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IN THE SUPREME COURT OF CALIFORNIA

Coordination Proceeding Special Title (Rule 1550(b)):

CIPRO CASES I & II

Judicial Council Coordination Proceeding Nos. 4154 & 4220

After a Decision by the Court of Appeal,
Fourth Appellate District, Division One

SUPPLEMENTAL LETTER BRIEF OF APPELLANTS ADDRESSING THE RELEVANCE OF *FTC V. ACTAVIS, INC.*

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I. PRELIMINARY STATEMENT

In accordance with the Court's Order dated December 11, 2013, Appellants respectfully submit this supplemental brief addressing the relevance of *FTC v. Actavis, Inc.* (2013) 570 U.S. __ [133 S.Ct. 2223].

Actavis shows that the lower courts' determinations in this action, and Respondents' position before this Court, cannot stand. *Actavis* rejects the "scope of the patent" test established in *In re Tamoxifen Citrate Antitrust Litigation* (2d Cir. 2006) 466 F.3d 187, adopted below and advocated by Respondents. Instead, *Actavis* supports application of a constrained rule of reason analysis to reverse payments or, in the alternative, a precisely formulated *per se* illegality rule. *Actavis* also confirms that federal law does not preempt Appellants' claims.

The remaining Respondents are the generic pharmaceutical companies (the "Generics") that accepted a $398.1 million payment from Bayer in exchange for their agreement to drop their litigation challenge to Bayer's Cipro patent.[1] The Generics received this reverse payment as consideration for their agreement to stay out of the Cipro market. The payment substantially exceeded the profits the Generics stood to earn in a competitive market, and ensured high monopoly prices of a vital prescription drug for more than seven years. Such anticompetitive agreements violate California law.

Actavis rejects the legal standard applied by the lower courts in this case, a standard that grants virtual—and unjustified—immunity to an

[1] On November 18, 2013, the Superior Court of San Diego granted final approval to the $74 million class action settlement between Appellants and Bayer, releasing the claims against Bayer. The Generics are jointly and severally liable for the entirety of the harm to the California class. (Bus. & Prof. Code § 16720, *et seq.*; *Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 544.)

anticompetitive settlement. Just as *Actavis* found that standard too weak to protect consumers, so should this Court institute a rule that follows the Cartwright Act's pro-consumer purpose. *Actavis* supports adoption of what may be termed either (a) a constrained rule of reason analysis, or (b) a *per se* ban on reverse payments where they exceed the patentee's avoided litigation costs and the value of any goods and services obtained through the agreement. Importantly, *Actavis* does not narrow the broader reach of California law, which holds that agreements restraining free competition and affecting the prices paid by consumers are *per se* illegal. (See Sections II.A & II.C, *infra.*)

Finally, recent United States Supreme Court decisions show that federal law does not preempt Appellants' claims. To the contrary, restrictions on reverse payments under California antitrust law are consistent with federal law after *Actavis.*

II. THE UNITED STATES SUPREME COURT REJECTED THE LEGAL STANDARD ADOPTED BELOW

The decisions below rested on two propositions that do not survive *Actavis*: that within the physical and temporal scope of a patent, (1) a patentee should receive near complete deference in its efforts to restrain competition, and (2) the policy favoring settlement should override concerns about harm to competition. (*In re Cipro Cases I and II* (2011) 200 Cal.App.4th 442, 467–468.) *Actavis* rejects these grounds for "near-automatic antitrust immunity" for pharmaceutical pay-for-delay settlements like the one at issue here. (*Actavis, supra*, 133 S.Ct. at p. 2237.) *Actavis* instead holds that cash payments from a patentee to settle a patent dispute may "provide strong evidence that the patentee seeks to induce the generic challenger to abandon its claim with a share of its monopoly profits that would otherwise be lost in the competitive market." (*Id.* at p. 2235.)

Antitrust law—not the "scope of the patent" test—applies to agreements under which a pharmaceutical company "walks away with money simply so it will stay away from the patentee's market." (*Id.* at p. 2233.)

While the Generics have defended the summary judgment order on the basis that their acceptance of a payoff did not affect commerce beyond the "exclusionary potential of the Cipro patent" (Generics Br. at p. 15), the Court in *Actavis* held that a patent's mere potential to exclude infringing use is insufficient to justify an agreement that allows the patentee to avoid the risk of competition. (*Actavis, supra*, 133 S.Ct. at p. 2236.) As such, it is clear that *Actavis* renders the decisions below unsustainable.

Indeed, the $398.1 million reverse payment in this case is just the sort *Actavis* condemns: a "payment [that] in effect amounts to a purchase by the patentee of the exclusive right to sell its product, a right it already claims but would lose if the patent litigation were to continue and the patent were held invalid or not infringed . . . ." (*Actavis, supra*, 133 S.Ct. at p. 2234.) This type of "unexplained *large* reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival." (*Id.* at p. 2236, italics added.) Especially under these circumstances, the patent's formal parameters do not override the traditional antitrust concerns about the stifling of free competition and the barricading of monopoly prices. (*Id.* at pp. 2230–2231.)

Furthermore, as *Actavis* holds, patent law does not authorize reverse payments from patent holders to patent challengers, and in fact strongly favors the adversarial testing such payments foreclose. (*Id.* at p. 2233.) Therefore, whether a reverse payment agreement "lies 'beyond the limits of the patent monopoly' is a conclusion that flows from [the] analysis and not . . . its starting point." (*Id.* at pp. 2231–2232.)

Nor does the general policy favoring settlement translate into immunity for this species of payments not to compete. Precedents "make clear that patent-related settlement agreements can sometimes violate the antitrust laws." (*Id.* at pp. 2232–2233, citing, *inter alia, United States v. Singer Mfg. Co.* (1963) 374 U.S. 174; cf. Appellants' Opening Br. at p. 35 [discussing *Singer*]; Appellants' Reply Br. at pp. 36–37 [same].)[2] Moreover, those contesting patent rights commonly use less harmful ways to settle. (See Michael A. Carrier, *Unsettling Drug Patent Settlements: A Framework for Presumptive Illegality* (2009) 108 Mich. L. Rev. 37, 74–75.)

A. *Actavis* Makes Clear That the Determinations Below Should Not Stand.

The key premise of *Actavis* has firm support in California law. *Actavis* recognizes that federal antitrust law mainly promotes *consumer* welfare. (See *Actavis, supra*, 133 S.Ct. at p. 2235 [focusing on harm to "the consumer" who "loses" when reverse payments are made]; see also Edlin, Hemphill, Hovenkamp, and Shapiro, *Activating Actavis* (2013) vol. 28, No. 1, Antitrust 16, 17 [describing how both the majority and dissenting opinions take "a consumer welfare approach" to liability].)[3] California law provides an even clearer commitment to consumers. This Court has

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[2] *Actavis*, like Appellants here, also quoted on-the-record statements from the legislative architects of the Hatch-Waxman Act condemning reverse payments, and noting that this sort of collusion was not the intended Congressional result. (Compare *Actavis, supra*, 133 S.Ct. at p. 2234, with Appellants' Reply Br. at pp. 40–42.)

[3] Appellants respectfully submit that this article by Edlin, Hemphill, Hovenkamp, and Shapiro merits close attention as it was authored by nationally recognized scholars whose work the Court in *Actavis* cited extensively, in particular the scholarship of Herbert Hovenkamp and C. Scott Hemphill. (See *Actavis, supra,* 133 S.Ct. at pp. 2227, 2229, 2235.)

consistently held that protecting consumers is the principal or sole aim of our state's antitrust laws. (See *Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 935 [". . . designed primarily to aid the consumer."]; *Cianci v. Super. Ct.* (1985) 40 Cal.3d 903, 918 ["Consumer welfare is a principal, if not the sole, goal . . . ."].)

Much of the reasoning in *Actavis* proceeds from a commitment to protect consumer welfare. The harm the Court identifies from reverse payments is that a brand drug company will pay a large sum of money to a generic drug company to avoid the *risk* of competition, allowing the two companies instead to divide the monopoly profits. (*Actavis*, *supra*, 133 S.Ct. at p. 2235; cf. *Marin County*, *supra*, 16 Cal.3d at p. 935 [an arrangement to limit market entry by competitors violates the Cartwright Act]; *Guild Wineries & Distilleries v. J. Sosnick & Son* (1980) 102 Cal.App.3d 627, 633 [an agreement not to compete is illegal *per se*].) As the *Actavis* Court explained, with a typical reverse payment, "[t]he patentee and the challenger gain; the consumer loses." (*Actavis*, *supra*, 133 S.Ct. at p. 2235.) But consumers benefit if the patentee and challenger test the patent's validity (or infringement) or compromise only over the date of generic entry.

Hence, *Actavis* emphasized that "the relevant anticompetitive harm" is the effort "to prevent the risk of competition." (*Id.* at p. 2236.) If the patent holder wishes to resolve the challenge, it can avoid this *risk* only through a settlement that redounds to the benefit of consumers. (See Edlin, *et al.*, *supra*, at p. 17 [*Actavis* frowns upon settlements that "reduce[] competition in expectation, thereby depriving consumers of some of the benefits from competition."]; 1 Herbert Hovenkamp, *et al.* (2013 Supplement) IP and Antitrust § 15.2a1 [*Actavis* recognizes that a patent holder is willing to settle for more than the cost of litigation "precisely because the settlement will permit it to exclude competition from the market, whereas if it went to trial there is a chance that the patent would be held invalid or not infringed and the market would become competitive"; thus the Court "does not intend the rule of reason to be unbounded or to allow settling parties to justify their conduct on the ground that it acquired certainty."].)

The reverse payment here had precisely the sort of adverse effect on consumers that *Actavis* seeks to prevent. The record evidence shows that Bayer paid nearly $400 million to avoid the risk of competition, and then raised prices to unprecedented levels and kept them there for nearly seven years. (6AA 1167, 1169.) Starting in 1997, Bayer raised Cipro prices at rates among the highest in the entire pharmaceutical industry: "Measured as the percentage price increase over the entire period divided by the number of years in the period, Bayer increased the prices for the three major [Cipro] dosages 4.56%, 4.85% and 4.33% annually in the five years prior to the settlement agreements and 10.53%, 11.66% and 74.83% respectively for the seven years after the settlement agreements." (6AA 1208.) The price of Cipro increased 16% from the beginning of 1997 to the end of 1998 alone. (6AA 1167.) During the monopoly period, a single Cipro pill cost consumers upwards of $5.30, whereas a generic pill would have cost only $1.10. (5AA 1093.)

To deter such conduct, promote consumer health and welfare, and ensure that injured purchasers can be made whole, *Actavis* supports application of either a constrained rule of reason analysis or a *per se* ban on most reverse payments. Under California law, some business combinations may be judged by reference to their economic reasonableness (see *Corwin v. Los Angeles Newspaper Serv. Bureau, Inc.* (1971) 4 Cal.3d 842, 854–855), while a deep pool of authority forbids agreements among actual or potential horizontal competitors to divide markets, fix prices, or otherwise restrict competition (see Appellants' Opening Br. at pp. 18–23; Appellants' Reply Br. at pp. 4–7).

B. *Actavis* Supports a Constrained Rule of Reason Analysis.

Were the Court to adopt a constrained rule of reason analysis for reverse payments, the specific constraints are worth setting out clearly: first, the justifications for reverse payments are limited and do not include a brand drug manufacturer's desire to avoid the *risk* of an adverse result in patent litigation; second, a large reverse payment by itself can establish an antitrust violation, including by demonstrating anticompetitive effects and market power; and third, no inquiry into a patent's merit is necessary to assess an alleged reverse payment violation.

1. *Actavis* Recognizes Only Two Justifications, and Business Certainty Is Not One of Them.

First, the legal justifications for reverse payments are few. To be sure, *Actavis* finds that some procompetitive justifications may exist. A reverse payment, for example, could in theory amount to nothing more than avoided litigation costs.[4] (*Actavis, supra*, 133 S.Ct. at p. 2236.) Or a reverse payment might be offered for additional or enhanced goods or services from the generic drug manufacturer, rather than for delayed entry.

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[4] Even this justification for a reverse payment is weak. It assumes the brand drug manufacturer, effectively giving the generic a windfall, would forfeit its anticipated litigation costs in a settlement payment even though the generic drug manufacturer would also save *its* costs. The more realistic view is that both companies will look to save their respective costs by settling, and that any reverse payment will delay generic entry beyond the entry date of a genuinely procompetitive compromise. (See Joshua P. Davis, *Applying Litigation Economics to Patent Settlements: Why Reverse Payments Should Be* Per Se *Illegal* (2009) 41 Rutgers L.J. 255, 304–305.)

(*Ibid.*) *Actavis* envisions no other possibilities, though it does not rule them out. (*Ibid.*)

What *Actavis* does foreclose is reliance on the patentee's desire to avoid the risk of a competitive marketplace. Thus, a reverse payment is anticompetitive where a patentee is "using its monopoly profits to avoid the *risk* of patent invalidation or a finding of noninfringement." (*Id.* at p. 2236, italics added.) The patentee therefore cannot defend a reverse payment as a means to avoid even the small chance that a strong patent might be held invalid. (*Ibid.*) That proffered justification fails because it "suggests that the payment's objective is to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market—the very anticompetitive consequence that underlies the claim of antitrust unlawfulness." (*Ibid.*)

2. **The Size of the Reverse Payment May Demonstrate Anticompetitive Intent and Effect.**

Second, a large reverse payment itself goes a long way toward establishing an antitrust violation. An outsized payment cannot plausibly be attributed to avoided litigation costs (and usually will outstrip any ancillary goods or services provided by the challenger). As a result, such a reverse payment normally will have anticompetitive effects without any countervailing benefit. (*Ibid.*) For when a brand manufacturer makes a settlement payment that exceeds any consideration it may legitimately receive in return, the only reasonable inference is that the money was paid to avoid risking an adverse outcome in patent litigation.[5] The payment here of almost $400 million is a prime example.

[5] "An unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival" and its intent is

Footnote continues on next page.

A large payment also provides strong evidence that the brand drug company possesses significant market power. (*Ibid.*; see *In re Nexium Antitrust Litig.* (D.Mass. Sept. 11, 2013) No. 12-md-02409, 2013 U.S. Dist. LEXIS 129696, at *51–52.) It makes little sense for the patent holder to pay a substantial sum to prevent generic competition unless this competition would decrease the brand's prices or market share (or both), depriving it of profits. (*Actavis*, *supra*, 133 S.Ct. at p. 2236; see also Thomas Cotter, FTC v. Actavis, Inc.: *When Is the Rule of Reason Not the Rule of Reason?* (2013) 15 Minn. J. L. Sci. & Tech. __[6] [under *Actavis*, a large reverse payment creates a presumption of market power and anticompetitive consequences].)

These points gain added weight when, as here, a brand manufacturer pays generic manufacturers substantially more than the generics' profits were they to come to market after winning a patent challenge.[7] In this circumstance, the obvious intent and effect of the payment is to inflate and maintain pricing. (*Actavis*, *supra*, 133 S.Ct. at p. 2235 ["Indeed, there are indications that patentees sometimes pay a generic challenger a sum even larger than what the generic would gain in profits if it won the paragraph IV litigation and entered the market."], citing C. Scott Hemphill, *Paying for*

"to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market. . . . The owner of a particularly valuable patent might contend, of course, that even a small risk of invalidity justifies a large payment. But, be that as it may, the payment (if otherwise unexplained) likely seeks to prevent the risk of competition." (*Ibid.*)

[6] Available at: http://mjlst.umn.edu/upcomingissue/home.html.

[7] The $398.1 million bribe the Generics took constitutes more than twice the profits they would have earned had they defeated the patent and competed with Cipro. (6AA 1203–04; 10AA 2353–75, 2377–2401.)

Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem (2006) 81 N.Y.U. L. Rev. 1553, 1581.)

3. It Is Not Necessary to Litigate Patent Validity to Determine Antitrust Liability.

Third, no inquiry into the merits of the patent at issue is necessary or relevant. (*Id.* at p. 2236.) What matters is that the patentee has paid to avoid the risk of competition. A patentee cannot "us[e] its monopoly profits to avoid the *risk* of patent invalidation or a finding of noninfringement." (*Ibid.*, italics added.) And a large reverse payment unexplained by avoided litigation costs, side consideration, or other factors demonstrates that the patentee shared its monopoly profits to avoid the business risk posed by a competitive market—which is "*the* relevant anticompetitive harm." (*Ibid.*, italics added.)

Forbidding a patent holder to avoid the risk from a patent challenge explains the *Actavis* Court's statement that "it is normally not necessary to litigate patent validity to answer the antitrust question." (*Ibid.*) After all, if the holder of a patent could defend a reverse payment simply by defending the patent, it would virtually always be necessary to consider the patent to judge an antitrust claim. Patent holders would then routinely invoke validity as a defense. That is inconsistent with *Actavis*. For this reason, Edlin, Hemphill, Hovenkamp, and Shapiro propose a jury instruction that states, "You may not consider the validity of the patent as a defense." (Edlin, *et al., supra*, at p. 21.)

Accordingly, the antitrust fact finder evaluates the circumstances as of the time of the reverse payment agreement, not the time of any later ruling on validity or infringement.[8] It is at the time of the agreement that the patentee avoids the *risk* of a challenge to its patent rights.

C. ***Actavis* Supports a Focused *Per Se* Ban on Reverse Payments.**

Actavis also supports a focused ban on reverse payments. The ban would apply not to all reverse payments but rather only to those that cannot be attributed to litigation costs or services provided.[9] Under these circumstances, proof of the payment would suffice to establish a violation of California antitrust law.

Subjecting reverse payments to a focused *per se* rule finds ample support in California law. The Cartwright Act declares agreements that restrain trade "absolutely void" and prohibits businesses from pooling their interests, whether "directly or indirectly[,]" such that price "might in any manner" be affected. (Bus. & Prof. Code §§ 16722, 16720, subd. (e)(4).) Appellants have previously explained why standard *per se* treatment of this horizontal restraint would provide California consumers with the maximal protection to which they are entitled under California law. (See Appellants' Opening Br. at pp. 18–23; Appellants' Reply Br. at pp. 4–14; see also

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[8] The preclusive effects of patent litigation are notably asymmetrical. A finding of invalidity or noninfringement may subject a patent holder to non-mutual collateral estoppel in subsequent litigation. (*Blonder-Tongue Labs. v. Univ. of Ill. Found.* (1971) 402 U.S. 313, 350.) A finding of validity or infringement, however, does not preclude later patent challenges for entities not involved in that litigation. (*In re Swanson* (Fed.Cir. 2008) 540 F.3d 1368, 1377, citations omitted.) As a result, consumers or other purchasers challenging a reverse payment would not be bound by a finding of validity or infringement in patent litigation to which they were not parties.

[9] Although the *Actavis* Court did not frame its rule as a *per se* ban, the Court's reasoning supports that label given the limited justifications stated. (See generally Cotter, *supra* [arguing *Actavis* in effect held reverse payments are presumptively illegal].)

Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Constr. Co. (1971) 4 Cal.3d 354, 361 [as it applies to claims under California law, the *per se* rule "encompasses certain practices that normally tend to eliminate competition."].)

This Court is, of course, free to apply the *per se* rule even if it does not read *Actavis* as in effect doing so. Considering "the Legislature intended to strike as broadly as it could in the Cartwright Act," federal precedents "must be used with caution" in applying and defining the bounds of California's own antitrust law. (*Cianci, supra*, 40 Cal.3d at pp. 919–921; *Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 183 n.9, citation omitted.)

D. **This Court Should Clarify the Law to Deter Reverse Payments That Harm Californians.**

In light of the above points, the reverse payment at issue here is plainly unlawful. It is far too large—almost $400 million—to be explained away as avoided litigation costs. Nor were there even any pretextual services provided in exchange. This was a naked noncompetition payment.[10] Bayer never would have paid almost $400 million unless it benefited (and consumers suffered) from its consequent consolidation of market power. The Generics also benefited, receiving a share of the

[10] The side license agreement between Bayer and Barr gave rise to no meaningful competition. Under the limited license covering a six-month period in 2003, Barr was contractually bound to pay 85% of Bayer's list price for Cipro during the prior fiscal quarter. (4AA 780.) When the license finally took effect after more than six years of monopoly, Barr not only matched Bayer's price increases but sold Bayer-manufactured Cipro at prices 5–10% *higher* than Bayer's own supracompetitive prices. (5AA 997, 1037; 6AA 1207–08.) Any claim by the Generics to a procompetitive effect from Barr's Cipro sales at a price similar to Bayer's would be "laughable," Dr. Hartman concluded. (6AA 1207-08, 5AA 1037.)

unlawful gain that far surpassed their expected profits and therefore removed their incentive to continue their challenge no matter how sure they were they would invalidate the patent.

After *Actavis*, drug manufacturers will continue to test the limits of the antitrust laws and the mettle of antitrust enforcers. They may do so by masking their conduct, at times by offering a payoff in some form less transparent than money, at times by pretending a generic company is receiving funds only for valuable goods or services when it is not. Regardless of the particular conduct, determining the appropriate standard would help to guide future antitrust reverse payment litigation.

III. *ACTAVIS* SHOWS THAT THE CLAIMS ARE NOT PREEMPTED

Actavis further demonstrates the Court of Appeal's error in holding these California claims preempted. Having embraced the now-defunct "scope of the patent" test, the Court of Appeal proceeded to reject Appellants' position that triable issues of fact exist as to whether Bayer's infringement suit was a sham under that test. The Court of Appeal held the sham litigation issue preempted on the grounds that federal courts would have exclusive jurisdiction. (See *Cipro Cases I & II*, *supra*, 200 Cal.App.4th at p. 473 [holding that the objective baselessness of Bayer's suit "necessarily depends on resolution of a substantial question of federal patent law—i.e., whether Bayer engaged in inequitable conduct in the procurement of its patent."].) *Actavis* eliminates the underpinning of this preemption ruling by rejecting the "scope of the patent" test and its sham litigation prong. The Generics may be held liable for colluding with Bayer even though their agreement did not purport to extend the Cipro patent, and without the need to make a showing of sham litigation that the Court of Appeal held would be preempted.

California courts have jurisdiction over these state claims. Patent law issues are, at most, incidental to this case and "it is normally not necessary to litigate patent validity to answer the antitrust question . . . ." (*Actavis, supra*, 133 S.Ct. at p. 2236.) Moreover, even were the analysis to require some consideration of patent strength, the claims would not involve a "substantial" patent law question. While the Court of Appeal relied on the legal malpractice case *Lockwood v. Sheppard, Mullin, Richter & Hampton* (2009) 173 Cal.App.4th 675, that case has been severely undermined by *Gunn v. Minton* (2013) 568 U.S. ___ [133 S.Ct. 1059], which reversed a judgment of the Texas Supreme Court and held that federal courts do not have exclusive jurisdiction over a state law legal malpractice claim arising from a patent dispute. (*Id.* at p. 1068.) Despite the same potential as in *Lockwood* for a "case within a case" on patent issues, the U.S. Supreme Court held the federal issues insufficiently substantial to divest the Texas courts of subject matter jurisdiction. (*Gunn, supra*, 133 S.Ct. at pp. 1066–1068.)

There can be no conflict of law where both federal and state law treat the same category of restraint as actionable. (See *Actavis, supra*, 133 S.Ct. 2223 [reverse payments subject to federal antitrust scrutiny].) Rather than conflicting, the two antitrust regimes complement one another to foster procompetitive results. (See *California v. ARC America Corp.* (1989) 490 U.S. 93, 101 [the Sherman Act does not preempt the broader Cartwright Act remedies].) Here, if anything, the Generics' violation of federal law as clarified in *Actavis* is a further predicate for their UCL liability. (See *McKell v. Washington Mut., Inc.* (2006) 142 Cal.App.4th 1457, 1485–1486 [the UCL confers a remedy for federal law violations, and when a state law as applied "provides a means of enforcing federal requirements," it "is the type of state law not preempted by federal law."].)

There is no conflict with patent law either. *Actavis* finds that nothing in the Patent Act authorizes collusion in the form of reverse payments to prop up patent rights. As the opinion of the Court noted, "The dissent does not identify any patent statute that it understands to grant such a right to a patentee, whether expressly or by fair implication." (*Actavis, supra*, 133 S.Ct. at p. 2233.) In fact, a finding that a patent-related restraint violates antitrust law yields the "conclusion" that the restraint "lies 'beyond the limits of the patent monopoly[.]' " (*Id.* at pp. 2231–2232.) Absent any federal patent right to burden, state law enforcement here presents no conflict.

Nor is there implied obstacle preemption. (See Appellants' Reply Br. at pp. 48–50.) When it comes to anticompetitive reverse payments, there is no "patent law policy [that] offsets the antitrust law policy strongly favoring competition." (*Actavis, supra*, 133 S.Ct. at p. 2233.) On the other hand, *Actavis* holds that reverse payments short-circuit "the patent-related policy of eliminating unwarranted patent grants so the public will not 'continually be required to pay tribute to would-be monopolists without need or justification.' " (*Actavis, supra*, 133 S.Ct. at p. 2233, quoting *Lear, Inc. v. Adkins* (1969) 395 U.S. 653, 670.)

Actavis, therefore, makes clear that reversal here accords with federal law and policy.

IV. CONCLUSION

The *Actavis* decision overwhelmingly supports Appellants' position that this Court should reverse the grant of summary judgment, clarify the legal standard for purposes of the Cartwright Act and the UCL, and remand these claims for trial.

Dated: January 24, 2014

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

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

Pursuant to the California Rules of Court and this Court's Order of December 11, 2013, counsel of record certifies that this Supplemental Brief uses 13-point Roman type and contains 4,516 words, including footnotes. Counsel relies on the count of the computer program used to prepare this Brief.

Dated: January 24, 2014

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In the

Supreme Court

of the

State of California

IN RE CIPRO CASES I AND II

CALIFORNIA COURT OF APPEAL – FOURTH APPELLATE DISTRICT – NO. D056361
SUPERIOR COURT OF SAN DIEGO – HON. RICHARD E.L. STRAUSS
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