prejudice. *LaFlamme v. Societe Air Fr.*, 702 F. Supp. 2d 136, 155 (E.D.N.Y. 2010) (citing *Horoshko v. Chase Manhattan Mortgage Corp.*, 373 F.3d 248, 249 (2d Cir. 2004); *Nat'l Union of Hosp. & Health Care Employees v. Carey*, 557 F.2d 278, 282 (2d Cir. 1977); *Trautenberg v. Paul, Weiss, Rifkind, Wharton, Garrison LLP*, 351 Fed. App'x 472, 474 (2d Cir. 2009); and *Anatian v. Coutts Bank (Switz.) Ltd.*, 193 F.3d 85, 89 (2d Cir. 1999)).

Conclusion

Plaintiffs argue that "this court need not, now, engage in . . . the 'intricate proposition' of valuing the payment from Pfizer to Ranbaxy." (ECF No. 509 at 44). The Court disagrees. Pursuant to *Twombly* and *Iqbal*, the standard for considering a motion to dismiss a complaint is based upon a flexible pleading benchmark. In this case, where Plaintiffs rely on a non-

monetary reverse payment of an inchoate claim, they must plead plausible facts including an estimate the monetary value of same so the *Actavis* rationale can be applied. The Plaintiffs have failed to delineate any type of methodology to connect the claim to its monetary value. To meet this standard, Plaintiffs must stand in the shoes of the underlying parties at the time of the settlement, and determine an estimate of the monetary value of the settlement at that time. The Complaint as pleaded does not do so, despite it being the second attempt by Plaintiffs to plead their causes of action. The flexible pleading benchmark established by *Twombly* requires such pleading same in these difficult cases. Remember, this is not a car accident where plausible facts are easily set forth; it is a non-monetary payment in an antitrust suit which is at the opposite end of the benchmark scale. Guesswork -- like the use of the bond amount (\$200 million) or the difference in sales (\$225 million to \$70 million) -- coupled with non-specific statements of Pfizer management is insufficient. A reliable foundation need not yield a precise amount of the alleged non-monetary payment, but one that fits within the ballpark like using the loss of profit standard. *See infra* at 34-36. The Complaint fails to provide same. For the reasons stated above, Defendant's motion to dismiss the Direct Purchaser's Complaint is granted with prejudice.

s/Peter G. Sheridan
PETER G. SHERIDAN, U.S.D.J.

September 12, 2014

APPENDIX G

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

MDL No. 2332

Master Docket No. 3:12-cv-02389 (PGS)

[Filed February 6, 2014]

IN RE LIPITOR ANTITRUST LITIGATION	)
	)
THIS DOCUMENT RELATES TO:	)
	)
RP Healthcare, Inc., et al. v. Pfizer, Inc., et al.	)
3:12-cv-5129	)

ORDER

THIS MATTER comes before the Court on the motion (ECF' No. 418) of Plaintiff RP Healthcare, Inc. ("Plaintiff") to remand the action to the Superior Court of California, Sonoma County; and Defendants having opposed the motion; and the Court having reviewed the parties' submissions; and having held oral argument on December 5, 2013; and for the reasons set forth on the record,

IT IS on this **6th** day of **February, 2014**;

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ORDERED that Plaintiffs Motion to Remand (ECF No. 418) is denied.

s/_____
HONORABLE PETER G. SHERIDAN, U.S.D.J.

APPENDIX H

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

MDL No. 2332
No. 12-2389 (PGS/DEA)

[Filed October 25, 2012]

In re LIPITOR ANTITRUST LITIGATION

MEMORANDUM AND ORDER

This matter is before the Court on a motion to remand the action to the California State Court in Sonoma County, California (ECF No. 111) and on a Cross-Motion by defendants to amend the notice of removal (ECF No. 143). The procedural history is set forth below.

On November 7, 2011, the matter of *Chimes Pharmacy, Inc. v. Pfizer* was filed in Federal Court (later renamed *RP Healthcare v. Pfizer*).

On December 23, 2011, Plaintiff filed an amended complaint to add and delete certain defendants.

On December 6, 2011, other cases were filed throughout the country, and the Judicial Panel on Multidistrict Litigation (MDL) was requested to centralize the matters.

On January 20, 2012, Plaintiffs apparently disliked the MDL procedure, withdrew the federal suit, and reinstituted the matter in California state court.

On March 3, 2012, the California state court action was removed to federal court by Pfizer and other defendants. The reasons for the removal were that the case involved “an abuse of the Hatch-Waxman Act”, “fraudulent procurement and enforcement of a patent in violation of the Sherman Act” and “commercial bribery” in violation of the Robinson Patman Act.

On March 16, 2012, plaintiff filed a motion to remand on the basis that only California causes of action (California antitrust statutes) applied. As such, patent law or the other reasons were not a critical element.

On August 3, 2012, the Judicial Panel on Multidistrict Litigation denied the motion to vacate the Central Transfer Order and forwarded the case here “for inclusion in the coordinated and consolidated pre-trial proceedings.”

Discussion

At the first hearing with counsel in July, 2012, plaintiff's attorney (Mr. Alioto) argued for remand alleging that *RP Healthcare* is a case in which patent law is not at issue, and that only California antitrust claims are at issue. However, despite this contention, there may be many patent issues raised as defenses in this case which would engender federal jurisdiction. Mr. Alioto's argument that patent issues will not arise in the California state court case is speculative when Pfizer will be arguing otherwise.

Moreover, even if a remand were appropriate, the Court has discretion to coordinate discovery with a state court. See, Ten Steps to Better Case Management, The Judicial Panel on Multidistrict Litigation and the Federal Judicial Center, p. 7 (2009).

The Court agrees with the Judicial Panel on Multidistrict Litigation that the centralized case will further serve the convenience of the parties and the efficient conduct of the litigation. The Judicial Panel on Multidistrict Litigation wrote:

In opposing transfer, the *RP Healthcare* plaintiffs argue, inter alia, that they have brought only claims under California law, and that theirs is an individual action, whereas the centralized actions are putative class actions. We find these arguments unpersuasive. California law claims are already in the MDL.

* * *

we find that *RP Healthcare* involves common questions of fact with actions previously transferred to MDL No. 2332, and that transfer will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation.

Defendants have filed a cross-motion to amend the notice of removal in support of their response to the motion to remand. Such applications should be liberally granted in this early stage in the proceedings, and, as such, the Court grants this motion.

Plaintiff further argues in its motion that Pfizer did not acquire the consent of the other Defendants when it filed the removal, and therefore, the removal petition

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is void. However, the amended notice of removal clarifies that Pfizer had such consent. The motion to remand is denied.

ORDER

For the reasons set forth above,

IT IS on this 19th day of October, 2012

ORDERED that a motion to remand the action to the California State Court in Sonoma County, California (ECF No. 111) is denied; and it is further

ORDERED that the Cross-Motion by defendants to amend the notice of removal (ECF No. 143) is granted.

s/Peter G. Sheridan

PETER G. SHERIDAN, U.S.D.J.

APPENDIX I

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 14-4632

[Filed January 30, 2018]

IN RE: LIPITOR ANTITRUST LITIGATION)
)
RP HEALTHCARE, INC.; CHIMES PHARMACY,)
INC.; JAMES CLAYWORTH, R.Ph., d/b/a)
Clayworth Pharmacy; MARIN APOTHECARIES,)
INC., d/b/a Ross Valley Pharmacy; GOLDEN)
GATE PHARMACY SERVICES, INC., d/b/a)
Golden Gate Pharmacy; PEDIATRIC CARE)
PHARMACY, INC.; MEYERS PHARMACY, INC.;)
TONY MAVRANTONIS R. PH., d/b/a Jack's)
Drugs; TILLEY APOTHECARIES INC,)
d/b/a Zweber's Apothecary,)
Appellants)

(D. N.J. No. 12-cv-02389, MDL 2332,
D. N.J. No. 12-cv-05129)

Present: SMITH, *Chief Judge*, AMBRO, CHAGARES,
JORDAN, HARDIMAN, VANASKIE, SHWARTZ,
KRAUSE, RESTREPO, BIBAS, and FISHER¹,
Circuit Judges.

¹ Judge Fisher's vote is limited to panel rehearing only.

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SUR PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT:

s/ D. Michael Fisher
Circuit Judge

Dated: January 30, 2018
tmk/cc: all counsel of record