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January 23, 2014

Mr. Frank A. McGuire
Clerk of the Court
Supreme Court of California
350 McAllister St.
San Francisco, CA 94102-4797

RE: *In re Cipro Cases I & II*, No. S198616

Dear Mr. McGuire:

Defendants-Respondents Barr Laboratories, Inc.; Hoechst Marion Roussel, Inc.; The Rugby Group, Inc.; and Watson Pharmaceuticals, Inc. (collectively, the "Generic Defendants") respectfully submit this brief in accordance with this court's order that the parties "submit simultaneous supplemental letter briefs discussing the relevance of *FTC v. Actavis, Inc.* (2013) 570 U.S. __ [133 S.Ct. 2223] [(*Actavis*)] to the issues in this case." (Dec. 11, 2013 Order.)

SUMMARY

The U.S. Supreme Court's decision in *Actavis* expressly rejected the very same arguments that plaintiffs have advanced in this appeal—and the reasoning of *Actavis* confirms why the superior court's grant of summary judgment should be affirmed.

In particular, plaintiffs have argued that pharmaceutical patent settlements like the Cipro Settlement should be held per se unlawful or else deemed presumptively unlawful under a so-called "quick look" approach. (See, e.g., Reply Br. 4.) *Actavis* squarely considered—and rejected—both of those proposed approaches. (See *Actavis*, *supra* [133 S.Ct. at pp. 2237-2238].)

The U.S. Supreme Court concluded that such settlements are neither presumptively lawful nor presumptively unlawful, and instead must be analyzed using the traditional antitrust Rule of Reason. Contrary to plaintiffs' contention that the lower courts relied on a different approach here and "immunized" the Cipro Settlement because it did not exceed the scope of Bayer's patent on Cipro, both the superior court and the Court of Appeal expressly concluded that the Cipro Settlement did not violate the Cartwright Act *under the Rule of Reason.* (11 AA 2690, 2693 [superior court]; accord Slip opn. 3, 32-33 [Court of Appeal].) As the lower courts explained, plaintiffs could not show that the settlement had a substantially adverse effect on

competition (11 AA 2690, 2693; accord Slip opn. 3, 32-33)—the first step of the Rule of Reason—especially when the settlement allowed the Generic Defendants to introduce a competing ciprofloxacin product six months *before* Bayer's patent expired and a full year before Bayer's FDA exclusivity for Cipro ended, whereas three other companies that challenged the patent litigated and lost in court.

For these reasons, the Generic Defendants respectfully request that this court affirm the decision below.

ARGUMENT

I. *Actavis* Rejected Plaintiffs' Arguments That Settlements Like the Cipro Settlement Are Per Se Illegal or Presumptively Unlawful Under the Antitrust Laws.

Plaintiffs' position throughout this litigation—including in their merits briefs to this court—has been that the Cipro Settlement is per se unlawful or, in the alternative, presumptively unlawful under a "quick look" antitrust analysis. (See, e.g., Reply Br. 4 ["[R]everse 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* [the Third Circuit's now-vacated decision in *In re K-Dur Antitrust Litig.* (3d Cir. 2012) 686 F.3d 197]."]; see also Pls.' Opening Br. on the Merits 17-18 (Opening Br.); Br. of Appellants to Court of Appeal 24; 1 AA 173-175.)

In considering the very same arguments from the Federal Trade Commission that plaintiffs advance here, the U.S. Supreme Court concluded that neither a per se approach nor a quick look approach was appropriate:

> [A]bandonment of the "rule of reason" in favor of presumptive rules (or a "quick-look" approach) is appropriate only where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." [Citations.] *We do not believe that reverse payment settlements, in the [Hatch-Waxman patent litigation] context we here discuss, meet this criterion.*

(*Actavis*, *supra* [133 S.Ct. at p. 2237], quoting *California Dental Assn. v. FTC* (1999) 526 U.S. 756, 770, emphasis added.) Instead, *Actavis* held that such settlements are neither presumptively lawful nor presumptively unlawful, and that they are properly evaluated under the antitrust Rule of Reason. (*Ibid.*)

The U.S. Supreme Court's holding is consistent with California law—and thus underscores the correctness of the decisions below.[1] California courts have long recognized that the Rule of Reason is the traditional approach to evaluating whether a challenged practice violates the Cartwright Act. (See, e.g., *Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 930-931 (*Marin County*).) As the Court of Appeal observed in this case, "[u]nder the Cartwright Act, as under the Sherman Act, the 'illegal per se' designation is reserved for agreements or practices that have a pernicious effect on competition and *lack any redeeming virtue*. [Citations.]." (Slip opn. 32, citing, *inter alia*, *Corwin v. L.A. Newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842, 853; see also *Marin County*, *supra*, 16 Cal.3d at pp. 930-931.) The superior court similarly emphasized that "[plaintiffs] have cited no California case, nor is there one, supporting that a per se illegal analysis is applicable to the specific agreement at issue here, a reverse payment settlement agreement under the Hatch Waxman Act concerning a patent." (11 AA 2689.) It is thus unsurprising that both of the lower courts in this case, like the U.S. Supreme Court in *Actavis*, concluded that Hatch-Waxman settlements generally, and the Cipro Settlement specifically, do not come close to warranting the extraordinary conclusion that they are per se unlawful. This is true especially where, as here, the settlement agreement enabled the generic challenger to sell ciprofloxacin six months *before* the challenged patent expired and a full year before Bayer's FDA exclusivity ended.

Actavis also underscores why plaintiffs' effort to condemn the Cipro Settlement under a quick-look approach fails as a matter of law. Antitrust jurisprudence has long reserved quick-look analysis for exceptional cases in which courts have already had judicial experience with a challenged practice and can already conclude that it causes competitive harm. (See *Actavis*, *supra* [133 S.Ct. at p. 2237].) Indeed, plaintiffs concede that their proposed quick-look approach would be "only slightly less stringent than the *per se* rule" (Opening Br. 37) because it would *eliminate* the first step of the Rule of Reason, *assume* that every Hatch-Waxman settlement has actual adverse effects on competition, and automatically *shift the burden* to defendants to demonstrate that a settlement had pro-competitive benefits (see *id.* at p. 42; 11 AA 2581-2582). In so doing, plaintiffs' approach would turn the burden of proof on its head and raise serious due process concerns. (Compare Opening Br. 42 ["Defendants bear the initial burden."] with *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 861 [holding that a Cartwright Act plaintiff has the burden of proof].) Nothing in California law supports the use of that approach here (see Slip opn. 3, 32-34), and *Actavis* similarly refused to adopt it (see *Actavis*, *supra* [133 S.Ct. at pp. 2237-2238]). Although plaintiffs' merits reply brief to this court featured a Third Circuit panel decision adopting a quick-look approach in *K-Dur* (Reply Br. 1-4, 8, 14-19, 24-25, 46), the U.S.

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[1] *Actavis* considered federal antitrust claims brought by the FTC under the FTC Act. (See *Actavis*, *supra* [133 S.Ct. 2229-2230], citing 15 U.S.C. § 45.)

Supreme Court subsequently vacated the *K-Dur* decision in light of *Actavis*. (*Merck & Co. v. Louisiana Wholesale Drug Co.* (2013) __ U.S. __ [133 S.Ct. 2849].)

Applying the traditional Rule of Reason, and not a per se or "quick-look" approach, makes sense. After all, there is nothing inherently anticompetitive about settling patent litigation, including through a settlement in which a would-be infringer agrees to abide by the patent and receives both monetary consideration and an early-entry license—despite plaintiffs' speculation about whether the patent holder would have litigated and lost, or whether the parties would have reached an alternative settlement on different terms. Plaintiffs' argument that the Cipro Settlement was nothing more than "a naked payoff ... from one horizontal competitor to other horizontal competitors to suppress competition" (Opening Br. 17) ignores the presence of a patent that already foreclosed Barr and others from selling infringing alternatives. Patents are presumed valid by operation of law (see *In re Ciprofloxacin Hydrochloride Antitrust Litigation* (Fed.Cir. 2008) 544 F.3d 1323, 1337 (*Cipro Fed. Cir.*), citing 35 U.S.C. § 282), and nothing in the antitrust laws requires every patent case to be litigated through trial and appeal, or entitles antitrust plaintiffs to dictate the terms on which litigants may settle (see *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP* (2004) 540 U.S. 398, 415-16 [explaining that the antitrust laws do not require "that a monopolist alter its way of doing business whenever some other approach might yield greater competition"]).

Actavis thus confirms that the lower courts were correct to reject plaintiffs' arguments that the Cipro Settlement is either per se unlawful or presumptively unlawful.

II. *Actavis* Confirms That the Lower Courts Were Correct in Applying the Rule of Reason to Uphold the Cipro Settlement.

Because the Rule of Reason has long been the test that California courts have used to evaluate Cartwright Act claims, *Actavis* also confirms the correctness of the decision below in granting summary judgment for the Generic Defendants.

As the lower courts explained, the Rule of Reason analysis under the Cartwright Act requires that (1) an alleged restraint on trade has anticompetitive effects, and (2) the anticompetitive effects outweigh any pro-competitive benefits. (See 11 AA 2690; Slip opn. 16; accord *Bert G. Gianelli Distributing Co. v. Beck & Co.* (1985) 172 Cal.App.3d 1020, 1048 (*Gianelli*), disapproved on another ground in *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 394, fn. 2; *Marin County, supra*, 16 Cal.3d at pp. 934-935.) The threshold question under the Rule of Reason is whether an actual "restraint" on trade exists, which requires a "'substantially adverse effect on competition in the relevant market.'" (*Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1681, quoting *Gianelli*, 172 Cal.App.3d at p. 1049.) Both the superior court and Court of Appeal correctly concluded that plaintiffs could not show that the Cipro Settlement had anticompetitive effects independent of the Cipro patent itself, and therefore

could not satisfy this threshold step in the Rule of Reason analysis. (11 AA 2690-2693; Slip opn. 37-38.)

Actavis provides no basis to disturb the lower courts' conclusion. To be sure, *Actavis* declined to adopt the "scope of the patent" test that made the lawfulness of a Hatch-Waxman patent settlement under federal antitrust laws turn on the exclusionary potential of the patent. (See *Actavis*, *supra* [133 S.Ct. at pp. 2230-2231].) Although plaintiffs contend that the lower courts "immunized" the Cipro Settlement from any scrutiny by relying solely on the scope of the patent test (see Opening Br. 3-4), the opinions below conclusively demonstrate otherwise.

To begin with, the lower courts correctly observed that California law itself *supports* the scope of the patent approach. As the Court of Appeal explained, "[t]he principle that an agreement is not unlawful under California ... antitrust law if it restrains competition only within the exclusionary scope of a patent is reflected in *Fruit Machine[ry] Co. v. F.M. Ball & Co.* (1953) 118 Cal.App.2d 748 [(*Fruit Machinery*)]," which held that a patent licensing regime did not violate the Cartwright Act because the parties did not "'exercise[] rights or powers not accorded to them by the patent law or abuse[] any rights or powers accorded to them by that law.'" (Slip opn. 33-34, quoting *Fruit Machinery*, *supra*, 118 Cal.App.2d at p. 762, emphasis omitted; see also *Schering-Plough Cartwright Act Cases* (Ala.Cty.Super.Ct. Dec. 17, 2009) JCCP No. 4559 [adopting the scope of the patent framework]; Generic Defs. Answer Br. 19-24.) Because "[t]he grant of a patent is the grant of a statutory monopoly and is an express exception to laws prohibiting monopolies" (*Aetna Casualty and Surety Co. v. Superior Court* (1993) 19 Cal.App.4th 320, 328, citing *Sears, Roebuck & Co. v. Stiffel Co.* (1964) 376 U.S. 225, 229), a settlement that extends no further than the patent itself is lawful.

Even if that were not so, the Court of Appeal expressly held that the Cipro Settlement did not violate the Cartwright Act under the Rule of Reason. The court held that "the Cipro agreements do not violate the Cartwright Act ***under rule-of-reason analysis or the [scope of the patent] analysis***" that the U.S. Court of Appeals for the Eleventh Circuit had used in cases such as *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.* (11th Cir. 2003) 344 F.3d 1294, and *Schering-Plough Corp. v. FTC* (11th Cir. 2005) 402 F.3d 1056. (Slip opn. 32-33, emphasis added; see also 11 AA 2690 [superior court decision concluding "that the agreement does not violate the Cartwright Act under the Rule of Reason."].)

In other words, far from relying on the scope of the patent test to "immunize" the Cipro Settlement from review, both the Court of Appeal and the superior court concluded that plaintiffs' Cartwright Act claims failed *under the Rule of Reason*, because plaintiffs could not show that the Cipro Settlement had an adverse effect on competition. The lower courts correctly observed that the Cipro patent itself already precluded others from selling generic ciprofloxacin, and, as antitrust jurisprudence has long made clear, "the public [i]s not entitled to profit by competition among infringers." (*Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.* (7th

Cir. 1907) 154 F. 358, 364; see also *Hynix Semiconductor Inc. v. Rambus Inc.* (N.D. Cal. 2007) 527 F.Supp.2d 1084, 1096 ["[A]n infringer" has "no legal right to be competing in the product market."].) If anything, the Cipro Settlement *accelerated* competition by allowing the Generic Defendants to sell a competing ciprofloxacin product six months before Bayer's patent expired, and a full year before Bayer's FDA exclusivity on Cipro ended. Thus, far from preventing competition, the Cipro Settlement was *pro*-competitive—and even the plaintiffs' economic experts in the federal Cipro antitrust litigation (which occurred in parallel with this case) conceded that the agreement had pro-competitive effects. (See *In re Ciprofloxacin Hydrochloride Antitrust Litigation* (Fed.Cir. Mar. 3, 2008, No. 2008-1097) 2008 WL 1771301, at *5 [Brief of Generic Defendants, quoting record from federal MDL case].)[2]

Indeed, as the lower courts, the Second Circuit, and the Federal Circuit observed in upholding the 1997 Cipro Settlement, the absence of anticompetitive effects is particularly apparent in this case because the settlement did not foreclose other generic drug companies from pursuing their own challenges to Bayer's patent—none of which were successful. In one case, a federal district court in New Jersey granted summary judgment in Bayer's favor and upheld the validity of the patent against challenges by Mylan Pharmaceuticals and Schein Pharmaceutical—a decision that the U.S. Court of Appeals for the Federal Circuit affirmed on appeal. (*Bayer AG v. Schein Pharmaceutical, Inc.* (D.N.J. 2001) 129 F.Supp.2d 705, affd. (Fed.Cir. 2002) 301 F.3d 1306.) In another, a federal district court in San Diego conducted a nine-day bench trial in a case brought by Carlsbad Technology, resulting in another decision upholding the validity of Bayer's patent on Cipro. (*Bayer AG v. Carlsbad Technology, Inc.* (S.D.Cal. June 7, 2002 and Aug. 7, 2002, No. 01CV0867-B) [opinions available at 1 RA 181-193, 195-227].) Carlsbad did not appeal. And for its part, Bayer submitted the Cipro patent for review by the U.S. Patent and

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[2] *Actavis* confirms that consideration of Bayer's patent is not only relevant, but also required. Although the U.S. Supreme Court noted that it is not always "necessary to litigate patent validity to answer the antitrust question" in every case (*Actavis*, *supra* [133 S.Ct. at p. 2236]), the decision expressly held that "courts must 'balance the privileges of [the patent holder] and its licensees under the patent grants with the prohibitions of the [antitrust laws] against combinations and attempts to monopolize'" (*id.* at p. 2231, quoting *United States v. U.S. Gypsum Co.* (1948) 333 U.S. 364, 390-391; see also *ibid.* ["[T]his Court has indicated that patent and antitrust policies are both relevant in determining the 'scope of the patent monopoly'—and consequently antitrust law immunity—that is conferred by a patent."]). Nor was the Supreme Court's recognition of this fact new: as it explained decades ago, the patent laws and antitrust laws are "in pari materia" and thus must both be considered. (*Simpson v. Union Oil Co. of Cal.* (1964) 377 U.S. 13, 24; see also *E. Bement & Sons v. Nat. Harrow Co.* (1902) 186 U.S. 70, 91 ["The fact that the conditions in the contracts keep up the [patent] monopoly or fix prices does not render them illegal."].)

Trademark Office ("PTO"), which reaffirmed the validity of the patent in a re-examination proceeding.[3]

All of this also underscores several distinguishing features between *Actavis* and this case—and further demonstrates why the grant of summary judgment for defendants was correct. (E.g., *D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1, 19 ["'If [the decision below is] right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' [Citation.]"]; *American Meat Institute v. Leeman* (2009) 180 Cal.App.4th 728, 747-749 [similar].)

A. *Actavis* Did Not Involve an Antitrust Case Brought By a Private Plaintiff. *First*, "[t]he Supreme Court had no occasion in *Actavis* to consider reverse-payment settlements in the context of private antitrust litigation," because it was presented with a case brought by the FTC under the federal FTC Act. (Simmons et al., *Viewing* FTC v. Actavis *Through the Lens of Clayton Act Section 4* (2013) ABA Antitrust Magazine, 24, 25-26.) This is important because when the government brings a case under the FTC Act (as in *Actavis*), it need not demonstrate either (1) antitrust injury or (2) causation, as that statute broadly applies to conduct that is even "likely to cause" injury. (15 U.S.C. § 45, subd. (n); see also *FTC v. Neovi, Inc.* (9th Cir. 2010) 604 F.3d 1150, 1155, 1157 (*Neovi*); *In re Flonase Antitrust Litigation* (E.D.Pa. 2011) 798 F.Supp.2d 619, 628 fn. 9.) By contrast, a private plaintiff suing under the Cartwright Act (like a private plaintiff suing under the Sherman Act) must prove both. (See *Morrison v. Viacom, Inc.* (1998) 66 Cal.App.4th 534, 548 (*Morrison*); see also 3A Areeda & Hovenkamp, Antitrust Law ¶ 303 ["Unlike the government enforcer, the private damage claimant must show not only an antitrust violation but also reasonably proximate injury to its trade or business and that this injury was 'antitrust injury.' [Fn. omitted]"].)

The antitrust injury element requires that a private plaintiff's alleged harm be attributable to defendants' anticompetitive conduct and not something else—such as the patent on Cipro. (E.g., *Morrison*, *supra*, 66 Cal.App.4th at 548.) Antitrust injury is a separate and independent

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[3] Plaintiffs incorrectly argue that these decisions should be ignored because they involved a "narrowed" patent and because the subsequent patent challengers raised different grounds. (Opening Br. 50.) It is undisputed, however, that when Bayer re-submitted the Cipro patent to the PTO, the relevant patent claim (claim 12) at issue in the Bayer-Barr litigation "did not change in reexamination." (11 AA 2691.) And in affirming the grant of summary judgment in the defendants' favor in the federal *Cipro* antitrust litigation, the Federal Circuit—the court with specialized jurisdiction over patent cases and whose rulings are authoritative on matters of federal patent law—expressly concluded that "no fraud occurred" in Bayer's procurement of the Cipro patent. (*Cipro Fed. Cir.*, *supra*, 544 F.3d at p. 1341; see also *Lockwood v. Sheppard, Mullin, Richter & Hampton* (2009) 173 Cal.App.4th 675, 684, citing 28 U.S.C. § 1295(a)(1).)

requirement in addition to proof of the antitrust violation itself: for example, even when an agreement is per se unlawful under the antitrust laws, a private plaintiff still must show antitrust injury to establish liability. (*Ibid.*; see also *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.* (2011) 198 Cal.App.4th 1366, 1378 ["[T]he antitrust injury requirement applies to cases alleging conduct that is per se unlawful as well as to cases governed by the rule of reason."].) There was no similar requirement in *Actavis*. (See *Atlantic Richfield Co. v. USA Petroleum Co.* (1990) 495 U.S. 328, 339 ["Antitrust injury does not arise [under the FTC Act] until a *private party* is adversely affected by an anticompetitive aspect of the defendant's conduct," emphasis modified].)

Likewise, to state a claim under the FTC Act, the government need not demonstrate causation. (See 15 U.S.C. § 45, subd. (n); see also *Neovi*, *supra*, 604 F.3d at pp. 1155, 1157.) By contrast, a private plaintiff suing under the Cartwright Act (like a private plaintiff under the Sherman Act) must show that defendants' conduct was the but-for cause of his or her actual injury—as opposed to some other cause such as a patent that already foreclosed generic competition by operation of law. (*Morrison*, *supra*, 66 Cal.App.4th at p. 548 [affirming judgment on the pleadings for defendant because plaintiffs "failed to allege any facts to show they suffered an injury which was *caused* by restraints on competition"].)

Because the lower courts held that plaintiffs could not satisfy the first step of the Rule of Reason as a matter of law, the lower courts had no occasion to consider whether plaintiffs could satisfy the antitrust injury and causation requirements, and these issues are not before the court.

B. *Actavis* Involved a Settlement of Litigation Over a Patent Whose Validity Has Never Been Resolved. *Second*, *Actavis* involved a settlement of litigation over a patent whose validity has never been adjudicated. In concluding that Hatch-Waxman patent settlements may warrant antitrust scrutiny under the Rule of Reason, the U.S. Supreme Court noted the concern that such a patent might go unreviewed. (See *Actavis*, *supra* [133 S.Ct. at p. 2231] ["The patent here may or may not be valid, and may or may not be infringed."]; *id.* at p. 2240 (dis. opn. of Roberts, C.J.) ["The problem, as the Court correctly recognizes, is that we're not quite certain if the patent is actually valid, or if the competitor is infringing it."].)

Here, however, that concern is not present, because Bayer's patent has been adjudicated again and again—and upheld again and again—by three different courts and by the PTO. While *Actavis* recognizes the need for antitrust scrutiny when a patent settlement forecloses *any* adjudication of whether a patent is valid, the premise behind that concern does not exist where, as here, Bayer followed the Cipro Settlement by submitting its patent to the PTO *and* defending it against multiple other challengers—resulting in decisions upholding the patent at trial (against Carlsbad) and at the Federal Circuit (against Mylan and Schein).

III. In the Alternative, the Court Could Remand This Case For Further Proceedings in Light of *Actavis*.

As explained above, the relevance of *Actavis* is that it *rejects* the exact same arguments that plaintiffs have advanced here in demanding that the Cipro Settlement be held per se unlawful or presumptively unlawful under a quick-look approach. In holding that Hatch-Waxman patent settlements should be analyzed under the Rule of Reason, *Actavis* also underscores that the lower courts correctly concluded that the Generic Defendants were entitled to summary judgment because plaintiffs could not demonstrate that the Cipro Settlement had an actual adverse effect on competition—as the threshold step in the Rule of Reason requires. Although the superior court considered the scope of the patent test in its opinion, it *also* held "that the agreement does not violate the Cartwright Act under the Rule of Reason." (11 AA 2690.) The Court of Appeal likewise concluded that the Cipro Settlement was lawful under the Rule of Reason. (Slip opn. 32-33 [concluding that "the Cipro agreements do not violate the Cartwright Act under rule-of-reason analysis ***or*** the [scope of the patent] analysis" that the Eleventh Circuit had used before *Actavis* was decided, emphasis added].)

Even if the court were to conclude that *Actavis* warrants a more fulsome Rule of Reason analysis, the appropriate step would be to transfer the case to the Court of Appeal with instructions that the case be remanded without decision to the superior court for further proceedings. (See Code Civ. Proc., § 43; see also *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1052 [remanding to the Court of Appeal with directions to, in turn, remand to the trial court for further proceedings].) A remand would enable the parties to develop a more complete record of all of the competitive circumstances surrounding the Cipro Settlement and to brief the relevant legal issues with the benefit of a fully developed record. For example, expert discovery was commenced but never completed in the superior court because the parties agreed to suspend further discovery pending the outcome of the federal *Cipro* antitrust litigation (which was resolved in defendants' favor on summary judgment and then affirmed on appeal). As a result, one or both sides may wish to present additional expert analyses of the economic effects of the settlement's terms against plaintiffs' asserted alternatives—as well as analyses of the impact of Bayer's patent rights on the competitive landscape before and after the settlement was reached.

Actavis itself contemplates that trial courts will oversee the Rule of Reason inquiry in the first instance, given their first-hand access to the complete record and the ability to develop such additional evidence as may become relevant. (*Actavis*, *supra* [133 S.Ct. at p. 2238] ["We therefore leave to the lower courts the structuring of the present rule-of-reason antitrust litigation."].) This accords with the practice of California courts, which have held that a Rule of Reason analysis should be performed first by the trial court. (*Feldman v. Sacramento Bd. of Realtors, Inc.* (1981) 119 Cal.App.3d 739, 745-747 (*Feldman*) [remanding to trial court to consider aspect of Rule of Reason analysis not previously passed upon].) This makes sense.

After all, "'when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered[,] [citation],'" and will not take additional evidence absent "exceptional circumstances." (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444 fn. 3.) By contrast, the trial court can supplement the record as needed for proper consideration of all issues to be decided. For this reason, remand to the trial court is appropriate if an appellate court determines that further analysis under the Rule of Reason is necessary. (See, e.g., *Feldman, supra,* 119 Cal.App.3d at pp. 745-747; *Freeman v. San Diego Assn. of Realtors* (9th Cir. 2003) 322 F.3d 1133, 1147, fn. 16.)

Accordingly, if this court concludes that it cannot affirm the decision below on the record before it, it should remand the case to the Court of Appeal with instructions that the case be remanded to the superior court so that the parties can further develop the record.

CONCLUSION

For the foregoing reasons, the Generic Defendants respectfully request that the court affirm the decision below or, in the alternative, remand the case without decision to the Court of Appeal with instructions that the case be remanded to the superior court for further proceedings.

Sincerely,

Jay P. Lefkowitz, P.C.

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court and this court's December 11, 2013 Order, the undersigned certifies that the foregoing supplemental letter brief contains 4,455 words, exclusive of tables, certificates, and attachments, as counted by the Word Court feature of Microsoft Word.

Edwin John U

DECLARATION OF SERVICE

Case Name: ***In re Cipro Cases I & II***

Case No.: S198616

I am over the age of eighteen years and not a party to this action. My business address is 655 15th Street, NW, Washington, DC 20005. On January 23, 2014, I served the attached Supplemental Letter Brief of the Generic Defendants by placing it in a sealed envelope with postage fully prepaid, in the Federal Express pickup location at Kirkland & Ellis LLP, 655 15th Street, NW, Washington, DC 20005 addressed as set forth below. I am familiar with Kirkland & Ellis' practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with Federal Express.

I declare under penalty of perjury under the laws of the United States that the above is true and correct. Dated January 23, 2014.

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California Court of Appeal Fourth Appellate District, Div. One Symphony Towers 750 B Street, Suite 300 San Diego, CA 92101	**By Federal Express**