

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA,	:	
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	:	
v.	:	Case No. 08-CR-115 (RMU)
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	:	
ANDREW BODNAR,	:	Redacted Pursuant to
	:	Fed. R. Crim. P. 49.1
	:	
Defendant.	:	
-----X	:	

SENTENCING MEMORANDUM
ON BEHALF OF DR. ANDREW G. BODNAR

Elkan Abramowitz
Lawrence S. Bader
Stephen M. Juris
Jerold L. Steigman
MORVILLO, ABRAMOWITZ, GRAND,
IASON, ANELLO & BOHRER, P.C.
565 Fifth Avenue
New York, NY 10017
(212) 856-9600

Howard M. Shapiro
Ronald C. Machen
Demian S. Ahn
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6000

Attorneys for Defendant Andrew G. Bodnar

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INTRODUCTION

After a life devoted to the service of others, a distinguished 30-year career as a physician, teacher, and corporate executive, in June 2006, Dr. Andrew G. Bodnar signed a certification on behalf of his employer, Bristol Myers Squibb Company (BMS), that was submitted to the Federal Trade Commission (FTC). With the benefit of hindsight, Dr. Bodnar now knows and acknowledges that part of that document was inaccurate. Acknowledging his mistake, on April 6, 2009, Dr. Bodnar pled guilty to violating 18 U.S.C. §1018 -- a misdemeanor -- for filing a document with the FTC that he now knows to be false. As outlined below, however, the unusual facts of this case and the fact that Dr. Bodnar was unaware of this inaccuracy at the time the certification was made should be given substantial consideration by the Court in imposing its sentence.

This memorandum is respectfully submitted on Dr. Bodnar s behalf to review his personal and professional history, to describe the offense conduct, and to make what we hope will be a useful contribution to the Court s decision regarding an appropriate sentence in this case. Attached to this memorandum as Exhibit A are 31 letters from family, friends, former co-workers, and others who have known Dr. Bodnar best. As set forth in those letters, Dr. Bodnar is a modest and unassuming man who has used -- and continues to use -- his considerable skills to benefit others. He has made exceptional contributions to medical science, but has never let his successes alter his values or outlook. He has given freely of his time to charity and colleagues alike. And over the course of his medical career, he has always advocated for what he believes to be right and in the interest of patients. It is for these reasons that so many others have looked to Dr. Bodnar for help and guidance in their own times of need.

Dr. Bodnar already has paid a high price for signing the certification at issue in this case. His professional career at BMS was effectively ended, cutting short an accomplished career that had resulted in the development of multiple life-saving pharmaceuticals. His family, health, and reputation have suffered tremendously in the interim. Given Dr. Bodnar's significant contributions to his community, his patients, and medical science, as well as the impact that a more severe sentence would necessarily have on Dr. Bodnar's health, his family, and the charitable medical organizations that continue to rely on Dr. Bodnar for their important work, we respectfully ask the Court to impose a sentence of a fine only, within the range provided for by the United States Sentencing Guidelines (the Guidelines).

I. DR. BODNAR'S PERSONAL BACKGROUND

For anyone who has worked with or known Dr. Bodnar over the course of his long and distinguished career, his presence before this Court for sentencing is beyond comprehension. Dr. Bodnar has led an honorable and extraordinary life, marked by a commitment to public service and selflessness that is all too often missing among successful professionals. That he now finds himself a defendant in a criminal case is a tragic turn of events that has shaken Dr. Bodnar and his family to the core.

A. Family History

Dr. Bodnar was raised in a family that had been decimated by the Holocaust. His mother, Magda, Hungarian by birth, was a student studying in Austria when it was annexed by Nazi Germany. She returned to her family in Hungary and urged them to flee Hungary, as she had fled Austria, before the German invasion. Her family

stayed, believing that they would remain safe in Hungary. Before the Nazis invaded Hungary, Magda met and married Dr. Bodnar's father, Bela Bohm.

Tragically, Magda's family, including Bela, was no safer in Hungary. During the war, Bela, a lawyer, was conscripted into the German-controlled Hungarian army, and, along with other Jews, was assigned the task of walking ahead of army regulars for the purpose of setting off land mines. Magda and her entire family were deported to Auschwitz. Magda was the sole survivor.

Dr. Bodnar, the Bohms' only child, was born in Hungary in 1948. Fearing persecution after the end of World War II, the Bohm family changed their last name to Bodnar when Dr. Bodnar was two years old, as the name Bodnar sounded more neutrally Hungarian than Bohm. When Dr. Bodnar was only six years old, his family was once again struck by tragedy when Dr. Bodnar's father died in a drowning accident. Two years later, the Hungarian Revolution occurred, and once again, Magda (and her young son, Andrew) had to flee from persecution. Dr. Bodnar and his mother hid in a hay cart as they fled to the Hungarian border with Austria, with Russian tanks on the same road headed in the other direction. After escaping across the border into the temporary shelter of the Red Cross, Dr. Bodnar and his mother were transported to Camp Kilmer, a displaced persons camp in New Jersey for Hungarian refugees. Shortly thereafter, they moved to Manhattan's Washington Heights neighborhood, where Dr. Bodnar's mother struggled to raise him given the limited financial resources at her disposal as a single mother.

Dr. Bodnar's mother remarried in 1962 to Louis Laszlo. Living in Washington Heights and later the Bronx, Dr. Bodnar grew up in a very loving

environment. He quickly learned to speak English and excelled in school. Dr. Bodnar became a naturalized United States citizen in 1962 at the age of 14, and graduated from the Bronx High School of Science in 1966. He then attended Harvard College, graduating *magna cum laude* in 1970.

Dr. Bodnar met his wife, Dr. Amy Pruitt, in 1974 at Massachusetts General Hospital, where they were both young interns. Before they met, however, Dr. Bodnar's mother had seen Amy's face in a book with pictures of all of the interns. Magda pointed to Amy's picture and told Andrew that he should look out for Amy at the hospital. As fate would have it, they met on the first day of their respective internships in internal medicine.

Dr. Bodnar and Dr. Pruitt were married in 1983, and have two sons with whom they are especially close. Their elder son, Benjamin, is 24 years old and a first-year law student at the University of Michigan Law School. Nicholas, their second child, is 20 years old and a sophomore at Harvard College. Dr. Bodnar's 89-year-old stepfather, Louis Laszlo, has lived with the Bodnars since 1991, as did Dr. Bodnar's mother, who passed away in 2008. Both played key roles in the upbringing of the Bodnar's sons.

Dr. Pruitt currently is an associate professor of neurology at the Hospital of the University of Pennsylvania, where she has worked since 1991. She has a subspecialty in neuro-oncology, the treatment of brain malignancies. Dr. Pruitt is a caring physician, wife, and mother. She and Dr. Bodnar have a strong and loving marriage, and an exceptional relationship with their children, as explained in Dr. Pruitt's accompanying letter to the Court. After 26 years of marriage, Dr. Pruitt has written that the person I

have known and loved for many years, her husband, is the best doctor I have ever met and the most intelligent and honorable man I know.

Dr. Bodnar also has a step-sister, Kati Gale, who is the daughter of Dr. Bodnar's stepfather, Louis Laszlo, by a prior marriage. At Dr. Bodnar's urging, Ms. Gale came to live with their father and Dr. Bodnar's mother after Dr. Bodnar left for college. Ms. Gale and Dr. Bodnar have been and are very close, and she visits the Bodnars and her father regularly, even though she lives in Toledo, Ohio. She was introduced to her husband, Steven Gale, by Dr. Bodnar when she was employed at the pathology lab at Massachusetts General Hospital and Dr. Gale was a fellow medical student of Dr. Bodnar's. Both have written to your Honor about their close relationship with Dr. Bodnar. Ms. Gale has written: Andy is a most caring, considerate and honest individual. I am not alone when I say my life is beautiful because of him. I am proud he is my brother. Similarly, her husband describes Dr. Bodnar as an extremely generous, caring human being.

B. Dr. Bodnar's Professional Career

Dr. Bodnar's personal qualities are not merely evident from his relationships with his family. After he graduated from Harvard College in 1970, Dr. Bodnar returned to New York City to attend medical school at Columbia University's College of Physicians and Surgeons, where he obtained his M.D. in 1974. He then returned to Boston to complete his internship, residency, and chief residency in internal medicine and a fellowship in cardiology at Massachusetts General Hospital (Massachusetts General), a teaching hospital affiliated with the Harvard Medical School and one of the world's preeminent hospitals. In the course of his medical career,

Dr. Bodnar eventually became Assistant Chief and Associate Chief of both Cardiology and Internal Medicine, Acting Chief of Cardiology, and Director of the Internal Medicine Training Program at Massachusetts General. Dr. Bodnar also was an instructor and lecturer at the Harvard Medical School.

Dr. Bodnar worked for 15 years at Massachusetts General, attending to hundreds of patients in his capacity as a cardiologist, treating individuals suffering from coronary disease, hypertension, valvular heart disease, and congestive heart failure. In addition, he trained and oversaw the training of hundreds of medical students, new interns in internal medicine, and residents and fellows in cardiology. Dr. Bodnar is Board Certified in Internal Medicine and Cardiovascular Disease, and considers his prior work -- training and mentoring young interns and residents to be caring and competent physicians -- an especially proud part of his career.

Dr. Bodnar's commitment to the training and development of young doctors is evident from the letters submitted to the Court by his former medical colleagues. Dr. Peter Slavin, current President of Massachusetts General, has written to the Court about his first exposure to Dr. Bodnar in 1984, when Dr. Bodnar was the residency program director. Dr. Slavin recalls: I was immediately struck by the personal interest that Andy took in my career and that of the other residents. He was a busy academic cardiologist at the time but went out of his way to teach, coach, and cheerlead the residents during a formative time in their careers. He was universally liked by the residents for these qualities as well as his superb skills as a physician, his kindness, his keen intelligence, and his energy and optimism. He was an invaluable and important

mentor to me during my early days as a physician and carried out these responsibilities with great skill and sensitivity.

One of the other doctors who benefitted from Dr. Bodnar's guidance is Dr. Michael Seiden, who is now the President and Chief Executive Officer of the Fox-Chase Cancer Center in Philadelphia. As Dr. Seiden has written to your Honor, when he first became an intern at Massachusetts General in 1986, Dr. Bodnar was the Internal Medicine House Staff Program Director and Associate Chairman of Cardiology. Dr. Seiden writes that he had weekly encounters with Dr. Bodnar, who provided an outstanding role model of a compassionate and highly skilled internist, cardiologist and physician. He also spent considerable time in mentoring all junior housestaff on the art of delivering medical care and managing a myriad of time intensive responsibilities in a stressful environment. He was a role model of a multi-faceted, highly professional and compassionate academic physician. Others who trained under Dr. Bodnar or worked with or for him over the years have paid similar testament to Dr. Bodnar's concern for his patients and colleagues alike and to his sensitivity to the needs of others. The letters submitted to your Honor by Kathleen Meriwether, Dr. Gerard D. Picot, Miriam Lane Sparrow, John L. Skule, and others vividly describe the professional respect and assistance they personally received from Dr. Bodnar, as well as his attentiveness to the medical needs of patients.

In 1983, Dr. Bodnar received a law degree *magna cum laude* from Harvard Law School while working as a full-time cardiologist. One year later, he was appointed by then-Governor Michael Dukakis to the Massachusetts Board of Registration in Medicine, the entity that oversees the professional conduct of Massachusetts

physicians. While continuing to work full-time as a cardiologist, he served as the Board's Vice-Chairman and, later, Chairman in a term that ended in 1990.

In 1987, while working as a physician in Boston, Dr. Bodnar was approached to join the Squibb Corporation, a large pharmaceutical company located in Princeton, New Jersey. Unwilling to move his family from Boston (particularly since his wife was a doctor with an active practice in Boston), Dr. Bodnar agreed to work as a consultant for Squibb. In the two years that followed, Dr. Bodnar assumed more and more responsibility. During this time, Dr. Bodnar was considering a career move from clinical medicine (taking care of patients and teaching) to working for a large pharmaceutical company. Dr. Bodnar labored over this decision, given how much he enjoyed working with interns and helping patients at Massachusetts General. Ultimately, he concluded that he could help more people working to develop life-saving drugs than he could treating individual patients, and in September 1989 he therefore accepted a position at Squibb as the Chief Operating Officer of the Squibb Institute for Medical Research (Squibb's research and development division). In April 1991, Dr. Bodnar moved with his family to Princeton. Squibb merged with the Bristol-Myers Company to form BMS in October 1991.

Dr. Bodnar was employed by BMS from 1991 until 2007, when he retired as Senior Vice President, Strategy in the wake of the governmental inquiry that resulted in the instant case. During his time at Squibb and BMS, Dr. Bodnar held senior positions in research and development, product strategy and business development, and oversaw several of the company's U.S.-based businesses. Dr. Bodnar also played a significant role in developing and advocating for the launch of various pharmaceuticals.

During his tenure at BMS, Dr. Bodnar played a key role in enhancing that company's commitment to the core principles of patient care that Dr. Bodnar had learned and embraced at Massachusetts General. Dr. Bodnar was informally responsible for framing the company's long-term strategic plans and policies, as well as its corporate philanthropy. And in 2006, Dr. Bodnar took formal responsibility for these areas. Under his oversight, BMS undertook various initiatives aimed towards the public interest. For example, Dr. Bodnar pushed for, and obtained, a company commitment to exercise price increase restraints so that the company would not raise prices above increases for inflation. When the AARP reported drug price increases in 2007, BMS's price increases consequently were the smallest of the 26 companies reviewed. Moreover, in the face of public perception that the pharmaceutical industry did not place patients' needs first, Dr. Bodnar encouraged BMS to pledge to report the results of its trials in a more public manner than required in the industry.

As Dr. Eugene Braunwald has written to your Honor, this emphasis on the needs of the public at the potential expense of Dr. Bodnar's own employer was highly unusual. Dr. Eugene Braunwald writes to the Court about an incident in 2004, when BMS was involved in a clinical trial comparing a BMS cholesterol-reducing drug against one developed by a competitor. The results of the trial demonstrated that BMS's competitor's drug was clearly superior to BMS's. According to Dr. Braunwald (who also has supplied his corresponding letter to Dr. Bodnar from 2004 praising BMS's response to the disappointing results), Dr. Bodnar's frank response to this situation was as extraordinary as it was unexpected:

According to our contract with BMS, the company had the right to scrutinize the data and subject it to reanalysis. This

could have delayed its public release. Dr. Bodnar, however, insisted on its early release and publication, an action which, while not helpful [to BMS] from a commercial standpoint, was beneficial to hundreds of patients. This action, which is one that I have never seen taken by a senior manager of a pharmaceutical company, showed again Dr. Bodnar's enlightened humanism -- no matter what the cost.

This sentiment is echoed in the letter submitted to your Honor by Kathleen Meriwether, a former colleague of Dr. Bodnar's at BMS: In pharmaceutical companies, where the ability to influence a favorable outcome from a regulator, or to present safety information in a favorable light could literally translate into millions of dollars in revenue, Andy was invariably able to persuade the organization that the best approach was to put patients first, to protect BMS's credibility and reputation, and to do the right thing.

Similarly, regarding the question of pharmaceutical advertising, Dr. Bodnar led BMS's effort to restrict direct advertisements to consumers for the first year its products were marketed. While delaying the direct marketing of a new product may well have reduced BMS sales in the short term, it was Dr. Bodnar's belief -- and it ultimately became BMS policy -- that restricting such marketing would allow physicians some breathing room to determine whether there were any additional side effects associated with new pharmaceuticals. Dr. Bodnar believed it was important for BMS to be doing the right thing for the people who were relying on its products. Throughout, as Dr. Bodnar's friends and colleagues can attest, Dr. Bodnar's basic approach and outlook has been the same: serve the patients' interests first and foremost.

In addition to advocating for these policies, Dr. Bodnar also played a central role in the development of significant drugs that have made a difference in the lives of thousands of patients. As Allan Fox, a former Chief Counsel for the Senate

Health Committee who has spent his entire career focusing on the health care industry, writes to the Court, Dr. Bodnar played a crucial role in developing both the anti-cancer drug, Taxol, and one of the earliest AIDS drugs, Videx. Mr. Fox notes that Dr. Bodnar was an invaluable source of guidance to the project team developing Taxol, and that his contribution to the process was all the more impressive because he kept the needs and concerns of cancer patients in the forefront of his thinking. Regarding the development of Videx, Mr. Fox likewise highlights Dr. Bodnar's emphasis on doing the right thing for AIDS patients in desperate need of treatment:

During the clinical trial, when it became clear that the drug was effective but before the drug was approved, BMS was confronted with demands by patients, their families and activist groups for access to the drug. In what became known as a typical Bodnar question, Dr. Bodnar asked the BMS AIDS working group the question: What is the right thing to do? As a result, we established the first large scale compassionate use program in cooperation with the FDA and the NIH and quickly made the drug freely available throughout the country.

A third drug championed by Dr. Bodnar -- and which has brought relief to thousands of patients suffering from metastatic colorectal cancer and other types of cancer of the head and neck -- is Erbitux. Erbitux became mired in controversy in 2002 after the CEO of the company associated with Erbitux, ImClone, became embroiled in a well-publicized insider trading case in New York. As one of BMS's designees on ImClone's Board of Directors, Dr. Bodnar believed in the drug and fought to have it reviewed based on its medical merits. BMS's General Counsel, Sandra Leung, writes to your Honor:

Andy kept ImClone and the U.S. Food and Drug Administration focused on the value of Erbitux to patients and away from the controversy surrounding ImClone that

was completely unrelated to the medicine. Today, thousands of patients have been benefitted from Erbitux due in large part to Andy's leadership.

In September 2006, Dr. Bodnar was Senior Vice President, Strategy and Medical & External Affairs at BMS. However, as a result of the investigation by the Department of Justice that led to Dr. Bodnar's guilty plea, Dr. Bodnar was suspended from BMS's executive committee and worked away from BMS's main offices. He retired from BMS on May 10, 2007. As outlined below and in the accompanying letters submitted to your Honor, Dr. Bodnar continues to volunteer substantial time to the New York Blood Center and other charitable/medical causes.

C. **Dr. Bodnar's Character and Concern for Others**

Many of the letters to your Honor speak at length concerning Dr. Bodnar's exemplary ethical standards and overriding concern for patients. We have already highlighted Dr. Eugene Braunwald's letter recalling Dr. Bodnar's response to a clinical trial that was not favorable to BMS. A similar incident is described in a letter to your Honor from Sandra Leung, BMS's General Counsel. Recounting an internal disagreement within BMS nearly 17 years ago, in which the debate revolved around BMS's potential disclosure of the results of a clinical trial that had not been as favorable as had been anticipated, Ms. Leung notes Dr. Bodnar's insistence on doing the right thing. While others advocated more opaque disclosures, Andy took the unpopular but clear position for transparent disclosure and argued persuasively that it was the correct decision because it was in the best interests of patients and consistent with the BMS Mission and Pledge. BMS's former General Counsel, John McGoldrick, similarly observes:

Andy is a highly ethical person. He would almost always be the first in the room to identify and raise an ethical issue, even one not easily recognizable as such to most. Whether it was medical in nature, or legal, or personal, he would in his calm way never let it slide by, but would make sure that it was on the table, and talked through to the most ethical outcome. Because of this, he was often sought out for counsel on any ethical issue: by physicians and scientists and even bio-ethicists on medical issues; by lawyers on legal issues; by business people on commercial issues; by anyone on personal issues.

Additional letters to your Honor speak of Dr. Bodnar's personal decency in unusual and glowing terms. Evan Chesler, the Presiding Partner at Cravath, Swain & Moore, LLP, who has known Dr. Bodnar for approximately 10 years and played a central role in advising BMS regarding the negotiations with Apotex that led to the instant case, describes Dr. Bodnar as "one of the most genuinely decent people I have ever known." Former U.S. District Court Judge Frederick B. Lacey, who served as BMS court-appointed Monitor during the period in question and had occasion to work with Dr. Bodnar on scores of corporate decisions, writes: "I interacted extensively with Andy, often on a daily basis, and found him to be a person of extraordinary skill, integrity, compassion, humility, and wisdom. In my career, I have met few individuals who rival Andy in embodying these qualities."

Likewise, Dr. Bodnar's colleague and friend of 20 years, Margaret Maruschak, writes: "Andy is one of the finest persons I have ever known. His character, values, ethics, social conscience and deep sense of fairness and justice always mark him and make him so appealing as a co-worker and friend. Ms. Maruschak also has observed: "During our many years together at Bristol-Myers Squibb, I came to rely on Andy's extraordinary abilities, in particular, his unfailingly sound judgment, highly-

developed and unshakeable ethics, deeply-rooted conscience, and practical wisdom His focus was always on fairness, justice, core values and above all else, doing the right thing whatever the apparent cost.

Many of the letters submitted to your Honor describe Dr. Bodnar's self-effacing manner, and his genuine concern for all, regardless of one's employment position or station in life. For example, Ms. Leung, BMS's current General Counsel, writes: He treated everyone with dignity and respect regardless of job position or title There are countless stories from administrative assistants, maintenance workers, mid-level managers and senior managers alike where Andy provided invaluable comfort and advice through very difficult times. As the letters indicate, Dr. Bodnar would frequently devote substantial time and energy helping BMS employees whose family members had taken ill, sometimes traveling hundreds of miles to help ensure that they were receiving appropriate medical care and that their families understood the options that were available to them. Dr. Bodnar did not do this because it was his obligation, or to advance his own career. He did it because he believed it was the right thing to do.

These qualities are perhaps best described by two women who were Dr. Bodnar's long-time administrative assistants: one at Massachusetts General (Patricia McBride), and the other at BMS (Jacqueline Turner). Ms. McBride has written to your Honor that Andy always treated everyone the same whether you were the cleaning person, mail delivery person, lab or EKG tech, secretary or colleague. Everyone had their own unique value, it didn't make any difference what your lot in life was. Ms. Turner echoes this sentiment when she writes: People within the company, from the top

executive down to the mail room, would seek out Andy for medical advice or referrals. He always had an open door policy. He would never turn anyone away.

BMS's former General Counsel, John L. McGoldrick, has emphasized these same qualities. Referring to Dr. Bodnar as "the finest person I have ever known," Mr. McGoldrick states: "I fear your Honor may hear frequently such high praise, often over-the-top, in the course of your sentencing duties. I can only say that in this case it is true. And, there are a great many others who feel as I do." Mr. McGoldrick also writes:

Andy's egalitarian nature showed itself at BMS in how he treated everyone equally, from the mailroom to the highest office, and although he was very frequently the smartest person in the room, he was never boastful, always modest in style.

Another powerful example of this quality is described by Villate Castor, the owner of a small New Jersey car service of which Dr. Bodnar is a long-time client. As recounted by Mr. Castor, a native of Haiti: "Coming from a country where those who are in position are arrogant and abuse the less fortunate, I was quite surprise[d] to see that it wasn't so for Dr. Bodnar. He always keeps a low key and rarely talks about his accomplishments. . . . When I started the business, I didn't have money to buy a good car. It was an old Crown Victoria that smoke[d] terribly and smell[ed of] gas because of a leak. That didn't deter Dr. Bodnar to continue to ride with me for months until I was able to buy a better one. His patience with me meant a lot more than the money he was paying me. And when Mr. Castor needed financial support for his goal of funding a hospital in Mr. Castor's Haitian village, Dr. Bodnar personally supplied him with the funds to make sure that the hospital would be completed."

D. Dr. Bodnar's Other Charitable Works

Dr. Bodnar has devoted substantial time and energy *pro bono* to various medical and other charitable causes. He has served without compensation for 15 years on the Board of the Fox-Chase Cancer Center (Fox-Chase), a prominent Philadelphia institution consisting of a hospital devoted entirely to cancer treatment and a research facility devoted entirely to cancer prevention. He also has served as Chairman of the Board Committee that oversees the hospital at Fox-Chase.

In addition, for over 15 years, Dr. Bodnar has served without compensation on the Board of Trustees of the New York Blood Center (Blood Center). The Blood Center serves as the primary source of blood and blood products for 20 million people in the New York metropolitan area. It also conducts research with important research discoveries to its credit, including a vaccine against a strain of hepatitis C. Dr. Bodnar has spent hundreds of hours working for the Blood Center, both as a member and as Chairman of the Executive Committee of that organization s Board of Directors. Howard Milstein, the Blood Center s Chairman, has written to your Honor that Dr. Bodnar s devotion to the Blood Center is so complete that Dr. Bodnar participat[ed] in Board deliberations on serious matters from his hospital bed during a recent serious illness -- Dr. Bodnar s recent bout with cancer, as described below.

Lawrence Hannigan, CFO of the Blood Center, writes:

[D]uring the whole prosecution process as well as even now after his guilty plea, he has been tireless with his commitment of his time, energy and intellectual contribution to me and his continued involvement of helping us fulfill our mission. I cannot express how deeply committed he has been to making sure we continue to perform our duties of meeting the needs of the New York hospital community.

In short, as Mr. Milstein writes, Dr. Bodnar has played -- and continues to play -- a central role in that organization's important work: Our institution relies on his continued involvement and would be seriously damaged if he were unavailable to us.

As noted above, while living in Massachusetts, Dr. Bodnar served on the Board of Registration in Medicine that regulates physicians in Massachusetts through licensure and discipline. According to a letter sent to your Honor by Andy Hyams, the former General Counsel to that Board, Dr. Bodnar was a consummate public servant; he was dedicated, wise and accessible.

In New Jersey, Dr. Bodnar has been an active member of the Board of Trustees of a local school. And, as detailed in the accompanying letter from Connie Mercer, both he and his wife have been active supporters of HomeFront, a local organization that serves the homeless. Dr. Bodnar has advocated successfully within BMS to support HomeFront, and has personally provided financial support to that organization. Ms. Mercer, HomeFront's founder and CEO, writes that Dr. Bodnar has helped us grow from a rag tag group of well meaning volunteers into a powerful organization that makes a real difference in our community. . . . Andy's unwavering encouragement has been invaluable to me, especially at times when I was unsure whether or not HomeFront would be able to continue to serve desperate homeless families.

E. Dr. Bodnar's Health Problems

Dr. Bodnar recently has experienced significant health problems, suffering a serious heart attack in November 2008 and battling colon cancer. It was determined that the heart attack was brought on by very serious anemia, which in turn had resulted from severe internal bleeding that necessitated multiple blood transfusions. Tests were

conducted in the aftermath of his heart attack that determined he was also ill with colon cancer, and a few days after his admission to the hospital for the heart attack, Dr. Bodnar underwent emergency surgery in an attempt to treat the cancer. He was discharged from the hospital a week after the surgery, having lost approximately 20-25 pounds. At present, Dr. Bodnar's health is being aggressively monitored as he tries to recover from this serious health-related ordeal.

II. OFFENSE CONDUCT

The crime to which Dr. Bodnar ultimately pleaded guilty is a misdemeanor that does not require the defendant to know that the statements he made were false at the time they were made. The facts giving rise to his guilty plea are as follows:

This case centers on a patented prescription drug named Plavix, which is used to prevent heart attacks and strokes. Invented by a French pharmaceutical company named Sanofi-Aventis (Sanofi), Plavix has been sold in the United States as part of a joint venture between Sanofi and BMS. The Plavix patent was granted on July 11, 1989 and expires on November 17, 2011.

Pharmaceutical companies -- and particularly the makers of generic pharmaceuticals -- routinely attempt to challenge the validity of patents for prescription drugs. Such was the case with Plavix. On November 16, 2001, a Canadian generic drug company named Apotex filed an Abbreviated New Drug Application, or ANDA, with the U.S. Food and Drug Administration (FDA) for the right to sell a generic version of Plavix, challenging the Plavix patent. Under the Hatch-Waxman Act, 21 U.S.C. § 355(j)(5)(B)(iv), if Apotex obtained FDA approval, as the first ANDA filer, Apotex

would be entitled to be the only generic company able to market its own generic version of Plavix for a period of 180 days -- a period sometimes referred to as 180 days of market exclusivity. Apotex would have no competition from a competing generic version of Plavix during the 180-day period, unless BMS itself decided to market what is called an authorized generic version of Plavix.¹

While Apotex's ANDA was pending, BMS and Sanofi (collectively, BMS/Sanofi) filed a patent infringement action against Apotex on March 21, 2002 in the United States District Court for the Southern District of New York. The filing of that action triggered a statutory 30-month stay of the FDA's possible approval of Apotex's ANDA.

In October 2005, while the patent infringement action was still pending in New York, Apotex threatened BMS/Sanofi that it would begin to sell its generic version of Plavix if and when it obtained FDA approval, even if such approval was obtained by Apotex before the patent trial began. In the pharmaceutical industry, this is known as a launch at risk because the generic manufacturer runs the risk that it will be found to have infringed upon another company's patent, potentially resulting in damages as well as injunctive relief. At the time this threat was made by Apotex, the outcome of the patent litigation remained in doubt. Both sides therefore attempted to negotiate a settlement of the patent litigation.

In March 2006, Dr. Bodnar was acting for BMS and Sanofi when he negotiated a settlement of the patent litigation with Apotex. This settlement agreement

¹ The term "authorized generic" refers to a drug which is chemically identical to a brand-name drug and that the brand-name manufacturer authorizes to be marketed as a generic.

(the Original Settlement Agreement) was reached among the parties in late March 2006, and was thereafter submitted to the Federal Trade Commission (FTC) for its approval.²

As part of the March 2006 Original Settlement Agreement, Apotex agreed, among other things, that in the event that the FTC and the State Attorneys General approved the settlement agreement, it would cease its challenge to the Plavix patent and agree to a launch date of September 17, 2011 for its own generic version of Plavix. BMS/Sanofi in turn agreed to grant Apotex a license to sell generic Plavix starting on September 17, 2011, and also agreed that BMS/Sanofi would not launch its own authorized generic version of Plavix starting in 2011 when Apotex would be entitled to the benefit of the 180 days of exclusivity awarded by Congress under the Hatch-Waxman Act.

After initial discussion between the FTC and BMS/Sanofi s counsel, Cravath, Swaine & Moore LLP, in which FTC officials raised concerns about several of the terms of the settlement agreement, BMS/Sanofi ultimately decided to renegotiate various aspects of the agreement to address those concerns. On behalf of BMS/Sanofi, Dr. Bodnar therefore negotiated a revised settlement agreement with Apotex that BMS/Sanofi hoped would satisfy the FTC.

² In or about April 2003, the FTC, BMS, and several State Attorneys General entered into a consent order that, among other things, prohibited BMS from settling any patent infringement litigation with any generic drug producer without first submitting the settlement agreement to the FTC and the State Attorneys General for advisory approval that the settlement did not contain anticompetitive provisions (FTC Consent Decree). BMS also was required by law to submit any settlement agreement with a generic drug producer to the FTC under the Medicare Prescription Drug Improvement and Modernization Act of 2003, Pub. L. No. 108-173, Title XI, § 1112, 117 Stat. 2066 (Dec. 8, 2003) (MMA).

At a meeting held at Apotex's offices on May 12, 2006, Dr. Bodnar informed Apotex's CEO, Barry Sherman, that, in connection with a negotiated settlement, he (Dr. Bodnar) was personally opposed to BMS/Sanofi launching its own authorized generic during Apotex's period of exclusivity. Dr. Bodnar also told Sherman that, if circumstances at BMS remained the same in 2011 when Apotex launched its generic, he would personally advocate against BMS/Sanofi launching its own generic version of Plavix during Apotex's period of exclusivity. However, Dr. Bodnar also told Sherman in no uncertain terms that he could not, and would not, commit BMS/Sanofi not to launch an authorized generic version of Plavix during Apotex's period of exclusivity.

On May 25, 2006, on behalf of BMS/Sanofi, Dr. Bodnar signed a revised settlement agreement with Apotex (the Revised Settlement Agreement). Among other things, the Revised Settlement Agreement omitted the previous language from the Original Settlement Agreement that prohibited BMS/Sanofi from launching its own generic version of Plavix during Apotex's 180-day period of exclusivity. The Revised Settlement Agreement was submitted by BMS/Sanofi's lawyers to the FTC on May 30, 2006. A few days later, on June 5, 2006, Apotex's lawyers also submitted the Revised Settlement Agreement to the FTC. However, Apotex's lawyers alleged in their cover letter to the FTC that, in addition to what was written in the Revised Settlement Agreement, BMS/Sanofi had made an oral commitment that there will be no authorized generic launched during Apotex's period of exclusivity, if the agreement is approved by FTC. As indicated above, Dr. Bodnar had made no such commitment.

After receiving the letter from Apotex's attorneys, the FTC asked BMS/Sanofi to have its outside counsel and the corporate representative involved in the

negotiations sign a certification, drafted by the FTC, stating that BMS/Sanofi had not made any representation, commitment, or promise to Apotex not explicitly set forth in the Revised Settlement Agreement that BMS/Sanofi had submitted to the FTC, including the representation that [BMS/Sanofi] would not launch an authorized generic version of Plavix during Apotex's period of exclusivity. Dr. Bodnar signed that certification believing it to be true.

Even though he did not make the particular oral commitment that was alleged by Apotex's lawyers in their letter to the FTC, Dr. Bodnar now knows and takes full responsibility for the fact that the certification he signed contains a statement that is literally false, in that he did make representations to Apotex that were not explicitly set forth in the Revised Settlement Agreement. Specifically, Dr. Bodnar informed Sherman that he (Dr. Bodnar) was personally opposed to BMS/Sanofi launching its own authorized generic during Apotex's period of exclusivity, and told Sherman that, if things at BMS stayed the same, in 2011 when Apotex launched its generic, he would advocate against BMS/Sanofi launching its own generic version of Plavix during Apotex's period of exclusivity.

III. A FINE-ONLY SENTENCE IS APPROPRIATE

Under 18 U.S.C. § 3553(a), the factors to be considered in determining Dr. Bodnar's sentence are the nature and circumstances of the offense, the history and characteristics of the defendant, and the types of sentences available. Section 3553(a)(2) also expressly provides that courts should impose the minimum sentence necessary:

- (a) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (b) to afford adequate deterrence to criminal conduct;

- (c) to protect the public from further crimes of the defendant; and
- (d) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a).

Pursuant to the Plea Agreement in this case, the parties agreed not to seek a sentence outside the applicable Guidelines range. See Ex. B ¶ 9. In light of the unique and compelling circumstances of this case, we respectfully request that the Court impose a fine-only sentence on Dr. Bodnar, which is consistent with the Guidelines. Dr. Bodnar has pled guilty to a single misdemeanor charge. He has no criminal history, poses absolutely no risk of recidivism, and has made a tremendously positive impact on the lives of his fellow citizens. Given the impact that this case has already had on Dr. Bodnar, his family, his career, and his health, we ask that the Court be merciful and sentence Dr. Bodnar to a fine consistent with the Guidelines range. Such a sentence would be sufficient, but not greater than necessary to satisfy the statutory purposes of sentencing, as contemplated by 18 U.S.C. § 3553(a).

As the Plea Agreement indicates, both the Government and Dr. Bodnar are in agreement that the adjusted Guidelines offense level is 4, reflecting a base offense level of 6 under U.S.S.G. § 2B1.1(a)(2) and a 2-level reduction for Dr. Bodnar's acceptance of responsibility under U.S.C.G. § 3E1.1(a). See Ex. B ¶ 8. The parties likewise are in agreement that Dr. Bodnar's conduct did not cause any loss. Therefore, no restitution would be appropriate.

Federal law requires that an individual found guilty of a criminal offense be sentenced to a fine, a term of probation, or a term of imprisonment. See 18 U.S.C. §

3551(b). Given Dr. Bodnar's criminal history score of 0, his offense level falls within Zone A of the Sentencing Table. Thus, under the Guidelines, the authorized sentence may consist of a fine of \$250-\$5,000 (see U.S.S.G. § 5E1.2(c)(3)); a term of probation (including unsupervised probation) of up to three years (see U.S.S.G. § 5B1.2(a)(2)); or a term of imprisonment of 0-6 months.

We respectfully submit that a fine strikes the appropriate balance under Section 3553(a). The Guidelines themselves recognize that a fine-only sentence may be appropriate where, as here, the Guidelines do not require a term of imprisonment. See U.S.S.G. § 5E1.2, Application Note 1. As the Supreme Court has stated, the central purposes of a probationary term and its attendant restrictions are to ensure the probationer's rehabilitation and reintegration into the community, and to protect society from future criminal violations. See United States v. Knights, 534 U.S. 112, 119 (2001); Griffin v. Wisconsin, 483 U.S. 868, 874-5 (1987). Here, where the defendant has lived an otherwise law-abiding life and neither these purposes nor the public interest would be served by making Dr. Bodnar subject to oversight by the United States Probation Office, imposing a probationary sentence would not serve the interests of justice. Indeed, based on our review of sentences imposed for similarly-situated defendants, 8 other defendants with an offense level of 4 that have been sentenced for violations of 18 U.S.C. § 1018 over the past decade have received fine-only sentences, and the fine imposed in each instance was within the applicable Guidelines range. A table reflecting these cases in which a fine-only sentence has been imposed is annexed hereto as Exhibit C.

Finally, as the above discussion and accompanying letters underscore, Dr. Bodnar continues to play a key role in various health-related charities. The impact of a

probationary sentence on those activities -- and Dr. Bodnar's ability to maintain his current level of involvement in the face of a sentence other than a fine within the Guidelines range -- is a matter of some uncertainty. Thus, we respectfully ask that the Court impose a fine within the Guidelines-sanctioned range, as such a sentence will ensure that Dr. Bodnar may continue providing his time and talents for the greater good of his community.

CONCLUSION

In preparing this Memorandum for the Court, we have been struck by many things, including a comment in the letter written to the Court by Dr. Bodnar's administrative assistant from 1994 to 2007, Jacqueline Turner. In her often revealing letter about her former boss, Ms. Turner writes:

As so very often happens, when mistakes are made much time is spent on trying to place the blame. Andy would say I don't care who made the mistake let's get on with righting the wrong and get the job done.

In this case, it is clear in hindsight that mistakes were made in connection with the submission of BMS's certification to the FTC. Rather than trying to place blame on others, Dr. Bodnar has tried to right the wrong himself by entering his plea in this case.

We trust that this Memorandum has shown the Court that Dr. Bodnar has lived an exemplary life and is worthy of this Court's consideration at sentencing. We respectfully submit that no public interest would be served either by Dr. Bodnar's incarceration or by probation. Therefore, we respectfully ask that the Court impose a sentence of a fine within the Guideline range and mercifully end Dr. Bodnar's ordeal.

Respectfully submitted,

By:

/s/ Elkan Abramowitz

Elkan Abramowitz, *pro hac vice*
Lawrence S. Bader, *pro hac vice*
Stephen M. Juris, *pro hac vice*
Jerrold L. Steigman, *pro hac vice*
MORVILLO, ABRAMOWITZ, GRAND,
IASON, ANELLO & BOHRER, P.C.
565 Fifth Avenue
New York, NY 10017
(212) 856-9600

By:

/s/ Howard M. Shapiro

Howard M. Shapiro, DC Bar 454274
Ronald C. Machen, DC Bar 447889
Demian S. Ahn, DC Bar 491109
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6000

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