IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Nos. 15-3559 & 15-3591

Nos. 15-3559, 15-3591, 15-3681 & 15-3682
In Re: Wellbutrin Xl Antitrust Litigation

On Appeal from the United States District Court for the Eastern District of Pennsylvania (Nos. 08-cv-2431, 08-cv-2433)

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE REQUESTING PANEL'S CERTIFICATION OF STATE LAW QUESTION TO THE CALIFORNIA SUPREME COURT IN SUPPORT OF PLAINTIFF-APPELLANTS' PETITIONS FOR REHEARING AND REHEARING EN BANC

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INTRODUCTION

Federal antitrust law does not control interpretation of the Cartwright Act, California's competition statute, which was modeled after the laws of California's sister states rather than on the Sherman Act. *In re Cipro Cases I & II*, 348 P.3d 845, 858-59 (Cal. 2015) ("*Cipro*"). Interpreting this State's unique statute, the California Supreme Court in *Cipro* adopted a framework for analyzing the legality of reverse payment agreements under the Cartwright Act that is more defined and strict than the rule of reason approach adopted in *FTC v. Actavis*, 133 S.Ct. 2222, 2237 (2013) ("*Actavis*"). *Id.* at 863-71.

The Panel here concluded that the Wellbutrin XL reverse payment agreements caused no harm under both federal and California antitrust law, reasoning that a third party patent blocked any "lawful" competition by the generics. Op. at 49-76. Its holding was based on the erroneous premise that California law on antitrust standing, injury, and causation "appears to be" indistinguishable from federal antitrust law. That is incorrect.

Under *Cipro*—which the Panel's decision did not cite—the strength or weakness of a third party patent is not determinative of the harm caused by a reverse payment agreement. Even aside from *Cipro*, under general state law principles of causation, the strength or weakness of a "blocking" patent could not defeat causation unless there were 100% certainty that the patent would be valid,

infringed, and enforced. *See, e.g., In re Tobacco II Cases*, 207 P.3d 20, 39-40 (Cal. 2009); *PPG Industries, Inc. v. Transamerica Ins. Co.*, 975 P.2d 652, 655-56 (Cal. 1999). Moreover, the California Supreme Court requires that its state antitrust law be applied to maximize deterrence of antitrust violations, even if plaintiffs are overcompensated. *Clayworth v. Pfizer*, 233 P.3d 1066, 1083 (Cal. 2010).

Rather than wading into state law, in light of federalism and comity, the Panel should certify questions of this nature to the California Supreme Court. *See Michaels v. State of New Jersey*, 150 F.3d 257, 259 (3d Cir. 1998). The indirect plaintiffs have requested certification. *See* Pet. For Rehg. of Indirect Purchaser Class Plaintiff-Appellant State Law Claims at 12 n.7, *In re Wellbutrin XL Antitrust Litig.*, Nos. 15-3559 et al. (Aug. 31, 2017). No restriction exists on the ability of this Panel at this stage to certify such questions even *sua sponte*. *See* United States Court of Appeals for the Third Circuit, Local Appellate Rules, Rule 110.1 (Aug. 1, 2011). And the California Supreme Court can accept the certification of such questions. California Rules of Court, Rule 8.548(a)(2) (2017).

Respectfully, the State of California requests that this Panel certify the following question to the California Supreme Court as part of its consideration of the filed petitions for rehearing and rehearing en banc: "Under what circumstances, if any, does *In re Cipro Cases I & II*, 348 P.3d 845 (Cal. 2016) and state law principles on causation allow for consideration of a third party 'blocking'

patent in determining whether, as a matter of California antitrust law, a reverse payment settlement caused anti-competitive delay in entry into the market?"

INTEREST OF THE STATE OF CALIFORNIA

The State of California has multiple interests in the development and enforcement of state antitrust laws in general and as applied to the pharmaceutical industry. Proper interpretation and enforcement of state law promotes a competitive marketplace and access to affordable drugs. California is itself a major prescription drug purchaser: Prescription drugs for state agencies and needy citizens represent a multi-billion-dollar cost for the State of California each year. Legislative Analyst's Office, *State Prescription Drug Purchases et al.* at 2 (May 10, 2016), http://lao.ca.gov/handouts/Health/2016/Pricing-Standards-051016.pdf. As the chief law enforcement officer for the State of California, the Attorney General has brought several actions challenging reverse payment agreements. *See, e.g.*, Press Release, California Office of the Attorney General, Attorney General Becerra Joins Price-Fixing Lawsuit Against Six Drug Companies (Mar. 1, 2017), https://oag.ca.gov/news/press-releases/attorney-general-becerra-joins-price-fixing-lawsuit-against-six-drug-companies. The Attorney General has also filed amicus briefs in private reverse payment lawsuits, including before the California Supreme Court in the *Cipro* litigation. Amicus Brief of the California Attorney General, 2014 WL 1765268, *In re Cipro Cases I & II*, No. S198616 (Cal. Mar. 19, 2014). To deter anti-competitive reverse payment

settlements and ensure adequate compensation of the victims of these settlements, the State of California has a strong interest in the development and safeguarding of our state antitrust standards, including those involving standing, injury, and causation. *See Clayworth*, 233 P.3d at 1082.

ARGUMENT

I. FEDERAL LAW DOES NOT CONTROL CALIFORNIA LAW ON ISSUES INVOLVING ANTITRUST STANDING AND INJURY

The Panel's held that California law on antitrust standing and injury "appears to be" indistinguishable from federal antitrust law with a citation to a single federal district court opinion. Op. at 61-62 n.53. The State of California here brings to the Panel's attention the California Supreme Court's repeated pronouncements that the Cartwright Act is broader than, and not coextensive with, the Sherman Act. *See, e.g.*, *Cipro*, 348 P.3d at 858-59; *Aryeh v. Canon Bus. Sol's, Inc.*, 292 P.3d 871, 877 (Cal. 2013); *Clayworth*, 233 P.3d at 1083; *State of California ex rel. Van de Kamp v. Texaco, Inc.*, 762 P.2d 385, 387-88, 395 (Cal. 1988); *Cianci v. Superior Court*, 710 P.2d 375, 383 (Cal. 1985). For example, in *Clayworth*, *supra*, 233 P.3d at 1084-85, the California Supreme Court rejected application of a federal antitrust rule that would have limited the damages that private plaintiffs could recover in a state antitrust action and so limited the liability of defendants.

Further, there are a legion of decisions from state and federal courts all finding that state antitrust law is distinguishable from federal antitrust law as to antitrust standing and injury. *See, e.g., Cipro*, 348 P.3d at 858-59; *Cellular Plus, Inc. v. Sup. Ct.*, 18 Cal. Rptr. 2d 308, 312-13 (Cal. App. 4 Dist., Div. 1 1993); *see also, e.g., Samsung Elec. Co. v. Panasonic Corp.*, 747 F.3d 1199, 1205 n.4 (9th Cir 2014); *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1003-04 (9th Cir. 2008); *In re Capacitors Antitrust Litig.*, No. 14-CV-03264-JD, 2015 WL 3398199, *13 (N.D. Cal. May 26, 2015); *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-MD-2420 YGR, 2014 WL 4955377, *10 (N.D. Cal. Oct. 12, 2014); *Stanislaus Food Prods. Co. v. USS-POSCO Indus.*, 782 F. Supp. 2d 1059, 1079–80 (E.D. Cal. 2011); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1123 (N.D. Cal. 2008); *In re Graphics Processing Unit Antitrust Litig.*, 527 F. Supp. 2d 1011, 1025 (N.D. Cal. 2007).

In light of this precedent, a federal court must consider state law to be distinguishable from federal law on standing and injury in addressing the issue of a third party blocking patent. *See, e.g., Nationwide Mut. Ins. Co. v. Buffeta*, 230 F.3d 634, 637 (3rd Cir. 2000). And where California law is at issue, the question is whether the California Supreme Court would have reached a different result in addressing third party blocking patents under state antitrust law in reliance on its prior decision in *Cipro* and/or on general state principles regarding causation.

II. UNDER CALIFORNIA LAW, THE EXISTENCE OF A THIRD-PARTY PATENT INFRINGEMENT LAWSUIT DOES NOT BAR A REVERSE PAYMENT CHALLENGE

The Panel did not, in reaching its holding, address the *Cipro* decision of the California Supreme Court. Had the Panel done so, it likely would have predicted that the probability of success of an unadjudicated third-party patent infringement lawsuit against the generic manufacturer is legally irrelevant. It has no bearing on a challenge to a reverse payment settlement, and does not break the causal link between the settlement and any resulting harm to competition.

Cipro specifically held that a patent is only "a right to ask the government to exercise its power to keep others from using an invention without consent" (*Cipro*, 348 P.3d at 860 (citing *Zenith v. Hazeltine*, 395 U.S. 100 (1969)), that "patents are in a sense probabilistic, rather than ironclad, . . ." (*id.*), and that the predicted ultimate success or failure of a patent infringement lawsuit thus cannot operate to break causation of harm (*id.* at 870 n.19). Rather, the *Cipro* Court specifically held that the size of an unexplained large reverse payment, standing alone, provides a workable surrogate for a patent's strength—allowing a court to infer that a large payment suggests a weaker patent—so that a court does not have to conduct an independent mini-trial on the strength or weakness of a

patent. *Cipro*, 348 P.3d at 870-71 (citing and quoting *Actavis*, 133 S.Ct. at 2236-37).

Based on *Cipro*, it is not at all clear that California Supreme Court would allow an unadjudicated third party patent to justify or negate liability for an anticompetitive reverse payment agreement. Indeed, the core rationale of *Cipro* is that the level of uncertainty of a given patent cannot be assumed away, or conversely, the protection afforded by that patent cannot be viewed as conclusive absent a court injunction finding it to be so. *See Cipro*, 348 P.3d at 859-860. The Panel decision would thus give an untested third party patent the very conclusiveness that *Cipro* expressly rejected, and would reintroduce the very same requirement of a detailed exploration of a patent's strengths and weaknesses that *Cipro* disclaimed—even as to causation. No court appears to have interpreted *Cipro* as allowing for such a categorical exception as to causation for third party untested patents. *See, e.g.*, *In re Wellbutrin XL Antitrust Litig.*, 133 F. Supp. 2d 734, 764 n.45 (E.D. Pa. 2015) (finding that *Cipro* controlled on causation as to a third party patent in spite of the district court's disagreement with that decision).

III. UNDER CALIFORNIA LAW, PLAINTIFFS MAY PURSUE AN ANTITRUST CAUSE OF ACTION EVEN IF THERE ARE MULTIPLE CAUSES OF THEIR INJURY

In addition, the Panel decision did not account for California Supreme Court precedent holding that plaintiffs retain a valid cause of action even if there

are multiple causes of their injury (of which only one may be the illegal act in question). *See, e.g., In re Tobacco II Cases*, 207 P.3d at 39-40 (state unfair competition law); *PPG Industries*, 975 P.2d at 655-56 (tort). Had the Panel done so, it likely would have predicted that the California Supreme Court would hold that the hypothetical success of a patent infringement lawsuit based on a third party lawsuit operates to break causation of harm only if undisputed evidence demonstrated the lawsuit was certain to succeed as to validity, infringement, and enforceability.

This conclusion follows from well-established precedent under state tort principles and California's Unfair Competition Law. *Cf., e.g., Saxer v. Philip Morris*, 126 Cal. Rptr. 327, 338 (Cal. App. 4 Dist., Div. 2 1975) (it is enough for plaintiffs to be injured by one facet of a conspiracy violating state antitrust laws); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 987, 990 (9th Cir. 2000) (same). There is no reason to think that the California Supreme Court will carve out antitrust as being subject to a different rule. Quite to the contrary, it is reasonable to predict that the California Supreme Court would hold that antitrust liability still attaches if there are multiple causes of a plaintiff's injury—even if the illegal act in question may have played only a small part in bringing about that injury. *See, e.g., Cipro*, 348 P.3d at 864 ("Every restraint of trade condemned for suppressing market entry involves uncertainties about the extent to which competition would have come to pass. [Citation omitted.]"); *see also, e.g., Paroline*

v. United States, 134 S.Ct. 1710, 1723-24 (2014) (discussing general tort principles); *People v. Jennings*, 237 P.3d 474, 496 (Cal. 2010) (discussing general tort and criminal law principles). The California Supreme Court has emphatically stated that the goal of state antitrust law is maximum deterrence even if that results in a windfall for plaintiffs. *Clayworth*, 233 P.3d at 1083.

Here, viewing the evidence in the manner most favorable to defendants, there was still a 20 percent chance that the generic manufacturer would have prevailed and been found not to be infringing against the third-party "blocking" patent. Because the outcome of any such blocking litigation was far from certain, defendants could argue only that there were multiple causes of plaintiffs' injuries and could not avoid liability on this basis.

CONCLUSION

As part of this Panel's consideration of the petitions for rehearing and rehearing en banc, the State of California respectfully requests that this Court certify the state law question proposed above. Such certification fits the rules of this Court and of the California Supreme Court. By allowing the California Supreme Court resolve that question, this Panel can satisfy "judicial federalism" concerns. *See Michaels*, 150 F.3d at 259.

DATED: September 7, 2017

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure, because this brief contains no more than 2,106 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 29(b)(4); and

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3. Under Third Circuit L.A.R. 31(c), I further certify that before filing the electronic version of this brief, the electronic version of this brief was scanned using Trend Micro version: 12.0.1352 and that no virus or worm was detected in the file.

Dated: September 7, 2017

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CERTIFICATE OF BAR MEMBERSHIP

Under Third Circuit L.A.R. 46, I certify that I have been admitted to the bar of the United States Court of Appeals for the Third Circuit.

Dated: September 7, 2017

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CERTIFICATE OF SERVICE

I, Belinda Chan, certify that, on September 7, 2017, I electronically filed the foregoing document with the United States Court of Appeals for Third Circuit by using the CM/ECF system. All counsel of record are registered CM/ECF filers and will be served by the appellate CM/ECF system.

Dated: September 7, 2017 /s/ Belinda Chan
Belinda Chan