

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - x

FEDERAL TRADE COMMISSION, :

Petitioner : No. 12-416

v. :

ACTAVIS, INC., ET AL. :

- - - - - x

Washington, D.C.

Monday, March 25, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

MALCOLM L. STEWART, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of Petitioner.

JEFFREY I. WEINBERGER, ESQ., Los Angeles, California; on behalf of Respondents.

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	MALCOLM L. STEWART, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	JEFFREY I. WEINBERGER, ESQ.	
7	On behalf of the Respondents	24
8	REBUTTAL ARGUMENT OF	
9	MALCOLM L. STEWART, ESQ.	
10	On behalf of the Petitioner	51
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case 12-416, the Federal Trade Commission v. Actavis.

Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART

ON BEHALF OF THE PETITIONER

MR. STEWART: Mr. Chief Justice, and may it please the Court:

As a general matter, a payment from one business to another in exchange for the recipient's agreement not to compete is an paradigmatic antitrust trust violation. The question presented here is whether such a payment should be treated as lawful when it is encompassed within the settlement of a patent infringement suit. The answer to that question is no.

Reverse payments to settle Hatch-Waxman suits are objectionable for the same reasons that payments not to compete are generally objectionable. They subvert the competitive process by giving generic manufacturers an incentive to accept a share of their rival's monopoly profits as a substitute for actual competition in the --

JUSTICE SCALIA: Why -- why are payments not

1 to compete different from, let's say, dividing a market?
2 I mean, suppose there's a lawsuit, somebody challenging
3 the validity of the patent, and the patentee agrees to
4 allow the person challenging the patent to have
5 exclusive -- exclusive rights to sell in a particular
6 area.

7 Does that violate the antitrust laws?

8 MR. STEWART: I mean, there are really two
9 differences between that -- that scenario and the one
10 presented here. The first is that an exclusive license
11 is expressly authorized by the Patent Act, in Section
12 261 of Title 35, but -- but the second thing is --

13 JUSTICE SCALIA: That -- that doesn't
14 impress me. What else? What's your second point?

15 (Laughter.)

16 MR. STEWART: The second thing is that an
17 exclusive license doesn't give the -- the infringement
18 defendant anything that it couldn't hope to achieve by
19 prevailing in the lawsuit. That is, if the -- at least
20 any right to compete that it wouldn't get by prevailing
21 in the lawsuit.

22 If the infringement defendant won, it would
23 be able to sell wherever it wanted to.

24 Now, there may be some --

25 JUSTICE SCALIA: In order to make money. I

1 mean, that's -- that's what it wants is money.

2 MR. STEWART: But the point of --

3 JUSTICE SCALIA: So instead of giving them a
4 license to compete -- you know, we'll short-circuit the
5 whole thing, here's the money. Go away.

6 MR. STEWART: But the point here is that the
7 money is being given as a substitute for earning profits
8 in a competitive marketplace. That is, in -- in the
9 Hatch-Waxman settlement context, by definition, we have
10 a disagreement by parties as to the relative merits of
11 the infringement and -- and/or invalidity questions as
12 to the patent infringement suit.

13 The brand name is saying its patent is valid
14 and infringed. The generic is saying either that the
15 patent is invalid or that its own conduct won't be
16 infringing or both. And if the generic wins, it will be
17 able to enter the market immediately. If the brand name
18 wins, it will be able to keep the generic off until the
19 patent expires.

20 And so in that circumstance, a logical
21 subject of compromise would be to agree upon an entry
22 date in between those two end points, just as the
23 parties to a damages action would be expected to settle
24 the case by the defendant agreeing to pay a portion of
25 the money it would have to pay if it lost. That's an

1 actual subject of compromise and we don't have a problem
2 with that.

3 JUSTICE SCALIA: Mr. Stewart, do you have a
4 case in which the patentee acting within the scope of
5 the patent has nonetheless been held liable under the
6 antitrust laws --

7 MR. STEWART: Yes.

8 JUSTICE SCALIA: -- for something that it's
9 done acting within the scope of the patent?

10 MR. STEWART: Yes, if you adopt Respondent's
11 conception of what it means to act within the scope of
12 the patent. And let me explain. When the Respondents
13 say that the restrictions at issue here are within the
14 scope of the patent, what they mean is that the goods
15 that are being restricted are arguably encompassed by
16 the patent and the restriction doesn't extend past the
17 date when the patent expires.

18 That's all they mean. And if that were the
19 exclusive test, the defendants in *Masonite*, in *New*
20 *Wrinkle Inline Material*, they would all have been off
21 the hook, because all of those cases involved
22 restrictions on trade in patented goods during the
23 period that the patent was in effect, and yet, the Court
24 found antitrust liability in each of these.

25 Now, the way that Respondent tries to

1 explain Masonite, for example, Masonite involved a
2 resale price maintenance agreement in which the
3 patentholder sold goods and then attempted to control
4 the price at which they would be resold, and the Court
5 said that under the rule of patent exhaustion, the
6 patentholder didn't have the right to do that and
7 therefore the patent laws provided no shield and the
8 agreement was held to be a violation of the antitrust
9 laws.

10 Now, Respondents say, well, that's
11 consistent with their theory because the restriction
12 imposed went beyond the scope of the patent because the
13 right to control resale is not one of the rights that
14 the Patent Act confers. But if that's the test for
15 whether a restriction is within the scope of the patent,
16 then we would say that it's not met here, because
17 there's nothing in the Patent Act that says you can pay
18 your competitor not to engage in conduct that you
19 believe to be infringing.

20 And really that's the thrust of their
21 position, that if you have -- if a patentholder has a
22 non-sham allegation that a particular mode of
23 competition would be an infringement of its patent, the
24 patentholder can pay the competitor not to engage in
25 that competition.

1 Again, we are not talking about conduct in
2 which there has been any judicial determination that
3 infringement has occurred. We are just talking about
4 cases in which the patentholder has a non-sham
5 allegation that infringement would occur.

6 JUSTICE GINSBURG: Mr. Stewart, does this
7 represent a change in the government's position? I got
8 the idea from the briefs that at the time of this
9 Schering-Plough case, that was also before the Eleventh
10 Circuit, that the government was not taking that
11 position it's now taking.

12 MR. STEWART: Well, the FTC has consistently
13 taken this position. The Department of Justice, up
14 until 2009, we didn't endorse the scope of the patent
15 test. Indeed, in our invitation brief in Joblove we
16 specifically said that the scope-of-the-patent test
17 was -- didn't provide for enough scrutiny of these
18 settlements.

19 But what we advocated, what the Department
20 of Justice advocated, instead was a test that would
21 focus on the strength and scope of the patent. That is,
22 the likelihood that the brand name would ultimately have
23 prevailed if the suit had been litigated to judgment.
24 And in 2009 for the first time in an amicus brief filed
25 in the Second Circuit, we took essentially the position

1 that we're taking here, that is that agreements of this
2 sort should be treated as presumptively unlawful with
3 the presumption able to be rebutted in various ways.

4 JUSTICE KENNEDY: And one way is to assess
5 the validity or the strength of the infringement case?

6 MR. STEWART: We would say that that's not a
7 way, that --

8 JUSTICE KENNEDY: That's my concern, is your
9 test is the same for a very weak patent as a very strong
10 patent. That doesn't make a lot of sense.

11 MR. STEWART: Well, the test is whether
12 there has been a payment that would tend to skew the
13 parties' choice of an entry date, that would tend to
14 provide an incentive for the parties to -- for the
15 generic to agree to an entry date later than the one
16 that it would otherwise insist on. Now, it probably is
17 the case that our test would have greater practical
18 import in cases where the parties perceive the patent to
19 be --

20 JUSTICE KENNEDY: Why wouldn't that
21 determination itself reflect the strength or weakness of
22 the patent so that the market forces take that into
23 account?

24 MR. STEWART: Well, I think in the kind of
25 settlement that we would regard as legitimate, where the

1 parties simply agree to a compromise date of generic
2 entry, then the parties would certainly take into
3 account their own assessment of what would likely happen
4 at the end of the suit. And so if the parties believe
5 that the brand name was likely to prevail, then if the
6 brand name agreed to early generic entry at all, it
7 would presumably be for a fairly small amount of time.

8 Conversely, if the parties collectively
9 believe that the generic -- that the brand name had a
10 weak case and the generic was likely to prevail, then
11 they would negotiate for an earlier date. And the
12 problem with the reverse payment is that it gives the
13 generic an incentive to accept something other than
14 competition as a means of earning money. I mean, to
15 take another --

16 JUSTICE SCALIA: This -- this was not a
17 problem, I gather, until the Hatch-Waxman amendments?

18 MR. STEWART: These suits -- these types of
19 payments appear to be essentially unknown in other
20 lawsuits and other patent infringement cases.

21 JUSTICE SCALIA: Yes, and so -- and so do
22 suits against this kind of payment. And I have -- I
23 have the feeling that what happened is that Hatch-Waxman
24 made a mistake. It did not foresee that it would
25 produce this kind of -- this kind of payment. And in

1 order to rectify the mistake the FTC comes in and brings
2 in a new interpretation of antitrust law that did not
3 exist before, just to make up for the mistake that
4 Hatch-Waxman made, even though Congress has tried to
5 cover its tracks in later amendments, right, which --
6 which deter these, these -- these payments?

7 MR. STEWART: Congress has tried to reduce
8 the incentives for these payments to be made.

9 JUSTICE SCALIA: So, why should we overturn
10 understood antitrust laws just to -- just to patch up a
11 mistake that Hatch-Waxman made?

12 MR. STEWART: Well, a couple things I would
13 say. First, I don't think we're -- we're not asking you
14 to overturn established antitrust laws. To take along
15 analogy, for example, if Watson instead of developing a
16 generic equivalent to AndroGel, had developed an
17 entirely new drug that it believed would be better than
18 AndroGel for the same conditions and if Solvay had paid
19 Watson not to seek FDA approval and not to seek to
20 market the drug, I think everyone would agree that that
21 was a per se antitrust violation, even though Watson's
22 ultimate ability to market the new drug would depend on
23 FDA approval that might or might not be granted.

24 And so when we say it's unlawful to buy off
25 uncertain competition, it's unlawful to buy out

1 competition even when the competition might have been
2 prevented by other means, we are just enforcing standard
3 antitrust principles. To focus on the distinction
4 between Hatch-Waxman and other patent litigation,
5 Professor Hovenkamp's conclusion is that the reason that
6 you don't see payments like this in the normal patent
7 infringement suit is that in the typical market if a
8 patentholder were known to have paid a large sum of
9 money to a competitor who had been making a challenge to
10 the patent, if other competitors knew that that had
11 happened, then they would perceive that to be a sign
12 that the patent was weak and that they would leap in.

13 But he says Hatch-Waxman makes it more
14 difficult for that to be done, because Hatch-Waxman
15 gives unique incentives to the first paragraph 4 filer.

16 JUSTICE KENNEDY: Is that the 18 -- the
17 18-month rule primarily?

18 MR. STEWART: It's a 180-day period of
19 exclusivity.

20 JUSTICE KENNEDY: Right. I mean 180 days,
21 yes.

22 MR. STEWART: Yes, and the way it works is
23 that the exclusivity period is not good in and of itself
24 for consumers. That is, during the period when one
25 generic is on the market and the others are not yet

1 allowed to compete, you have essentially duopoly
2 conditions, the price of the drug drops but only by a
3 little bit. Congress granted the 180-day exclusivity
4 period because it wanted generics to have ample
5 incentives to challenge patents that were perceived to
6 be weak.

7 And if the first filer is able essentially
8 to be bought off, is able to set settle for something
9 other than early entry into the marketplace, then other
10 potential competitors face barriers to entry that
11 they -- similarly situated competitors wouldn't face in
12 other industries.

13 JUSTICE BREYER: Well, that doesn't mean
14 that -- that's rather thin. I don't know how -- I don't
15 have the ability to assess that, the significance of it,
16 empirically. The thing I wonder, therefore, you said
17 it's common in antitrust? I'm -- I'm not up to
18 everything in the field, but I know there's an existence
19 of something called the per se rule, let's price fix it.

20 I know there's a rule of reason, and I know
21 there's a sort of vague area that sometimes in some
22 cases that Justice Souter mentioned in California
23 Dental, there is something slightly in between, which as
24 I saw those cases, they're very much like price fixing
25 or -- or agreements not to enter. And what they seem to

1 say is, Judge, pay attention to the department when it
2 says that these are very often can be anticompetitive,
3 and ask the defendant why he's doing it.

4 I mean, is that what you want us to say? It
5 didn't seem in your briefs as if you were. If you were
6 asking us to produce some kind of structure -- I don't
7 mean to be pejorative, but it's rigid -- a whole set of
8 complex per se burden of proof rules that I have never
9 seen in other antitrust cases, I -- my question is, when
10 I say I've never seen anything like this before in terms
11 of procedure, I want you to refer me to a case that will
12 show, oh, no, I'm out of date.

13 MR. STEWART: Well, the -- the Court has
14 recognized such a thing as the quick look approach, but
15 I think even though the case didn't use the term "quick
16 look," I don't believe it did, NCAA v. Regents of
17 University of Oklahoma is probably the best example,
18 where the --

19 JUSTICE BREYER: And are there others?

20 MR. STEWART: Well, that's the -- that's the
21 one I'm most familiar with.

22 JUSTICE BREYER: Is there any other? Are
23 you familiar with any other? Because I want to be sure
24 I read all of them.

25 MR. STEWART: I'll need to look back and see

1 what --

2 JUSTICE BREYER: Well, if there are few or
3 none, then I would say why isn't the government
4 satisfied with an opinion of this Court that says, yes,
5 there can be serious anticompetitive effects; yes,
6 sometimes there are business justifications; so, Judge,
7 keep that in mind. Ask him why he has this agreement;
8 ask him what his justification is, and see if there's a
9 less restrictive alternative.

10 In other words, it's up to the district
11 court, as in many complex cases, to structure their case
12 with advice from the attorneys.

13 MR. STEWART: I think that would leave
14 courts without guidance as to --

15 JUSTICE BREYER: It's got guidance.

16 MR. STEWART: -- without guidance as to what
17 factors would be appropriate --

18 JUSTICE BREYER: The same thing is
19 appropriate as is appropriate in any antitrust case.
20 Are there anticompetitive effects? I have 32 briefs
21 here that explain very clearly what you said in a
22 sentence. It may be that they're simply dividing the
23 monopoly profit. I understand that -- you know, I can
24 take that in and so can every judge in the country. And
25 what's complicated about that?

1 And then I have some very nice dark green
2 briefs that clearly say, four instances, maybe five,
3 where there would be offsetting justifications. I think
4 they can get that, too.

5 MR. STEWART: Well, certainly our proposed
6 approach accounts for that. It provides -- it provides
7 really two different forms of rebuttal. First our
8 approach says, this is on its face an agreement not to
9 compete, the generic has agreed to stay out of the
10 market for a defined period of time, and the payment
11 gives rise to an inference that the agree -- that the
12 delay that the generic has agreed to is longer than the
13 period that would otherwise reflect its best assessment
14 of its likelihood of -- of success in the lawsuit.

15 But then we say, there are basically two
16 different types of ways in which the presumption could
17 be rebutted. First, the parties can show that the
18 payment was not in consideration for delay, that there
19 was some other commensurate value transferred, and the
20 payment -- and that arrangement would have been entered
21 into even without the larger settlement.

22 And then second, we're at least accepting
23 the possibility that brand names and generics could come
24 in and say, even though our payment was for delay, even
25 though we can't identify anything else that the payment

1 could have been consideration for, it's still, quote,
2 "competitive" under --

3 JUSTICE BREYER: And they mention at least
4 two others. The first one they mention is because the
5 person's already in the market thinks that the next year
6 or two or three years is worth \$100 million a year, and
7 the person who's suing thinks it's worth 30 million a
8 year. And so he says, hey, I have a great idea, I'll
9 give him the 30 million and keep the 70. And -- and
10 that, I don't see why that's anticompetitive if that's
11 what's going on.

12 And the second instance they bring up is
13 that it's very hard to break into a market. So for the
14 new generic to come in, he's thinking, giving me two
15 years isn't worth much, because I'll spend a lot of
16 money, it's very hard for me to do it. But the
17 defendant -- the defendant who wants this patent kept
18 intact says, I will not only let -- I'll let you in a
19 year earlier and I'll give you enough money so that you
20 can start up a distribution system. The second seems
21 procompetitive; the first, neutral.

22 The problem of deciding whether other
23 matters are or are not really payments for something
24 else, a true nightmare when you start talking about five
25 drugs and different distribution systems, and the matter

1 of whether you're paying for litigation costs, a matter
2 of great debate for the judge. Okay. That's the
3 arguments that they make. Go ahead.

4 MR. STEWART: Let me say a couple of things
5 about the administrative nightmare. The first is that
6 to the extent that these inquiries are difficult,
7 they're difficult only by -- because the brand names and
8 the generics have made them difficult by tacking on
9 additional transactions to their settlement proposal.

10 And to take an analogy, there are government
11 ethics rules that say that -- what are called prohibited
12 sources. Basically, people who have business before the
13 department can't give me gifts as a government employee.
14 Now, obviously, it would be absurd to have a rule that
15 said a prohibited source couldn't give me a Rolex watch,
16 but could sell me a Rolex watch for a dollar. And so
17 the ethics rules treat as a gift an exchange for value
18 in which fair market value is not paid.

19 And everybody understands that once you go
20 down that route, occasionally, you will have hard cases
21 in which people could legitimately agree, was this a
22 legitimate arm's length exchange or was it a concealed
23 gift? But the prospect of those difficult cases doesn't
24 mean that we get rid of a gift ban altogether. And
25 certainly, Federal employees couldn't bring the -- the

1 ethics office to its knees by engaging in such a
2 proliferation of these side deals that the ethics office
3 decided it's not worth it.

4 The second thing is that Respondent's
5 approach would apply even when there are no hard
6 questions. Respondents would say that even if the
7 agreement provides for delayed generic entry until the
8 date the patent expires, and even if the only other term
9 of the agreement is the brand name pays the generic a
10 lot of money, that that would be a legitimate agreement,
11 because the restriction would apply to arguably patented
12 drugs and it wouldn't extend beyond the date of patent
13 expiration.

14 I guess the -- the other thing I would say
15 about the way in which these payments can facilitate
16 settlement really shows their anticompetitive potential.
17 That is, suppose the parties were negotiating for a
18 compromise date of entry, but they couldn't agree;
19 the -- the brand name said beginning of 2017 is the
20 earliest we'll let you in and the generic said beginning
21 of 2015 is the latest date that we would accept.

22 Now, the Respondents use the term "bridge
23 the gap," but there's obviously no way that a payment
24 from the brand name to the generic could enable the
25 parties to agree on an entry date between 2015 and 2017.

1 The brand name is never going to say, well, I would
2 insist on holding out until 2017, but if I'm going to
3 pay you a whole lot of money, then I'll let you earlier
4 and accept a -- a diminution of your profits. The brand
5 name is going to say, if I pay you money, I'm going to
6 insist on deferring entry even later than the 2017 date
7 that would otherwise be my preferred compromise.

8 So the natural effect of these payments is
9 not to facilitate a -- a bridging the gap in the sense
10 of a picking of a point between the dates that the
11 parties would otherwise insist on. It is going -- it is
12 very likely to cause the parties to agree to an entry
13 date that's even later than the one the brand name would
14 otherwise find acceptable.

15 JUSTICE SOTOMAYOR: Mr. Stewart, can we go
16 back to Justice Breyer's question, initial question.
17 It's rare that we find a per se antitrust violation.
18 Most situations we put it into rule of reason.

19 You seem to be arguing that this is price
20 fixing, a reverse payment like price fixing so that it
21 has to fall into something greater than the rule of
22 reason.

23 MR. STEWART: Not -- not price fixing, but
24 it's -- it's an agreement not to compete. That is, the
25 parties are not agreeing as to the prices they will

1 charge. The generic is agreeing to stay off the market
2 first. But that would be treated as per se --

3 JUSTICE SOTOMAYOR: But why is the rule of
4 reason so bad? As an -- and that's really my bottom
5 line, because you're creating all -- I think that's what
6 Justice Breyer was saying. I mean, for -- for example,
7 I have difficulty understanding why the mere existence
8 of a reverse payment is presumptively gives -- changes
9 the burden from the Plaintiff.

10 It would seem to me that you have to bear
11 the burden -- the burden of proving that the payment for
12 services or the value given was too high. I don't know
13 why it has to shift to the other side.

14 MR. STEWART: Now, if you wanted to tweak
15 the theory in that way and to say that in cases where
16 there is not just a payment and an agreement on the date
17 of market entry, but there is additional consideration
18 exchanged beside, if you wanted to say that the
19 Plaintiff would bear the burden of showing that this was
20 not a fair exchange for value, that -- that's not
21 something we would agree with, but that would be a
22 fairly minor tweak to our theory.

23 JUSTICE SOTOMAYOR: So answer the more
24 fundamental question: Why is the rule of reason so bad?

25 MR. STEWART: The rule -- I mean, it's bad

1 for reasons both of administrability and it's bad
2 conceptually. The reason it's bad for reasons of
3 administrability is that -- at least I take what you are
4 proposing to be that the antitrust court would consider
5 all the factors that might bear on the assessment of the
6 agreement, that those would include presumably a
7 strength of the patent claim, the subjective --

8 JUSTICE BREYER: No. No. I mean, Professor
9 Areeda, who is at least in my mind a minor deity in the
10 matter, in this area, if not major, he explains it. He
11 says don't try for more precision than you can give.
12 The quality of proof required should vary with the
13 circumstances.

14 Do you know how long it took -- I mean, and
15 I -- of course, I -- I know a little bit of antitrust.
16 But I mean, I think -- do you know how long it takes to
17 take in your basic argument that these sometimes can be
18 a division of profit, monopoly profit? It takes
19 probably 3 minutes or less. And judges can do that.

20 So you say to the judge: Judge, this is
21 what's relevant here. And there's a rule of evidence:
22 Don't waste the jury's time.

23 So -- so you shape the case as -- and this
24 is what goes -- used to go on for 40 years. You shape
25 the case in light of the considerations that are

1 actually relevant, useful and provable in respect to
2 that case. And district judges, that's their job.
3 So -- so what -- I'm not saying you'd lose the case.
4 They didn't side with the Eleventh Circuit. They said
5 there's no violation, okay?

6 I've got your point on that. But -- but I'm
7 worried about creating some kind of administrative
8 monster.

9 MR. STEWART: It's not atypical -- I mean --
10 and the Court did this in NCAA, for example, where it
11 said that the agreement it was looking at, which dealt
12 with the allocation of -- of -- allocation of rights to
13 televised football games -- was essentially a limitation
14 on output, and the Court said those are presumptively
15 unlawful. Long experience in the market has shown that
16 they are suspect.

17 The Court didn't say there was long
18 experience in the market for television rights to
19 football. It just said output limitations have been
20 established as disfavored.

21 Nevertheless, because competitive sports by
22 nature require a degree of cooperation between the
23 people who compete against each other -- to establish
24 the rules of the game and so forth -- we will look to
25 see whether the parties have identified -- whether the

1 defendants have identified anything about their specific
2 industry that would justify our decision not to apply
3 the usual presumption, and it concluded that there was
4 nothing there.

5 And we're really asking the Court to take
6 the same approach here. We're saying payments not to
7 compete are generally disfavored. The parties can --
8 when you have a Hatch-Waxman settlement in which money
9 is passing from the brand name to the generic, it's an
10 unusual settlement to begin with, because there's no way
11 that the suit could have culminated in the generic
12 receiving a money judgment.

13 And therefore, we'll -- we'll look upon this
14 with suspicion, but we'll give the parties adequate
15 opportunities to -- to rebut.

16 If I may, I'd like to reserve the balance of
17 my time.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 Mr. Stewart.

20 Mr. Weinberger?

21 ORAL ARGUMENT OF JEFFREY I. WEINBERGER

22 ON BEHALF OF THE RESPONDENTS

23 MR. WEINBERGER: Mr. Chief Justice, and may
24 it please the Court:

25 I'd like to first respond to a question that

1 was asked of my friend by Justice Scalia a few minutes
2 ago. He was asked if there were any cases in which the
3 Court has ever found a restraint outside the scope of
4 the patent to be unlawful, and the answer to that
5 question is no, that -- all of the cases that have found
6 violations of the antitrust laws based on a patent-based
7 restraint do so because the object of the agreement, the
8 restraint that's being achieved in the agreement, is
9 beyond the scope that could be legitimately achieved
10 with a patent.

11 For example, it's an attempt to control
12 downstream the resale prices of -- of products that you
13 cannot do simply by exercising your patent. Or it's an
14 attempt to control the sale of unpatented products that
15 go beyond what a patent can protect.

16 Every -- every case in which --

17 JUSTICE SOTOMAYOR: Why isn't this then?

18 Meaning there is no presumption of infringement.

19 There's no presumption that the item that someone else
20 is going to sell necessarily infringes.

21 MR. WEINBERGER: That's correct.

22 JUSTICE SOTOMAYOR: So what you're arguing
23 is that in fact a settlement of an infringement action
24 is now creating that presumption.

25 MR. WEINBERGER: No, Justice Sotomayor, I'm

1 not arguing that. But -- but I do want to say that I
2 think our patent system depends upon the notion that you
3 don't evaluate from the perspective of the antitrust
4 laws a patent restraint based upon whether you could
5 have proved in a litigation that that patent -- that the
6 patent was infringed.

7 JUSTICE SOTOMAYOR: I don't know, but I
8 don't know why we would be required to accept that there
9 has or would be infringement by the product that has
10 voluntarily decided not to pursue its rights.

11 MR. WEINBERGER: I think you're not --
12 you're not accepting infringement. What you're doing is
13 recognizing there's a reasonable basis to assert the
14 patent, a bona fide reasonable dispute, and the parties
15 have the ability to settle the dispute. Just as if the
16 party -- if someone was entering into a license
17 agreement with -- with someone who had a product that
18 they claimed did not infringe the patent, they sat down,
19 negotiated a license and resolved it --

20 JUSTICE SOTOMAYOR: But there, you'd know
21 that they're not sharing the profits.

22 MR. WEINBERGER: Yes.

23 JUSTICE SOTOMAYOR: Meaning there you know
24 that a -- a product's been licensed and the -- that's
25 normal. The infringer is now paying the other side

1 money to sell that product.

2 MR. WEINBERGER: But Justice Sotomayor, many
3 other --

4 JUSTICE SOTOMAYOR: A reverse payment
5 suggests something different, that they're sharing
6 profits.

7 I don't know what else you can conclude.

8 MR. WEINBERGER: Many license -- I don't
9 think that's correct, and that's because many license
10 disputes are in fact resolved by the -- the alleged
11 infringer exiting the market for a period of time, or
12 agreeing to stay off until a certain time. And then the
13 license --

14 JUSTICE SOTOMAYOR: But not many for reverse
15 payments.

16 MR. WEINBERGER: Yes, they are, because --
17 because, for example, it could be a license agreement
18 where the infringer agrees to stay off the market for X
19 number of years, and when it comes on it pays a certain
20 royalty. Now, anybody could argue that that royalty, if
21 it were higher, could result in an earlier entry.
22 There's always an argument to be made with any delayed
23 entry situation that monopoly profits are shared.
24 That's just -- just inherent in the nature of it.

25 And if you take the FTC's argument to its

1 full force, it would mean that any situation where
2 anyone is agreeing to a delayed entry, and there's any
3 other value that's being exchanged in that situation,
4 that in effect in economic terms is a payment for
5 delayed entry. There's no difference.

6 JUSTICE BREYER: Yes. But there, it's
7 not -- their point is not it's per se unlawful. What
8 they want is they want to cut some kind of line between
9 a per se rule and the kitchen sink. And if you look at
10 the brief supporting you, it is the kitchen sink. You
11 have economists attacking the patent system or praising
12 it, da, da, da, and here and there and the other. They
13 don't want the kitchen sink.

14 Now, suppose I don't want the kitchen sink,
15 but I have a hard time saying what the per se rule is.
16 So what's your argument?

17 MR. WEINBERGER: I -- I've obviously given a
18 lot of thought to whether there is any kind of an
19 intermediary test that works, and I don't believe there
20 is. Let me explain why.

21 First, you can't really measure whether
22 there were any anticompetitive effects from such a
23 settlement agreement without determining what would have
24 happened if the case hadn't settled and it would have
25 been litigated. And if the patentee had won the

1 litigation, then there would be no anticompetitive
2 effects.

3 That's what the Second Circuit and the
4 Federal Circuit concluded in applying the rule of reason
5 test, and saying the first condition of such a test has
6 not been met, because there's no demonstration of
7 anticompetitive effects.

8 And the cases -- both of those cases are
9 very good illustrations of what I'm talking about.
10 Those were the Tamoxifen and Cipro cases, where the
11 parties agreed to so-called reverse payment settlements
12 that FTC would say are basically per se lawful.

13 JUSTICE KENNEDY: Would it -- would it help
14 if you were -- were thinking about rules and caps, to
15 consider not what the branding company would have --
16 would have made, but what the generic company would have
17 lost, and -- and use the latter as the limit?

18 MR. WEINBERGER: Well, you really don't know
19 unless you can assume when they could have entered --

20 JUSTICE KENNEDY: Well, you -- you have to
21 make an extrapolation, yes.

22 MR. WEINBERGER: Well, because it all
23 depends on what would have happened in the patent
24 litigation. So that you can't really tell whether
25 there's any anticompetitive effect.

1 I should also say with respect to the
2 generic losing, there's really no risk to the generic
3 here, which is one of the reasons you see these
4 settlements, that in this industry --

5 JUSTICE KENNEDY: Well, if the generic wins,
6 though, its -- everybody's profits are lower. And you
7 can gear it to just what the -- what the generic would
8 have made.

9 MR. WEINBERGER: They're -- they're lower
10 than they would be under some other situation, but --
11 but the patent gave the patentholder the legal right to
12 exclude. So unless there's a reason, there's some
13 reason to believe that it couldn't reasonably assert
14 that patent, it's entitled to monopoly profits for the
15 whole duration of the patent.

16 JUSTICE KAGAN: Mr. Weinberger, can I just
17 understand what you're saying, and maybe do it through a
18 hypothetical.

19 MR. WEINBERGER: Certainly.

20 JUSTICE KAGAN: Suppose you had a -- a
21 lawsuit and the generic sends the brand name
22 manufacturer an e-mail and the e-mail says, we have this
23 lawsuit, I think I have about a 50 percent chance of
24 winning.

25 If I win, I take your -- your monopoly

1 profits down from 100 million to \$10 million. Wouldn't
2 it be a good thing if you just gave me 25 million? All
3 right? And then the brand name sends an e-mail back,
4 says -- you know, that seems like a pretty good idea, so
5 I'll give you 25 million.

6 Now, as I understand it, your argument is, I
7 mean, that's just fine. That's hunky dory.

8 MR. WEINBERGER: Well, what I'm saying is
9 that in -- in any given situation --

10 JUSTICE KAGAN: Is that fine?

11 MR. WEINBERGER: I -- I think that if the --
12 if it's a single situation and the evidence is that
13 there's a reasonable basis to assert that patent and in
14 truth, the patent has, which you say, has a 50/50 chance
15 of prevailing, then I think that there could be a
16 settlement like that, if it's in good faith.

17 JUSTICE KAGAN: Even though -- but what if
18 it isn't in good faith? It's clear what's going on here
19 is that they're splitting monopoly profits and the
20 person who's going to be injured are all the consumers
21 out there.

22 MR. WEINBERGER: Any -- any situation in
23 which there's any -- in any patent dispute in which
24 there's a tradeoff, like the examples I mentioned
25 before, time for value, could -- that argument could be

1 made. And, in fact, if that was true, if it was true
2 that the natural inference and the motivations of the
3 people were simply to divide these profits with no other
4 consideration, then what you'd expect to see is that
5 every single patent dispute, especially in Hatch-Waxman
6 would result in a settlement that just pays the generic
7 until the end of the patent, because after all, the
8 market would be --

9 JUSTICE KAGAN: Well, Mr. Weinberger, I
10 think if we give you the rule that you're suggesting we
11 give you, that is going to be the outcome, because this
12 is going to be the incentive of both the generic and the
13 brand name manufacturer in every single case is to split
14 monopoly profits in this way to the detriment of all
15 consumers.

16 MR. WEINBERGER: Let me address that, Your
17 Honor. I don't think that's realistic at all,
18 because -- and let's take this industry specifically.
19 That the ability to challenge a patent in this industry
20 is lower than any industry that I can think of, and
21 that's because a generic is given the right to certify
22 against the patent and then basically challenge the
23 patent without having actually developed the product,
24 gotten a marketing force, gotten a factory, putting the
25 product on sale and taking the risk that everyone else

1 who challenges a patent has to take. All they have to
2 do is -- is file an NDA, which is roughly 300,000 to
3 \$1 million for these size drugs, that's not a lot, and
4 certify it.

5 And the FTC's own studies have shown that it
6 takes a very small chance of winning, something like
7 4 percent for a drug over \$130 billion to justify a
8 generic suing a brand name company. And what -- so what
9 happens in these cases --

10 JUSTICE SOTOMAYOR: Is that in all cases or
11 just Hatch-Waxman cases?

12 MR. WEINBERGER: It's Hatch-Waxman cases.
13 It's because of --

14 JUSTICE SOTOMAYOR: Because it does skew the
15 dynamics a lot.

16 MR. WEINBERGER: Yes.

17 JUSTICE SOTOMAYOR: You know, the Second
18 Circuit recognized, even though it accepted your scope
19 of the patent, that there was a troubling dynamic in
20 what you're arguing, which is that the less sound the
21 patent, the more you're going to hurt consumers, because
22 those are the cases where the payoff, the sharing of
23 profits is the greatest inducement for the patentholder.

24 MR. WEINBERGER: The Second Circuit
25 recognized that, but then they said further -- upon

1 further reflection, further consideration of this, we
2 are not troubled by it. One of the reasons they were
3 not troubled, it's what I was trying to answer Justice
4 Kagan about, is because the reality of the situation is
5 with so many potential challengers to the patent, all
6 they have to do is file an NDA, there are 200 generic
7 companies in this industry, that if you try to adopt
8 that strategy of paying the profits of a generic,
9 there's going to be a long line of --

10 JUSTICE BREYER: Okay. Suppose --

11 JUSTICE KAGAN: Well, I don't think that
12 that's true, Mr. Weinberger, and it's because of
13 something that Justice Scalia suggested, that there's a
14 kind of glitch in Hatch-Waxman, and the glitch is that
15 the 180 days goes to the first filer. And once the
16 180-day first filer is bought off, nobody else has the
17 incentive to do this.

18 MR. WEINBERGER: That's clearly not correct
19 either by logic or by reference to actual experience.
20 It's true that the first filer is given a greater
21 incentive, but these products can last for 20 or
22 25 years.

23 JUSTICE KAGAN: But the -- the huge
24 percentage of the profits is done in the exclusivity
25 period. I mean, it's true that it can go on for a long

1 time, but you're making dribs and drabs of money for a
2 long time. Where you're really making your money is in
3 the 180 days.

4 MR. WEINBERGER: Experience doesn't show
5 that, because if you look at Hatch-Waxman litigation,
6 we've cited in -- in the red brief and it's been
7 discussed by the antitrust economists and the Generic
8 Pharmaceutical Association in their amicus brief, that
9 many of these Hatch-Waxman cases involve multiple
10 filers.

11 You have five, 10, as many as 16 companies
12 challenging these patents, all of -- one of whom are not
13 the first filer. So there -- there must be an incentive
14 for them to do this, and -- and they are. So I think
15 experience says that that kind of extreme view of
16 incentives is not really true.

17 JUSTICE KENNEDY: What -- what do we look at
18 to verify what you say? Is that -- is that all in the
19 briefs?

20 MR. WEINBERGER: Yes, it's in the -- in the
21 Solvay brief and other briefs.

22 JUSTICE KENNEDY: Because I had thought, as
23 Justice Kagan's question might indicate, that the
24 180 days is crucial, it allows you to go to the doctors,
25 to give them the name of your generic equivalent, et

1 cetera, and that that's a big advantage.

2 MR. WEINBERGER: It's a big advantage --

3 JUSTICE KENNEDY: And now, you're -- now,
4 you're indicating that it isn't.

5 MR. WEINBERGER: It's a big advantage. It's
6 an incentive for the first six months, I don't debate
7 that, but after that, the market opens up.

8 JUSTICE BREYER: Okay. Suppose -- this
9 sounds like an argument, a discussion that you have in
10 the district court, so -- so why -- what's your reaction
11 to this: Say A, sometimes these settlements can be very
12 anticompetitive, dividing monopoly profit. In deciding
13 whether anticompetitive outweighs business practices
14 without less restrictive alternatives, judge, you may
15 take that into account; 2, do not take into account the
16 strength of a patent; 3, do not try to relitigate the
17 patent.

18 4, there are several possible
19 justifications, ones I listed before out of the briefs,
20 litigation costs -- the other products, different
21 assessments of -- of value. 5, there could be, in fact,
22 no anticompetitive effect here because of what you just
23 said now in response to Justice Kennedy and Justice
24 Kagan, but there could be. We don't know. Okay?

25 So, start with where we were. Could be

1 anticompetitive. Give the defense a chance to go
2 through five, 1 through 5, and if they convince you
3 there is a 6, we're not saying there isn't, but we can't
4 think of one on the briefs, let them have the 6th, too.
5 Okay? Now, judge, weigh and decide. That's what we do.
6 So we've structured it somewhat to keep the kitchen sink
7 out on the basis of the briefs given to us. What's
8 wrong with that?

9 MR. WEINBERGER: Well, I think the first
10 problem with it is that it's -- it's very unpredictable.
11 It's really hard to figure out how that all gets sorted
12 out, and the parties who are sitting down to do a
13 settlement need, I feel, much clearer guidance.

14 JUSTICE SCALIA: You can't -- you can't
15 possibly figure it out, can you, without assessing the
16 strength of the patent?

17 MR. WEINBERGER: That's right.

18 JUSTICE SCALIA: Isn't that crucial to -- to
19 the conclusion?

20 MR. WEINBERGER: I -- I believe that the
21 only thing that brought --

22 JUSTICE SCALIA: And to say you can consider
23 every other factor other than the strength of the patent
24 is -- is to leave -- leave out the -- the elephant in
25 the room.

1 MR. WEINBERGER: I agree with that,
2 Justice Scalia. I don't think that an alternative
3 test -- the only alternative test that could be
4 fashioned that would -- that would make sense is one
5 based on strength of the patent. But there are so many
6 reasons that that is an undesirable result that I -- I
7 don't think it's the way this Court should go.

8 JUSTICE SOTOMAYOR: For whom? And -- and --
9 you know, the government is basically saying, we really
10 don't want reverse payments, period. We want people to
11 settle this the way they should settle it, which is on
12 the strength of the patent. And that means settling it
13 simply by either paying a royalty for use or settling as
14 most cases do, on an early entry alone, so there's no
15 sharing of -- of -- of profits. What's so bad about
16 that? I mean, it doesn't deprive either side of the
17 ability to finish the litigation if they want to.

18 MR. WEINBERGER: Let's say -- I wouldn't
19 concede that most cases settle like that. But let's --
20 let's accept that and take the case of a -- of a strong
21 patent or a patent with a long term. Let's say
22 it has -- you evaluate the strength of the patent and
23 you conclude that it has 10 or 15 good years remaining.

24 Now, you have a generic who is -- or many
25 generics who have sued with no risk or minimal risk in

1 Hatch-Waxman, and their response is, why would I -- why
2 would I drop this lawsuit to get an entry date in 2025
3 or 2028? That doesn't meet my business needs, I have
4 shareholders, I have investors, I have to run a
5 business, and I'm going to keep on litigating unless you
6 give me something of value. So that's what these
7 agreements are about. They're saying, well, what
8 other -- remember, this is not just a cash payment.
9 There are all --

10 JUSTICE SOTOMAYOR: Well, in the normal
11 course, if the patent's really strong, if you get a year
12 or two earlier entry, that has an inherent value, and
13 that's what you'll pay for is what the government is
14 saying. That will be the determination the two parties
15 will make, which is at what point is earlier entry worth
16 it --

17 MR. KATZ: Well, first of all --

18 JUSTICE SOTOMAYOR: -- for the very strong
19 patentholder.

20 MR. WEINBERGER: First of all, parties often
21 don't agree on the merits. Parties tend to be
22 overconfident. They both think they are going to win.
23 So it's sometimes very hard to come to a consensus where
24 entry date is the only bargaining chip available.

25 JUSTICE SOTOMAYOR: Well, they pointed to

1 most settlements and say that is the vast majority.

2 MR. WEINBERGER: I don't know where the
3 evidence would be for that. I don't think --

4 JUSTICE SOTOMAYOR: Well, we do know that
5 these reverse payments, except for recent times when
6 people figured out they were so valuable, were the
7 exception, not the rule.

8 MR. WEINBERGER: Actually, we have ten years
9 of experience since the circuit courts first began
10 applying scope-of-the-patent tests to these settlements
11 since 2003. So we have a pretty good window as to what
12 would happen.

13 JUSTICE SOTOMAYOR: They have been
14 increasing in number, not decreasing.

15 MR. WEINBERGER: No, I think they have been
16 actually very steady. They are roughly between 25 and
17 30 percent, pretty much constant and you don't really
18 see any huge blips depending on what a particular court
19 is ruling.

20 If the FTC's kind of
21 the-sky-is-going-to-fall approach is right, that
22 everybody's going to run out and do this, you would have
23 thought that after the first Eleventh Circuit ruling,
24 after the Federal Circuit ruling, after the Second
25 Circuit ruling, after second Eleventh Circuit ruling,

1 that there would be huge increases in this, but we
2 haven't seen that.

3 Some of the numbers increased last year, but
4 as a percentage of the total settlements they are very
5 steady. They are pretty much the same.

6 JUSTICE GINSBURG: What about the
7 consideration that seems to be driving the government?
8 That is, the generic is getting an offer that they would
9 never get on the street. I mean, they have been paid
10 much more than they would get if they won the patent
11 infringement suit. If they won the patent infringement
12 suit then they can sell their generic in competition
13 with the brand, but under this agreement they get more
14 than they would get by winning the lawsuit.

15 MR. WEINBERGER: Justice Ginsburg, first of
16 all, every settlement agreement involving one of these
17 cases must be filed with the FTC. They have hundreds of
18 them. And they haven't pointed to a single example
19 where that's the case.

20 JUSTICE KAGAN: But it's just an economic --

21 JUSTICE KENNEDY: Well, suppose -- suppose
22 that hypothetical is correct. That's was my concerns,
23 too. What the brand company can lose is much greater
24 than what the generic can make. So why don't you just
25 put a cap on what the generic can make and then we won't

1 have a real concern with the restraint of trade, or
2 we'll have a lesser concern. I think that's the thrust
3 of Justice Ginsburg's question and it's my concern as
4 well.

5 MR. WEINBERGER: Yes, and I want to make
6 clear that I don't think that could happen, because if a
7 brand name company adopted that as a strategy to protect
8 its patent, it would --it would be held up. It would be
9 held up by the many generic companies that could easily
10 challenge these patents without actually having a
11 manufactured product, without putting it on sale,
12 etcetera.

13 So I think that the antitrust rule should
14 not be fashioned to deal with a case on the extreme,
15 which hasn't been shown to happen, which logically from
16 an economic point of view is highly unlikely to happen.
17 And if for some reason that starts happening
18 empirically, then Congress -- and it is a loophole in
19 Hatch-Waxman that is causing that, and there is really
20 no evidence that that extreme example has happened --
21 then Congress can deal with it, just as it dealt with
22 the exclusivity provision.

23 JUSTICE GINSBURG: I thought the government
24 was telling us that that's this case, that the -- what
25 the generic is being offered in the way of sharing the

1 monopoly profits is more than it could ever make if it
2 wanted to and sold its drug.

3 MR. WEINBERGER: Well, I don't see any
4 examples of that cited in their brief. It's a theory,
5 it's a hypothetical theory, but there is no data. We
6 have had years of experience with this case.

7 JUSTICE KENNEDY: Well, but it's not
8 hypothetical that if the generic wins everybody -- the
9 brand companies profits are going to go way, way down
10 right away and generic profits are not going to be that
11 great.

12 MR. WEINBERGER: Of course. I think that's
13 true in many -- many patent litigations.

14 JUSTICE KENNEDY: Well, but so then the
15 question still holds. If you -- if you key your payment
16 to what the brand company will make, it's just a much
17 higher figure, and a greater danger of unreasonable
18 restraint.

19 MR. WEINBERGER: There is that hypothetical
20 risk. What I'm -- I am trying to make the point that
21 it's not -- with the number of challenges you have here,
22 which is basically unlimited, that if you put a sign
23 around your neck that says, paying off all generic
24 companies their profits, whoever wants to challenge my
25 patent come do it, there is going to be a long line of

1 people, of companies, doing it.

2 JUSTICE KENNEDY: Okay, I will grant you
3 that point that the 180 days is not that big a
4 difference, and that there are many generics out there.
5 But isn't that true in every industry? You said at the
6 outset: Oh, well, now in the drug industry there are a
7 lot of people ready to pounce in. Isn't that true in
8 any industry?

9 MR. WEINBERGER: It is true and that's why
10 it doesn't happen. It's -- it's more true here because
11 it's much easier to challenge a patent. So in any other
12 industry a potential challenger has to make a major
13 investment in a product, has to get it manufactured, has
14 to put it on sale, and then litigate. And if they lose,
15 they are going to be liable for enormous damages.

16 That's not the case under Hatch-Waxman. All
17 they need to do is file an ANDA. They have nothing at
18 risk. If they lose, they haven't lost any damages.
19 They just walk away. So there is an enormous difference
20 in the risks between Hatch-Waxman and other cases that
21 explains the particular form of some of these
22 settlements and why they happen.

23 JUSTICE SOTOMAYOR: I see that as an
24 argument that there is an economic reality in
25 Hatch-Waxman that would require us not to apply any rule

1 we choose or accept here to other situations; only here.
2 That's the argument that you're creating for me, that
3 there's a different economic reality here that requires
4 a different rule.

5 MR. WEINBERGER: Justice Sotomayor, I think
6 the economic reality cuts the other way. It doesn't cut
7 in favor of making a rule that makes these more
8 difficult. What I'm saying is that --

9 JUSTICE SOTOMAYOR: Oh, but it does, because
10 in Hatch-Waxman Congress decided that there was a
11 benefit for generics entering without suffering a
12 potential loss to enter the market more quickly.

13 MR. WEINBERGER: Justice Sotomayor, I don't
14 think the legislation --

15 JUSTICE SOTOMAYOR: And any settlement in
16 these cases deprives consumers of the potential of
17 having the benefit of an earlier entry.

18 MR. WEINBERGER: I don't think there is
19 anything in Hatch-Waxman that supports the idea that the
20 purpose was to provide for generic entry prior to patent
21 expiration. What the structure is designed to do is
22 encourage challenges --

23 JUSTICE SOTOMAYOR: Exactly, and what you
24 are doing with permitting settlements of this kind is
25 not permitting the process to go to conclusion.

1 MR. WEINBERGER: I don't think there is
2 anything in Hatch-Waxman that suggests in any way that
3 settlements or -- should be discouraged or that cases
4 should be mandated to proceed to judgment or that all
5 have to be litigated.

6 JUSTICE SOTOMAYOR: It's encouraging
7 infringement suits.

8 MR. WEINBERGER: It's encouraging challenges
9 and it has produced many challenges. And can I say that
10 with 10 years of the application of the
11 scope-of-the-patent rule, there is no particular problem
12 with Hatch-Waxman. It's working very well. The
13 amount -- the number of drugs that have now gone generic
14 from just 10 years ago to today has increased
15 enormously.

16 JUSTICE BREYER: So why does it help you to
17 say, if the Court says or the FTC says when you get one
18 of these suits you can settle it by letting them in, but
19 you can't pay them money, that that will help to stop
20 strike suits. It costs them nothing to get in. They
21 have to really want to enter or they won't bring
22 lawsuits. So why does that hurt you?

23 MR. WEINBERGER: Well, I actually think that
24 you raise a point that the generic -- in some of the
25 amicus briefs, some of the generic parties have talked

1 about, which is that their ability to challenge these
2 cases depends on their not having to litigate every one
3 of them to conclusion. And that's not bad, because most
4 patent cases settle. Most -- most of these disputes
5 settle. And if our system was one in which every case
6 had to be litigated fully to judgment, we would be
7 unable to cope with that.

8 So -- so what I think the statute mandates
9 or contemplates is that generics should be able to
10 challenge, and should have strong incentive to
11 challenge, but that doesn't mean that they should be
12 required to litigate to conclusion. And if settlement
13 is made more difficult so that different perceptions or
14 different business objectives can't be bridged with some
15 kind of a business settlement, that is going to mean
16 that fewer generics are going to challenge these patents
17 and that is contrary to the purpose of the Hatch-Waxman
18 Act.

19 JUSTICE KENNEDY: I think it's correct that
20 to develop a new drug sometimes you need not just
21 scientists and attorneys, you need investment bankers.
22 And you then need marketers, because the cost of these
23 drugs can be hundreds of millions. Is there anything in
24 the record that shows the development cost of this drug?

25 MR. WEINBERGER: This particular drug, I

1 don't know. I mean, there are lots of studies of how
2 much average drugs cost, and that figure is over a
3 billion dollars.

4 JUSTICE KENNEDY: It can be a billion.

5 MR. WEINBERGER: Easily a billion dollars.

6 JUSTICE KENNEDY: Anything in this case?

7 MR. WEINBERGER: This particular drug --

8 JUSTICE KENNEDY: Anything in the record?

9 MR. WEINBERGER: No, because we are on a
10 12(b)(6) motion on a motion to dismiss, so none of that
11 was ever developed, but --

12 JUSTICE KAGAN: I'm sorry, go ahead.

13 MR. WEINBERGER: But I was just going to say
14 that the -- of course, any given drug development cost
15 doesn't even begin to tell the picture, because for
16 every drug that succeeds, there are at least 10 that
17 fail, and all the costs that are involved in the drugs
18 that fail have to be covered with the one drug that
19 succeeds.

20 JUSTICE KAGAN: Could I just make sure I
21 understand the way the 180-day period worked? The first
22 filer gets it, if I buy off -- if I'm a brand name
23 manufacturer and I buy off the first filer with one of
24 these reverse payments, you're suggesting that that's
25 not going to do me much good because they're all going

1 to be -- there's going to be a long line. And that long
2 line of people, it's not just that they don't get the
3 180-day period, it's like even if one of those people
4 wins, the person whom I've paid off is going to get the
5 180-day exclusivity period; isn't that right?

6 MR. WEINBERGER: Not completely. First of
7 all, it depends on the -- the agreement. For example,
8 in this case, that 180-day exclusivity was waived.

9 JUSTICE KAGAN: But if it's not waived by
10 the parties, in other words, it's just like I don't get
11 it so my incentives go down. It's that my competitor
12 gets it. So why in the world am I standing in line
13 to -- to challenge this if my competitor is going to get
14 the exclusive period?

15 MR. WEINBERGER: This was the exact problem
16 that Congress addressed in 2003, when it amended
17 Hatch-Waxman and changed the exclusivity requirements.
18 So the way the law now reads is that subsequent
19 generics, subsequent filers can trigger that 180-day
20 exclusivity by continuing to litigate. So, if the first
21 filer settles and these other folks are in line and
22 they're litigating, they can force that period to start
23 running and then they can come in right after. So, it
24 is not correct that you can tie up the first filer in
25 settlement and prevent everybody else from entering.

1 And even before that amendment, the Eleventh
2 Circuit, Federal circuit in the Second, applying the
3 scope of the patent rule recognized that if the
4 agreement creates a bottleneck to other filers that goes
5 beyond what the statutory exclusivity provides, where
6 they agree not to give up their exclusivity or agree to
7 retain it, then that's beyond the scope of the patent,
8 because you can't achieve that kind of a restraint
9 simply -- with a patent, you -- you're using the
10 agreement to expand upon your patent rights to block
11 other filers.

12 So I think that problem's been addressed by
13 Congress. And if somebody feels that solution's not
14 perfect and they want to make it even easier for
15 subsequent filers to come in, then I submit that
16 Congress can do that. That they --

17 JUSTICE GINSBURG: Well, what was the change
18 that was made?

19 MR. WEINBERGER: The change that was made,
20 Justice Ginsburg, is that -- there were a number of
21 changes, but the one that's relevant here is that if
22 a -- if a subsequent filer -- strike that.

23 You can trigger the exclusivity beginning to
24 run by getting the judgment. So, in the past, if a
25 first filer settled and they just didn't do anything --

1 may I finish the --

2 CHIEF JUSTICE ROBERTS: Yes, certainly.

3 MR. WEINBERGER: And they just didn't do
4 anything, that would prevent other generics from coming
5 to market. But now anybody else who's litigating the
6 patent, if they go ahead and win their case, then
7 that -- that triggers the first filer's rights and if
8 they don't exercise that -- those rights within 75 days,
9 they're gone, they're forfeited. So that's the change.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 MR. WEINBERGER: Thank you.

12 CHIEF JUSTICE ROBERTS: Mr. Stewart, you
13 have five minutes remaining.

14 MR. WEINBERGER: Thank you, Your Honor.

15 REBUTTAL ARGUMENT OF MALCOLM L. STEWART

16 ON BEHALF OF THE PETITIONER

17 MR. STEWART: Thank you.

18 Mr. Weinberger argued that in order to
19 determine whether a settlement of this sort has
20 anticompetitive effects, we would have to know how the
21 lawsuit would have turned out, but it's perhaps the most
22 fundamental principle of antitrust law that particular
23 conduct can be legal or illegal, depending on the
24 deliberative process that led up to it.

25 And to put that in concrete terms, if a

1 business charges a particular price for a particular
2 product, because it's made the assessment that this will
3 maximize profits in a competitive environment, that
4 decision is almost immune from antitrust scrutiny. But
5 if the business charges the same price for the same
6 product in the same market because it's agreed with its
7 competitor that it will charge that price, that's a per
8 se antitrust violation.

9 So it's not at all anomalous to say that
10 this type of agreement can be deemed anticompetitive,
11 even though the same result, namely, exclusion of the
12 generic from the market might have been able to be
13 obtained by other means.

14 The second thing is, Mr. Weinberger said
15 there are instances in which second and successive
16 filers will attempt to challenge the brand name even
17 after the first filer has been bought off. I think
18 we -- we disagree that it's as easy as he would say it
19 is, but we'll concede it happens occasionally. But the
20 fact that particular anticompetitive conduct doesn't
21 always work doesn't make it lawful.

22 It could often happen that two firms were
23 thinking about entering into a price-fixing agreement,
24 for instance, but thought to themselves, if we do that,
25 there's a third competitor in the market who will be

1 able to undersell us, and this would make our agreement
2 unprofitable. And it might happen sometimes that two
3 firms try to proceed with a price-fixing conspiracy, but
4 they're thwarted because of the unexpected competition
5 from a third firm.

6 CHIEF JUSTICE ROBERTS: Well, I thought that
7 Mr. Weinberger's point was that this is always going to
8 happen, because it's very easy -- as he said, you put a
9 sign on your neck saying, generics line up to get your
10 payment. That seems quite different than saying there's
11 another firm out there in the abstract that -- that
12 might want to enter into a similar market sharing
13 arrangement. This is a very different system.

14 MR. STEWART: I mean, first, there certainly
15 is no evidence suggesting that it has happened often,
16 although there is evidence that it has happened. But if
17 the brand name perceived on a systemic basis that the
18 likely result of paying off one competitor was that
19 another competitor would step in and couldn't be bought
20 off would litigate the suit to judgment, there would be
21 no incentive to make the reverse payment in the first
22 place.

23 That is, in making the reverse payment, what
24 the -- the brand name is attempting to purchase is
25 protection from the possibility that it will have its

1 patent invalidated, and it will suffer a large
2 competitive advantage. If a brand name thinks in a
3 particular instance there is somebody else who's going
4 to expose it to -- me to that risk, the -- the payment
5 wouldn't be expected to be made. So at least --

6 JUSTICE KAGAN: And what's your
7 understanding of why there would not be a long line in
8 some cases or in many cases?

9 MR. STEWART: I think for the reasons
10 that -- that your question suggested, that there is the
11 180-day exclusivity period and leaving aside the cases
12 in which that is waived, subsequent manufacturers would
13 realize not only that they wouldn't get that period of
14 heightened profits themselves, but they would have to
15 wait in line for others, and they might focus their
16 attention on other patents that were perceived to be
17 weak as to which they could hope to -- to get the
18 180-day exclusivity contract.

19 JUSTICE KAGAN: And is there anything to
20 show what I think Justice Kennedy asked -- you know, how
21 much of one's profits comes from the 180-day period as
22 opposed to what happens after that?

23 MR. STEWART: I know it is the great
24 majority, I don't have a percentage figure. And the
25 reason, as I indicated earlier, was that during the

1 180-day exclusivity period, you have only two
2 competitors. Basically, a biopoly arrangement. And my
3 understanding is that the generics would usually charge
4 around 80 to 85 percent of the brand name's price during
5 that period. And after there is full competition, the
6 price would drop to a fraction of that.

7 The next thing I would say is that our
8 system encourages settlement, but not to the nth degree.
9 And so, for instance, if you had two -- two firms
10 fighting over a million dollars and each firm decided
11 internally, 600,000 is the least I will accept. If they
12 stuck to their guns, the case couldn't be settled.

13 Now, if the public could be made to kick in
14 an additional 200,000, then each of the firms could get
15 its 600,000 and walk away content. But we don't pursue
16 the policy in favor of settlement to that degree. But
17 that's essentially what's happening here. The -- the
18 way these payments facilitate settlement is by inducing
19 the generics to agree to a later entry date by
20 increasing the total pool of profits that are available
21 to the two firms combined and thereby maximizing the
22 likelihood that each firm will find its own share of the
23 profit satisfactory.

24 And the last thing I would say is I think
25 everyone who comes to this issue recognized that there

1 is a conundrum. Our natural instinct is to compare the
2 settlement to the expected outcome of litigation. But
3 everyone also recognizes that it just isn't feasible to
4 try the patent suit. And, therefore, our approach
5 focuses on whether the competitive process has been
6 preserved.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel,
8 counsel.

9 The case is submitted.

10 (Whereupon, at 12:06 p.m., the case in the
11 above-entitled matter was submitted.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

A				
ability 11:22 13:15 26:15 32:19 38:17 47:1	advantage 36:1 36:2,5 54:2	36:14	40:10 50:2	attacking 28:11
able 4:23 5:17,18 9:3 13:7,8 47:9 52:12 53:1	advice 15:12	altogether 18:24	approach 14:14 16:6,8 19:5 24:6 40:21 56:4	attempt 25:11,14 52:16
above-entitled 1:11 56:11	advocated 8:19 8:20	amended 49:16	appropriate 15:17,19,19	attempted 7:3
abstract 53:11	ago 25:2 46:14	amendment 50:1	approval 11:19 11:23	attempting 53:24
absurd 18:14	agree 5:21 9:15 10:1 11:20 16:11 18:21 19:18,25 20:12 21:21 38:1 39:21 50:6,6 55:19	amicus 8:24 35:8 46:25	area 4:6 13:21 22:10	attention 14:1 54:16
accept 3:22 10:13 19:21 20:4 26:8 38:20 45:1 55:11	agreed 10:6 16:9 16:12 29:11 52:6	amount 10:7 46:13	Areeda 22:9	attorneys 15:12 47:21
acceptable 20:14	agreeing 5:24 20:25 21:1 27:12 28:2	ample 13:4	arguably 6:15 19:11	atypical 23:9
accepted 33:18	agreement 3:13 7:2,8 15:7 16:8 19:7,9,10 20:24 21:16 22:6 23:11 25:7,8 26:17 27:17 28:23 41:13,16 49:7 50:4,10 52:10,23 53:1	analogy 11:15 18:10	argue 27:20	authorized 4:11
accepting 16:22 26:12	agrees 4:3 27:18	AND 44:17	argued 51:18	available 39:24 55:20
account 9:23 10:3 36:15,15	ahead 18:3 48:12 51:6	AndroGel 11:16 11:18	arguing 20:19 25:22 26:1 33:20	average 48:2
accounts 16:6	AL 1:6	and/or 5:11	argument 1:12 2:2,5,8 3:3,7 22:17 24:21 27:22,25 28:16 31:6,25 36:9 44:24 45:2 51:15	a.m 1:13 3:2
achieve 4:18 50:8	allegation 7:22 8:5	Angeles 1:18	arguments 18:3	
achieved 25:8,9	alleged 27:10	anomalous 52:9	arm's 18:22	B
act 4:11 6:11 7:14,17 47:18	allocation 23:12 23:12	answer 3:17 21:23 25:4 34:3	arrangement 16:20 53:13 55:2	back 14:25 20:16 31:3
Actavis 1:6 3:5	allows 35:24	anticompetitive 14:2 15:5,20 17:10 19:16 28:22 29:1,7,25 36:12,13,22 37:1 51:20 52:10,20	arranged 25:1,2 54:20	bad 21:4,24,25 22:1,2 38:15 47:3
acting 6:4,9	alternative 15:9 38:2,3	antitrust 3:13 4:7 6:6,24 7:8 11:2 11:10,14,21 12:3 13:17 14:9 15:19 20:17 22:4,15 25:6 26:3 35:7 42:13 51:22 52:4,8	asking 11:13 14:6 24:5	balance 24:16
action 5:23 25:23	alternatives	anybody 27:20 51:5	assert 26:13 30:13 31:13	ban 18:24
actual 3:23 6:1 34:19		appear 10:19	assessment 10:3 16:13 22:5 52:2	bankers 47:21
additional 18:9 21:17 55:14		APPEARANC... 1:14	assessments 36:21	bargaining 39:24
address 32:16		application 46:10	Association 35:8	barriers 13:10
addressed 49:16 50:12		apply 19:5,11 24:2 44:25	assume 29:19	based 25:6 26:4 38:5
adequate 24:14		applying 29:4		basic 22:17
administrability 22:1,3				basically 16:15 18:12 29:12 32:22 38:9 43:22 55:2
administrative 18:5 23:7				basis 26:13 31:13 37:7 53:17
adopt 6:10 34:7				basis 26:13 31:13 37:7 53:17
adopted 42:7				bear 21:10,19 22:5

<p>believe 7:19 10:4 10:9 14:16 28:19 30:13 37:20 believed 11:17 benefit 45:11,17 best 14:17 16:13 better 11:17 beyond 7:12 19:12 25:9,15 50:5,7 big 36:1,2,5 44:3 billion 33:7 48:3 48:4,5 biopoly 55:2 bit 13:3 22:15 blips 40:18 block 50:10 bona 26:14 bottleneck 50:4 bottom 21:4 bought 13:8 34:16 52:17 53:19 brand 5:13,17 8:22 10:5,6,9 16:23 18:7 19:9 19:19,24 20:1,4 20:13 24:9 30:21 31:3 32:13 33:8 41:13,23 42:7 43:9,16 48:22 52:16 53:17,24 54:2 55:4 branding 29:15 break 17:13 Breyer 13:13 14:19,22 15:2 15:15,18 17:3 21:6 22:8 28:6 34:10 36:8 46:16 Breyer's 20:16 bridge 19:22</p>	<p>bridged 47:14 bridging 20:9 brief 8:15,24 28:10 35:6,8,21 43:4 briefs 8:8 14:5 15:20 16:2 35:19,21 36:19 37:4,7 46:25 bring 17:12 18:25 46:21 brings 11:1 brought 37:21 burden 14:8 21:9 21:11,11,19 business 3:12 15:6 18:12 36:13 39:3,5 47:14,15 52:1,5 buy 11:24,25 48:22,23</p> <hr/> <p style="text-align: center;">C</p> <p>C 2:1 3:1 California 1:18 13:22 called 13:19 18:11 cap 41:25 caps 29:14 case 3:4 5:24 6:4 8:9 9:5,17 10:10 14:11,15 15:11,19 22:23 22:25 23:2,3 25:16 28:24 32:13 38:20 41:19 42:14,24 43:6 44:16 47:5 48:6 49:8 51:6 55:12 56:9,10 cases 6:21 8:4 9:18 10:20 13:22,24 14:9 15:11 18:20,23</p>	<p>21:15 25:2,5 29:8,8,10 33:9 33:10,11,12,22 35:9 38:14,19 41:17 44:20 45:16 46:3 47:2 47:4 54:8,8,11 cash 39:8 cause 20:12 causing 42:19 certain 27:12,19 certainly 10:2 16:5 18:25 30:19 51:2 53:14 certify 32:21 33:4 cetera 36:1 challenge 12:9 13:5 32:19,22 42:10 43:24 44:11 47:1,10 47:11,16 49:13 52:16 challenger 44:12 challengers 34:5 challenges 33:1 43:21 45:22 46:8,9 challenging 4:2,4 35:12 chance 30:23 31:14 33:6 37:1 change 8:7 50:17 50:19 51:9 changed 49:17 changes 21:8 50:21 charge 21:1 52:7 55:3 charges 52:1,5 Chief 3:3,9 24:18 24:23 51:2,10 51:12 53:6 56:7 chip 39:24</p>	<p>choice 9:13 choose 45:1 Cipro 29:10 circuit 8:10,25 23:4 29:3,4 33:18,24 40:9 40:23,24,25,25 50:2,2 circumstance 5:20 circumstances 22:13 cited 35:6 43:4 claim 22:7 claimed 26:18 clear 31:18 42:6 clearer 37:13 clearly 15:21 16:2 34:18 collectively 10:8 combined 55:21 come 16:23 17:14 39:23 43:25 49:23 50:15 comes 11:1 27:19 54:21 55:25 coming 51:4 commensurate 16:19 Commission 1:3 3:5 common 13:17 companies 34:7 35:11 42:9 43:9 43:24 44:1 company 29:15 29:16 33:8 41:23 42:7 43:16 compare 56:1 compete 3:13,20 4:1,20 5:4 13:1 16:9 20:24</p>	<p>23:23 24:7 competition 3:24 7:23,25 10:14 11:25 12:1,1 41:12 53:4 55:5 competitive 3:21 5:8 17:2 23:21 52:3 54:2 56:5 competitor 7:18 7:24 12:9 49:11 49:13 52:7,25 53:18,19 competitors 12:10 13:10,11 55:2 completely 49:6 complex 14:8 15:11 complicated 15:25 compromise 5:21 6:1 10:1 19:18 20:7 concealed 18:22 concede 38:19 52:19 conception 6:11 conceptually 22:2 concern 9:8 42:1 42:2,3 concerns 41:22 conclude 27:7 38:23 concluded 24:3 29:4 conclusion 12:5 37:19 45:25 47:3,12 concrete 51:25 condition 29:5 conditions 11:18 13:2 conduct 5:15 7:18 8:1 51:23</p>
--	--	--	---	--

<p>52:20 confers 7:14 Congress 11:4,7 13:3 42:18,21 45:10 49:16 50:13,16 consensus 39:23 consider 22:4 29:15 37:22 consideration 16:18 17:1 21:17 32:4 34:1 41:7 considerations 22:25 consistent 7:11 consistently 8:12 conspiracy 53:3 constant 40:17 consumers 12:24 31:20 32:15 33:21 45:16 contemplates 47:9 content 55:15 context 5:9 continuing 49:20 contract 54:18 contrary 47:17 control 7:3,13 25:11,14 conundrum 56:1 Conversely 10:8 convince 37:2 cooperation 23:22 cope 47:7 correct 25:21 27:9 34:18 41:22 47:19 49:24 cost 47:22,24 48:2,14 costs 18:1 36:20 46:20 48:17</p>	<p>counsel 51:10 56:7,8 country 15:24 couple 11:12 18:4 course 22:15 39:11 43:12 48:14 court 1:1,12 3:10 6:23 7:4 14:13 15:4,11 22:4 23:10,14,17 24:5,24 25:3 36:10 38:7 40:18 46:17 courts 15:14 40:9 cover 11:5 covered 48:18 creates 50:4 creating 21:5 23:7 25:24 45:2 crucial 35:24 37:18 culminated 24:11 cut 28:8 45:6 cuts 45:6</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 da 28:12,12,12 damages 5:23 44:15,18 danger 43:17 dark 16:1 data 43:5 date 5:22 6:17 9:13,15 10:1,11 14:12 19:8,12 19:18,21,25 20:6,13 21:16 39:2,24 55:19 dates 20:10 days 12:20 34:15 35:3,24 44:3 51:8</p>	<p>deal 42:14,21 deals 19:2 dealt 23:11 42:21 debate 18:2 36:6 decide 37:5 decided 19:3 26:10 45:10 55:10 deciding 17:22 36:12 decision 24:2 52:4 decreasing 40:14 deemed 52:10 defendant 4:18 4:22 5:24 14:3 17:17,17 defendants 6:19 24:1 defense 37:1 deferring 20:6 defined 16:10 definition 5:9 degree 23:22 55:8,16 deity 22:9 delay 16:12,18 16:24 delayed 19:7 27:22 28:2,5 deliberative 51:24 demonstration 29:6 Dental 13:23 department 1:16 8:13,19 14:1 18:13 depend 11:22 depending 40:18 51:23 depends 26:2 29:23 47:2 49:7 deprive 38:16 deprives 45:16</p>	<p>Deputy 1:15 designed 45:21 deter 11:6 determination 8:2 9:21 39:14 determine 51:19 determining 28:23 detriment 32:14 develop 47:20 developed 11:16 32:23 48:11 developing 11:15 development 47:24 48:14 difference 28:5 44:4,19 differences 4:9 different 4:1 16:7 16:16 17:25 27:5 36:20 45:3 45:4 47:13,14 53:10,13 difficult 12:14 18:6,7,8,23 45:8 47:13 difficulty 21:7 diminution 20:4 disagree 52:18 disagreement 5:10 discouraged 46:3 discussed 35:7 discussion 36:9 disfavored 23:20 24:7 dismiss 48:10 dispute 26:14,15 31:23 32:5 disputes 27:10 47:4 distinction 12:3 distribution 17:20,25 district 15:10</p>	<p>23:2 36:10 divide 32:3 dividing 4:1 15:22 36:12 division 22:18 doctors 35:24 doing 14:3 26:12 44:1 45:24 dollar 18:16 dollars 48:3,5 55:10 dory 31:7 downstream 25:12 drabs 35:1 dribs 35:1 driving 41:7 drop 39:2 55:6 drops 13:2 drug 11:17,20,22 13:2 33:7 43:2 44:6 47:20,24 47:25 48:7,14 48:16,18 drugs 17:25 19:12 33:3 46:13 47:23 48:2,17 duopoly 13:1 duration 30:15 dynamic 33:19 dynamics 33:15 D.C 1:8,16</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 earlier 10:11 17:19 20:3 27:21 39:12,15 45:17 54:25 earliest 19:20 early 10:6 13:9 38:14 earning 5:7 10:14</p>
--	--	---	---	--

<p>easier 44:11 50:14 easily 42:9 48:5 easy 52:18 53:8 economic 28:4 41:20 42:16 44:24 45:3,6 economists 28:11 35:7 effect 6:23 20:8 28:4 29:25 36:22 effects 15:5,20 28:22 29:2,7 51:20 either 5:14 34:19 38:13,16 elephant 37:24 Eleventh 8:9 23:4 40:23,25 50:1 empirically 13:16 42:18 employee 18:13 employees 18:25 enable 19:24 encompassed 3:16 6:15 encourage 45:22 encourages 55:8 encouraging 46:6,8 endorse 8:14 enforcing 12:2 engage 7:18,24 engaging 19:1 enormous 44:15 44:19 enormously 46:15 enter 5:17 13:25 45:12 46:21 53:12 entered 16:20 29:19</p>	<p>entering 26:16 45:11 49:25 52:23 entirely 11:17 entitled 30:14 entry 5:21 9:13 9:15 10:2,6 13:9,10 19:7,18 19:25 20:6,12 21:17 27:21,23 28:2,5 38:14 39:2,12,15,24 45:17,20 55:19 environment 52:3 equivalent 11:16 35:25 especially 32:5 ESQ 1:15,18 2:3 2:6,9 essentially 8:25 10:19 13:1,7 23:13 55:17 establish 23:23 established 11:14 23:20 et 1:6 35:25 etcetera 42:12 ethics 18:11,17 19:1,2 evaluate 26:3 38:22 everybody 18:19 43:8 49:25 everybody's 30:6 40:22 evidence 22:21 31:12 40:3 42:20 53:15,16 exact 49:15 Exactly 45:23 example 7:1 11:15 14:17 21:6 23:10 25:11 27:17</p>	<p>41:18 42:20 49:7 examples 31:24 43:4 exception 40:7 exchange 3:12 18:17,22 21:20 exchanged 21:18 28:3 exclude 30:12 exclusion 52:11 exclusive 4:5,5 4:10,17 6:19 49:14 exclusivity 12:19 12:23 13:3 34:24 42:22 49:5,8,17,20 50:5,6,23 54:11 54:18 55:1 exercise 51:8 exercising 25:13 exhaustion 7:5 exist 11:3 existence 13:18 21:7 exiting 27:11 expand 50:10 expect 32:4 expected 5:23 54:5 56:2 experience 23:15,18 34:19 35:4,15 40:9 43:6 expiration 19:13 45:21 expires 5:19 6:17 19:8 explain 6:12 7:1 15:21 28:20 explains 22:10 44:21 expose 54:4 expressly 4:11</p>	<p>extend 6:16 19:12 extent 18:6 extrapolation 29:21 extreme 35:15 42:14,20 e-mail 30:22,22 31:3</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face 13:10,11 16:8 facilitate 19:15 20:9 55:18 fact 25:23 27:10 32:1 36:21 52:20 factor 37:23 factors 15:17 22:5 factory 32:24 fail 48:17,18 fair 18:18 21:20 fairly 10:7 21:22 faith 31:16,18 fall 20:21 familiar 14:21,23 fashioned 38:4 42:14 favor 45:7 55:16 FDA 11:19,23 feasible 56:3 Federal 1:3 3:4 18:25 29:4 40:24 50:2 feel 37:13 feeling 10:23 feels 50:13 fewer 47:16 fide 26:14 field 13:18 fighting 55:10 figure 37:11,15 43:17 48:2</p>	<p>54:24 figured 40:6 file 33:2 34:6 44:17 filed 8:24 41:17 filer 12:15 13:7 34:15,16,20 35:13 48:22,23 49:21,24 50:22 50:25 52:17 filers 35:10 49:19 50:4,11 50:15 52:16 filer's 51:7 find 20:14,17 55:22 fine 31:7,10 finish 38:17 51:1 firm 53:5,11 55:10,22 firms 52:22 53:3 55:9,14,21 first 4:10 8:24 11:13 12:15 13:7 16:7,17 17:4,21 18:5 21:2 24:25 28:21 29:5 34:15,16,20 35:13 36:6 37:9 39:17,20 40:9 40:23 41:15 48:21,23 49:6 49:20,24 50:25 51:7 52:17 53:14,21 five 16:2 17:24 35:11 37:2 51:13 fix 13:19 fixing 13:24 20:20,20,23 focus 8:21 12:3 54:15 focuses 56:5</p>
---	--	--	--	--

folks 49:21	30:7,21 32:6,12	goes 22:24 34:15	happened 10:23	hundreds 41:17
football 23:13,19	32:21 33:8 34:6	50:4	12:11 28:24	47:23
force 28:1 32:24	34:8 35:7,25	going 17:11 20:1	29:23 42:20	hunky 31:7
49:22	38:24 41:8,12	20:2,5,5,11	53:15,16	hurt 33:21 46:22
forces 9:22	41:24,25 42:9	25:20 31:18,20	happening 42:17	hypothetical
foresee 10:24	42:25 43:8,10	32:11,12 33:21	55:17	30:18 41:22
forfeited 51:9	43:23 45:20	34:9 39:5,22	happens 33:9	43:5,8,19
form 44:21	46:13,24,25	40:22 43:9,10	52:19 54:22	
forms 16:7	52:12	43:25 44:15	hard 17:13,16	I
forth 23:24	generics 13:4	47:15,16 48:13	18:20 19:5	idea 8:8 17:8
found 6:24 25:3,5	16:23 18:8	48:25,25 49:1,4	28:15 37:11	31:4 45:19
four 16:2	38:25 44:4	49:13 53:7 54:3	39:23	identified 23:25
fraction 55:6	45:11 47:9,16	good 12:23 29:9	Hatch-Waxman	24:1
friend 25:1	49:19 51:4 53:9	31:2,4,16,18	3:18 5:9 10:17	identify 16:25
FTC 8:12 11:1	55:3,19	38:23 40:11	10:23 11:4,11	illegal 51:23
29:12 41:17	getting 41:8	48:25	12:4,13,14 24:8	illustrations 29:9
46:17	50:24	goods 6:14,22	32:5 33:11,12	immediately
FTC's 27:25 33:5	gift 18:17,23,24	7:3	34:14 35:5,9	5:17
40:20	gifts 18:13	gotten 32:24,24	39:1 42:19	immune 52:4
full 28:1 55:5	Ginsburg 8:6	government 8:10	44:16,20,25	import 9:18
fully 47:6	41:6,15 42:23	15:3 18:10,13	45:10,19 46:2	imposed 7:12
fundamental	50:17,20	38:9 39:13 41:7	46:12 47:17	impress 4:14
21:24 51:22	Ginsburg's 42:3	42:23	49:17	incentive 3:22
further 33:25	give 4:17 17:9,19	government's	hear 3:3	9:14 10:13
34:1,1	18:13,15 22:11	8:7	heightened	32:12 34:17,21
G	24:14 31:5	grant 44:2	54:14	35:13 36:6
	32:10,11 35:25	granted 11:23	held 6:5 7:8 42:8	47:10 53:21
G 3:1	37:1 39:6 50:6	13:3	42:9	incentives 11:8
game 23:24	given 5:7 21:12	great 17:8 18:2	help 29:13 46:16	12:15 13:5
games 23:13	28:17 31:9	43:11 54:23	46:19	35:16 49:11
gap 19:23 20:9	32:21 34:20	greater 9:17	hey 17:8	include 22:6
gather 10:17	37:7 48:14	20:21 34:20	high 21:12	increased 41:3
gear 30:7	gives 10:12	41:23 43:17	higher 27:21	46:14
general 1:15	12:15 16:11	greatest 33:23	43:17	increases 41:1
3:11	21:8	green 16:1	highly 42:16	increasing 40:14
generally 3:20	giving 3:21 5:3	guess 19:14	holding 20:2	55:20
24:7	17:14	guidance 15:14	holds 43:15	indicate 35:23
generic 3:21 5:14	glitch 34:14,14	15:15,16 37:13	Honor 32:17	indicated 54:25
5:16,18 9:15	go 5:5 18:3,19	guns 55:12	51:14	indicating 36:4
10:1,6,9,10,13	20:15 22:24	H	hook 6:21	inducement
11:16 12:25	25:15 34:25		hope 4:18 54:17	33:23
16:9,12 17:14	35:24 37:1 38:7	happen 10:3	Hovenkamp's	inducing 55:18
19:7,9,20,24	43:9 45:25	40:12 42:6,15	12:5	industries 13:12
21:1 24:9,11	48:12 49:11	42:16 44:10,22	huge 34:23 40:18	industry 24:2
29:16 30:2,2,5	51:6	52:22 53:2,8	41:1	30:4 32:18,19

<p>32:20 34:7 44:5 44:6,8,12 inference 16:11 32:2 infringe 26:18 infringed 5:14 26:6 infringement 3:17 4:17,22 5:11,12 7:23 8:3,5 9:5 10:20 12:7 25:18,23 26:9,12 41:11 41:11 46:7 infringer 26:25 27:11,18 infringes 25:20 infringing 5:16 7:19 inherent 27:24 39:12 initial 20:16 injured 31:20 Inline 6:20 inquiries 18:6 insist 9:16 20:2,6 20:11 instance 17:12 52:24 54:3 55:9 instances 16:2 52:15 instinct 56:1 intact 17:18 intermediary 28:19 internally 55:11 interpretation 11:2 invalid 5:15 invalidated 54:1 invalidity 5:11 investment 44:13 47:21 investors 39:4 invitation 8:15</p>	<p>involve 35:9 involved 6:21 7:1 48:17 involving 41:16 issue 6:13 55:25 item 25:19</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>JEFFREY 1:18 2:6 24:21 job 23:2 Joblove 8:15 judge 14:1 15:6 15:24 18:2 22:20,20 36:14 37:5 judges 22:19 23:2 judgment 8:23 24:12 46:4 47:6 50:24 53:20 judicial 8:2 jury's 22:22 Justice 1:16 3:3 3:9,25 4:13,25 5:3 6:3,8 8:6,13 8:20 9:4,8,20 10:16,21 11:9 12:16,20 13:13 13:22 14:19,22 15:2,15,18 17:3 20:15,16 21:3,6 21:23 22:8 24:18,23 25:1 25:17,22,25 26:7,20,23 27:2 27:4,14 28:6 29:13,20 30:5 30:16,20 31:10 31:17 32:9 33:10,14,17 34:3,10,11,13 34:23 35:17,22 35:23 36:3,8,23 36:23 37:14,18</p>	<p>37:22 38:2,8 39:10,18,25 40:4,13 41:6,15 41:20,21 42:3 42:23 43:7,14 44:2,23 45:5,9 45:13,15,23 46:6,16 47:19 48:4,6,8,12,20 49:9 50:17,20 51:2,10,12 53:6 54:6,19,20 56:7 justification 15:8 justifications 15:6 16:3 36:19 justify 24:2 33:7</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Kagan 30:16,20 31:10,17 32:9 34:4,11,23 36:24 41:20 48:12,20 49:9 54:6,19 Kagan's 35:23 KATZ 39:17 keep 5:18 15:7 17:9 37:6 39:5 Kennedy 9:4,8 9:20 12:16,20 29:13,20 30:5 35:17,22 36:3 36:23 41:21 43:7,14 44:2 47:19 48:4,6,8 54:20 kept 17:17 key 43:15 kick 55:13 kind 9:24 10:22 10:25,25 14:6 23:7 28:8,18 34:14 35:15 40:20 45:24 47:15 50:8</p>	<p>kitchen 28:9,10 28:13,14 37:6 knees 19:1 knew 12:10 know 5:4 13:14 13:18,20,20 15:23 21:12 22:14,15,16 26:7,8,20,23 27:7 29:18 31:4 33:17 36:24 38:9 40:2,4 48:1 51:20 54:20,23 known 12:8</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>L 1:15 2:3,9 3:7 51:15 large 12:8 54:1 larger 16:21 latest 19:21 Laughter 4:15 law 11:2 49:18 51:22 lawful 3:15 29:12 52:21 laws 4:7 6:6 7:7,9 11:10,14 25:6 26:4 lawsuit 4:2,19,21 16:14 30:21,23 39:2 41:14 51:21 lawsuits 10:20 46:22 leap 12:12 leave 15:13 37:24,24 leaving 54:11 led 51:24 legal 30:11 51:23 legislation 45:14 legitimate 9:25 18:22 19:10</p>	<p>legitimately 18:21 25:9 length 18:22 lesser 42:2 letting 46:18 let's 4:1 13:19 32:18 38:18,19 38:20,21 liability 6:24 liable 6:5 44:15 license 4:10,17 5:4 26:16,19 27:8,9,13,17 licensed 26:24 light 22:25 likelihood 8:22 16:14 55:22 limit 29:17 limitation 23:13 limitations 23:19 line 21:5 28:8 34:9 43:25 49:1 49:2,12,21 53:9 54:7,15 listed 36:19 litigate 44:14 47:2,12 49:20 53:20 litigated 8:23 28:25 46:5 47:6 litigating 39:5 49:22 51:5 litigation 12:4 18:1 26:5 29:1 29:24 35:5 36:20 38:17 56:2 litigations 43:13 little 13:3 22:15 logic 34:19 logical 5:20 logically 42:15 long 22:14,16 23:15,17 34:9 34:25 35:2</p>
--	---	---	---	---

38:21 43:25 49:1,1 54:7 longer 16:12 look 14:14,16,25 23:24 24:13 28:9 35:5,17 looking 23:11 loophole 42:18 Los 1:18 lose 23:3 41:23 44:14,18 losing 30:2 loss 45:12 lost 5:25 29:17 44:18 lot 9:10 17:15 19:10 20:3 28:18 33:3,15 44:7 lots 48:1 lower 30:6,9 32:20	9:22 11:20,22 12:7,25 16:10 17:5,13 18:18 21:1,17 23:15 23:18 27:11,18 32:8 36:7 45:12 51:5 52:6,12,25 53:12 marketers 47:22 marketing 32:24 marketplace 5:8 13:9 Masonite 6:19 7:1,1 Material 6:20 matter 1:11 3:11 17:25 18:1 22:10 56:11 matters 17:23 maximize 52:3 maximizing 55:21 mean 4:2,8 5:1 6:14,18 10:14 12:20 13:13 14:4,7 18:24 21:6,25 22:8,14 22:16 23:9 28:1 31:7 34:25 38:16 41:9 47:11,15 48:1 53:14 Meaning 25:18 26:23 means 6:11 10:14 12:2 38:12 52:13 measure 28:21 meet 39:3 mention 17:3,4 mentioned 13:22 31:24 mere 21:7 merits 5:10 39:21	met 7:16 29:6 million 17:6,7,9 31:1,1,2,5 33:3 55:10 millions 47:23 mind 15:7 22:9 minimal 38:25 minor 21:22 22:9 minutes 22:19 25:1 51:13 mistake 10:24 11:1,3,11 mode 7:22 Monday 1:9 money 4:25 5:1,5 5:7,25 10:14 12:9 17:16,19 19:10 20:3,5 24:8,12 27:1 35:1,2 46:19 monopoly 3:23 15:23 22:18 27:23 30:14,25 31:19 32:14 36:12 43:1 monster 23:8 months 36:6 morning 3:4 motion 48:10,10 motivations 32:2 multiple 35:9	name's 55:4 natural 20:8 32:2 56:1 nature 23:22 27:24 NCAA 14:16 23:10 NDA 33:2 34:6 necessarily 25:20 neck 43:23 53:9 need 14:25 37:13 44:17 47:20,21 47:22 needs 39:3 negotiate 10:11 negotiated 26:19 negotiating 19:17 neutral 17:21 never 14:8,10 20:1 41:9 Nevertheless 23:21 new 6:19 11:2,17 11:22 17:14 47:20 nice 16:1 nightmare 17:24 18:5 non-sham 7:22 8:4 normal 12:6 26:25 39:10 notion 26:2 nth 55:8 number 27:19 40:14 43:21 46:13 50:20 numbers 41:3	3:19,20 objectives 47:14 obtained 52:13 obviously 18:14 19:23 28:17 occasionally 18:20 52:19 occur 8:5 occurred 8:3 offer 41:8 offered 42:25 office 19:1,2 offsetting 16:3 oh 14:12 44:6 45:9 okay 18:2 23:5 34:10 36:8,24 37:5 44:2 Oklahoma 14:17 once 18:19 34:15 ones 36:19 one's 54:21 opens 36:7 opinion 15:4 opportunities 24:15 opposed 54:22 oral 1:11 2:2,5 3:7 24:21 order 4:25 11:1 51:18 outcome 32:11 56:2 output 23:14,19 outset 44:6 outside 25:3 outweighs 36:13 overconfident 39:22 overturn 11:9,14
<hr/> M <hr/>				
maintenance 7:2 major 22:10 44:12 majority 40:1 54:24 making 12:9 35:1 35:2 45:7 53:23 MALCOLM 1:15 2:3,9 3:7 51:15 mandated 46:4 mandates 47:8 manufactured 42:11 44:13 manufacturer 30:22 32:13 48:23 manufacturers 3:22 54:12 March 1:9 market 4:1 5:17		<hr/> N <hr/>		
		N 2:1,1 3:1 name 5:13,17 8:22 10:5,6,9 19:9,19,24 20:1 20:5,13 24:9 30:21 31:3 32:13 33:8 35:25 42:7 48:22 52:16 53:17,24 54:2 names 16:23 18:7	<hr/> O <hr/>	<hr/> P <hr/>
			O 2:1 3:1 object 25:7 objectionable	P 3:1 PAGE 2:2 paid 11:18 12:8

<p>18:18 41:9 49:4 paradigmatic 3:13 paragraph 12:15 particular 4:5 7:22 40:18 44:21 46:11 47:25 48:7 51:22 52:1,1,20 54:3 parties 5:10,23 9:13,14,18 10:1 10:2,4,8 16:17 19:17,25 20:11 20:12,25 23:25 24:7,14 26:14 29:11 37:12 39:14,20,21 46:25 49:10 party 26:16 passing 24:9 patch 11:10 patent 3:16 4:3,4 4:11 5:12,13,15 5:19 6:5,9,12 6:14,16,17,23 7:5,7,12,14,15 7:17,23 8:14,21 9:9,10,18,22 10:20 12:4,6,10 12:12 17:17 19:8,12 22:7 25:4,10,13,15 26:2,4,5,6,14 26:18 28:11 29:23 30:11,14 30:15 31:13,14 31:23 32:5,7,19 32:22,23 33:1 33:19,21 34:5 36:16,17 37:16 37:23 38:5,12 38:21,21,22 41:10,11 42:8 43:13,25 44:11</p>	<p>45:20 47:4 50:3 50:7,9,10 51:6 54:1 56:4 patented 6:22 19:11 patentee 4:3 6:4 28:25 patentholder 7:3 7:6,21,24 8:4 12:8 30:11 33:23 39:19 patents 13:5 35:12 42:10 47:16 54:16 patent's 39:11 patent-based 25:6 pay 5:24,25 7:17 7:24 14:1 20:3 20:5 39:13 46:19 paying 18:1 26:25 34:8 38:13 43:23 53:18 payment 3:11,15 9:12 10:12,22 10:25 16:10,18 16:20,24,25 19:23 20:20 21:8,11,16 27:4 28:4 29:11 39:8 43:15 53:10,21 53:23 54:4 payments 3:18 3:20,25 10:19 11:6,8 12:6 17:23 19:15 20:8 24:6 27:15 38:10 40:5 48:24 55:18 payoff 33:22 pays 19:9 27:19 32:6 pejorative 14:7</p>	<p>people 18:12,21 23:23 32:3 38:10 40:6 44:1 44:7 49:2,3 perceive 9:18 12:11 perceived 13:5 53:17 54:16 percent 30:23 33:7 40:17 55:4 percentage 34:24 41:4 54:24 perceptions 47:13 perfect 50:14 period 6:23 12:18,23,24 13:4 16:10,13 27:11 34:25 38:10 48:21 49:3,5,14,22 54:11,13,21 55:1,5 permitting 45:24 45:25 person 4:4 17:7 31:20 49:4 person's 17:5 perspective 26:3 Petitioner 1:4,17 2:4,10 3:8 51:16 Pharmaceutical 35:8 picking 20:10 picture 48:15 place 53:22 Plaintiff 21:9,19 please 3:10 24:24 point 4:14 5:2,6 20:10 23:6 28:7 39:15 42:16 43:20 44:3</p>	<p>46:24 53:7 pointed 39:25 41:18 points 5:22 policy 55:16 pool 55:20 portion 5:24 position 7:21 8:7 8:11,13,25 possibility 16:23 53:25 possible 36:18 possibly 37:15 potential 13:10 19:16 34:5 44:12 45:12,16 pounce 44:7 practical 9:17 practices 36:13 praising 28:11 precision 22:11 preferred 20:7 presented 3:14 4:10 preserved 56:6 presumably 10:7 22:6 presumption 9:3 16:16 24:3 25:18,19,24 presumptively 9:2 21:8 23:14 pretty 31:4 40:11 40:17 41:5 prevail 10:5,10 prevailed 8:23 prevailing 4:19 4:20 31:15 prevent 49:25 51:4 prevented 12:2 price 7:2,4 13:2 13:19,24 20:19 20:20,23 52:1,5 52:7 55:4,6</p>	<p>prices 20:25 25:12 price-fixing 52:23 53:3 primarily 12:17 principle 51:22 principles 12:3 prior 45:20 probably 9:16 14:17 22:19 problem 6:1 10:12,17 17:22 37:10 46:11 49:15 problem's 50:12 procedure 14:11 proceed 46:4 53:3 process 3:21 45:25 51:24 56:5 procompetitive 17:21 produce 10:25 14:6 produced 46:9 product 26:9,17 27:1 32:23,25 42:11 44:13 52:2,6 products 25:12 25:14 34:21 36:20 product's 26:24 Professor 12:5 22:8 profit 15:23 22:18,18 36:12 55:23 profits 3:23 5:7 20:4 26:21 27:6 27:23 30:6,14 31:1,19 32:3,14 33:23 34:8,24 38:15 43:1,9,10</p>
---	---	--	---	--

<p>43:24 52:3 54:14,21 55:20 prohibited 18:11 18:15 proliferation 19:2 proof 14:8 22:12 proposal 18:9 proposed 16:5 proposing 22:4 prospect 18:23 protect 25:15 42:7 protection 53:25 provable 23:1 proved 26:5 provide 8:17 9:14 45:20 provided 7:7 provides 16:6,6 19:7 50:5 proving 21:11 provision 42:22 public 55:13 purchase 53:24 purpose 45:20 47:17 pursue 26:10 55:15 put 20:18 41:25 43:22 44:14 51:25 53:8 putting 32:24 42:11 p.m 56:10</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>quality 22:12 question 3:14,17 14:9 20:16,16 21:24 24:25 25:5 35:23 42:3 43:15 54:10 questions 5:11 19:6</p>	<p>quick 14:14,15 quickly 45:12 quite 53:10 quote 17:1</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 3:1 raise 46:24 rare 20:17 reaction 36:10 read 14:24 reads 49:18 ready 44:7 real 42:1 realistic 32:17 reality 34:4 44:24 45:3,6 realize 54:13 really 4:8 7:20 16:7 17:23 19:16 21:4 24:5 28:21 29:18,24 30:2 35:2,16 37:11 38:9 39:11 40:17 42:19 46:21 reason 12:5 13:20 20:18,22 21:4,24 22:2 29:4 30:12,13 42:17 54:25 reasonable 26:13,14 31:13 reasonably 30:13 reasons 3:19 22:1,2 30:3 34:2 38:6 54:9 rebut 24:15 rebuttal 2:8 16:7 51:15 rebutted 9:3 16:17 receiving 24:12 recipient's 3:12</p>	<p>recognized 14:14 33:18,25 50:3 55:25 recognizes 56:3 recognizing 26:13 record 47:24 48:8 rectify 11:1 red 35:6 reduce 11:7 refer 14:11 reference 34:19 reflect 9:21 16:13 reflection 34:1 regard 9:25 Regents 14:16 relative 5:10 relevant 22:21 23:1 50:21 relitigate 36:16 remaining 38:23 51:13 remember 39:8 represent 8:7 require 23:22 44:25 required 22:12 26:8 47:12 requirements 49:17 requires 45:3 resale 7:2,13 25:12 reserve 24:16 resold 7:4 resolved 26:19 27:10 respect 23:1 30:1 respond 24:25 Respondent 6:25 Respondents 1:19 2:7 6:12 7:10 19:6,22</p>	<p>24:22 Respondent's 6:10 19:4 response 36:23 39:1 restraint 25:3,7 25:8 26:4 42:1 43:18 50:8 restricted 6:15 restriction 6:16 7:11,15 19:11 restrictions 6:13 6:22 restrictive 15:9 36:14 result 27:21 32:6 38:6 52:11 53:18 retain 50:7 reverse 3:18 10:12 20:20 21:8 27:4,14 29:11 38:10 40:5 48:24 53:21,23 rid 18:24 right 4:20 7:6,13 11:5 12:20 30:11 31:3 32:21 37:17 40:21 43:10 49:5,23 rights 4:5 7:13 23:12,18 26:10 50:10 51:7,8 rigid 14:7 rise 16:11 risk 30:2 32:25 38:25,25 43:20 44:18 54:4 risks 44:20 rival's 3:23 ROBERTS 3:3 24:18 51:2,10 51:12 53:6 56:7</p>	<p>Rolex 18:15,16 room 37:25 roughly 33:2 40:16 route 18:20 royalty 27:20,20 38:13 rule 7:5 12:17 13:19,20 18:14 20:18,21 21:3 21:24,25 22:21 28:9,15 29:4 32:10 40:7 42:13 44:25 45:4,7 46:11 50:3 rules 14:8 18:11 18:17 23:24 29:14 ruling 40:19,23 40:24,25,25 run 39:4 40:22 50:24 running 49:23</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:1 3:1 sale 25:14 32:25 42:11 44:14 sat 26:18 satisfactory 55:23 satisfied 15:4 saw 13:24 saying 5:13,14 21:6 23:3 24:6 28:15 29:5 30:17 31:8 37:3 38:9 39:7,14 45:8 53:9,10 says 7:17 12:13 14:2 15:4 16:8 17:8,18 22:11 30:22 31:4 35:15 43:23</p>
--	---	--	--	--

<p>46:17,17 Scalia 3:25 4:13 4:25 5:3 6:3,8 10:16,21 11:9 25:1 34:13 37:14,18,22 38:2 scenario 4:9 Schering-Plough 8:9 scientists 47:21 scope 6:4,9,11 6:14 7:12,15 8:14,21 25:3,9 33:18 50:3,7 scope-of-the-p... 8:16 40:10 46:11 scrutiny 8:17 52:4 se 11:21 13:19 14:8 20:17 21:2 28:7,9,15 29:12 52:8 second 4:12,14 4:16 8:25 16:22 17:12,20 19:4 29:3 33:17,24 40:24,25 50:2 52:14,15 Section 4:11 see 12:6 14:25 15:8 17:10 23:25 30:3 32:4 40:18 43:3 44:23 seek 11:19,19 seen 14:9,10 41:2 sell 4:5,23 18:16 25:20 27:1 41:12 sends 30:21 31:3 sense 9:10 20:9 38:4</p>	<p>sentence 15:22 serious 15:5 services 21:12 set 13:8 14:7 settle 3:18 5:23 13:8 26:15 38:11,11,19 46:18 47:4,5 settled 28:24 50:25 55:12 settlement 3:16 5:9 9:25 16:21 18:9 19:16 24:8 24:10 25:23 28:23 31:16 32:6 37:13 41:16 45:15 47:12,15 49:25 51:19 55:8,16 55:18 56:2 settlements 8:18 29:11 30:4 36:11 40:1,10 41:4 44:22 45:24 46:3 settles 49:21 settling 38:12,13 shape 22:23,24 share 3:22 55:22 shared 27:23 shareholders 39:4 sharing 26:21 27:5 33:22 38:15 42:25 53:12 shield 7:7 shift 21:13 short-circuit 5:4 show 14:12 16:17 35:4 54:20 showing 21:19 shown 23:15 33:5 42:15 shows 19:16</p>	<p>47:24 side 19:2 21:13 23:4 26:25 38:16 sign 12:11 43:22 53:9 significance 13:15 similar 53:12 similarly 13:11 simply 10:1 15:22 25:13 32:3 38:13 50:9 single 31:12 32:5 32:13 41:18 sink 28:9,10,13 28:14 37:6 sitting 37:12 situated 13:11 situation 27:23 28:1,3 30:10 31:9,12,22 34:4 situations 20:18 45:1 six 36:6 size 33:3 skew 9:12 33:14 slightly 13:23 small 10:7 33:6 sold 7:3 43:2 Solicitor 1:15 solution's 50:13 Solvay 11:18 35:21 somebody 4:2 50:13 54:3 somewhat 37:6 sorry 48:12 sort 9:2 13:21 51:19 sorted 37:11 Sotomayor 20:15 21:3,23 25:17 25:22,25 26:7 26:20,23 27:2,4</p>	<p>27:14 33:10,14 33:17 38:8 39:10,18,25 40:4,13 44:23 45:5,9,13,15 45:23 46:6 sound 33:20 sounds 36:9 source 18:15 sources 18:12 Souter 13:22 so-called 29:11 specific 24:1 specifically 8:16 32:18 spend 17:15 split 32:13 splitting 31:19 sports 23:21 standard 12:2 standing 49:12 start 17:20,24 36:25 49:22 starts 42:17 States 1:1,12 statute 47:8 statutory 50:5 stay 16:9 21:1 27:12,18 steady 40:16 41:5 step 53:19 Stewart 1:15 2:3 2:9 3:6,7,9 4:8 4:16 5:2,6 6:3,7 6:10 8:6,12 9:6 9:11,24 10:18 11:7,12 12:18 12:22 14:13,20 14:25 15:13,16 16:5 18:4 20:15 20:23 21:14,25 23:9 24:19 51:12,15,17 53:14 54:9,23</p>	<p>stop 46:19 strategy 34:8 42:7 street 41:9 strength 8:21 9:5 9:21 22:7 36:16 37:16,23 38:5 38:12,22 strike 46:20 50:22 strong 9:9 38:20 39:11,18 47:10 structure 14:6 15:11 45:21 structured 37:6 stuck 55:12 studies 33:5 48:1 subject 5:21 6:1 subjective 22:7 submit 50:15 submitted 56:9 56:11 subsequent 49:18,19 50:15 50:22 54:12 substitute 3:23 5:7 subvert 3:21 succeeds 48:16 48:19 success 16:14 successive 52:15 sued 38:25 suffer 54:1 suffering 45:11 suggested 34:13 54:10 suggesting 32:10 48:24 53:15 suggests 27:5 46:2 suing 17:7 33:8 suit 3:17 5:12 8:23 10:4 12:7 24:11 41:11,12</p>
--	--	---	--	---

<p>53:20 56:4 suits 3:19 10:18 10:22 46:7,18 46:20 sum 12:8 supporting 28:10 supports 45:19 suppose 4:2 19:17 28:14 30:20 34:10 36:8 41:21,21 Supreme 1:1,12 sure 14:23 48:20 suspect 23:16 suspicion 24:14 system 17:20 26:2 28:11 47:5 53:13 55:8 systemic 53:17 systems 17:25</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 2:1,1 tacking 18:8 take 9:22 10:2 10:15 11:14 15:24 18:10 22:3,17 24:5 27:25 30:25 32:18 33:1 36:15,15 38:20 taken 8:13 takes 22:16,18 33:6 talked 46:25 talking 8:1,3 17:24 29:9 Tamoxifen 29:10 televised 23:13 television 23:18 tell 29:24 48:15 telling 42:24 ten 40:8 tend 9:12,13 39:21</p>	<p>term 14:15 19:8 19:22 38:21 terms 14:10 28:4 51:25 test 6:19 7:14 8:15,16,20 9:9 9:11,17 28:19 29:5,5 38:3,3 tests 40:10 Thank 24:18 51:10,11,14,17 56:7 theory 7:11 21:15,22 43:4,5 the-sky-is-goi... 40:21 thin 13:14 thing 4:12,16 5:5 13:16 14:14 15:18 19:4,14 31:2 37:21 52:14 55:7,24 things 11:12 18:4 think 9:24 11:13 11:20 14:15 15:13 16:3 21:5 22:16 26:2,11 27:9 30:23 31:11,15 32:10 32:17,20 34:11 35:14 37:4,9 38:2,7 39:22 40:3,15 42:2,6 42:13 43:12 45:5,14,18 46:1 46:23 47:8,19 50:12 52:17 54:9,20 55:24 thinking 17:14 29:14 52:23 thinks 17:5,7 54:2 third 52:25 53:5 thought 28:18 35:22 40:23</p>	<p>42:23 52:24 53:6 three 17:6 thrust 7:20 42:2 thwarted 53:4 tie 49:24 time 8:8,24 10:7 16:10 22:22 24:17 27:11,12 28:15 31:25 35:1,2 times 40:5 Title 4:12 today 46:14 total 41:4 55:20 tracks 11:5 trade 1:3 3:4 6:22 42:1 tradeoff 31:24 transactions 18:9 transferred 16:19 treat 18:17 treated 3:15 9:2 21:2 tried 11:4,7 tries 6:25 trigger 49:19 50:23 triggers 51:7 troubled 34:2,3 troubling 33:19 true 17:24 32:1,1 34:12,20,25 35:16 43:13 44:5,7,9,10 trust 3:14 truth 31:14 try 22:11 34:7 36:16 53:3 56:4 trying 34:3 43:20 turned 51:21 tweak 21:14,22 two 4:8 5:22 16:7</p>	<p>16:15 17:4,6,14 39:12,14 52:22 53:2 55:1,9,9 55:21 type 52:10 types 10:18 16:16 typical 12:7</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultimate 11:22 ultimately 8:22 unable 47:7 uncertain 11:25 undersell 53:1 understand 15:23 30:17 31:6 48:21 understanding 21:7 54:7 55:3 understands 18:19 understood 11:10 undesirable 38:6 unexpected 53:4 unique 12:15 United 1:1,12 University 14:17 unknown 10:19 unlawful 9:2 11:24,25 23:15 25:4 28:7 unlimited 43:22 unpatented 25:14 unpredictable 37:10 unprofitable 53:2 unreasonable 43:17 unusual 24:10 use 14:15 19:22 29:17 38:13 useful 23:1</p>	<p>usual 24:3 usually 55:3</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:5 3:5 14:16 vague 13:21 valid 5:13 validity 4:3 9:5 valuable 40:6 value 16:19 18:17,18 21:12 21:20 28:3 31:25 36:21 39:6,12 various 9:3 vary 22:12 vast 40:1 verify 35:18 view 35:15 42:16 violate 4:7 violation 3:14 7:8 11:21 20:17 23:5 52:8 violations 25:6 voluntarily 26:10</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wait 54:15 waived 49:8,9 54:12 walk 44:19 55:15 want 14:4,11,23 26:1 28:8,8,13 28:14 38:10,10 38:17 42:5 46:21 50:14 53:12 wanted 4:23 13:4 21:14,18 43:2 wants 5:1 17:17 43:24 Washington 1:8 1:16 waste 22:22 watch 18:15,16</p>
--	--	--	---	---

<p>Watson 11:15,19 Watson's 11:21 way 6:25 9:4,7 12:22 19:15,23 21:15 24:10 32:14 38:7,11 42:25 43:9,9 45:6 46:2 48:21 49:18 55:18 ways 9:3 16:16 weak 9:9 10:10 12:12 13:6 54:17 weakness 9:21 weigh 37:5 Weinberger 1:18 2:6 24:20,21,23 25:21,25 26:11 26:22 27:2,8,16 28:17 29:18,22 30:9,16,19 31:8 31:11,22 32:9 32:16 33:12,16 33:24 34:12,18 35:4,20 36:2,5 37:9,17,20 38:1 38:18 39:20 40:2,8,15 41:15 42:5 43:3,12,19 44:9 45:5,13,18 46:1,8,23 47:25 48:5,7,9,13 49:6,15 50:19 51:3,11,14,18 52:14 Weinberger's 53:7 went 7:12 we'll 3:3 5:4 19:20 24:13,13 24:14 42:2 52:19 we're 9:1 11:13 11:13 16:22 24:5,6 37:3</p>	<p>we've 35:6 37:6 win 30:25 39:22 51:6 window 40:11 winning 30:24 33:6 41:14 wins 5:16,18 30:5 43:8 49:4 won 4:22 28:25 41:10,11 wonder 13:16 words 15:10 49:10 work 52:21 worked 48:21 working 46:12 works 12:22 28:19 world 49:12 worried 23:7 worth 17:6,7,15 19:3 39:15 wouldn't 4:20 9:20 13:11 19:12 31:1 38:18 54:5,13 Wrinkle 6:20 wrong 37:8</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p>x 1:2,7 27:18</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>year 17:5,6,8,19 39:11 41:3 years 17:6,15 22:24 27:19 34:22 38:23 40:8 43:6 46:10 46:14</p> <hr/> <p style="text-align: center;">\$</p> <hr/> <p>\$1 33:3 \$10 31:1 \$100 17:6</p>	<p>\$130 33:7</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>1 37:2 10 35:11 38:23 46:10,14 48:16 100 31:1 11:05 1:13 3:2 12(b)(6) 48:10 12-416 1:4 3:4 12:06 56:10 15 38:23 16 35:11 18 12:16 18-month 12:17 180 12:20 34:15 35:3,24 44:3 180-day 12:18 13:3 34:16 48:21 49:3,5,8 49:19 54:11,18 54:21 55:1</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2 36:15 20 34:21 200 34:6 200,000 55:14 2003 40:11 49:16 2009 8:14,24 2013 1:9 2015 19:21,25 2017 19:19,25 20:2,6 2025 39:2 2028 39:3 24 2:7 25 1:9 31:2,5 34:22 40:16 261 4:12</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 2:4 22:19 36:16 30 17:7,9 40:17 300,000 33:2</p>	<p>32 15:20 35 4:12</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>4 12:15 33:7 36:18 40 22:24</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>5 36:21 37:2 50 30:23 50/50 31:14 51 2:10</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p>6 37:3 6th 37:4 600,000 55:11,15</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>70 17:9 75 51:8</p> <hr/> <p style="text-align: center;">8</p> <hr/> <p>80 55:4 85 55:4</p>
---	---	---	--