In the

Supreme Court

of the

State of California

S198616

IN RE CIPRO CASES I & II

CALIFORNIA COURT OF APPEAL · FOURTH APPELLATE DISTRICT · NO. D056361
SUPERIOR COURT OF SAN DIEGO · HON. RICHARD E. L. STRAUSS
NOS. JCCP 4154 AND JCCP 4220
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REPLY BRIEF ON THE MERITS

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SUMMARY OF REPLY

This Court should reverse the grant of summary judgment to Respondents and remand for trial. Respondents' entire argument rests on the broad premise that their pay-for-delay settlement agreement is beyond the reach of the Cartwright Act and the Unfair Competition Law because "a patent confers a lawful monopoly that entitles the patent holder to exclude competition *within* the patent's scope." (Generics at p. 1, italics original.) But under California law—and indeed under federal law, as the recent Third Circuit decision in *In re K-Dur Antitrust Litigation* (3d Cir. 2012) 686 F.3d 197 (*K-Dur Antitrust*), confirms—how a patent holder accomplishes exclusion has always mattered. California law does not permit a patent holder to exclude competition with a naked cash payment so large it casts serious doubt on the patent's legal ability to exclude.

Bayer's mammoth payout demonstrates Respondents' belief at the time of settlement that the Cipro patent was very weak, probably unenforceable. Otherwise Bayer never would have paid so much—more money even than the Generics stood to gain by competing with Cipro. Respondents nowhere dispute the economic reality of their $398.1 million agreement. This was a horizontal splitting of monopoly rents that enabled Bayer, the incumbent, to charge monopoly prices for more than seven years without the risk of losing its patent. Holding a patent does not give a company free rein to divvy up a market by committing straightforward, garden-variety antitrust violations. The United States Supreme Court and the Hatch-Waxman Act encourage challenges to patent validity. Respondents' proposed rule would let drug companies foreclose such challenges—and competition—by obtaining questionable patents and then buying protection from challenges that the patent grants alone cannot furnish.

That rule has now been rejected or criticized by a majority of the regional federal circuits to have considered the issue. (See *K-Dur Antitrust*, *supra*, 686 F.3d at pp. 209-214.) Indeed, *K-Dur* reveals the major premises underlying the lower courts' decisions here to be false. There is no unbroken line of federal authority standing behind *Tamoxifen*; rather, the first two federal appeals courts to examine reverse payment agreements "concluded that such agreements should be subject to strict antitrust scrutiny" without regard to whether the agreements affected commerce outside the formal patent grant. (*K-Dur Antitrust, supra*, 686 F.3d at pp. 209-211.) Now, after *K-Dur*, the disagreement among the federal appellate courts is undeniable. The California lower courts' jurisdictional bogeyman—that subjecting Respondents' agreement to scrutiny under the antitrust laws would require re-trying the patent case—has no more truth. As the Third Circuit stated: "[T]here is no need to consider the merits of the underlying patent suit because '[a]bsent proof of other offsetting consideration, it is logical to conclude that the *quid pro quo* for the payment was an agreement by the generic to defer entry beyond the date that represents an otherwise reasonable litigation compromise.'" (*Id.* at p. 218, citation omitted.) The Third Circuit also recognized that neither patent law nor any judicial policy in favor of settlement immunizes reverse payments from antitrust scrutiny. (*Id.* at pp. 214-218.) Thus, there is simply no credible argument that contrary interpretations of the Sherman Act by three federal circuits should prevent the People of California from enforcing their own laws in their own courts.

Petitioners' Reply has five parts. First, a faithful interpretation of existing California law should lead this Court to condemn Bayer's reverse payment as facially anticompetitive. California law, like federal law, prohibits bald efforts to allocate markets. Bayer's $398.1 million payment

to Barr in exchange for Barr's agreement to drop its challenge to the Cipro patent, and stay out of the market for a richer share of monopoly profits, is exactly that.

Second, this Court, like the court in *K-Dur*, should repudiate the *Tamoxifen* "scope of the patent" test. A long line of cases recognizes that abuse of a patent can occur *within* the physical and temporal scope of the patent, and condemning Respondents' reverse payment agreement is in keeping with this established law. The rule adopted below allows drug companies to extend unfounded prescription drug monopolies and maintain high monopoly prices for years, to the detriment of patients and insurers. Exempting pay-for-delay settlements from antitrust scrutiny makes for bad law and—especially here, where the settlement adversely affected Californians' health and welfare, denying them affordable generic medicine—very bad policy.

Third, Respondents violated the UCL, because their agreement to foreclose competition violated the Cartwright Act and because they committed unfair and unscrupulous acts that harmed California consumers. For example, the Bayer-Barr settlement agreement required Barr's lawyers to destroy all the evidence of the Cipro patent's unenforceability (except for one copy of everything that was delivered to Bayer), so that subsequent challengers could not make use of such evidence. (4AA 704–06.)

Fourth, this is not a federal case and there is no conflict with federal law. Instead, a finding of liability here fully accords with federal law, as *K-Dur* shows.

Fifth, the claims against Watson are viable. Watson joined Respondents' unlawful combination and benefited from it.

ARGUMENT

The decisions of the Second and Federal Circuits concerning Respondents' reverse payment agreement are not persuasive and do not control this Court's analysis. None of the claims here was adjudicated by those decisions. Just as the Third Circuit recently refused to defer to the Eleventh Circuit's prior decision addressing the K-Dur reverse payment, so should this Court, exercising independent judgment, decline to defer to prior Cipro decisions. (See *K-Dur Antitrust, supra*, 686 F.3d at pp. 211-212 & fn. 8.) Under ordinary antitrust principles, reverse payments should be either *per se* illegal—because they are agreements among horizontal competitors not to compete—or subject to the quick-look Rule of Reason imposed in *K-Dur*.

I. California Law Should Ban Reverse Payments.

A. The Cartwright Act Guarantees California Citizens Maximum Protection From Anticompetitive Conduct.

California's existing black-letter law forbidding horizontal market allocation must not be limited by adoption of the lower courts' rule, which is drawn from inapposite federal precedent and a narrower statute. "California courts have never said that federal authority is *binding* on" interpretations of the Cartwright Act. (*Dimidowich v. Bell & Howell* (9th Cir. 1986) 803 F.2d 1473, 1477, italics original.) Rather, "federal precedents must be used with caution because the acts, although similar, are not coextensive." (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 183 n.9, citation omitted.)

California's antitrust laws provide *at least* the same level of protection against anticompetitive behavior as federal antitrust laws, and sometimes apply more broadly. (See, e.g., *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 948-950 (*Arthur Andersen*) [rejecting federal

court's attempt to create a "narrow-restraint" exception to California's prohibition of noncompetition agreements]; see also *Bay Guardian Co. v. New Times Media LLC* (2010) 187 Cal.App.4th 438, 455-459, petn. for review denied, 2010 Cal. Lexis 12380 (Cal. Nov. 23, 2010) ["The Sherman Act and Robinson-Patman Act (15 U.S.C. § 13(a)) seek to prevent anticompetitive acts that impair competition or harm competitors, whereas the [Unfair Practices Act, Bus. & Prof. Code §§ 17000, *et seq.*] reflects a broader '[l]egislative concern not only with the maintenance of competition, but with the maintenance of "fair and honest competition." [Citations.]' (*ABC Internat. Traders, Inc. v. Matsushita Electric Corp.* (1997) 14 Cal.4th 1247, 1262.)"].) Business and Professions Code section 16600—enacted in 1872 as Civil Code section 1673—reinforces the *per se* illegality of covenants not to compete and has no counterpart in federal law: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." (Bus. & Prof. Code § 16600.) In addition, while federal law now subjects vertical price-fixing agreements to the Rule of Reason, the Cartwright Act has always categorically proscribed such agreements, both before and after the 2007 change in federal law.[1] And significantly, California permits indirect purchasers to recover antitrust overcharges, while federal law does not. (*California v. ARC America Corp.* (1989) 490 U.S. 93 (*ARC America*).)

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[1] (Compare *Leegin Creative Leather Prods. Inc. v. PSKS Inc.* (2007) 551 U.S. 877 (*Leegin*), with *Mailand v. Burckle* (1978) 20 Cal.3d 367 (*Mailand*), and *California v. DermaQuest Inc.*, No. RG10497526 (Alameda Super. Ct. filed Feb. 23, 2010), complaint available at: http://antitrustcommentary.com/wp-content/uploads/2010/03/dermaquest-complaint.pdf; final judgment available at: http://antitrustcommentary.com/wp-content/uploads/2010/03/dermaquest-judgment.pdf [applying *Mailand*'s *per se* rule despite *Leegin*].)

The Cartwright Act thus "reaches beyond the Sherman Act" in certain instances. (Hon. Kathryn M. Werdegar, *Conclusion*, Competition (Fall 2008), at p. 223; see also *Cellular Plus, Inc. v. Super. Ct.* (1993) 14 Cal.App.4th 1224, 1242 ["[T]he Cartwright Act is broader in range and deeper in reach than the Sherman Act."].) In 1907, the Legislature enacted the Cartwright Act "in reaction to the perceived ineffectiveness" of the Sherman Act. (ABA Section of Antitrust Law, *State Antitrust Practice and Statutes* (3d ed. 2004), at p. 6-1.) A bill introduced in the U.S. Senate in 1888, later enacted in substantially similar form as the Cartwright Act, "was designed not to narrow the scope of the Sherman Act but to broaden it. . . . As shown by the plain meaning of the statutory language, the evident implication of such language, and the manifest purpose of the Act, the Legislature intended to strike as broadly as it could in the Cartwright Act." (*Cianci v. Super. Ct.* (1985) 40 Cal.3d 903, 919-921 (*Cianci*).)

Accordingly, the Act provides the utmost protection to California citizens from restraints of trade, "maximizing effective deterrence of antitrust violations" through its categorical language: agreements restraining open competition are "absolutely void." (*Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, 764 (*Clayworth*); Bus. & Prof. Code § 16722.)

B. *Per Se* Treatment Is Warranted Because the Cipro Agreements Totally Eliminated Competition and Lack Any Redeeming Value.

Respondents claim that reverse payment settlements of Hatch-Waxman litigation "do not come close to falling within the narrow and exceptional per se category." (Generics at p. 36; see also Bayer at p. 32.) But in fact, paying your competitor to stay out of the market is precisely the sort of cartelization this Court traditionally has treated as illegal *per se*. (See *Wright v. Ryder* (1868) 36 Cal. 342; see also *Palmer v. BRG of Georgia, Inc.* (1990) 498 U.S. 46.) By allocating the entire market to

Bayer, the Cipro agreements excluded competition and impeded free-market pricing. Such horizontal agreements dividing markets or precluding entry "because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal" in California, "without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." (*Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Constr. Co.* (1971) 4 Cal.3d 354, 361 (*Oakland-Alameda*), citation omitted; see also *Guild Wineries & Distilleries v. J. Sosnick & Son* (1980) 102 Cal.App.3d 627, 633 [horizontal market allocation deemed *per se* illegal]; *Fisherman's Wharf Bay Cruise Corp. v. Super. Ct.* (2003) 114 Cal.App.4th 309, 334 ["The law conclusively presumes manifestly anticompetitive restraints of trade to be unreasonable and unlawful"].)

1. Respondents' Agreement Horizontally Allocated the Cipro Market in Restraint of Trade.

Bayer's noncompetition agreement, through which it shared nearly $400 million in monopoly profits with potential competitors, deprived prescription drug consumers of the lower prices and affordable alternatives they would have obtained if—as both Bayer and Barr evidently believed—Bayer's patent was invalid or unenforceable. Regardless of whether the patent would have been struck down, the parties conspired to pull the plug on the courts' power to decide that question, defeating the very purpose of the statute under which the suit arose. (See Section II.D.2, *infra*.)

The Court should declare this manifestly anticompetitive agreement illegal. (See Bus. & Prof. Code §§ 16720(e)(4), 16722 [the Cartwright Act "absolutely" proscribes every agreement between businesses "to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any . . . article or commodity,

that its price might in any manner be affected."]; Bus. & Prof. Code § 16726 ["Except as provided in this chapter, every trust is unlawful, against public policy and void."]; *Arthur Andersen, supra*, 44 Cal.4th at p. 945 ["Today in California, covenants not to compete are void," subject to certain exceptions not applicable here]; see, e.g., *K-Dur Antitrust, supra*, 686 F.3d at p. 216 [finding that reverse exclusionary payments "permit the sharing of monopoly rents" and that the exclusion results from the payment, not the patent]; see also Joshua P. Davis, *Applying Litigation Economics to Patent Settlements: Why Reverse Payments Should Be Per Se Illegal* (2009) 41 Rut. L. J. 255, 262, 307 [noting that reverse payments "allow the brand manufacturer to share profits from its drug monopoly with the generic manufacturer in exchange for a delay in generic entry," and concluding that a categorical "ban on reverse payments is likely to produce the most efficient resolution of patent disputes."].)

Even the Eleventh Circuit, in departing from its own precedents to adopt the *Tamoxifen* standard,[2] had to concede the FTC's point that "a potential competitor can make more money by dropping its patent challenge in return for a share of the holder's monopoly profits than it can by continuing to attack an invalid patent and bringing a less expensive version of the drug to market before the patent expires." (*FTC v. Watson Pharms., Inc.* (11th Cir. 2012) 677 F.3d 1298, 1315 (*Watson*).)

In this case of first impression, the Court has the opportunity to apply the *per se* rule to reverse payment agreements to develop California law in response to new forms of collusion among firms. The *per se* rule in California "does not denote an arbitrary rigid classification, but rather

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[2] (See *In re Tamoxifen Citrate Antitrust Litig.* (2d Cir. 2006) 466 F.3d 187 (*Tamoxifen*).)

encompasses certain practices that *normally* tend to eliminate competition." (*Oakland-Alameda, supra*, 4 Cal.3d at p. 361, italics added; see also *Reynolds v. California Dental Service* (1988) 200 Cal.App.3d 590, 597 ["In deciding on the proper [antitrust] standard, the court should inquire into whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to increase economic efficiency and render markets more, rather than less, competitive."], internal quotation marks and citations omitted.)

There is nothing pro-competitive about the Cipro agreements. Respondents' settlement was designed for (and achieved) no purpose other than to eliminate potential competition and control price. This is precisely the sort of agreement the Cartwright Act treats as illegal *per se*.

2. Bayer's Ownership of a Cipro Patent Does Not Remove This Market Allocation Agreement From the *Per Se* Illegal Category of Restraints.

Nor does the Cipro patent excuse Bayer's horizontal agreement with Barr to destroy competition and pass the costs to consumers. Under California law, as under federal law, a patent holder can be found to violate antitrust law based on collusive agreements which do not expand the formal scope of a patent grant.[3] The Court does not face a blank slate here: antitrust law and patent law are "two chapters of jurisprudence firmly embedded in the public policy of our commonwealth." (*Futurecraft Corp. v. Clary Corp.* (1962) 205 Cal.App.2d 279, 280, fn. 1, quoting trial

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[3] Respondents' central argumentative premise—that a cash payment to protect an infirm patent falls within the scope of the patent—is incorrect. "A patent affords no immunity for a monopoly not fairly or plainly within the grant." (*United States v. Masonite Corp.* (1942) 316 U.S. 265, 277 (*Masonite*); see Section II.B, *infra*.)

court findings.) And whereas the California courts *liberally* construe the Cartwright Act, they *strictly* construe the rights of patent holders in light of "the patent policy favoring free competition, dissemination of ideas and maximum utilization of intellectual resources." (Compare *Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 927 (*Marin County*), with *Sinclair v. Aquarius Elec., Inc.* (1974) 42 Cal.App.3d 216, 224, citation omitted.) It is settled that anticompetitive conditions in a contract involving patent rights violate the Cartwright Act. (See *Vulcan Powder Co. v. Hercules Powder Co.* (1892) 96 Cal. 510 (*Vulcan*).)

Respondents try and fail to align this Court's important *Vulcan* decision with *Tamoxifen*. In holding horizontal market allocation agreements *per se* unlawful, the *Vulcan* Court did not look solely at whether a valid patent covered the restrained commerce. Instead, the Court was troubled by the nature of the agreements, finding their provisions to be "clearly in restraint of trade and against public policy," and noting "it is obvious that the consideration moving from [some of the parties] was their covenant to refrain from competition in the dynamite business, and that they had no patent rights to 'interchange.'"[4] (*Vulcan, supra*, 96 Cal. at p. 515.) For all Respondents' distortions of *Vulcan*, they cannot deny that the only consideration Barr gave Bayer was its agreement to refrain from competing with Cipro, or that Barr lacked any patent rights to exchange.

Bayer ventures that the *Vulcan* Court "would have had no occasion to consider whether the contract was 'confined' to the patented processes" unless the Court's conclusion turned on the finding that some of the

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[4] By contrast, in *Standard Oil Company v. United States* (1931) 283 U.S. 163, 171, the settlement included "[a]n interchange of patent rights and a division of royalties according to the value attributed by the parties to their respective patent claims . . . ."

provisions were *not* so confined. (Bayer at p. 18; see also Bayer at pp. 13, 35.) This is faulty logic. The Court may have discussed the provisions affecting rights beyond the patent grants, not because those provisions were necessary to antitrust liability, but because they made the set of restraints even more pernicious. This seems to be why the Court twice used the word "indeed" in the relevant paragraph. (*Vulcan, supra*, 96 Cal. at p. 516.) Further, although the Generics conflate the two questions, whether a patent holder receives consideration for its patent rights is a different question from whether an agreement expands those rights. (Generics at p. 24.) Bayer did not receive consideration for its patent rights. The consideration it received—Barr's agreement to drop the case and stay out of the market—was for its $398.1 million settlement payment.[5]

Moreover, even if the scope of the patent somehow insulated Bayer and Barr from liability for anticompetitive conduct, any such immunity necessarily depends on the validity of the patent in question. Despite what Respondents say, patent law does not conclusively presume patents are valid. While there is a statutory presumption of validity, it is merely a procedural device for determining how to assess whether a particular patent was properly issued. (*In re Etter* (Fed.Cir. 1985) 756 F.2d 852, 856 (en banc) (*Etter*); see Section II.B.2, *infra*; Opening Merits Br. at pp. 26–27; *K-Dur Antitrust, supra*, 686 F.3d at p. 214.) We cannot know for certain what

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[5] Respondents also misplace reliance on the lower court decision in *Fruit Machinery Company v. F. M. Ball & Company* (1953) 118 Cal.App.2d 748 (*Fruit Machinery*). It is ironic that Bayer quotes *Fruit Machinery*'s statement that a patent allows for "conditions of sale . . . reasonably adapted to secure pecuniary reward for the patentee's monopoly." (Bayer at p. 3, quoting *Fruit Machinery, supra*, 118 Cal.App.2d at p. 759; see also Bayer at pp. 24, 26.) Bayer neither sold nor assigned its patent, nor licensed it on pro-competitive terms, but instead *paid* the generic challenge a hefty sum to stay out of the market.

the original patent court would have done, for the simple reason that Bayer paid Barr a lot of money to avoid finding out. But what we do know is that Bayer thought the risk of invalidity was so high that it paid Barr more money than Barr would have made even if it had invalidated the patent. It is incredible on its face that a corporation would risk antitrust liability by paying upwards of $400 million to another corporation to withhold a product from the market when it had a defensible patent on that product. Yet one would have to believe this to conclude there is no collusion and the payment falls inside the patent's actual scope. Antitrust law requires no deference to "fatally weak" patents (*Tamoxifen, supra*, 466 F.3d at p. 212), particularly when the only reason the patent has not been invalidated is that the patent owner paid handsomely to avoid that result.

Respondents make much of the fact that a narrowed Cipro patent was upheld in some other proceedings, suggesting that this must mean the patent was truly enforceable, or at the very least that the original infringement suit was not a sham. (Bayer at pp. 2, 9, 52; Generics at pp. 1, 7–8, 49, 65.) In fact, however, Bayer litigated with only some of the Generics, while paying others—not just Barr but also Ranbaxy (see 7AA 1522–30, 1591–93 [Bayer settled its infringement suit against Ranbaxy with $60 million in cash])—to leave the market without going to court. That is consistent not with the idea that the patent was valid and enforceable, but with the likelihood that some defendants found very strong evidence of invalidity or unenforceability, and Bayer simply paid off those defendants in order to end the case and hide the evidence. So is the fact that Bayer was willing to spend nearly $400 million to settle the original case; on Respondents' theory, that money was largely wasted, because the parties thought that Bayer would win all along. That is simply not plausible. Indeed, that Bayer managed to claim attorney-client privilege in

Barr's lawyers' assessment of the case as part of the settlement reinforces the conclusion that the settled cases had something Bayer thought worth hiding. (7AA 1467–68, 6AA 1173, 4AA 704–06; see Section III.B, *infra*.)

Finally, it is well-established that the legality of this settlement must be evaluated as of the time it was entered into, not based on what happened afterwards. Even the latest Eleventh Circuit decision acknowledges as much. (See *Watson, supra*, 677 F.3d at p. 1308 [holding that "a court must judge the antitrust implications of a reverse payment settlement as of the time that the settlement was executed."]; accord, 1 Herbert Hovenkamp, *et al.*, *IP and Antitrust* (2d ed. 2010), § 15.3a(1)[B], at pp. 15-37–15-38 [focus is on *ex ante* assessment of risk].) A cartel that fixes prices does not get a free pass because some unexpected price shock sends prices higher anyway. It is the act of foreclosing competition, not the ultimate practical effect, that the law renders illegal *per se*. Similarly, Bayer should not be entitled to defend its effort to pay competitors to stay off the market by trying to show that they ultimately would not have entered the market anyway.[6]

Four hundred million dollars is a lot to get for standing on the sidelines. It is the very definition of an agreement not to compete. Under *Vulcan, supra*, 96 Cal. 510, the *per se* rule applies to Respondents' deal,

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[6] Clearly established antitrust law holds evidence of events occurring after an alleged restraint inadmissible. (See Opening Merits Br. at p. 60.) Ignoring this law, Respondents rely on the same lone case, *Blank v. Coffin* (1942) 20 Cal.2d 457 (*Blank*), to dispute the inadmissibility of evidence of the follow-on Cipro patent litigation. (See Bayer at p. 54; Generics at p. 65.) *Blank* is not an antitrust case and consequently is inapposite. Furthermore, the issue in *Blank* was whether the trial court properly admitted evidence that the defendant's employee drove the defendant's car with the defendant's permission after the accident, which tended to show that the employee was driving the car with the defendant's permission at the time of the accident. (*Id.* at p. 463.) The evidence of Bayer's later patent cases does not implicate this type of habitual relationship.

which far exceeded the parties' litigation costs, far exceeded the profits Barr would have gained through lawful competition, and had zero redeeming value. (See Opening Merits Br. at pp. 23–37; see also *Arkansas Carpenters Health & Welfare Fund v. Bayer AG* (2d Cir. 2010) 625 F.3d 779, 780, Pooler, J., dis. from rehg. en banc [criticizing the Cipro agreements and stating that "pharmaceutical patent settlements involving exclusion payments . . . serve no obvious redeeming social purpose."].[7])

II. The Judgment Below Should Be Reversed Even Under the Rule of Reason.

A. *K-Dur* Demonstrates the Flaws in Respondents' Test.

Alternatively, even if this Court does not apply the *per se* rule California courts have long thought proper for agreements to allocate markets, it should reject the Court of Appeal's rule of "extreme deference" (1 Hovenkamp, *et al.*, *IP and Antitrust, supra*, § 15.3a(1)[B], at p. 15-40) in favor of a "quick-look" Rule of Reason. In this respect the Third Circuit's recent *K-Dur* decision provides a useful analytical framework. (See *K-Dur Antitrust, supra*, 686 F.3d 197.) The case concerned a $60 million patent settlement payment by a brand-name pharmaceutical company in exchange for delayed generic sales of a potassium chloride drug used to treat patients with high blood pressure. (*Id.* at pp. 203, 205-206.)

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[7] Bayer and the Generics tout their limited license covering a six-month period in 2003, at the end of the long monopoly period achieved by their pay-for-delay settlement in which there were no licensed sales of Cipro. (Generics at pp. 1, 7–9, 55, 70; Bayer at pp. 2, 9). No redeeming virtue resulted from this limited license. Under it, Barr was contractually obligated to pay 85 percent of Bayer's list price for Cipro during the prior fiscal quarter. (4AA 780.) Ultimately, Barr not only matched Bayer's price increases, but in fact sold Bayer-manufactured Cipro at prices that were 5-10 percent *higher* than Bayer's own supracompetitive prices. (5AA 997, 1037; 6AA 1207–08.)

K-Dur confirmed under federal law what has always been the better view of the law of California: first, neither a defendant's patent rights nor the policy in favor of settlement should immunize reverse exclusionary payments from antitrust scrutiny, and second, under ordinary antitrust principles, such payments should be viewed with great skepticism. Respondents are simply wrong when they argue that decisions concerning pay-for-delay settlements are uniform and this Court has no choice but to let stand the Court of Appeal's decision affirming the trial court's summary judgment order. (See, e.g., Bayer at pp. 14–16; Generics at pp. 29–33.)

Contrary to Respondents' interpretation, the first two federal appeals courts to examine reverse payment agreements "concluded that such agreements should be subject to strict antitrust scrutiny," regardless of whether the agreements restrained trade beyond the physical or temporal scope of the patent grant itself. (*K-Dur Antitrust, supra*, 686 F.3d at pp. 209-211.) But, the defective *Tamoxifen* standard adopted here by the California lower courts "does not subject reverse payment agreements to any antitrust scrutiny." (*Id.* at p. 214.) The Third Circuit embraced the earlier appellate decisions as it debunked the same arguments raised by Respondents. In place of *Tamoxifen*, the Third Circuit adopted the DOJ-FTC-Hovenkamp quick-look standard (see Opening Merits Br. at pp. 40–42), a standard that looks to "the economic realities of the reverse payment settlement rather than the labels applied by the settling parties." (*K-Dur Antitrust, supra*, 686 F.3d at p. 218.) In doing so, the court endorsed the reasoning of the D.C. Circuit in *Andrx Pharmaceuticals, Inc. v. Biovail Corporation International* (D.C.Cir. 2001) 256 F.3d 799, 808-815; the Sixth Circuit in *In re Cardizem CD Antitrust Litigation* (6th Cir. 2003) 332 F.3d 896, 899-915 (*Cardizem*); and the dissent in *Tamoxifen, supra*, 466 F.3d at pp. 221-232.

The Third Circuit in *K-Dur* determined that pay-for-delay settlements strangle the market and "permit the sharing of monopoly rents between would-be competitors without any assurance that the underlying patent is valid." (*K-Dur Antitrust, supra*, 686 F.3d at pp. 216-217.) *Tamoxifen*'s effectively unrebuttable presumption of legality is erroneous, the court found, because it "nominally protects intellectual property, not on the strength of a patent holder's legal rights, but on the strength of its wallet." (*Id.* at p. 217.) The court repudiated Respondents' self-serving approach, adopted here by the courts below, which "enable[s] the holder of a patent that the holder knows is weak to buy its way out of both competition with the challenging competitor and possible invalidation of the patent"—harming consumers by empowering drug companies to strike agreements that prevent the introduction of affordable generic medicine. (*Id.* at pp. 215-217.)

Applying the quick-look, the *K-Dur* court rejected all asserted patent law justifications for a nakedly anticompetitive agreement that forced consumers to pay hundreds of millions of extra dollars for prescription drugs. Such an agreement flouts not just antitrust law, but also the public interest bound up with patent law, which "supports judicial testing and elimination of weak patents." (*K-Dur Antitrust, supra*, 686 F.3d at p. 215.) Important "aspects of the Supreme Court's general patent jurisprudence had been overlooked by [courts] adopting the scope of the patent test." (*Id.* at p. 216.) That test precludes scrutiny of agreements that delay generic drug entry, and consumers "are typically the biggest beneficiaries of generic entry." (*Id.* at p. 208.) Conversely, the "principal beneficiaries" of the *Tamoxifen* approach—as the majority opinion in *Tamoxifen* noted—"will be name brand manufacturers with weak or narrow patents that are unlikely to prevail in court. *See* 466 F.3d at 211. Thus while such a rule might be

good policy from the perspective of name brand and generic pharmaceutical producers, it is bad policy from the perspective of the consumer, precisely the constituency Congress was seeking to protect." (*K-Dur Antitrust, supra*, 686 F.3d at p. 217.)

As for "the judicial preference for settlement," it is "generally laudable" but "should not displace countervailing public policy objectives or, in this case, Congress's determination—which is evident from the structure of the Hatch-Waxman Act and the statements in the legislative record—that litigated patent challenges are necessary to protect consumers from unjustified monopolies by name brand drug manufacturers." (*K-Dur Antitrust, supra*, 686 F.3d at p. 217; see Section II.C, *infra.*)

Therefore, a Hatch-Waxman reverse payment agreement that purports not to broaden a prescription drug patent nonetheless violates the Sherman Act, except if the settling parties (the antitrust defendants) can demonstrate a genuine pro-competitive benefit—a possibility the court acknowledged is "probably rare." (*K-Dur Antitrust, supra*, 686 F.3d at p. 218.) This quick-look Rule of Reason makes it wholly unnecessary to examine the drug patent or the merits of the underlying patent suit.[8] (*Ibid.*)

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[8] Remarkably, the Generics assert that such a quick-look antitrust analysis "create[s] serious due process problems . . . ." (Generics at p. 41.) The Generics may be unaware of the settled line of U.S. Supreme Court quick-look precedents. (See *California Dental Ass'n v. FTC* (1999) 526 U.S. 756, 769-770 [discussing, *inter alia*, *NCAA v. Board of Regents* (1984) 468 U.S. 85]; see also Antitrust and Unfair Competition Law Section, The State Bar of California, *California State Antitrust and Unfair Competition Law* (Cheryl Lee Johnson, ed., Matthew Bender & Co., 2009), § 2.04[B] ["[U]nder federal law, if a person with even a rudimentary understanding of economics could conclude that the restraint in question would have an anticompetitive effect on customers and the market, the burden then immediately shifts to defendants to present a plausible pro-competitive efficiency justifying the restraint. . . . [¶] No California state court has

Footnote continues on next page.

In sum, the Third Circuit's "common sense" pay-for-delay decision holds that patent rights cannot immunize reverse payments from antitrust scrutiny (*K-Dur Antitrust, supra*, 686 F.3d at pp. 214-218), that the same is true for the general policy in favor of settlements (*id.* at pp. 217-218), and that a reverse payment is *prima facie* evidence of an unreasonable restraint of trade (*id.* at p. 218). Moreover, "there is no need to consider the merits of the underlying patent suit because '[a]bsent proof of other offsetting consideration, it is logical to conclude that the *quid pro quo* for the payment was an agreement by the generic to defer entry beyond the date that represents an otherwise reasonable litigation compromise.'" (*Ibid.*, citation omitted.) This Court can and should follow the Third Circuit's lead, and reject the erroneous *Tamoxifen* test for California.

B. A Patent Holder Is Not Exempt From Antitrust Scrutiny Simply Because It Pays for Delay Without Enlarging the Patent Grant.

Respondents' legal argument proceeds from the assertion that "[a]ny restraint on competition within the patent's scope flows not from the settlement, but from the patent itself." (Generics at p. 1; see Bayer at p. 34 ["[G]eneric entrants were excluded by the patents themselves"].) On the contrary, the restraint here was plainly embedded in the *settlement agreement*. (4AA 702–33.) Had Bayer obtained an injunction based on the patent, then the patent itself would have restrained competition and Petitioners would have no legitimate objection. The Generics' initial assertion contradicts their statement that the Cipro agreements restrained no more trade than the "exclusionary *potential* of the Cipro patent . . . ."

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expressly applied the quick look analysis to Cartwright Act claims, though no court has suggested that such an analysis would not be applied in the appropriate set of circumstances."].)

(Generics at p. 15, italics added.) A patent's mere potential to exclude, as opposed to its actual strength as determined through adversarial testing, is insufficient to justify a substantial payment to prevent competitive entry. Indeed, the noncompetition agreement here is the functional equivalent of a victory by the entity claiming the patent was invalid. Barr received more than it would have earned had it invalidated the patent. But consumers gained no benefit. In effect, they funded the settlement.

Issuance of a patent provides a limited monopoly but bestows no right to execute such an agreement in restraint of trade. (See *K-Dur Antitrust, supra*, 686 F.3d at p. 216 [reverse exclusionary payments are presumed illegal because they "permit the sharing of monopoly rents between would-be competitors without any assurance that the underlying patent is valid."].)

1. A Patent Holder Does Not Have the Right to Pay a Competitor Not to Challenge Its Patent in Court.

Respondents' answering briefs give short shrift to the fact that patent law overwhelmingly favors the testing of patents, so weak or invalid ones will be exposed and stripped from the economy. Though one would never know it from Respondents' briefs, legions of U.S. Supreme Court cases stress the importance of keeping the way open for challenges to patents. As these cases recognize, patents are a narrow exception to the free marketplace of ideas, and the public stands to gain from the lower prices and competition that result from patent invalidation. (See, e.g., *United States v. Glaxo Group Ltd.* (1973) 410 U.S. 52, 58 ["It is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly."], quoting *Pope Mfg. Co. v. Gormully* (1892) 144 U.S. 224, 234; see also *Blonder-Tongue Labs., Inc. v. University of Ill.*

Found. (1971) 402 U.S. 313, 343-347 (*Blonder-Tongue*).) As a result, contracts foreclosing patent challenges are suspect.

For example, in *Edward Katzinger Company v. Chicago Metallic Manufacturing Company* (1947) 329 U.S. 394, the Court held that a patent licensing agreement that required the licensee to charge a fixed price for the patented product could not estop the licensee from challenging the validity of the patent. The Court reasoned that this price-fixing provision would violate the antitrust laws but for the existence of a valid patent, so the licensee could not be contractually barred from attacking the patent. (*Id.* at pp. 399, 401-402.) The Court stated that its holding resulted from "solicitude for the interest of the public fostered by freedom from invalid patents and from restraints of trade," and "the broad public interest in freeing our competitive economy from the trade restraints which might be imposed by price-fixing agreements stemming from narrow or invalid patents." (*Id.* at pp. 400-401.) In vindicating the "the public interest which is dominant in the patent system," the Court reiterated that "the right to challenge [a patent] is not only a private right to the individual, but it is founded on public policy which is promoted by his making the defence, and contravened by his refusal to make it." (*Id.* at p. 401, internal quotation marks and citations omitted.)

The Court extended this reasoning in *Lear, Inc. v. Adkins* (1969) 395 U.S. 653 (*Lear*). The decision on appeal there—a decision of this Court—had held that "so long as a licensee is operating under a license agreement he is estopped to deny the validity of his licensor's patent in a suit for royalties under the agreement." (*Id.* at p. 656, citation omitted.) This estoppel rule had long been justified with a contract-law principle: "a licensee should not be permitted to enjoy the benefit afforded by the agreement while simultaneously urging that the patent which forms the

basis of the agreement is void." (*Ibid.*, citation omitted.) The U.S. Supreme Court reversed. It found the contract-law justification overcome by "the strong federal policy favoring free competition in ideas which do not merit patent protection." (*Ibid.*) Because of this policy, a licensee sued for royalties is entitled to defend on grounds of patent invalidity, and if it prevails on that question it pays nothing.[9]

The key reasoning is on page 670, where the Court noted, "A patent, in the last analysis, simply represents a legal conclusion reached by the Patent Office. Moreover, the legal conclusion is predicated on factors as to which reasonable men can differ widely. Yet the Patent Office is often obliged to reach its decision in an *ex parte* proceeding, without the aid of the arguments which could be advanced by parties interested in proving patent invalidity." (*Lear, supra*, 395 U.S. at p. 670.) The Court then concluded:

> Surely the equities of the licensor do not weigh very heavily when they are balanced against the important public interest in permitting full and free competition in the use of ideas which are in reality a part of the public domain. Licensees may often be the only individuals with enough economic incentive to challenge the patentability of an inventor's discovery. If they are muzzled, the public may continually be required to pay tribute to would-be monopolists without need or justification. We think it plain that the

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[9] The Court ruled that this holding applied retroactively given "the public's interest in the elimination of specious patents . . . ." (*Lear, supra*, 395 U.S. at p. 674, fn. 19.) The Court also nixed the inventor's position that the licensee had to pay him royalties for the duration of the patent term, regardless of his patent's validity, where the parties had executed the license before the patent was granted. The inventor's position, the Court explained, "would permit inventors to negotiate all important licenses during the lengthy period while their applications were still pending . . . *thereby disabling entirely all those who have the strongest incentive to show that a patent is worthless*." (*Id.* at pp. 672-673, italics added.)

> technical requirements of contract doctrine must give way before the demands of the public interest . . . .

(*Ibid.*) In a separate opinion, Justice Black wrote that "[t]he national policy expressed in the patent laws, favoring free competition and narrowly limiting monopoly, cannot be frustrated by private agreements . . . ." (*Id.* at p. 677, conc. & dis. opn. of Black, J.)

In the prescription drug sector, there are few, if any, potential litigants, other than generic filers of paragraph IV ANDAs, who have a sufficient "economic incentive to challenge the patentability of an inventor's discovery." (*Lear, supra*, 395 U.S. at p. 670.) The first such filer has a particularly strong incentive by virtue of the 180-day market exclusivity period it obtains, regardless of how the patent suit turns out. (See 21 U.S.C. § 355(j)(5)(B)(iv).) If such generic manufacturers "are muzzled" from pressing their challenges by a rule that permits the brands to pay them off, then "the public may continually be required to pay tribute to would-be monopolists without need or justification." (*Lear, supra*, 395 U.S. at p. 670.) In fact, this is happening right now with brand-name prescription drugs, as pharmaceutical companies increasingly settle Hatch-Waxman suits with cash in exchange for delayed entry.[10]

Consumers can gain no comfort from the slim chance that later generic challengers may succeed after the first was paid to drop its case. As a practical matter, the brand can just pay off any subsequent challengers too. This is how Bayer disposed of Ranbaxy's follow-on challenge to the narrowed, re-examined Cipro patent. (See 7AA 1522–30, 1591–93 [Bayer settled its suit against Ranbaxy with a $60 million cash payment]; cf. *K*-

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[10] (See http://www.ftc.gov/os/2011/10/1110mmachart.pdf [documenting the growth in pay-for-delay settlements after *Tamoxifen*].)

Dur Antitrust, supra, 686 F.3d at p. 215 [noting that "the high profit margins of a monopolist drug manufacturer may enable it to *pay off a whole series of challengers* rather than suffer the possible loss of its patent through litigation."], italics added.)

Bayer's lower court cases are inapposite or cut against its position. *In re Canadian Import Antitrust Litigation* (8th Cir. 2006) 470 F.3d 785, involved no infringement allegations, and held merely that the plaintiffs lacked standing to sue because federal law prohibits the importation of cheaper prescription drugs from Canada. (*Id.* at p. 791.) *United States v. Studiengesellschaft Kohle, m.b.H.* (D.C.Cir. 1981) 670 F.2d 1122 (*Studiengesellschaft*), observed that an agreement may be anticompetitive if it "give[s] potential competitors incentives to remain in cartels rather than turning to another product, inventing around the patent, or *challenging its validity*." (*Id.* at p. 1136, italics added.) It therefore should come as no surprise that the same federal judge who authored *Studiengesellschaft* later found a pharmaceutical reverse payment to be, "at its core, a horizontal agreement to eliminate competition in the market for Cardizem CD throughout the entire United States, a classic example of a *per se* illegal restraint of trade."[11] (*Cardizem, supra*, 332 F.3d at p. 908.)

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[11] As this statement discloses, application of the *per se* rule in *Cardizem* did not depend on the subset of restraints outside the patent's physical scope, but resulted from the restraints in the market for the patented drug, Cardizem CD. The court reasoned that "had [the patent holder] been confident of the independent durability of its patent and the validity of its infringement claim, it would not have paid $89 million to effect what the patent and infringement suit had already accomplished." (*Cardizem, supra*, 332 F.3d at p. 915.) Thus, a trier of fact could decide the noncompetition agreement violated antitrust law because "the patent infringement suit was a 'paper tiger' incapable of deterring the generic producer from entering the market . . . ." (*Ibid.*) The record here points to the same conclusion.

2. The Rebuttable Presumption of Patent Validity Does Not Confer Antitrust Immunity on a Payment to Foreclose a Patent Challenge.

Respondents contend "[i]t is not anticompetitive for a patent holder to keep would-be infringers out of the market . . . because patents are presumed valid by operation of law . . . ." (Generics at p. 37; see Bayer at p. 23.) The Generics go further, claiming that *per se* condemnation of the Cipro agreements "would in fact create a presumption of patent *invalidity*." (Generics at p. 38, italics original.) Neither claim is correct. The rebuttable presumption of patent validity has a limited role, and it has no relevance at all to the analysis of a large payment from a patentee to a challenger that agrees to drop its challenge before trial.

The rebuttable presumption of validity is nothing more than a procedural device to facilitate factual determinations at patent trials. (See 35 U.S.C. § 282; *Etter, supra*, 756 F.2d at p. 856; *K-Dur Antitrust, supra*, 686 F.3d at p. 214.) It does not confer a substantive right upon the patent holder, let alone the right to violate the antitrust laws with a naked payment not to compete. (*Stratoflex, Inc. v. Aeroquip Corp.* (Fed.Cir. 1983) 713 F.2d 1530, 1534; *Nutrition 21 v. United States* (Fed.Cir. 1991) 930 F.2d 867, 869; see also 1 Hovenkamp, *et al.*, *IP and Antitrust, supra*, § 15.3a(1)[B], at pp. 15-36–15-37 ["To presume the validity of a patent even when . . . the circumstances of the exclusion payment cast doubt on its strength is to give the patentee a more powerful right than the patent laws intended."].)

In practice, the presumption of patent validity is often irrelevant even in litigated validity determinations, because the presumption applies only to factual questions and the outcome of a validity challenge often hinges on pure legal questions (such as patentable subject matter), or the application of law to fact in prior sale or use, obviousness, or enablement

cases. In *Microsoft Corp. v. i4i Limited Partnership* (2011) 131 S.Ct. 2238 (*i4i*), the Court held that an alleged infringer who challenges a patent's validity must satisfy a "clear and convincing evidence" standard at trial. Justice Breyer, joined by Justices Scalia and Thomas, wrote separately to clarify that this standard applies only to pure questions of fact:

> Many claims of invalidity rest, however, not upon factual disputes, but upon how the law applies to facts as given. Do the given facts show that the product was previously "in public use"? 35 U.S.C. § 102(b). Do they show that the invention was "nove[l]" and that it was "non-obvious"? §§ 102, 103. Do they show that the patent applicant described his claims properly? § 112. Where the ultimate question of patent validity turns on the correct answer to legal questions—what these subsidiary legal standards mean or how they apply to the facts as given—today's strict standard of proof has no application. [¶] . . . By preventing the "clear and convincing" standard from roaming outside its fact-related reservation, courts can increase the likelihood that discoveries or inventions will not receive legal protection where none is due.

(*i4i, supra*, 131 S.Ct. at p. 2253, conc. opn. of Breyer, J.) In most patent trials, then, the presumption of validity is only marginally relevant if at all. Of paramount importance is the public interest in being freed from the effects of illegitimate patent monopolies.

By at least one estimate, in the Hatch-Waxman context, generic challengers of brand-name drug patents "prevailed seventy-three percent of the time." (*K-Dur Antitrust, supra*, 686 F.3d at p. 215, citing FTC, *Generic Drug Entry Prior to Patent Expiration* (2002), at p. 16.[12]) In this case, the magnitude of Respondents' wealth transfer alone raises a powerful inference that both the patentee and challenger believed the presumption of

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[12] (Available at: http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf.)

validity would be rebutted and the patent struck down at trial.[13] But Barr never had the chance to rebut the presumption. Bayer made it an offer it simply couldn't refuse. The effectively conclusive presumption that a patent holder can exclude likely competitors with cash is unsupportable.

3. A Patent Holder Can Violate the Antitrust Laws by Entering Into a Collusive Agreement Which Does Not Affect Rights Beyond the Patent's Physical or Temporal Scope.

Had Respondents agreed to exclude competition beyond the Cipro patent monopoly, their antitrust violation would have been too blatant for them to deny. Annexing the market beyond a formal patent grant, however, is not a prerequisite to antitrust liability. (See *Masonite, supra*, 316 U.S. at p. 276 [reversing a decision that had sought to justify an anticompetitive settlement; dismissing the lower court's finding that "there was no monopoly or restraint other than the monopoly or restraint granted by the patents"].) Respondents attempt the very argument rejected in *Masonite*,

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[13] Bayer suggests that, because it shared only 6 percent of its gross Cipro tablet sales with Barr, it thought "victory was virtually certain." (Bayer at pp. 2, 37–38.) The record refutes this. (7AA 1434 [according to a pre-settlement presentation shown to Bayer's Board, "[w]hilst a settlement may have a significant negative impact for our image, a loss would be much worse."].) Bayer's comparison to gross sales reveals that its payment amounted to significantly more than 6 percent of its Cipro *profits*, a more accurate measure of its belief that the patent was about to be "destroyed" at trial, as its Board was warned. (4AA 691.) Bayer's focus on the payment's size cannot be reconciled with its claim—on the same page of its brief—that size doesn't matter. (Bayer at p. 37.) In any event, because it is Barr that abandoned its validity challenge, it is the percentage of Barr's expected profits, not Bayer's, that matters the most. (6AA 1203 [the payment was 3.3 to 4 times larger than the profits Barr reasonably expected to gain through competing Cipro sales].) Once Barr is sure to take the deal, it doesn't matter how big an impact the deal has on Bayer's bottom line. (See 1 Hovenkamp, *et al., IP and Antitrust, supra*, § 15.3(a)(1)[B], at pp. 15-37–15-38 [refuting Bayer's claim on the present facts].)

claiming there was no restraint other than the restraint embedded in Bayer's patent. That is disproved by the exclusionary agreement between rivals, the size and the timing of the $398.1 million payment, the fact it surpassed Barr's anticipated profits in a competitive market by a wide margin, and the other telltale signs in the record that the patent was unenforceable and the parties knew it. (See Opening Merits Br. at pp. 9–15, 57–58, 62; Section III.B, *infra*.)

Antitrust law looks to the nature of the challenged agreement and/or its economic effects in the relevant market or markets. This is why the Court, in an earlier case, deemed it "unnecessary" to antitrust liability to decide whether the defendant's patents covered all the processes used to manufacture the products whose downstream prices the defendant had fixed. (*United States v. Univis Lens Company* (1942) 316 U.S. 241, 248-249; see also *United States v. Sealy, Inc.* (1967) 388 U.S. 350, 356, fn. 3 [rejecting argument that a scheme to allocate markets and fix prices was permissible merely because it did not go "beyond the protection of the trademark" to affect non-trademarked items, as this distinction was "not consequential"].)

Bayer puts too much reliance on *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corporation* (1965) 382 U.S. 172 (*Walker*). (Bayer at pp. 27–28.) In *Walker*, the Court held that a defendant in a patent infringement action may counterclaim for treble damages under section 4 of the Clayton Act on the grounds that the patent was invalid because procured or enforced with knowledge of fraud practiced on the Patent Office, "provided the other elements necessary to a [monopolization case under section 2 of the Sherman Act] are present." (*Walker, supra*, 382 U.S. at p. 174.) *Walker* involved circumstances in which the enforcement of a patent right itself could violate the antitrust laws. Nothing in *Walker* even

considers, much less purports to give a patentee blanket immunity for, striking deals with competitors or licensees that unlawfully restrain trade.

No such immunity exists. In *Sears, Roebuck & Company v. Stiffel Company* (1964) 376 U.S. 225, 230 (*Sears*),[14] another case cited by Respondents, and handed down the term before *Walker*, the Court affirmed that a "patent monopoly may not be used in disregard of the antitrust laws," citing *International Business Machines Corporation v. United States* (1936) 298 U.S. 131—involving a tying violation—and *United Shoe Machinery Corporation v. United States* (1922) 258 U.S. 451—where the Court, in condemning lease agreements that excluded competitors by restricting the lessees to use of the lessor-patentee's equipment, held that "the patent right confers no privilege to make *contracts in themselves illegal* . . . ."[15] (*Id.* at p. 463, italics added, citing, *inter alia*, *Standard Sanitary Mfg. Co. v. United States* (1912) 226 U.S. 20, 49.)

This principle also underlies the decision in *Besser Manufacturing Company v. United States* (1952) 343 U.S. 444. There, the Court affirmed a judgment that the mutual right to veto a competitor's sublicenses constituted patent misuse, and therefore violated the antitrust laws, because

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[14] In *Sears, supra*, 376 U.S. at p. 231, the Court reversed a holding that a firm had violated unfair competition laws by copying and selling a product unprotected by any valid patent. Bayer argues that the holder of a valid patent may enjoy antitrust immunity for "conduct permissible under the patent laws" (Bayer at pp. 5, 14, 26, citation omitted), but cites no provision of the Patent Act allowing a patent holder to bribe a rival to keep out of the market. There is none.

[15] (See also *United Shoe Mach. Co. v. La Chapelle* (Mass. 1912) 99 N.E. 289, 292 [noting "[t]here appears to be no inherent natural distinction between owners of patents and owners of oil which would justify the application of [antitrust law] to one and not to the other."]; see, e.g., *Ethyl Gasoline Corp. v. United States* (1940) 309 U.S. 436, 455-458 [holding that the antitrust laws prohibited cartelization of the gasoline market through restraints in patent licenses].)

this condition allowed two competing manufacturers of concrete block-making machines to exclude new market entrants. (*Id.* at p. 449, affirming judgment at 96 F.Supp.304, 310-311 (D.Mich. 1951) [finding that the contract's "[u]nquestionabl[e] purpose was to make certain that these two giants of the industry didn't battle each other over patents any more. . . . [¶] [T]he patentees have joined hands with the two largest competitors in the industry and by terms of their agreement have virtually made it impossible for others to obtain rights"].)

Walker did not purport to overrule any of this authority. The Generics nevertheless rely on *Walker* to claim that *per se* treatment of reverse payments "would run afoul of the longstanding antitrust framework that—absent fraud on the PTO or objectively baseless sham litigation—the good-faith exercise of patent rights is protected from antitrust liability within the exclusionary scope . . . ." (Generics at p. 38.) Among other problems, this claim suffers from the faulty assumptions that reverse payments (a) constitute an exercise of patent rights rather than the power of the wallet, and (b) lie within the exclusionary scope of a valid and infringed patent. In this case, Bayer did not actually "exercise" any patent rights. Instead, it offered the Generics a bribe in order to *avoid* having to litigate its patent.

Antitrust law draws fundamental distinctions between single-firm conduct and agreements among competitors, and is much more concerned with the latter. (See *California ex rel. Van de Kamp v. Texaco* (1988) 46 Cal.3d 1147, 1163 [holding that the Cartwright Act applies only to separate entities that "combine" through collusive activity].) *Walker* is a unilateral conduct case; it has no application to agreements not to compete.

4. A Patent Cannot Be Analogized to a Natural Monopoly.

The Generics invoke the legal concept of a "natural monopoly" in their attempt to justify the Court of Appeal's deferential approach. (Generics at p. 20.) They suggest that a patent is the equivalent of a natural monopoly and that, as such, patent litigation can be settled "on flexible terms."[16] (*Ibid.*) In fact, the terms of the Bayer-Barr settlement were not "flexible" but collusive, and a patent is not a natural monopoly.

Natural monopolies arise in markets where it is not economically sensible for multiple firms to produce competing goods or services. (See Richard A. Posner, *Natural Monopoly and Its Regulation* (1969) 21 Stan. L. Rev. 548, 548 [stating that a natural monopoly exists "[i]f the entire demand within a relevant market can be satisfied at lowest cost by one firm rather than by two or more"].) A natural monopoly can occur for many reasons, including that the monopolist, in operating a business, sells a unique product, enjoys economies of scale, or provides a good or service (such as a bridge or highway) that would not be economically sensible to duplicate. (See, e.g., Gregory N. Mankiw, *Principles of Economics* (5th ed. 2009), at p. 314 [observing that a toll bridge is a classic natural monopoly].)

Patents are not akin to natural monopolies. They are limited monopolies created by law. The very treatise cited by the Generics recognizes that patent law does not authorize exclusionary pay-offs to rivals to abandon validity challenges: "the fact that monopoly power was lawfully created by one or more patents is not a defense to an exclusionary practice

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[16] *Amicus curiae* the Washington Legal Foundation similarly argues that pharmaceutical companies must be allowed "flexibility" in settling infringement actions. (WLF Br. at p. 22.) Flexibility is one thing; outright collusion, like that embodied in the nearly $400 million Bayer-Barr wealth transfer, is something else entirely and violates California law.

not protected by the Patent Act." (3 Areeda & Hovenkamp, *Antitrust Law*, ¶ 658e, at p. 182 (3d ed. 2008), italics added.) Moreover, no monopoly, natural or otherwise, may be lawfully maintained by paying competitors not to challenge it; and "if a market really is a natural monopoly, exclusionary practices should be unnecessary as a general matter." (*Id.* ¶ 658b3, at p. 177.)

No one is going to build another Golden Gate Bridge. On the other hand, generic drug companies exist for the purpose of developing, marketing, and selling competing products. Thus, the concept of "natural monopolies" cannot justify the judgment below.

C. The General Policy in Favor of Settlement Does Not Immunize Anticompetitive Pay-for-Delay Agreements.

1. Settlements in Derogation of California Public Policy Are Void.

Respondents stake much of their defense on the policy favoring settlement of civil litigation. (See, e.g., Generics at pp. 43–44.) But that general policy is far from absolute. By California statute, stipulated judgments require approval of the trial court. (Cal. Code Civ. P. § 664.6.) As this Court held, the trial court "may reject a stipulation that is contrary to public policy (*Mary R. v. B. & R. Corp.* (1983) 149 Cal.App.3d 308, 316-317), or one that incorporates an erroneous rule of law (*Valdez v. Taylor Auto Co.* (1954) 129 Cal.App.2d 810, 819). 'While it is entirely proper for the court to accept stipulations of counsel that appear to have been made advisedly, and after due consideration of the facts, the court cannot surrender its duty to see that the judgment to be entered is a just one, nor is the court to act as a mere puppet in the matter.' (*City of Los Angeles v. Harper* (1935) 8 Cal.App.2d 552, 555.)" (*California State Auto. Assn. Inter-Ins. Bureau v. Super. Ct.* (1990) 50 Cal.3d 658, 664.)

Thus, the policy favoring settlement "does not excuse a contractual clause that is otherwise illegal or unjust"—and third parties, like this California class, may challenge a settlement in a separate action. (*Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1127; *River Garden Farms, Inc. v. Super. Ct.* (1972) 26 Cal.App.3d 986, 1000; see Bus. & Prof. Code § 16722 ["*Any* contract or agreement in violation of this chapter is absolutely void and is not enforceable"], italics added; see, e.g., *Hunter v. Super. Ct.* (1939) 36 Cal.App.2d 100, 106, 114-116 [societal interest in free competition rendered void a settlement agreement through which horizontal competitors arrogated the manufacture and sale of metal Venetian blinds to themselves]; see also *K-Dur Antitrust, supra*, 686 F.3d at p. 217.)

Consider, for example, Professor Hovenkamp's thought experiment regarding reverse payment settlements:

> We sometimes say that this preference [for private settlements] applies to settlements of all kinds, but that is not really the case. For example, suppose a gasoline station operator files a "trespass" action against a neighbor building a competing gasoline station. The plaintiff in this case has no title whatsoever to the defendant's land. The parties then settle their dispute by an agreement under which the station owner pays "exit payments" to the newcomer, who shuts down. No court would think twice about examining the title record and seeing that this entire lawsuit was a ham-handed sham to cover a naked market division agreement.
>
> The problem with exit payment settlements is not that they are settlements. Rather, it is that the state of intellectual property titles is so poor that the litigation has highly uncertain outcomes. Courts need to look less at the validity of the infringement action and more at the nature and size of the payment. One way of getting at the problem would be to say that the payment of a large sum defeats the presumption of validity and requires the patentee to establish it in any challenge to the legality of the reverse payment itself.

(Herbert Hovenkamp, *Antitrust and Innovation: Where We Are and Where We Should Be Going* (2011) 77 Antitrust L. J. 749, 753.)

2. Hatch-Waxman Cases Will Continue to Settle, and on More Pro-Competitive Terms, as They Did for Years Before *Tamoxifen*, if Pay-for-Delay Settlements Are Ruled Unlawful.

Respondents raise the specter of burdening patent settlements. Bayer gets especially overheated, contending antitrust scrutiny of reverse payment settlements of Hatch-Waxman cases would render "every patent settlement . . . anticompetitive," "undermine the settled expectations . . . across countless industries," "remove[] all incentives for the parties to settle in the first place," or even require patent suits to "be litigated to the death." (Bayer at pp. 4, 29–30, 37–38.) The Generics similarly warn that antitrust scrutiny of reverse payment settlements would "force[] [a patent holder] to litigate 'to the death . . . .'" (Generics at p. 61.) These are baseless scare tactics. Subjecting reverse payment agreements to appropriate scrutiny will not prevent Hatch-Waxman patent cases from settling without such collusive payments.

Hatch-Waxman cases settled at the same rate, on more consumer-friendly terms, and without affecting innovation, when the parties understood reverse exclusionary payments to be illegal under *Cardizem*. (Opening Merits Br. at pp. 28–30.) This was true despite the parties' asymmetric litigation risks (Generics at p. 46; Bayer at p. 8), and there is no reason to think the situation will be any different after rejection of *Tamoxifen* for California. A reverse payment from a patent holder to an infringer is hardly "traditional" (Bayer at p. 35), but instead departs from the normal settlement options available to patent litigants and relied upon for decades to settle patent suits. (8AA 1842 [Michael Jester, an

experienced patent practitioner, testified it is "unusual in the patent universe to settle a patent infringement case in that fashion."].)

The Generics' response—that *reverse payment* settlements have accelerated since the permissive *Tamoxifen* decision—compares apples to oranges. (Generics at p. 52.) It is not surprising that pharmaceutical companies pursued their self-interest by reaching such settlements when the law condoned them, but it says nothing about the total number of Hatch-Waxman settlements. It is also no surprise that the total number of Hatch-Waxman challenges increased after *Tamoxifen*, for generic firms have an obvious incentive to receive windfall cash settlement payments. The trend has harmed the public. (See Opening Merits Br. at pp. 21, 28, fn. 14.)

As the *K-Dur* decision shows, moreover, a rule against pharmaceutical pay-for-delay settlements can be readily limited to Hatch-Waxman settlements featuring cash payments from the brand to the generic. In order to avoid "overly restricting settlement options" (Generics at p. 54), the Court can simply make these limits plain:

> We caution that our decision today is limited to reverse payments between patent holders and would be generic competitors in the pharmaceutical industry. . . . [¶] We also emphasize that nothing in the rule of reason test that we adopt here limits the ability of the parties to reach settlements based on a negotiated entry date for marketing of the generic drug: the only settlements subject to antitrust scrutiny are those involving a reverse payment from the name brand manufacturer to the generic challenger.

(*K-Dur Antitrust, supra*, 686 F.3d at pp. 217-218.) In addition, the *per se* and quick-look antitrust standards make it unnecessary to re-litigate the patent case. (*Id.* at p. 218; cf. Generics at pp. 66–67; Bayer at p. 38.)

3. Respondents Misinterpret High Court Authority Regarding Patent Settlements.

In connection with settlement and patent policies, Bayer relies heavily upon *Bement & Sons v. National Harrow Company* (1902) 186 U.S. 70 (*Bement & Sons*), a case it neglected to cite to the Court of Appeal. *Bement & Sons* stands for the unremarkable proposition that a patent holder can set prices in a licensing agreement: "The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article." (*Id.* at p. 93.) The licenses with price-fixing provisions upheld in *Bement & Sons* settled "a large amount of litigation," a result the Court deemed beneficial. (*Ibid.*) Significantly, however—and unlike here—there was no indication that the relevant patents in *Bement & Sons* were invalid; rather, the settlement appears to have been precipitated by a litigated finding that some of the patents in fact were valid. (*Id.* at p. 76.)

Two other aspects of *Bement & Sons* undermine Bayer's argument. First, in contrast to Bayer, which *paid* a fortune to avoid trial, Bement & Sons *received* cash consideration under its license: "The defendant was to pay a royalty of $1 for each float spring tooth harrow or frame sold by it pursuant to the license . . . ." (*Bement & Sons, supra*, 186 U.S. at p. 72.) Second, in defining the basic limits to patent rights, the Supreme Court cited Chief Justice Marshall's holding that a patentee may exploit his limited monopoly only "if this can be done without transcending the intention of the statute, or countenancing acts which are fraudulent *or may prove mischievous*." (*Id.* at pp. 89-90, quoting *Grant v. Raymond* (1832) 31 U.S. 218, 242, italics added.) Bayer's market-exit payment of nearly $400 million—far more than the challenger would have earned after winning the

patent suit[17]—constitutes mischief, and violates the intention of Congress in enacting the Hatch-Waxman statute. (See Section II.D.2, *infra*.)

Any doubt about the need to scrutinize settlements foreclosing challenges to patents has long since been put to rest. In modern times the Supreme Court has cautioned against allowing "holders of invalid patents to exact licensing agreements or other settlements from alleged infringers." (*Blonder-Tongue, supra*, 402 U.S. at p. 342.) In *United States v. Singer Manufacturing Company* (1963) 374 U.S. 174 (*Singer*), the Court declared unlawful an elaborate licensing scheme intended to foreclose invalidity determinations, and concentrate patents in the hands of Singer so it could sue Japanese competitors for infringement to exclude them from the United States sewing machine market. (*Id.* at pp. 193-196.) The Court explained that antitrust law "imposes strict limitations on the concerted activities in which patent owners may lawfully engage, . . . and those limitations have been exceeded in this case." (*Id.* at p. 197, citations omitted.)

The Generics attempt to distinguish *Singer* on the grounds that the patent settlements described by Justice White in his concurrence (*Singer, supra*, 374 U.S. at pp. 197-200, conc. opn. of White, J.) "formed only part of the concerted action that the Supreme Court found to be unlawful . . . ." (Generics at p. 28.) On the contrary, *every* aspect of the course of conduct described in *Singer* revolved around agreements by the American, Italian, and Swiss manufacturers *not* to enforce their intellectual property rights against each other while selectively enforcing them against Japanese

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[17] Self-serving deposition testimony on this point from Barr's CEO (see Generics at p. 7) is belied by Barr's own documents and, at most, creates a disputed issue of material fact. (6AA 1204, citing Barr documents at 10AA 2353–75, 2377–2401.) Likewise, that juries in other cases resolved factual disputes concerning whether generic entry was delayed shows that the issue is properly reserved to the trier of fact in this case. (See Bayer at p. 34.)

manufacturers. (*Singer, supra*, 374 U.S. at pp. 191-196.) Bayer fares no better in asserting that "Justice White objected not to the settlement, but to 'collusion among applicants to prevent prior art from coming to . . . [the PTO's] attention.'" (Bayer at p. 29, citing *Singer, supra*, 374 U.S. at p. 200, conc. opn. of White, J.) Justice White certainly did object to the settlement between Singer and Gegauf—in rejecting their arguments, which like Respondents' arguments invoked "the general policy favoring settlement of litigation," Justice White specifically noted that under their settlement, "the parties were not to attack one another's patent applications 'directly or indirectly,' not to do anything to restrict one another's claims in patents or applications, and to facilitate the allowance to one another of 'claims as broad as possible.'" (*Id.* at p. 199.) The primary purpose of these terms was "to prevent an open fight over validity" and focus instead on excluding the Japanese. (*Ibid.*) The parties thereby "subordinated" the strong public interest in quashing invalid patents "to their private ends." (*Id.* at pp. 199-200.)

Bayer and Barr did the same thing, only with cash. The point is not that patent litigants can never settle to avoid validity determinations, as the Generics suggest. (Generics at p. 28.) Bayer and Barr would have been free, for instance, to settle without a reverse payment by agreeing on a compromise date of generic entry in a manner that would have benefited consumers. The point is that patent litigants cannot settle with a cash payment of such magnitude that it is apparent to all the patent holder obtained more exclusion than its legal rights warrant, and that "the public has been imposed upon and the patent clause subverted." (*Singer, supra*, 374 U.S. at pp. 199-200, conc. opn. of White, J.)

D. The Strong Pro-Consumer Policy in Favor of Generic Medicine Supports Reversal.

1. A Finding of Illegality Will Advance California's Policy Favoring Affordable Generics.

The Cipro agreements are not only illegal under California law, but, because they prevented affordable generic ciprofloxacin from coming to market for over seven years, costing California consumers hundreds of millions of dollars, they also violate a well-established California public policy of the highest importance: the strong policy favoring accessible health care in the form of generic prescription drugs.

A host of California statutes advance and defend this policy. In 2006, the Legislature required state agencies to negotiate prescription drug prices with drug companies to secure "the maximum possible discount for an eligible Californian," because "[a]ffordability is critical in providing access to prescription drugs for California residents, particularly the uninsured and those with inadequate insurance." (Health & Saf. Code § 130506, stats. 2006, ch. 619, § 1 (A.B. 2911).) Section 1342.7 of the Health and Safety Code requires the California agencies overseeing public health care benefits to consider "[d]ifferent tiered pharmacy benefits, including the use of generic prescription drugs." The Legislature also established the California Rx Prescription Drug Web Site Program, administered by the State Department of Health Care Services, "to provide information to California residents and health care providers about options for obtaining prescription drugs at affordable prices." (Health & Saf. Code § 110242.) Under section 4122 of the Business and Professions Code, "[i]n every pharmacy there shall be prominently posted in a place conspicuous

to, and readable by, prescription drug consumers a notice provided by the board concerning . . . the possibility of generic drug product[s]."[18]

These coordinated statutes are intended to ensure affordable generic drugs are available to California citizens, including the most vulnerable, who have no choice but to forego taking their medicine when it is too expensive. (See Opening Merits Br. at p. 28, fn. 14.) Pay-for-delay settlements that perpetuate monopolies and high drug prices vitiate this legislatively declared California policy. (See, e.g., Einer R. Elhauge & Alex T. Krueger, *Solving the Patent Settlement Puzzle*, Harvard Discussion Paper No. 724 (2012)[19] [economic analysis "proves that when the reverse payment amount exceeds the patentholder's anticipated litigation costs, then under standard conditions the settlement entry date will *always* delay expected entry, harm consumer welfare, and exceed the probabilistic patent scope according to the patentholder's own probability estimate."], italics original.) By holding these collusive settlements illegal, this Court will advance the policy favoring generic medicine and follow its own admonition that health care has "a special moral status and therefore a particular public interest" in California. (*Potvin v. Metropolitan Life Ins. Co.* (2000) 22 Cal.4th 1060, 1070, citation omitted.)

"Consumer welfare is a principal, if not the sole, goal" of California antitrust law. (*Cianci, supra*, 40 Cal.3d at p. 918; see also *Marin County, supra*, 16 Cal.3d at p. 935.) Reversal will promote the health and well-

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[18] (See also Bus. & Prof. Code § 16770(a) ["It is the intent of the Legislature to ensure that the citizens of this state receive high-quality health care coverage in the most efficient and cost-effective manner possible."]; Annotations, Gov. Code § 6254 [Governor urged "meaningful ways for reducing drug costs, including increased use of generic drugs"].)

[19] (Available at: http://ssrn.com/abstract=2125456.)

being of California patients, and will also defend the interests of the insurance companies who belong to this certified class.

2. A Finding of Illegality Will Advance Hatch-Waxman's Policy of Speeding Generic Entry to Benefit Consumers.

The Generics, offering more hyperbole, claim reverse payments are "even more logical in the Hatch-Waxman context." (Generics at p. 45.) In fact, nothing in the Hatch-Waxman Act condones the collusion here.

"As a co-author," Senator Hatch said, "I can tell you that I find these type of reverse payment collusive arrangements *appalling*. . . . [¶] We did *not* wish to encourage situations where payments were made to generic firms not to sell generic drugs and not to allow multi-source generic competition." (10AA 2234, italics added.[20])

"The law has been turned on its head," Representative Waxman said. "We were trying to encourage more generics and through different business arrangements, the reverse has happened." (10AA 2224.)

The Hatch-Waxman Act was not intended to permit drug companies to pay each other off at the expense of consumers, but rather to provoke litigation itself. (See, e.g., *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S* (2012) 132 S.Ct. 1670, 1677 (*Novo Nordisk*).) While Congress allowed for the vindication of legitimate intellectual property rights, it aimed "to make available more low cost generic drugs." (H.R. Rep. No. 98-857(I), at pp. 14-15, reprinted in 1984 U.S.C.C.A.N. 2647, 2647-2648.) That is why the Act rewards the first generic manufacturer to submit a paragraph IV ANDA

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[20] "[R]emarks by an Act's author do not trigger the typical concern about post-enactment legislative history, namely that the losers in the legislative arena hope to persuade the courts to give them the victory after all." (*Arkansas Carpenters Health & Welfare Fund v. Bayer AG* (2d Cir. 2010) 604 F.3d 98, 109), internal quotation marks and citations omitted.)

with a 180-day "head start" period during which it can sell its formulation and the FDA will refrain from approving other generic applications. (21 U.S.C. § 355(j)(5)(B)(iv).) "Under Hatch-Waxman, manufacturers of generic drugs are encouraged to challenge weak or invalid patents on brand name drugs so consumers can enjoy lower drug prices."[21] (S. Rep. No. 107-167 (2002), at p. 4.)

The text, history, and structure of the Hatch-Waxman Act make clear that Congress intended to "get generic drugs into the hands of patients at reasonable prices—fast." (*In re Barr Labs., Inc.* (D.C.Cir. 1991) 930 F.2d 72, 76.) The truncated process for the approval of generic prescription drugs that the statute established "is designed to speed the introduction of low-cost generic drugs to market." (*Novo Nordisk, supra*, 132 S.Ct. at p. 1676; see also *Eli Lilly & Co. v. Medtronic, Inc.* (1990) 496 U.S. 661, 676 [Hatch-Waxman is intended "to enable new drugs to be marketed more cheaply and quickly"]; *Mylan Pharms., Inc. v. Shalala* (D.D.C. 2000) 81 F.Supp.2d 30, 32 [purpose is to "make available more low cost generic drugs"], citation omitted.)

The Hatch-Waxman policy of making low-cost generics available to the public is nullified by the formalistic *Tamoxifen* test, which entitles the

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[21] Concerned about the anticompetitive effects of reverse payment agreements (see S. Rep. No. 107-167 (2002), at p. 4), Congress amended the Hatch-Waxman Act in 2003. The amendments require brand-name and generic pharmaceutical companies who enter into patent litigation settlements to file their settlement agreements with the FTC and DOJ for antitrust review. (Pub. L. No. 108-173, §§ 1111-1118, 117 Stat. 2066, 2461-2464, codified as amended at 21 U.S.C. § 355(j).) Congressman Waxman stated that the purpose of the amendments was to "re-emphasize" the Act's "original intent of enhancing competition, not collusion, between generic and name-brand drug manufacturers." (Brief for Rep. Henry A. Waxman as Amicus Curiae Supporting Petitioner, *FTC v. Schering-Plough Corp.* (Sept. 30, 2005) 2005 WL 2462026, at p. *10.)

patent holder to pay its potential competitors not to compete, entrenching supracompetitive prices. (See C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem* (2006) 81 N.Y.U. L. Rev. 1553, 1614 ["In the Hatch-Waxman Act . . . the promotion and delay of litigation are central preoccupations of the regulatory regime. An open-ended permission for innovators to set innovation policy by self-help [through reverse payments] is less plausible, as Congress has taken explicit steps to fill those gaps."].[22]) The *Tamoxifen* majority admitted its test mainly benefits brand-name manufacturers with weak or narrow patents that are unlikely to prevail in court. (See *Tamoxifen, supra*, 466 F.3d at pp. 211-212 [rule allows the holder of a "fatally weak" prescription drug patent to sustain its unfounded monopoly with cash].) The *Tamoxifen* approach is good policy for big pharma, to whom it secures lucrative monopoly profits; yet, for the consumers Congress sought to protect, it is nothing short of a disaster.

III. The UCL Claim Provides an Additional Basis for Liability.

Notwithstanding their arguments and the Court of Appeal's decision (see Opinion at pp. 50–51), Respondents should be held liable under the UCL for their antitrust violation and unscrupulous conduct.

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[22] The fact that Congress has not adopted even more legislation is scarcely a Congressional imprimatur on these agreements. (See Bayer at pp. 6–7, 40; Generics at p. 58.) It was a few federal courts that departed from established precedent to create an ungrounded immunity that circumvented the Hatch-Waxman legislation. Wiser heads should now prevail; it is up to courts such as this one to undo the damage of those aberrant rulings. And even if the federal courts do not, nothing obliges California courts to follow them off this cliff.

A. Petitioners' Preserved Their Challenge to the Dismissal of the UCL Claim.

Respondents are wrong that Petitioners waived the right to challenge the dismissal of the UCL claim. (Bayer at pp. 52–54; Generics at pp. 18, fn. 3.) Petitioners argued in their Opening Brief to the Court of Appeal that the Superior Court improperly limited the reach of the UCL, under which Petitioners brought a claim in the operative complaint. (See Opening Appellate Br. at p. 2.) By raising this issue there, in the Superior Court, and in every single brief to this Court, Petitioners preserved the ability to challenge the dismissal of the UCL claim. (See 1AA 219–21; Petn. for Review at pp. 1, 8, 23; Reply in Support of Petn. for Review at pp. 3, 12–13; Opening Merits Br. at pp. 1, 7, 17, 23 fn. 12, 50–53.)

The viability of the UCL claim is also properly before this Court because Respondents discuss the claim at length, and this Reply addresses those arguments. (*Fratessa v. Roffy* (1919) 40 Cal.App. 179, 188.)

B. Respondents' Unlawful and Unfair Conduct Violated the UCL.

The Court of Appeal erred in affirming the dismissal of Petitioners' UCL claim as a matter of law. Agreements that violate the Cartwright Act, such as Respondents' noncompetition agreement, necessarily violate the UCL's unlawful prong.[23] (Bus. & Prof. Code § 17200; *Cel-Tech*

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[23] Bayer incorrectly cites *Korea Supply Company v. Lockheed Martin Corporation* (2003) 29 Cal.4th 1134 (*Korea Supply*), for the proposition that a private UCL plaintiff must have dealt directly with the defendant to recover damages. (Bayer at p. 53.) The holding in *Korea Supply* was that disgorgement is available under the UCL only insofar as it is co-extensive with restitution. (*Id.* at p. 1144-1145.) Bayer's argument contradicts this Court's holding in *Clayworth, supra*, 49 Cal.4th 758, that "indirect purchases may support UCL standing." (*Id.* at p. 788, citation omitted; see *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1338-1341.)

Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 180-181 (*Cel-Tech*) ["'[S]ection 17200 "borrows" violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable."], citations omitted.)

Furthermore, Respondents violated the UCL's unfair prong under all three tests developed in the case law: the tethering test (*Cel-Tech, supra*, 20 Cal.4th at pp. 186-187); the balancing test (*State Farm Fire & Casualty Co. v. Super. Ct.* (1996) 45 Cal.App.4th 1093, 1103-1104); and the section 5 test (*Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, 252). (See also *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 312 [stating the UCL "protect[s] the general public against unscrupulous business practices."].) A reasonable trier of fact could conclude from the evidence that Bayer and Barr acted in an unscrupulous manner, stifled competition, violated the legislatively declared policy favoring generic medicine, and gouged the California public, causing unavoidable injury.

The record shows Respondents hid their true motives of avoiding patent invalidation so they could raise and fix prices, and split the monopoly overcharges. (4AA 691; 6AA 1203–04; 7AA 1440, 1434.) Bayer's unscrupulous acts include its post-settlement retention of Barr's lawyers to seal up the evidence of the Cipro patent's unenforceability, by virtue of the attorney-client privilege. (7AA 1467–68 [Bayer's general counsel testified the company persuaded Barr's patent lawyers to switch sides]; 6AA 1173 [Petitioners' expert Dr. Raymond Hartman concluded that, as a result of this eyebrow raising retention and the subsequent reexamination, the Cipro patent "was sufficiently narrowed and strengthened through the coordinated behavior of Bayer and Barr to effectively blockade and foreclose future generic entry."].) Bayer, in fact,

was so worried about the evidence of its bad faith coming to light that it insisted the settlement require Barr to:

> collect and destroy, other than one copy, which shall be held by [Barr's patent lawyers], all Documents in the possession of or under the control of any of the foregoing. . . . [¶] [I]n no event later than January 30, 1997, Barr will cause [its patent lawyers] to deliver to Bayer the copy of the Documents held by [them]; provided that each Document that is attorney work product shall be treated as directed by Bayer and each Document that is subject to, or intended to be subject to, the attorney-client privilege, (i) shall continue to be held by [Barr's patent lawyers] so as to preserve the attorney-client privilege . . . .

(4AA 704–05.)

Bayer provides no satisfactory explanation for its suspicious, implausible assertions that each of its patent agents who testified the company knowingly concealed disqualifying prior art had severe mental impairments. (7AA 1479, 8AA 1856, 1917.[24])

IV. This Is Not a Federal Case.

At the core of all of Respondents' arguments for federal preemption and federal jurisdiction lies the assumption that their pay-for-delay settlement is entitled to *Tamoxifen* "scope of the patent" protection under the Cartwright Act and the UCL, and that the success of Petitioners' claims therefore must turn on embedded patent law issues relating to patent validity or the strength of Respondents' settled litigation. Not true.

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[24] Such evidence of bad faith further shows that, even if *Tamoxifen* were to apply, Bayer's suit was an objectively baseless sham. (See also Opening Merits Br. at pp. 57–62; *Cummings v. Moore* (10th Cir. 1953) 202 F.2d 145, 147 [holding that "an invalid patent cannot be infringed."].)

Patent law does not protect naked payments to rivals, and these California claims do not necessarily turn on patent law. Moreover, any and all federal issues will fall away should this Court decline to make the defective *Tamoxifen* test California law; neither the *per se* rule nor *K-Dur*'s "quick look" rule requires a state court to scrutinize Bayer's patent or its patent case against Barr to find an antitrust violation.

Respondents wrongly presume that the presence of any issue of federal patent law transforms Petitioners' state case into a federal case. It is beyond question that state courts are qualified to decide patent law issues arising in state cases. (*Christianson v. Colt Indus. Operating Corp.* (1988) 486 U.S. 800 (*Christianson*); *Jacobs Wind Elec. Co., Inc. v. Florida Dept. of Transp.* (Fed.Cir. 1990) 919 F.2d 726, 728 ["[A]lthough a state court is without power to invalidate an issued patent, there is no limitation on the ability of a state court to decide the question of validity when properly raised in a state court proceeding"], citing *Lear, supra*, 395 U.S. at p. 676 [a defense attacking patent validity in a California contract case belonged in California court]); see also *Delta Process Equip., Inc. v. New England Ins. Co.* (La.Ct.App. 1990) 560 So.2d 923 [applying *Christianson*, holding that the Louisiana state courts had jurisdiction over a state claim that could turn on patent validity].)

Thus, state courts can and regularly do adjudicate state claims raising patent law questions, including questions of patent validity.[25] The First District Court of Appeal recently issued an instructive decision in which it overturned a ruling that the California courts lacked jurisdiction over breach of contract and fraud claims involving patent rights. Noting

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[25] As discussed in Section IV.B, *infra*, this case does not "arise under" federal patent law.

the "formidable heritage that defendants must push aside to divest a California court of the power" to entertain state claims relating to patents, the court surveyed the development of the law in this area, and pronounced:

> The appearance of a patent in state court is more than likely to unsettle lawyers and judges . . . . [¶] [T]his trepidation is unreasonably exaggerated. . . . [¶] [S]tate courts retain jurisdiction over a wide variety of suits involving contracts affecting patent rights or involving tort claims arising out of interference with business relations in which patent rights are implicated, and are regularly called upon to determine the scope and validity of federal patents with the clear bless[ing] of the United States Supreme Court. . . . [¶] [A] state law tort claim is not preempted by the federal patent law, even if it requires the state court to adjudicate a question of federal patent law, provided the state law cause of action . . . is not an impermissible attempt to offer patent-like protection to subject matter addressed by federal law.

(*Caldera Pharms., Inc. v. Regents of Univ. of Cal.* (2012) 205 Cal.App.4th 338, 344, 353, 359, citations, footnote, and internal quotation marks omitted (*Caldera Pharms.*).[26])

A. Petitioners' Claims Are Not Preempted.

The federal cases relied on by Respondents and the Court of Appeal interpret the Sherman Act. Neither Respondents nor the Court of Appeal explain how limiting the Sherman Act could have any preemptive effect on the Cartwright Act or the UCL. Competition law in California can sweep beyond the Sherman Act. (See *ARC America, supra*, 490 U.S. at p. 101 [finding "it is plain that this is an area traditionally regulated by the states."]; see generally Section I.A, *supra.*)

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[26] The *Caldera* court's citation to the Federal Circuit's Cipro opinion (see 205 Cal.App.4th at p. 366) is irrelevant here; Petitioners did not assert a claim under *Walker, supra*, 382 U.S. 172, arising from fraudulent patent procurement.

Respondents fail to justify the Court of Appeal's apparent ruling that the California claims are preempted by federal patent law. Preemption arguments are disfavored, and even more so when they target laws, such as the Cartwright Act and UCL, that embody the State of California's "historic police powers" and carry a "presumption against preemption" of "particular force . . . ." (*In re Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1088, citation omitted.) Whether federal law preempts state law is a question of Congressional intent, which may be implied where Congress intended to occupy an entire field, where compliance with both state and federal law is impossible, or if state law poses an obstacle to Congressional purposes. (*Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 955.)

It is clear now that only implied "obstacle" preemption is in dispute here. Respondents' preemption arguments boil down to this: allowing a remedy for Petitioners' claims would stand in the way of the unfettered ability of drug companies to enter into reverse payment settlement agreements in Hatch-Waxman suits and, as a result, to enjoy monopolies based on untested patents. (See Bayer at pp. 44–46; Generics at p. 61.) Yet Respondents' analysis, like the Court of Appeal's opinion, stops there. Missing from Respondents' briefs and the appellate record is any mention of—let alone the requisite delicate balancing of—the factors that determine whether Respondents' perceived conflicts exist and sufficiently hinder Congressional objectives to warrant preemption.

Courts consider three patent law purposes or objectives when faced with the argument that federal patent law preempts a state claim on obstacle grounds: "providing an incentive to invent, promoting the full disclosure of inventions, and ensuring that 'that which is in the public domain cannot be removed therefrom by action of the States.'" (*Dow Chem. Co. v. Exxon Corp.* (Fed.Cir. 1998) 139 F.3d 1470, 1474 (*Dow*), quoting *Kewanee Oil*

Co. v. Bicron Corp. (1974) 416 U.S. 470, 480-481 (*Kewanee*).) Limiting preemption to cases where applying state law would produce a genuine conflict with at least one of *Kewanee*'s three patent law objectives is in keeping with the principle that state courts are qualified to decide patent questions, and with Congress's intent not to occupy the field of patent law. (See *Dow, supra*, 139 F.3d at pp. 1473-1475; *Kewanee, supra*, 416 U.S. at p. 479; *Aronson v. Quick Point Pencil Co.* (1979) 440 U.S. 257, 262.)

Respondents identify purported rights to settle infringement litigation with a payment from the patent holder, and to safeguard a patent monopoly by co-opting a challenger, as emanating from patent law—citing only *Tamoxifen* and its mistaken progeny. Such rights do not exist, and in any event would neither promote the full disclosure of ideas, nor ensure that ideas in the public domain stay there, nor enhance the incentive to invent. Respondents cannot credibly maintain that innovation will be stunted unless pharmaceutical companies can settle patent cases with large payments, free from antitrust scrutiny, on the basis of a mere PTO decision. (Cf. *Lear, supra*, 395 U.S. at p. 670.) In actuality, such companies will still gain "big reward[s]" from developing new drugs if they are no longer able to fortify questionable patent monopolies with these market division agreements. (Compare Bayer at p. 25, citation omitted, with Opening Merits Br. at pp. 25–26, 29.) Reverse payments encourage weak patents, not strong ones, so if anything they may actually reduce innovation by encouraging drug companies to place more reliance on the least innovative patents. (See *K-Dur Antitrust, supra*, 686 F.3d at pp. 215-217.)

Obstacle preemption does not apply. In *Dow, supra*, 139 F.3d 1470, the Federal Circuit reversed the dismissal on preemption grounds of a state unfair competition claim that depended on proving a patent was obtained through inequitable conduct before the PTO. (*Id.* at pp. 1473-1479.) The

court's conclusion applies equally here: "It is difficult to fathom how such a state law cause of action could have any discernible effect on the incentive to invent, the full disclosure of ideas, or the principle that ideas in the public domain remain in the public domain." (*Id.* at p. 1475; see also *Sukumar v. Nautilus, Inc.* (W.D.Va. 2011) 829 F.Supp.2d 386 [refusing to find California unfair competition law preempted where state claims would not endanger any of the *Kewanee* objectives].) *Biotechnology Industry Organization v. District of Columbia* (Fed.Cir. 2007) 496 F.3d 1362 (*Biotech*), where pharmaceutical industry plaintiffs sought a finding of preemption, does not help Bayer's preemption argument. The plaintiffs in *Biotech* mounted a pre-enforcement challenge to a District of Columbia law that capped the prices of prescription drugs covered by patents, and consequently impaired the lawful exercise of legitimate patent rights. (*See id.* at pp. 1373-1374.) Here, there was no lawful exercise of patent rights, and Congressional intent was abrogated. Despite *amicus curiae*'s unsupported argument (WLF Br. at pp. 7–8, 14–15), it is reverse payments themselves that squelch the Hatch-Waxman Act's objectives of testing patents through litigation and reducing the cost of vital prescription drugs. (See Section II.D.2, *supra*; *K-Dur Antitrust, supra*, 686 F.3d at pp. 203-204, 208, 215-217.) Respondents' reliance on *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.* (1989) 489 U.S. 141 (*Bonito Boats*), simply confirms the futility of their preemption argument. In *Bonito Boats*, the Court held that the State of Florida could not protect inventors from competition on inventions that do not merit protection under federal patent law. (*Id.* at pp. 157-162.) The Court of Appeal's rule allows *private parties* to do what the Supreme Court held Florida was constitutionally prohibited from doing. The misguided rule allows private, self-interested

parties to create by agreement a "private patent" that is more exclusionary and anticompetitive than a patent issued by the United States government.

B. This Case Does Not Arise Under Federal Law.

The Court of Appeal erroneously suggested that Petitioners' California claims are subject to exclusive federal jurisdiction, should Petitioners attempt to establish that Bayer's infringement suit against Barr was objectively baseless.[27] (See Opinion at p. 44.) The question whether Petitioners' claims "arise under" patent law and therefore are subject to exclusive federal jurisdiction is distinct from the question whether the claims are preempted by patent law, though the answer to both questions is the same: No.

Under *Christianson, supra*, 486 U.S. 800, exclusive federal jurisdiction could only be present (1) if federal patent law created Petitioners' causes of action (which no court or party has asserted), or (2) if Petitioners' entitlement to relief under state law "necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims." (*Id.* at pp. 808-809; 28 U.S.C. § 1338(a).) For a state law cause of action to be subject to exclusive federal jurisdiction under *Christianson*'s second prong, a

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[27] Respondents disregard Petitioners' point that the "sham litigation" prong of *Tamoxifen* derives from the inapposite setting of *Noerr-Pennington* immunity. (See Opening Merits Br. at p. 49, fn. 26.) As the ABA treatise on antitrust law notes: "[S]ettlement agreements among private parties, resolving disputes among themselves, have typically been denied *Noerr* protection." (ABA Section of Antitrust Law, *Antitrust Law Developments* (6th ed. 2007), at p. 1288 & fn. 102, citing, *inter alia*, *Singer, supra*, 374 U.S. 174; accord, 1 Hovenkamp, *et al.*, *IP and Antitrust, supra*, § 7.2c, at p. 7-8.) Because the Court of Appeal's preemption ruling was predicated on its adoption of *Tamoxifen*, this Court can summarily dispose of the preemption ruling if it finds *Tamoxifen* inappropriate for California.

substantial issue of patent law must be essential to every potential theory of liability. (486 U.S. at pp. 810-811.) "*Christianson* teaches . . . scrutiny of the claims pleaded is thorough, for we must ascertain whether *all* the theories by which a plaintiff could prevail on a claim rely *solely* on resolving a substantial question of federal patent law." (*Caldera Pharms., supra*, 205 Cal.App.4th at p. 355, italics original, quoting *Hunter Douglas, Inc. v. Harmonic Design, Inc.* (Fed.Cir. 1998) 153 F.3d 1318, 1328-1329 (*Hunter Douglas*).[28]) Federal defenses do not affect this *Christianson* analysis. (486 U.S. at p. 809 [holding that a federal defense cannot create exclusive federal jurisdiction "even if the defense is anticipated in the plaintiffs' complaint, and even if both parties admit that the defense is the only question truly at issue in the case."], quoting *Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust* (1983) 463 U.S. 1, 14.)

This case belongs in state court. The alleged grounds for federal jurisdiction will disappear if the Court declines to adopt *Tamoxifen*, and thus eliminates any need for a fact-finder to inquire into the weakness of the Cipro patent or the merits of the Bayer-Barr litigation. Regardless, there can be no exclusive federal jurisdiction here because any patent law question inheres in only one *theory* of liability under California law. (*Christianson, supra*, 486 U.S. at p. 811; see *Caldera Pharms., supra*, 205 Cal.App.4th at pp. 363-364 [reversing a holding that federal courts had exclusive jurisdiction where the complaint set forth a basis for relief "that qualifies as a 'reason' and 'alternative theory' independent of federal patent law."], citations omitted.) The Court of Appeal's reasoning departs from the clear command of *Christianson*: "Plaintiffs' right to relief under the

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[28] Bayer's citations to *Hunter Douglas* overlook this aspect of its analysis, as well as its discussion of how state unfair competition law stands apart from patent law. (See *Hunter Douglas, supra*, 153 F.3d at pp. 1333-1335.)

Cartwright Act and UCL, *under the sham litigation theory*, depends on resolution of whether Bayer engaged in inequitable conduct" in applying for the Cipro patent. (Opinion at p. 43, italics added.) It is a basic precept of patent jurisdiction, however, that "just because an element that is essential to a particular *theory* might be governed by federal patent law does not mean that the entire monopolization *claim* 'arises under' patent law." (*Christianson*, 486 U.S. at p. 811, italics added.)

Bayer's reliance on *Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413 (*Holiday Matinee*), is unavailing. The plaintiff there alleged that the defendant failed to disclose its patent applications to the other members of a trade group in violation of the group's policies; improperly applied for patents based on open-standard materials the group was developing; and wielded its patent rights coercively against group members. (*Id.* at pp. 1417-1419.) Those claims could not be adjudicated without deciding substantial questions of patent law—liability depended entirely on the defendant's fraudulent procurement of patents and subsequent coercion of its competitors to pay unreasonable royalties and licensing fees. (*Id.* at p. 1426.) The court stated it did "not mean[] to suggest that a plaintiff, under no circumstances, may allege claims in California courts under the Cartwright Act and/or the unfair competition law, merely because they involve patents in some respect." (*Id.* at p. 1427, fn. 5.) And the court recognized that exclusive federal jurisdiction is "not established where a claim is supported by alternative theories, 'unless patent law is essential to *each* of those theories.'" (*Id.* at p. 1423, quoting *Christianson*, 486 U.S. at p. 810, italics added.)

Nor does *Lockwood v. Sheppard, Mullin, Richter & Hampton* (2009) 173 Cal.App.4th 675 (*Lockwood*), suggest the California courts lack jurisdiction over these antitrust and unfair competition claims. *Lockwood*

involved an attorney malpractice claim which, unlike the claims here, could be resolved only if the court stood in the shoes of the PTO to determine whether the PTO would have denied a petition for reexamination had attorneys not misrepresented facts in it. (*Id.* at p. 686-687.) By contrast, the trier of fact need not stand in the shoes of the PTO to decide the present case.

Respondents acknowledge that the merits of the Bayer-Barr litigation became a potential issue for the first time here on summary judgment, after Petitioners' California claims had been removed to federal court and remanded back to Superior Court, and after the legal sufficiency of the well-pleaded complaint (including state court jurisdiction) had been tested and upheld. So long as Petitioners *could* prove their case without implicating a substantial federal patent law question—something the procedural posture of this case confirms—it does not matter, as the case unfolds, whether they actually do. Federal patent jurisdiction is "determined by reference to the well-pleaded complaint, not the well-tried case." (*Christianson, supra*, 486 U.S. at p. 814.)

If there was any remaining doubt whether an antitrust claim arising from a reverse payment settlement must be decided as a matter of federal patent law, it is resolved by the fact that numerous federal circuit courts of appeals have weighed in on this issue. If the analysis of reverse payments required resolution of a substantial issue of federal patent law, any appeal from a federal district court decision would have to go to the U.S. Court of Appeals for the Federal Circuit, the exclusive venue for patent appeals. (See 28 U.S.C. § 1295(a)(1); *Christianson, supra*, 486 U.S. at pp. 806-807.) Yet the cases advanced by Respondents were appealed to and decided by the regional circuit courts, which means the federal courts do not treat reverse payment antitrust cases as either arising under or requiring

resolution of a substantial issue of patent law. (See, e.g., *In re DDAVP Direct Purchaser Antitrust Litig.* (2d Cir. 2009) 585 F.3d 677, 684-687 [declining to transfer an appeal to the Federal Circuit where at least one theory of antitrust liability did not involve a substantial patent law question].) Indeed, in the one reverse payment case that did go to the Federal Circuit, the court applied Second Circuit law rather than creating its own law, as it would have done had the question been one of patent law. (*In re Ciprofloxacin Hydrochloride Antitrust Litig.* (Fed.Cir. 2008) 544 F.3d 1323, 1332.)

V. The Court of Appeal Incorrectly Affirmed the Dismissal of the Claims Against Watson.

The Generics argue that the claims against Watson are deficient because Watson was not a party to the original Cipro agreements and did not injure the class. (Generics at pp. 68–71; see Opinion at p. 51 [affirming dismissal of the claims against Watson].) Nevertheless, Watson knowingly received payments under the Cipro agreements that caused widespread harm, so the claims against it are viable.

The California courts have long applied the conspiracy law principle that "everyone who enters into such a common design is in law a party to every act previously or subsequently done by any of the others in pursuance of it." (*De Vries v. Brumback* (1960) 53 Cal.2d 643, 648 (*De Vries*); see also *People v. Neighbors* (1963) 218 Cal.App.2d 593, 598 [late entrants to a conspiracy "assume responsibility for all done before."], citations omitted.)

Watson acquired Rugby from HMR in 1998 with the specific intent to benefit from Respondents' anticompetitive settlement. (7AA 1616–73.) An HMR executive who negotiated this deal testified that "[b]asically Watson wanted to be a party and be -- have benefit to the proceeds of those [Cipro] agreements. . . . Basically Watson had requested to be a beneficiary

of the settlement on Cipro as part of the purchase of Rugby." (3AA 549, 552.) Therefore, pursuant to the Side Letter Agreement between Watson and HMR, Watson was entitled to receive payments from the Cipro agreements; and discovery showed that Watson received such payments. (4AA 652, 862.) As Watson stated in court papers, it "received half of the proceeds from ciprofloxacin proceeds that HMR received from Barr"—$124 million.[29] (1AA 123.)

HMR and Barr did not pay Watson $124 million for nothing. Watson was paid, first, to ensure that its new affiliate Rugby would adhere to Rugby's prior agreement not to compete with Cipro; second, to refrain from helping any other firm compete with Cipro; and third, in exchange for Watson's promise not to develop any ciprofloxacin ANDAs. (4AA 654, 737–38.) A Watson executive involved in the HMR negotiations admitted that the Side Letter Agreement includes "a prohibition against Watson selling a competing product. And we negotiated that point fairly extensively . . . ." (7AA 1677–78; see 4AA 654.)

Under *De Vries*, Watson can and should be held liable because it participated in, and benefited from, Respondents' unlawful combination.

CONCLUSION

The decision below grants unfounded immunity to pharmaceutical monopolists that pay their potential competitors not to compete. Such conduct is contrary to public policy, consumer protection, and established principles of law. Accordingly, the judgment should be reversed.

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[29] Barr gained $496 million from selling Bayer-manufactured Cipro at supracompetitive prices in 2003 and 2004. (7AA 1606.) Barr was obligated to provide half of those proceeds to HMR. (4AA 648.) HMR, in turn, was obligated to pay half of that sum to Watson. (4AA 652.) Thus, Watson received $124 million from its participation in this conspiracy.

Respectfully submitted,

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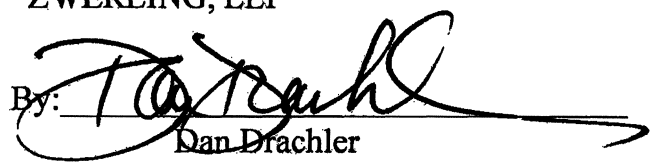
By: 
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CERTIFICATE OF WORD COUNT

[California Rule of Court 8.204(c)(1)]

Counsel of Record hereby certifies that pursuant to the California Rules of Court, this Brief of Petitioners uses 13-point Roman type and contains 17,409 words, including footnotes, which is the amount of words requested in Petitioners' Application for Leave to File an Oversized Brief, submitted herewith pursuant to Rule 8.204(c)(5). Counsel relies on the count of the computer program used to prepare this Brief.

Dated: August 20, 2012

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