06-5525 CV

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE DDAVP DIRECT PURCHASER ANTITRUST LITIGATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE STATES OF NEW YORK, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING, AND THE DISTRICT OF COLUMBIA AND PUERTO RICO AS AMICI CURIAE SUPPORTING PLAINTIFFS-APPELLANTS AND REVERSAL

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for Amici Curiae
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8096

BARBARA D. UNDERWOOD
Solicitor General

BENJAMIN N. GUTMAN
Deputy Solicitor General

JAY L. HIMES
Chief, Antitrust Bureau

ROBERT L. HUBBARD
Director of Litigation,
Antitrust Bureau

of Counsel

(Additional counsel listed on signature page)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

TABLE OF AUTHORITIES (cont'd)

FEDERAL STATUTES

MISCELLANEOUS

INTRODUCTION AND INTEREST OF AMICI CURIAE

The States of New York, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming, and the District of Columbia and Puerto Rico submit this brief as amici curiae in support of plaintiffs-appellants. Amici States seek reversal of the District Court's holding that consumers and other purchasers who paid inflated prices for patented products lack standing to assert antitrust claims based on the defendant's procurement of the patent by fraud.

In their efforts to protect their citizens and themselves from the effects of antitrust violations, Amici States investigate and assert antitrust claims, much like the claims dismissed by the District Court, on behalf of consumers and state agency purchasers. E.g., In re Buspirone Antitrust Litig., MDL No. 1413 (JGK) (S.D.N.Y) ($100 million settlement); Ohio v. Bristol-Myers Squibb Co., No. 02-1080 (EGS) (D.D.C.) ($50 million settlement). Amici States also seek to foster the proper interpretation of federal antitrust laws so that others can further similar interests. The District Court's holding threatens the ability of Amici States and others to recover

damages for purchasers, including consumers and state agencies, when they are the victims of antitrust violations arising from the fraudulent procurement of patents.

QUESTION PRESENTED

Do persons who pay artificially inflated prices for patented products have standing to assert antitrust claims based on the defendant's procurement of the patent by fraud?

Amici States take no position on any other question presented in this appeal.

STATEMENT OF THE CASE

In Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965), the Supreme Court held that a party who fraudulently obtained a patent from the Patent & Trademark Office violates section 2 of the Sherman Act, 15 U.S.C. § 2, if the party uses the fraudulently obtained patent to acquire or maintain monopoly power. See C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1364 (Fed. Cir. 1998).

Plaintiffs here are direct purchasers of DDAVP, an antidiuretic drug manufactured by defendants (J.A. 305-306). According to plaintiffs' complaint, defendants fraudulently obtained a patent on DDAVP, which allowed them to prevent other pharmaceutical companies

from producing generic versions of the drug (J.A. 306-307). As a result, defendants have a monopoly in the market for the drug, and consumers and other purchasers, such as plaintiffs, have been forced to pay hundreds of millions of dollars in supracompetitive prices for DDAVP (J.A. 307).

Plaintiffs assert Walker Process claims against defendants under section 4 of the Clayton Act, 15 U.S.C. § 15, alleging that defendants used their fraudulently obtained patent on DDAVP to acquire and maintain their market power. The District Court granted defendants' motion to dismiss. The court held that only competitors, not purchasers, have standing to assert Walker Process claims (J.A. 316). That holding exacerbated an existing split among the district courts on the standing question. Compare In re Remeron Antitrust Litig., 335 F. Supp. 2d 522, 529 (D.N.J. 2004), and In re Ciprofloxacin Hydrochloride Antitrust Litig., 363 F. Supp. 2d 514 (E.D.N.Y. 2005) (rejecting standing for purchasers), with Molecular Diagnostics Labs. v. Hoffman-La Roche, Inc., 402 F. Supp. 2d 276, 280 (D.D.C. 2005) (upholding standing for purchasers).

In addition to holding that plaintiffs lack standing, the District Court dismissed plaintiffs' claims on several merits-related grounds. In particular, the court held that (1) plaintiffs' complaint did not comply with Federal Rule of Civil Procedure 9(b), which requires parties to plead fraud with particularity; (2) the

factual record developed in a different lawsuit conclusively demonstrated that defendants did not obtain their patent fraudulently; and (3) defendants' efforts to enforce their patent though judicial and administrative proceedings were not a "sham" and were protected by the First Amendment (J.A. 312, 317-319).

Amici States address only the standing question and take no position on the merits. Regardless of how this Court resolves the merits-related arguments, this Court should address standing as a threshold issue implicating the Court's jurisdiction. Whether purchasers have standing to assert Walker Process claims is an important and recurring question as to which the district courts are divided and as to which no circuit has yet ruled.

ARGUMENT

Because artificially inflated prices paid by purchasers are what make antitrust violations profitable for sellers, purchasers typically are intended victims of anticompetitive conduct. Accordingly, federal antitrust law extends significant remedies to purchasers. Equally important, state law may extend to purchasers additional remedies that federal antitrust law declines to provide.

The District Court's holding should be reversed because direct purchasers have standing to sue when they allege that they have paid more for an item because of antitrust violations. Purchasers do not

lose their standing merely because competitors also have standing to assert claims based on those same antitrust violations. These principles apply to all antitrust claims, including monopolization claims premised on the fraudulent procurement of a patent.

I

PURCHASERS HAVE STANDING TO PURSUE ANTITRUST CLAIMS WHEN THEY HAVE PAID ARTIFICIALLY INFLATED PRICES BECAUSE OF AN ANTITRUST VIOLATION

Section 4 of the Clayton Act, 15 U.S.C. § 15, the antitrust treble-damages provision, provides that:

> any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover three fold damages by him sustained.

The purpose of section 4 is to deter antitrust violations and compensate the victims of those violations. E.g., California v. ARC Am. Corp., 490 U.S. 93, 102 (1989); Am. Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 575-76 (1982). "The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated. And the legislative history of the Sherman Act demonstrates that Congress used the phrase 'any person' intending it to have its naturally broad and inclusive meaning." Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 312 (1978) (citations omitted).

The Supreme Court has admonished that any "artificial limitations" on the breadth of section 4 do violence to its plain language and to Congress's broad remedial objective. Blue Shield of Va. v. McCready, 457 U.S. 465, 472-73 (1982). Thus, "in the absence of some articulable consideration of statutory policy suggesting a contrary conclusion in a particular factual setting," section 4 should be applied as broadly as its language suggests. Id. at 473.

When a defendant commits an antitrust violation that allows it to charge supracompetitive prices, those who are overcharged have standing under section 4 to assert antitrust claims. As the Supreme Court stated in Reiter v. Sonotone Corp., 442 U.S. 330 (1979), "[t]he essence of the antitrust laws is to ensure fair price competition in an open market." Id. at 342. Thus, when a plaintiff "alleges a wrongful deprivation of her money because the price of the [product] she bought was artificially inflated by reason of [a defendant's] anticompetitive conduct, she has alleged an injury in her 'property' under § 4." Id.

Plaintiffs allege direct purchases from defendants – monopolists who committed patent fraud. Overcharging direct purchasers, accomplished in part by patent fraud, is actionable under federal antitrust law. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 489 (1968) ("when a buyer shows that

the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § 4"); U.S. Gypsum Co. v. Ind. Gas Co., 350 F.3d 623, 627-28 (7th Cir. 2003) ("the potential to establish injury through elevation of price in the affected market satisfies any distinct 'antitrust standing' requirement").

As the leading antitrust commentators have similarly reminded, buyers are usually the "preferred plaintiffs in private antitrust litigation" because "protecting consumers from monopoly prices is the central concern of antitrust." 2 Phillip E. Areeda, Herbert Hovenkamp & Roger D. Blair, Antitrust Law ¶ 345, at 356 (2d ed. 2000). Thus, "consumer standing to recover for an overcharge paid directly to an illegal cartel or monopoly is seldom doubted." Id. And "consumer" standing is not limited to end-use purchasers; although dealers who purchase for resale are not really consumers, "they too have standing to challenge illegal overcharges." Id.

II

PURCHASERS DO NOT LOSE THEIR STANDING MERELY BECAUSE THE DEFENDANT'S COMPETITORS MIGHT ALSO SUFFER HARM FROM THE SAME ANTITRUST VIOLATION

The District Court found that plaintiffs lack standing because "there has been no enforcement of the patent against the customer Plaintiffs" (J.A. 316). The court thus held that antitrust claims

based on fraudulently obtained patents may be brought only by competitors, not purchasers. The court apparently reached this conclusion because the plaintiff in Walker Process was a competitor, and the Supreme Court allowed the competitor to pursue the antitrust claim in that case. Subsequently, lower courts have held Walker Process claims may be brought by competitors only if the defendant has enforced (or threatened to enforce) the patent against those competitors. See, e.g., Indium Corp. of Am. v. Semi-Alloys, Inc., 566 F. Supp. 1344, 1352-52 (N.D.N.Y. 1983) ("[T]he plaintiff must at least be able to allege facts that indicate that the defendant has enforced, or has sought to enforce, or has threatened to enforce its fraudulently obtained patent against the plaintiff itself.") (cited by the District Court at J.A. 316).

But neither Walker Process nor later cases like Indium Corp. address whether antitrust claims based on patent fraud also may be asserted by purchasers. That competitors may bring such claims does not mean that purchasers may not. The Supreme Court's decision in McCready illustrates this point. McCready was a consumer who complained that Blue Cross's practice of "refusing to reimburse subscribers for psychotherapy performed by psychologists, while providing reimbursement for comparable treatment by psychiatrists," was a group boycott that violated the antitrust laws. 457 U.S. at 467. Even though McCready was not the direct target of the boycott

– and in fact had not even paid higher rates for any of the medical care she actually received, id. at 481 – the Supreme Court held that she had standing to maintain an antitrust action against Blue Cross:

> [T]he remedy cannot reasonably be restricted to those competitors whom the conspirators hoped to eliminate from the market. . . . Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely the type of loss that the claimed violations would be likely to cause.

Id. at 479 (quotation marks and ellipses omitted).

The injury that plaintiffs claim here is equally "integral" to the alleged antitrust violation. According to plaintiffs' allegations, defendants fraudulently procured the patent so that they could overcharge purchasers like plaintiffs. Harming competitors – by preventing them from selling a generic substitute that costs less – was merely a means to achieve the ultimate, unlawful goal of charging purchasers supracompetitive prices. See In re Warfarin Sodium Antitrust Litig., 214 F.3d 395 (3d Cir. 2000) (holding that consumers have standing to assert injunctive relief claims under the antitrust laws based on a drug manufacturer's improper interference with the FDA approval process and public acceptance of a generic drug, because consumers were foreseeable and necessary victims, and the ultimate target, of the alleged anticompetitive conduct).

Like the consumer in McCready, plaintiffs here are asserting direct economic harm to themselves. As the Seventh Circuit explained, in such circumstances, even if "the reason the plaintiffs have been injured . . . implicates the rights of the competitors not to be excluded . . . through anticompetitive actions of Ameritech [the monopolist], . . . that does not make this a jus tertii case." Goldwasser v. Ameritech Corp., 222 F.3d 390, 398 (7th Cir. 2000). Because plaintiffs seek "lower prices and more choice," and allege that defendants have done "things to prevent that from happening," they are asserting their own rights. Id. at 398-99. Any benefit to the competitors is "incidental"; plaintiffs "do not care in principle which competitors enter their markets; they just want a competitively structured . . . market that will prevent [defendants] from inflicting antitrust injury on them." Id. at 399.

The Supreme Court's decision in Pfizer implicitly confirms that section 4 provides a remedy for Walker Process claims by consumers. In Pfizer, the nations of India, Iran, and the Phillippines brought antitrust claims premised in part on "fraud upon the United States Patent Office," which the defendants had committed by fraudulently securing a patent for antibiotics. 434 U.S. at 310; see also Charles Pfizer & Co., Inc. v. FTC, 401 F.2d 574, 577 (6th Cir. 1968). The Supreme Court held that foreign nations who purchased the antibiotics were "persons" under section 4 and were allowed to

pursue their claims, including Walker Process-type claims based on fraud on the Patent Office. 434 U.S. at 317-18. Just as those plaintiffs were permitted to assert their claims as purchasers, so too should the purchasers here. To hold otherwise would unduly restrict the scope of section 4 without good reason.

CONCLUSION

For the reasons set forth above, the District Court's alternative holding that direct purchasers lack standing to pursue Walker Process antitrust claims should be reversed.

Dated: New York, New York
May 30, 2007

Respectfully submitted,
ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for Amici Curiae

By: _____
Benjamin N. Gutman
Deputy Solicitor General

120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8096

BARBARA D. UNDERWOOD
Solicitor General

BENJAMIN N. GUTMAN
Deputy Solicitor General

JAY L. HIMES
Chief, Antitrust Bureau

ROBERT L. HUBBARD
Director of Litigation,
Antitrust Bureau

Talis J. Colberg
Attorney General of Alaska
P.O. Box 110300
Diamond Courthouse
Juneau, AK 99811
(907) 465-3600

Terry Goddard
Attorney General of Arizona
1275 W. Washington St.,
Phoenix, AZ 85007-2926
(602) 542-4266

Dustin McDaniel
Attorney General of Arkansas
200 Tower Bldg.,
323 Center Street
Little Rock, AR 72201
(800) 482-8982

Edmund G. "Jerry" Brown Jr.
Attorney General of California
1300 I st., Ste. 1740
Sacramento, CA 95814
(916) 445-9555

John W. Suthers
Attorney General of Colorado
1525 Sherman St.,
Denver, CO 80203
(303) 866-4500

Richard Blumenthal
Attorney General of Connecticut
55 Elm Street
Hartford, CT 06141-0120
(860) 808-5318

Joseph R. "Beau" Biden III
Attorney General of Delaware
Carvel State Office Bldg.,
820 N. French Street
Wilmington, DE 19801
(302) 577-8338

Bill McCollum
Attorney General of Florida
The Capitol, PL-01
Tallahassee, FL 32399-1050
(850) 414-3300

Mark J. Bennett
Attorney General of Hawaii
425 Queen St.,
Honolulu, HI 96813
(808) 586-1500

Lawrence G. Wasden
Attorney General of Idaho
State House, 700 W. Jefferson Street
P.O. Box 83720
Boise, ID 83720-1000
(208) 334-2400

Lisa Madigan
Attorney General of Illinois
James R. Thompson Ctr.,
100 West Randolph Street
Chicago, IL 60601
(312) 814-3000

Thomas Miller
Attorney General of Iowa
Hoover State Office Bldg.,
1305 E. Walnut Street
Des Moines, IA 50319
(515) 281-5164

Paul J. Morrison
Attorney General of Kansas
120 S.W. 10th Avenue, 2nd Fl.,
Topeka, KS 66612-1597
(785) 296-2215

Greg D. Stumbo
Attorney General of Kentucky
State Capital, Rm. 116
700 Capitol Avenue
Frankfort, KY 40601
(502) 696-5300

Charles C. Foti, Jr.
Attorney General of Louisiana
P.O. Box 94005
1885 North 3rd St.,
Baton Rouge, LA 70804-9005
(225) 326-6000

G. Steven Rowe
Attorney General of Maine
State House Station 6
Augusta, ME 04333
(207) 626-8800

Douglas F. Gansler
Attorney General of Maryland
200 St. Paul Place
Baltimore, MD 21202-2202
(410) 576-6300

Martha Coakley
Attorney General of Massachusetts
1 Ashburton Place
Boston, MA 02108-1698
(617) 727-2200

Mike Cox
Attorney General of Michigan
P.O. Box 30212
525 West Ottawa Street
Lansing, MI 48909-0212
517-373-1140

Lori Swanson
Attorney General of Minnesota
102 State Capitol, Ste. 102
St. Paul, MN 55155-1609
(651) 296-3353

Jim Hood
Attorney General of Mississippi
Department of Justice
P.O. Box 220
Jackson, MS 37205-0220
(601) 359-3680

Mike McGrath
Attorney General of Montana
Justice Bldg.
215 N Sanders
Helena, MT 59620-1401
(406) 444-2026

Kelly A. Ayotte
Attorney General of New Hampshire
State House Annex
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3658

Stuart Rabner
Attorney General of New Jersey
Richard J. Hughes Justice Complex
25 Market St.,
CN 080
Trenton, NJ 08625
(609) 292-8740

Gary King
Attorney General of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504-1508
(505) 827-6000

Wayne Stenehjem
Attorney General of North Dakota
State Capitol
600 E Boulevard Avenue
Bismarck ND 58505-0040
(710) 328-2210

Marc Dann
Attorney General of Ohio
State Office Tower
30 E. Broad St.,
Columbus, OH 43266-0410
(614) 466-4320

W.A. Drew Edmondson
Attorney General of Oklahoma
State Capitol Rm. 112
2300 N. Lincoln Boulevard
Oklahoma City, OK 73105-4894
(405) 521-3921

Hardy Myers
Attorney General of Oregon
Justice Bldg.,
1162 Court St NE
Salem OR 97301
(503) 378-4732

Thomas W. Corbett, Jr.
Attorney General of Pennsylvania
1600 Strawberry Square
Harrisburg, PA 17120
(717) 787-3391

Henry McMaster
Attorney General of South Carolina
Rembert C. Dennis Office Bldg.,
P. O. Box 11549
Columbia, SC 29211-1549
(803) 734-3970

Robert E. Cooper, Jr.
Attorney General of Tennessee
500 Charlotte Avenue
Nashville, TN 37243
(615) 741-5860

Greg Abbott
Attorney General of Texas
P.O. Box 12548
Capitol Station
Austin, TX 78711-2548
(512) 463-2100

Mark L. Shurtleff
Attorney General of Utah
State Capitol, Rm. 236
Salt Lake City, UT 84114-0810
(801) 538-9600

William H. Sorrell
Attorney General of Vermont
109 State Street
Montpelier, VT 05609-1001
(802) 828-3173

Rob McKenna
Attorney General of Washington
900 Fourth Street, Suite 2000
Olympia, WA 98504-0100
(360) 753-6200

Darrell V. McGraw, Jr.
Attorney General of West Virginia
State Capitol
1900 Kanawha Blvd., E.,
Charleston, WV 25305
(304) 558-2021

J. B. Van Hollen
Attorney General of Wisconsin
State Capitol, Ste. 114 E
P.O. Box 7857
Madison, WI 53707-7857
(608) 266-1221

Patrick J. Crank
Attorney General of Wyoming
State Capitol Bldg.,
Cheyenne, WY 82002
(307) 777-7841

Linda Singer
Attorney General of District of Columbia
John A. Wilson Building
1350 PA Ave, NW Suite 409
Washington, DC 20009
(202) 724-1305

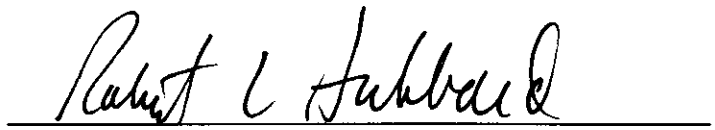
Hon. Roberto J. Sanchez-Ramos
Attorney General of Puerto Rico
GPO Box 902192
San Juan, PR 00902-0192
(787) 721-2900

Certification of Compliance
With Type Volume Limits,
Type Face & Style Requirements,
And Anti-Virus Scan Requirements

1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 32(a)(7) and 29(d) because it contains 2,197 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), as counted by the WordPerfect 12 word processing program used to prepare it.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it was prepared in a monospaced typeface using the WordPerfect 12 word processing program in 12-point Courier font, which has fewer than 10.5 characters per inch.

3. The electronic copy of this brief submitted in Portable Document Format (PDF) as an email attachment to briefs@ca2.uscourts.gov pursuant to Local 32(a)(1)(A) complies with Local Rule 32(a)(1)(E) because it was scanned for viruses by the Department of Law's server and no virus was detected.



Robert L. Hubbard

Certificate of Service

I caused two copies of the accompanying **Brief for the States of New York, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming, and the District of Columbia and Puerto Rico as Amici Curiae Supporting Plaintiffs-Appellants and Reversal** to be sent via overnight delivery service and an electronic copy sent via email on the 30th of May, 2007, to each of the following:

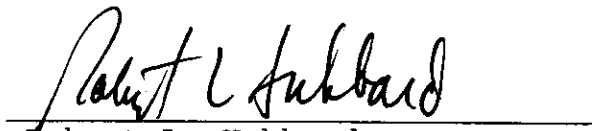
Bruce E. Gerstein
Garwin, Bronzaft, Gerstein & Fisher
1501 Broadway
New York, NY 10036
bgerstein@gbgf-law.com
(212) 398-0055
Counsel for Plaintiff Louisianna Wholesale Drug Co., Inc.

Daniel Berger
David F. Sorensen
Berger & Montague PC
1622 Locust St.
Philadelphia, PA 19103
dsorensen@bm.net
(215) 875-5705
Counsel for Plaintiff Rochester Drug Co-Operative, Inc.

Linda P. Nussbaum
Kaplan Fox & Kilsheimer LLP
805 Third Ave.
New York, NY 10022
lnussbaum@kaplanfox.com
(212) 687-1980
Counsel for Plaintiffs Meijer, Inc. et al.

Donald B. Ayer
Jones Day
51 Louisiana Ave. NW
Washington, DC 20001
dbayer@jonesday.com
(202) 879-4689
Counsel for Defendant Aventis Pharmaceuticals, Inc.

Barbara H. Wootton
Arnold & Porter, LLP
555 Twelfth Street NW
Washington, DC 20004
barbara_wootton@aporter.com
(202) 942-6545
Counsel for Defendants Ferring B.V. & Ferring Pharmaceuticals, Inc.



Robert L. Hubbard