From the patient's angle, one could argue that product hopping does not limit consumer choice. The generic is not prohibited from entering the market, and consumers are not prohibited from purchasing the generic. This simplistic explanation, however, ignores the unique characteristics of the pharmaceutical market, which does not operate much like a standard market at all, as we have discussed extensively. The argument of "consumer choice" is especially spurious in the case of *Namenda*, in which Actavis controlled the entire market for memantine treatment. No substitute treatment was available for old Namenda at the time Actavis intended to pull it from the market. Actavis was *so* committed to the idea of consumer choice, apparently, that it gave up substantial short-term profits from original Namenda to remove it completely from the market before a generic became available, *forcing* patients to move to the new Namenda XR medication. This is a suspiciously odd approach if a company wants to champion consumer choice. In fact, this willingness to forgo short-term profits was offered by the circuit panel as evidence of the need for antitrust scrutiny, concluding that the drastic move "makes sense only because it eliminates competition."[62]

The panel in *Namenda* dismissed Actavis's procompetive justifications with just one paragraph in its decision, ending with a sentence that underscores just how blatantly obvious the motives behind product hopping generally are: "Based largely on [Actavis's] *own documents*, [Plaintiff] has rebutted [Actavis's] procompetitive justifications" (emphasis added).[63]

D SCOUT'S HONOR IN PRODUCT HOPPING

Unsurprisingly, the development of antagonist strategies such as product hopping has created the opportunity for brand-name firms to dip back into their pool of Generation 2.0 tactics. In particular, product hopping has spawned a new set of "boy scout" clauses, in which the brand-name drug company agrees to refrain from antagonistic behavior after developing the tactics in the first place.[64]

One such clause combining Generations 2.0 and 3.0 is an agreement not to product hop before generic entry, or to pay the generic handsomely if product hopping occurs. For example, in *In re Opana*, class action plaintiffs allege that Endo, a brand-name firm, agreed to pay a first-filing prospective generic what amounted to more than $102 million, but only if sales of the brand-name drug fell below a certain level in the quarter before the generic launch date.[65] In exchange, the generic

[62] *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 659 (2d Cir. 2015) (citing *In re Adderall XR Antitrust Litigation* 754 F.3d 128, 133 (2d Cir. 2004)).

[63] *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 658 (2d Cir. 2015).

[64] See Chapter 2 for more discussion of "boy scout" clauses.

[65] End-Payors Plaintiffs' Consolidated Amended Class Action Complaint at para. 2, *In re* Opana ER Antitrust Litig., No. 14 C 10150, 2015 WL 2182959 (N.D. Ill. May 4, 2015).