Case No. S198616

Supreme Court of the State of California

In re Cipro Cases I & II

California Court of Appeal · Fourth Appellate District · Case No. D056361
Superior Court of San Diego · Hon. Richard E.L. Strauss · Nos. JCCP 4154, JCCP 4220

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APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF SUPPORTING RESPONDENTS

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APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENTS

To the Honorable Tani Cantil-Sakauye, Chief Justice:

The Chamber of Commerce of the United States of America (the "Chamber") respectfully moves for leave to file a brief as *amicus curiae* in support of Respondents.* The Chamber is the world's largest business federation. It represents 300,000 direct members, and it indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community, including cases arising under the antitrust and competition laws. Recent cases involving antitrust disputes in which the Chamber has participated include *American Express Co. v. Italian Colors Restaurant* (2013) 133 S.Ct. 2304 and *Comcast Corp. v. Behrend* (2013) 133 S.Ct. 1426.

The U.S. Supreme Court held in *FTC v. Actavis, Inc.* (2013) 133 S.Ct. 2223 that, under the federal antitrust laws, the rule of reason applies to so-called "reverse-payment" agreements to settle patent litigation

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* No party or counsel for a party authored the proposed *amicus curiae* brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than *amicus curiae* and its members, made a monetary contribution intended to fund the preparation or submission of this brief.

between brand-name pharmaceutical companies and prospective generic competitors. As the Chamber's proposed *amicus* brief explains, if this Court were to apply a different standard to such agreements under California law, the resulting variation in the regulation of patent settlements would frustrate businesses' ability to settle such disputes, would increase costs and uncertainty to the detriment of both businesses and consumers, and would disrupt the smooth flow of commerce. If this Court were to depart from the federal antitrust rule articulated in *Actavis*, future litigants might also use this case to advocate for further differences between California and federal antitrust law, creating additional difficulties for nationwide businesses trying to conform their conduct to more than one set of rules.

For the reasons stated above, the Court should grant this application and permit the Chamber to file the attached proposed *amicus curiae* brief.

DATED: March 18, 2014

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the United States. An important function of the Chamber is to represent the interests of its members in matters before Congress, state legislatures, the Executive Branch, state agencies, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

The Chamber has filed *amicus* briefs in other antitrust cases and is well situated to address the issues raised in this case. Its members are engaged in commerce in each of the 50 states, are subject in varying degrees to a wide range of statutes and regulations, and invest vast resources in developing, commercializing, and protecting intellectual property. As a result, its members often confront the interplay between the duties imposed by intellectual property law and competition law. The Chamber is uniquely suited to offer a broader perspective on the intersection of federal and state antitrust law and is keenly interested in ensuring that the regulatory environment in which its members operate is rational and consistent.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue before this Court is whether, in the wake of the U.S. Supreme Court's decision in *FTC v. Actavis, Inc.* (2013) 570 U.S. __ [133 S.Ct. 2223] (*Actavis*), California antitrust law should analyze "reverse-payment" settlements under the usual "rule of reason" approach espoused

by *Actavis* or whether California law should apply a different standard. The Chamber respectfully submits that in deciding this case, this Court should follow the U.S. Supreme Court's guidance in *Actavis* for six reasons:

First, the rule of reason is the standard mode of antitrust analysis, and there is a large body of California law detailing its contours. This Court, in *Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842, 853-855 (*Corwin*), laid the guiding framework for the rule of reason, and it since has been applied by the California courts in a variety of different contexts. The federal courts too have applied the rule of reason for over 100 years. This confirms the utility of the rule of reason and that lower courts can apply it soundly and effectively.

Second, the nationwide nature of these cases requires uniform, predictable rules that will guide businesses. The pharmaceutical industry is subject to extensive and exhaustive federal regulation. This includes the federal patent law and the federal Hatch-Waxman Act, both areas of exclusive federal control and nationwide reach. Moreover, pharmaceuticals are distributed through nationwide wholesaler and retailer networks. There are no California-specific legal or economic issues at stake. If California adopted its own rules for settlements of pharmaceutical patent litigation, other states may follow in California's footsteps and craft their own rules as well. Because of the nationwide nature of these cases, this would result in numerous different, potentially conflicting antitrust regimes applying to the same patent settlement. It would be nearly impossible for businesses to settle patent litigation without fear of running afoul of some state's rules.

Third, these same concerns also affect the practicability of adjudicating these cases. Most of these antitrust cases are litigated in proceedings in federal court in which state-law actions and federal-law actions have been consolidated. Differing state-law rules consequently

would subject federal judges and federal juries to the difficult task of deciding a single case under a hodgepodge of disparate antitrust regimes.

Fourth, if California extended antitrust liability further than *Actavis* did, it would raise serious preemption concerns. If this Court were to adopt Appellants' approach, California law would in some cases condemn the exercise of patent rights that federal law has determined are granted to patentees and are immune from antitrust liability. This not only would conflict with federal antitrust law, but also would frustrate the functioning of the federal patent system. A more restrictive liability rule in California also would fail to afford adequate comity to federal courts, by interfering with federal courts' view of when the underlying patent cases, which are litigated exclusively in federal court, could be settled.

Fifth, these issues here are not easily cabined to the pharmaceutical industry or patent law. If this Court were to adopt a more restrictive legal standard than that espoused by the Supreme Court in *Actavis*, future litigants may seek to apply that standard to settlements in a variety of different areas, including in copyright, real property, or other similar disputes. But as *Actavis* recognized, in assessing antitrust impact, courts must be acutely sensitive to the differences between industries and the details of the challenged settlement. The rule of reason is designed to take into account precisely these kinds of distinctions. The harsh *per se* or "quick look" treatment advocated by Appellants is unlikely to permit future courts to fine-tune the application of antitrust law to different industries, different kinds of property rights, and different factual scenarios.

Sixth, California courts have departed from federal antitrust law in interpreting the Cartwright Act only on narrow procedural issues or when the text of the Cartwright Act required it. Appellants have pointed to no textual basis to depart from *Actavis* in interpreting the Cartwright Act here.

Thus, this Court should follow *Actavis*, hold that the rule of reason applies in this case, and reject Appellants' contrary suggestions of a "constrained rule of reason" or a "precisely formulated *per se* illegality rule."

ARGUMENT

I. California Law Should Follow *Actavis* and Apply the Rule of Reason to "Reverse-Payment" Settlements

In *Actavis*, *supra*, 133 S.Ct. 2223, the U.S. Supreme Court held that the usual "rule of reason" analysis should govern federal antitrust challenges to so-called "reverse-payment" patent settlements, such as the settlement at issue in this case. (*Id.* at p. 2237.) This Court has explained that interpretations of the federal antitrust laws provide a helpful guide for interpreting the Cartwright Act. (*State of California ex rel. Van de Kamp v. Texaco, Inc.* (1988) 46 Cal.3d 1147, 1164 (*Texaco*) [describing judicial interpretation of the Sherman Act as "often helpful"]). Because the "rule of reason" is also the standard mode of antitrust analysis under California law, California law should follow federal law on this issue. And because there is already a large body of California law applying the rule of reason, there is no need to elaborate on *Actavis*'s meaning before holding that the rule of reason applies to reverse-payment settlements under the Cartwright Act as well.

A. Actavis *Applied the Rule of Reason, the Standard Mode of Antitrust Analysis Under Both Federal and California Law*

For over a century, the rule of reason has been the standard mode of antitrust analysis for evaluating agreements alleged to restrain trade. In *Standard Oil Co. of New Jersey v. United States* (1911) 221 U.S. 1, the United States Supreme Court held that "the standard of reason which had been applied at the common law and in this country . . . was intended to be

the measure used for the purpose of determining whether . . . a particular act had or had not brought about the wrong against which the" Sherman Act was aimed. (*Id.* at p. 60; see also *Continental T. V., Inc. v. GTE Sylvania Inc.* (1977) 433 U.S. 36, 49 ["Since the early years of this century a judicial gloss on [section 1 of the Sherman Act] has established the 'rule of reason' as the prevailing standard of analysis."].) California courts applying the Cartwright Act have likewise recognized that the rule of reason "is the prevailing standard of analysis to determine whether a plaintiff has shown a combination or conspiracy in restraint of trade." (E.g., *Bert G. Gianelli Distributing Co. v. Beck & Co.* (1985) 172 Cal.App.3d 1020, 1044, disapproved on another ground in *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384.)

The specific question addressed in *Actavis* was whether a mode of analysis other than the rule of reason should apply to antitrust challenges to reverse-payment settlements. The U.S. Supreme Court said "no," rejecting both the scope-of-the-patent test that had been applied by the court below, and the "presumptively unlawful" or "quick look" approach advocated by the Federal Trade Commission in that case. (*Actavis*, *supra*, 133 S.Ct. at p. 2237.) In so ruling, the Court concluded that abandonment of the rule of reason was appropriate only in rare circumstances. (*Ibid.* ["In *California Dental* [(1999) 526 U.S. 756, 770], we held (unanimously) that abandonment of the 'rule of reason' in favor of presumptive rules (or a 'quick-look' approach) is appropriate only where 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.'"].) After finding no such circumstances in the "reverse-payment" settlement context, the Supreme Court held that "the FTC must prove its case as in other rule-of-reason cases." (*Ibid.*)

Appellants have offered no persuasive reason for California law to depart from federal law on this issue.

B. *The Parties Seem to Agree that California Should Follow* Actavis, *but Appellants Mischaracterize Its Meaning*

The parties appear to argue in their supplemental briefing that California law should follow *Actavis*. Appellants, however, are advocating for an interpretation of *Actavis* that has no support in the U.S. Supreme Court's decision. Appellants argue that "*Actavis* supports . . . a precisely formulated *per se* illegality rule." (Appellants' Supp'l Br. at p. 1.) But the Supreme Court could not have been clearer that it rejected the argument that reverse-payment settlements should be considered presumptively unlawful, let alone banned outright: "The FTC urges us to hold that reverse-payment settlement agreements are presumptively unlawful . . . . We decline to do so." (*Actavis*, *supra*, 133 S.Ct. at p. 2237.)

Appellants alternatively argue that *Actavis* supports a "constrained rule of reason" analysis. Appellants appear to mean by this that courts should not actually engage in a standard rule-of-reason analysis, explicated by this Court in *Corwin*, *supra*, 4 Cal.3d at pp. 853-855. Instead, it appears Appellants would have courts assume that any payment not reflecting avoided litigation costs or the value of goods or services provided by the alleged infringer was illegal. (Appellants' Supp'l Br. at pp. 7-8.) Again, however, the U.S. Supreme Court explicitly declined to adopt a presumption that "reverse-payment settlement agreements are . . . unlawful." (*Actavis*, *supra*, 133 S.Ct. at p. 2237.) Indeed, the Court explained that a presumption of unlawfulness was inappropriate because the "likelihood of a reverse payment bringing about anticompetitive effects" varies from case to case, and turns on more than just "anticipated future litigation costs" or compensation for services: the Supreme Court

specifically noted that there may be "*other* convincing justification[s]" for a reverse-payment settlement as well. (*Ibid.*, italics added.)

Because the rule of reason has long been the primary mode of antitrust analysis, the approach taken by *Actavis* is very familiar to state and federal courts. This Court enunciated the contours of the rule of reason analysis more than 30 years ago: "To determine whether the restrictions are reasonable, 'the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, are all relevant facts.' [Citation.] The court should consider 'the percentage of business controlled, the strength of the remaining competition [and] whether the action springs from business requirements or purpose to monopolize.'" (*Corwin*, *supra*, 4 Cal.3d at pp. 853-855.)

Contrary to the suggestion by Appellants here that the courts below would need guidance on how to follow *Actavis*, there is already a large body of California precedent applying the rule of reason. (See, e.g., *Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1978) 22 Cal.3d 302, 314-315 [applying rule of reason analysis to case involving agreements of newspapers in the publication of notices of trustee sales]; *Marin County Board of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 932 [applying the rule of reason in a case involving membership rules of a county board of realtors]; *Fisherman's Wharf Bay Cruise Corp. v. Super. Ct.* (2003) 114 Cal.App.4th 309, 334 [applying the rule of reason to exclusive dealing contracts in the cruise industry]; *Exxon Corp. v. Super. Ct.* (1997) 51 Cal.App.4th 1672, 1681 [applying rule of reason analysis to dealings between gasoline franchisor and franchisees]; *Schmidt v. Foundation Health* (1995) 35 Cal.App.4th 1702, 1714 [analyzing the

prohibition of rebating commissions under rule of reason analysis]; *Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 542 [applying rule of reason test to lessor medical building's restriction to lease only to doctors]; *Redwood Theatres, Inc. v. Festival Enterprises, Inc.* (1988) 200 Cal.App.3d 687, 713 [applying the rule of reason to alleged exclusive dealing agreements for movie distribution].)

Appellants have pointed to no ambiguity in this well-developed doctrine that would need to be "clarified" or elaborated upon to apply it in this context. The very point of *Actavis* was that reverse-payment settlements do not need their own antitrust rules. The U.S. Supreme Court entrusted trial courts with evaluating all offered justifications under the rule of reason. (133 S.Ct. at p. 2238.) There is no reason for this Court to do otherwise.

II. The Issue Raised by This Appeal Should Be Subject to a Uniform National Rule

To the extent that Appellants' proposed interpretations of *Actavis* are merely a means to advocate for a more restrictive California standard than the rule of reason, the Court should reject any such effort. This case presents compelling reasons favoring California's adoption of the federal rule-of-reason analysis of reverse-payment patent settlements—and compelling reasons why subjecting businesses to disparate federal and state standards would be perilous. Because the settlements at issue in this case, in *Actavis*, and in every other reverse-payment antitrust case to date inextricably and exclusively involve federal law, regulatory regimes, and courts, application of California law to these settlements should mirror the analysis under federal law. Appellants' position is indeed remarkable: that California should adopt its own ban on settlements of *federal* litigation that are lawful under *federal* antitrust law, that affect drugs exclusively approved for distribution under *federal* law by a *federal* agency, and that

are exclusively subject to *federal* patents. Their position is all the more remarkable because they identify no California-specific legal or economic issues involved, and this case concerns a settlement of patent litigation that was pending in federal court in New York.

The dangers of such a California rule are significant, because it would impact cases nationwide and invite other states to adopt their own independent liability standards. If California adopted its own set of more restrictive liability rules, it not only would be unprecedented under California antitrust law but it also could wreak havoc with the resolution of patent disputes in federal court.

A. *California Should Follow Federal Antitrust Law Because the Underlying Patent Cases Concern Exclusively Federal Law and Have a Uniform National Impact*

Antitrust challenges to reverse-payment settlements to date have arisen solely from litigation in federal courts involving exclusively federal issues and having a uniform national impact. This context creates a particular need for uniform standards of liability. Settlement of these purely federal lawsuits could become nearly impossible if the litigants had to worry about numerous different legal standards potentially imposing treble damages antitrust liability. And because state and federal antitrust challenges to patent settlements are generally litigated together in a consolidated federal court proceeding, federal courts and juries would face an extremely difficult task if the same settlement were subject to multiple, conflicting antitrust standards.

1. The Settlements at Issue Concern Exclusively Federal Litigation and Federal Law and Have Uniform Nationwide Impact

The federal Food & Drug Administration ("FDA") holds exclusive authority to determine when a drug may lawfully be marketed in the United States under the Federal Food, Drug, and Cosmetic Act. (See 21 U.S.C.

§ 355(a) ["No person shall introduce or deliver for introduction into interstate commerce any new drug, unless an approval of an application filed pursuant to . . . this section is effective with respect to such drug"]; *Morris v. PLIVA, Inc.* (5th Cir. 2013) 713 F.3d 774, 778 [referring to "FDA's exclusive authority to approve drugs"].) The applications for generic drug approvals filed with the FDA prompt the innovator company to assert its patent on the drug.

The innovator company's patent is a right exclusively granted by the federal government, pursuant to the United States Constitution. (U.S. Const., art. I, § 8, cl. 8.) The innovator's patent lawsuit can be brought based on the application to the FDA for approval of a generic drug (before there is any actual infringement of the patent in the conventional sense) because the federal Hatch-Waxman Act, which closely regulates the conduct of such patent litigation, permits it. (See Answering Brief of Respondents Barr Laboratories, Inc. et al., at pp. 3-5 [describing the Hatch-Waxman Act].)

The resulting lawsuit can be brought only in federal court, and the questions of patent law that are litigated in such cases are exclusively federal. The cases can be appealed only to the Court of Appeals for the Federal Circuit, a court created by Congress specifically to promote national uniformity in the application of the patent laws. (*Bonito Boats, Inc. v. Thunder Craft Boats, Inc.* (1989) 489 U.S. 141, 162 (*Bonito Boats*) ["Congress has lodged exclusive jurisdiction of actions 'arising under' the patent laws in the federal courts, thus allowing for the development of a uniform body of law in resolving the constant tension between private right and public access. [Citations.] Recently, Congress [also] conferred exclusive jurisdiction of all patent appeals on the Court of Appeals for the Federal Circuit, in order to 'provide nationwide uniformity in patent law.'"], quoting H.R. Rep. No. 97-312, p. 20 (1981); see also 28 U.S.C.

§ 1338(a) [exclusive district court jurisdiction over patent cases]; 28 U.S.C. § 1295(a)(1) [exclusive Federal Circuit jurisdiction over patent appeals].)

The resolution of a Hatch-Waxman patent lawsuit necessarily also has nationwide rather than state-specific economic effects. If the innovator company wins, then the FDA is barred from approving the generic company's application until patent expiration, and the generic company cannot lawfully sell its drug anywhere in the United States until that time. (See 35 U.S.C. § 271(e)(4)(A).) If the generic company wins, then the generic company can obtain FDA approval to sell its generic product everywhere in the United States.

Not only are pharmaceuticals approved for marketing and subject to an intellectual property regime that is nationwide in scope, but the distribution system for pharmaceuticals is nationwide in reach and organization as well. Pharmaceutical manufacturers sell the vast majority of their drugs to three large national wholesalers, which resell the drugs to pharmacies, retailers, or other health care providers nationwide. (See, e.g., *Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.* (D.D.C. 2007) 246 F.R.D. 293, 301 [referring to "three large national wholesalers (McKesson, Cardinal Health, and AmerisourceBergen, collectively the 'Big Three') who collectively purchased 80% of all Ovcon 35 sold during the proposed class period"]; Kaiser Family Foundation & the Health Strategies Consultancy, Follow the Pill: Understanding the U.S. Commercial Pharmaceutical Supply Chain (2005) pp. 8-9.[1])

Because manufacturers sell the vast majority of drugs through this national distribution system, a restrictive California standard for the

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[1] Available at http://kaiserfamilyfoundation.files.wordpress.com/2013/01/follow-the-pill-understanding-the-u-s-commercial-pharmaceutical-supply-chain-report.pdf.

settlement of federal pharmaceutical patent disputes could impact settlements regardless of where in the country they are entered. Thus, the very approach rejected by the U.S. Supreme Court would, if adopted by this Court as urged by Appellants, impact the settlement of every pharmaceutical patent case nationwide.

2. If California Deviates from Federal Antitrust Laws, Other States May Follow Suit, Resulting in an Impossible Regulatory Patchwork

The nationwide distribution of pharmaceuticals also means that pharmaceutical patent settlements can be—and are—challenged not only under federal and California law, but under the laws of nearly every state that permits such claims. This case is itself paradigmatic of the sweeping, multi-forum antitrust litigation faced by patent litigants in reverse-payment cases. (See, e.g., *In re Ciprofloxacin Hydrochloride Antitrust Litigation* (E.D.N.Y. 2003) 261 F.Supp.2d 188, 191 ["Direct Purchaser and Indirect Purchaser Class Plaintiffs and Individual Non-Class Plaintiffs . . . have brought suit" under the Sherman Act and the laws of various states]; *King Drug Co. of Florence, Inc. v. Cephalon, Inc.* (E.D.Pa. 2010) 702 F.Supp.2d 514, 518 ["Sixteen (16) separate cases, many of which are class actions, commenced as a result of the patent litigation settlements," many of which were brought under the laws of various states].).

(a) Differing state rules would create conflicting standards for national businesses

The California Supreme Court will be the first state court of last resort after *Actavis* to decide whether to harmonize its own antitrust law with federal law on this issue. If California were to depart from *Actavis* and set its own antitrust course, other states may be emboldened to tread their own paths by taking different approaches from both California and federal law. Some might adopt the "scope of the patent" rule that many

federal appellate courts previously adopted; some might adopt the "presumption of illegality" that was espoused in a now-vacated decision by the Court of Appeals for the Third Circuit; some might adopt one of the alternative tests advanced by Appellants here; and some might adopt one of the innumerable approaches proposed by commentators and academics. (See, e.g., *FTC v. Watson Pharmaceuticals, Inc.* (11th Cir. 2012) 677 F.3d 1298, 1312 [elucidating the "scope of the patent" approach], revd. sub. nom. *Actavis*, *supra*, 133 S.Ct. 2223, 2227; *ibid.* [describing the Federal Trade Commission's proposed standard]; *In re K-Dur Antitrust Litigation* (3d Cir. 2012) 686 F.3d 197, 203 [adopting presumption of illegality or "quick look" approach], judg. vacated and cause remanded sub nom. *Merck & Co. v. Louisiana Wholesale Drug Co.* (2013) 133 S.Ct. 2849.)

The result would be a tangled patchwork of competing and conflicting antitrust regimes. In a nationally integrated economy, the resulting unpredictability would be very disruptive to the smooth flow of commerce. A jumble of differing antitrust regimes would also make settlement of patent cases very difficult, if not impossible, scuttling the "general legal policy favoring the settlement of disputes," *Actavis*, *supra*, 133 S.Ct. at p. 2234. Appellants' approach thus threatens to hang the Damoclean sword of treble damages over pharmaceutical patent litigants seeking settlement, resulting in an over-deterrence of settlements that would otherwise be lawful under federal law.

The need for uniform state and federal law on the issue raised here is pressing and palpable. It would be untenable for litigants in a single patent suit in federal court to have to consider separate liability regimes in multiple states before settling their dispute. To be sure, all businesses engaged in commerce across state lines may need to tailor their pricing, advertising, or other conduct to comport with the laws of each state, and the incidental burdens of doing so are consequences of the privilege of doing

business in the United States. But requiring businesses to "tailor" the settlement of a single patent case to meet numerous states' separate and differing competition laws would be more than an incidental burden; it may well be impossible.

(b) State-law challenges to reverse-payment settlements are typically litigated in the same federal court as federal antitrust challenges

Differing state rules about reverse-payment settlements would also make antitrust litigation about such settlements difficult for courts and juries as a practical matter. Antitrust challenges to reverse-payment settlements are likely to be litigated in federal court together with federal claims brought by direct purchasers, so differing state rules would mean that multiple legal standards would apply in the very same litigation.

The settlement agreements at issue in this case were challenged also by a class of direct purchasers asserting claims under federal antitrust law and by classes of indirect purchasers asserting claims under the antitrust and unfair competition laws of numerous states. This case was originally coordinated with the others in federal court, but was remanded to California in 2001 because, at that time, federal jurisdiction was lacking.

That the same settlement agreement was challenged by a class of direct purchasers under federal law and by classes of indirect purchasers under various state laws is not unusual: the vast majority of antitrust litigation involving reverse-payment settlement agreements follow a similar pattern, as noted above. However, the *Cipro* case is unusual because some of the indirect purchaser cases were remanded to state court. Since the *Cipro* case was filed in 2002, however, Congress enacted the Class Action Fairness Act of 2005 (CAFA) (28 U.S.C. § 1332(d)), which expanded federal diversity jurisdiction over class actions. As a result of CAFA, state-law indirect-purchaser actions in pharmaceutical cases by and large proceed

in federal court today. Moreover, the Judicial Panel on Multidistrict Litigation can—and routinely does—require all challenges to reverse-payment settlements pending in federal courts to be consolidated before a single federal judge for pretrial proceedings. (See 28 U.S.C. § 1407.)

Separate state-law standards of liability would thus be very difficult for the courts to manage. As noted above, if California forges its own path, other states may well decide to adopt an array of other antitrust liability standards. A single judge, presiding over otherwise identical state and federal claims, would have to apply multiple sets of liability rules to the same conduct in the same coordinated proceeding. Such an outcome would mire the federal courts, and federal juries, in endless exercises of state-by-state hair-splitting within the context of a single case.

B. *If California Adopts a More Restrictive Analysis of Patent Settlements Protected by Federal Law, It Would Raise Serious Preemption Concerns and Interfere with the Federal Courts*

If this Court concluded that California antitrust law should take a more aggressive stance against reverse-payment settlements than federal law, it would raise serious preemption concerns. Under Appellants' approach, California law would condemn the exercise of settlement rights regarding federally approved drugs that federal law has determined are within the rights granted to patentees by Congress and immune from federal antitrust liability. Indeed, Appellants' inflexible *per se* prohibition would set California antitrust law on a direct collision course not only with federal antitrust law, but also with two distinct and carefully calibrated bodies of exclusive federal law: patent law and drug marketing and distribution law. (See *Bonito Boats*, *supra*, 489 U.S. at p. 168; *Sears, Roebuck & Co. v. Stiffel Co.* (1964) 376 U.S. 225, 229 ["When state law touches upon the area of these federal statutes, it is 'familiar doctrine' that the federal policy 'may not be set at naught, or its benefits denied' by the

state law. [Citation.] This is true, of course, even if the state law is enacted in the exercise of otherwise undoubted state power."].)

Appellants themselves agree that to ensure there is no preemption concern, California and federal antitrust law must not conflict. (Appellants' Supp'l Br. at pp. 14-15.) The Supremacy Clause of the United States Constitution demands that California law tread carefully before subjecting patent settlements to more restrictive standards than federal law. If a patent settlement comports with the federal policy favoring settlement, the dictates of the patent system, and federal drug approval and distribution laws, then California law should not disturb that judgment and condemn the settlement as nonetheless illegal.

A more restrictive liability rule in California would also fail to provide the respect to federal courts that comity requires in our federal system. (Cf. *Allen v. McCurry* (1980) 449 U.S. 90, 95-96 ["[C]omity between state and federal courts . . . has been recognized as a bulwark of the federal system."].) California law would be taking it upon itself to decide when and how parties can settle litigation pending in federal courts and when parties must continue to litigate.

C. *A Presumption of Unlawfulness for Reverse-Payment Settlements Could Have Negative Effects in Other Areas of Law*

Variation among the rules adopted by each state also could open the door to challenges to other types of litigation settlements—not only to intellectual property disputes in other industries, but perhaps to many other kinds of disputes. If this Court were to adopt a legal standard more restrictive of reverse-payment settlements than the Supreme Court adopted in *Actavis*, future litigants may seek to apply that stricter standard to condemn settlements of copyright, real property, contract or similar disputes. Yet, as the U.S. Supreme Court recognized in *Actavis*, "[t]he

existence and degree of any anticompetitive consequence [of reverse payments] may . . . vary as among industries." (*Actavis*, *supra*, 133 S.Ct. at p. 2237.) The danger of spillover suggests that the Court should take a cautious approach, at least for now. It could otherwise become essentially impossible to settle many sorts of disputes without fear of treble damages liability under the law of some state.

Appellants' contention, after all, is that settlement consideration from a rights holder to a potentially infringing competitor is illegal if the infringer also agrees to resolve litigation that could lead to its market entry. Appellants contend such a settlement constitutes an unlawful payment to a competitor to remain off the market. But similar types of settlements with substantially similar effects are often necessary to resolve a wide variety of disputes, particularly when the plaintiff has no damages claim to compromise (as is usually the case in Hatch-Waxman patent litigation). Whenever a plaintiff has no damage claim to compromise, it must give up some other valuable consideration in exchange for the other side's agreement to respect its rights. If the Court adopts a restrictive approach to reverse-payment settlements, future litigants might argue that the logic of the rule applies to all kinds of settlements outside of the pharmaceutical context (based on a hindsight attack that the settlement was not "good enough"), threatening the ability of many kinds of cases to settle.

D. *Factors that Have Led California to Diverge from Federal Antitrust Law in Other Discrete Instances Are Absent Here*

Although federal antitrust law is not controlling, California courts have followed federal law on almost every antitrust issue raised over the past century. The few instances where the courts have caused California and federal law to diverge have involved unique circumstances not present here.

For example, Appellants may refer to California's statutory departure from *Illinois Brick Co. v. Illinois* (1977) 431 U.S. 720. (See Bus. & Prof. Code, § 16750, subd. (a).) But that was not a decision by the California courts to depart from federal law; it was a decision of the Legislature. Indeed, the fact that the Legislature chose to adopt a statutory *Illinois Brick* "repealer" might indicate that the Legislature understood that the California courts might otherwise follow federal precedent. *Illinois Brick* is also a procedural rule of standing, not a liability rule. It determines only which parties can seek to recover, not whether the conduct at issue violates the antitrust laws. The statutory departure from *Illinois Brick* does not, as a result, affect the decisions of businesses seeking to conform their conduct to the law. The question presented here, in contrast, concerns liability and legality of conduct. It concerns, moreover, the lawfulness of a single, discrete act—the settlement of a federal patent lawsuit for a federally approved drug—which may take place anywhere in the country.

Perhaps the only occasion on which this Court has charted a separate path for substantive California antitrust law is *Texaco*, *supra*, 46 Cal.3d at pp. 1164-1166. In that case, this Court relied on a "historical and textual analysis" of the Cartwright Act to hold that California antitrust law, unlike federal antitrust law, was not intended to apply to a merger between two businesses. (*Id.* at p. 1164.) Unlike in *Texaco*, no party here has identified any textual distinction between the Cartwright Act and the federal antitrust laws that mandates a standard different from the standard that the United States Supreme Court applied in *Actavis*. More importantly, the *Texaco* Court *narrowed* California law and *avoided* any potential conflict with federal law or the action of federal agencies (in that case, the Federal Trade Commission). Although Appellants here cannot point to any meaningful, relevant difference in the governing statutes, they seek to have

this Court *broaden* California law in a way that *creates* conflicts with federal law and the ability to settle cases in federal courts.

Even the lower California courts have diverged from federal antitrust law only on narrow procedural issues, usually with a clear basis in the language of the Cartwright Act. (See, e.g., *Bay Guardian Co. v. New Times Media LLC* (2010) 187 Cal.App.4th 438, 455 [distinguishing need of predatory pricing plaintiff to prove harm to competition under California law from plaintiffs under federal based on the specific text of California's Unfair Practices Act (UPA) (Bus. & Prof. Code, § 17043): "Section 17043 recites distinctive language, and has dissimilar elements and a different focus than" federal statutes]; *Cellular Plus, Inc. v. Super. Ct.* (1993) 14 Cal.App.4th 1224, 1241-1242 [holding that Cartwright Act did not adopt the federal "filed rate doctrine"]; *Bruno v. Super. Ct.* (1981) 127 Cal.App.3d 120, 131 [finding federal law inapplicable with respect to whether fluid class recovery is allowed in antitrust cases]; *People ex rel. Freitas v. City & County of San Francisco* (1979) 92 Cal.App.3d 913, 920 [determining that federal law was inapplicable in determining whether city enjoyed governmental immunity under the Cartwright Act].)

It is telling that Appellants have identified no instance in which any California court has determined that California law adopted a *per se* or "quick look" analysis when federal law did not.

CONCLUSION

For the foregoing reasons, this Court should follow *Actavis*, hold that the rule of reason applies in this case, and reject Appellants' suggestion of a "constrained rule of reason" or a "precisely formulated *per se* illegality rule."

DATED: March 18, 2014

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

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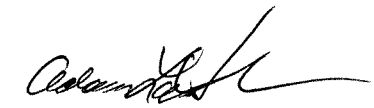

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PROOF OF SERVICE

I, Nieka L. Gore, declare as follows:

I am over the age of 18 and am not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 355 South Grand Avenue, 35th Floor, Los Angeles, CA 90071.

On March 18, 2014, I served true copies of the attached document described as

APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF SUPPORTING RESPONDENTS

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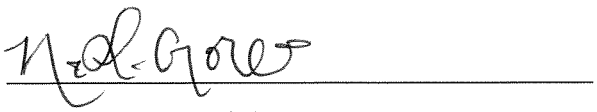

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