SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

Date: 08/21/2009 Time: 01:30:00 PM Dept: C-75

Judicial Officer Presiding: Judge Richard E. L. Strauss
Clerk: Tipin Johnson

Bailiff/Court Attendant: Paul Darvin
ERM:
Reporter: Teri Smith, 7949

Case Init. Date: 11/08/2000

Case No: JCCP4154 Case Title: JCCP4154 COORDINATION PROCEEDING CIPRO CASES I & II

Case Category: Civil - Unlimited Case Type: Antitrust/Trade Regulation

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Event Type: Summary Judgment / Summary Adjudication (Civil)
Moving Party: BAYER CORPORATION
Causal Document & Date Filed:Motion to Dismiss, 03/23/2009

Appearances:

For Appearances, please see sign in sheet, attached hereto and incorporated herein.

The court's tentative ruling is published but not read on the record. Court hears oral argument and confirms its modified tentative ruling, per agreement of both sides, as follows:

Defendant Bayer Corporation's Motion for Summary Judgment

Defendant Bayer Corporation's Motion for Summary Judgment is GRANTED. Under CCP § 437c, if the parties' papers show there is no triable issue of material fact and the "'moving party is entitled to a judgment as a matter of law'" (CCP § 437c(c)), the court must grant the motion for summary judgment. (Aguilar v. Atlantic Richfield (2001) 25 Cal.4th 826, 843.) Subdivision (p)(2) states: "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action ... cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show a triable issue of one or more material facts exists as to that cause of action or a defense thereto."

The Consolidated Second Amended Complaint (SAC) alleges three causes of action for (1) antitrust in violation of the Cartwright Act, under California Business and Professions Code Sections 16720, et. seq.; (2) unfair competition in violation of California Business and Professions Code Sections 17200 et. seq.; and (3) common law monopolization. Essentially, Plaintiffs allege Defendant Bayer entered into unlawful and anti-competitive agreements with its horizontal competitors, Defendants Barr Laboratories; Hoechst Marion Roussel, Inc. (HMR) and HMR's then subsidiary, Defendant Rugby Group, Inc. (Rugby). Plaintiffs allege these agreements, referred to as reverse payment settlements, (hereinafter the "agreement") effectively allowed Bayer to maintain an exclusive right to manufacture and market Cipro in California without competition to bring a generic form of ciprofloxacin to the market place. The result to consumers and Plaintiffs was increased costs of the prescription drug Cipro and increased profits to Bayer. In addition, the other parties to the agreement received large payments for not producing a generic form of Cipro.

As discussed more fully herein, the Court finds that the agreement does not violate the Cartwright Act. The undisputed evidence establishes that no triable issue of material fact exists that the agreement did

not fall outside the exclusionary scope of the patent; there is no evidence that the patent suit by Bayer against Barr was objectively baseless; and Plaintiff cannot establish that the settlement was otherwise unlawful.

The Cartwright Act (§§ 16700-16758) was designed primarily to prevent organization of trusts for control of markets for merchandise, but its definition of trust may, not unreasonably, include any contract "to carry out restrictions in trade or commerce," and to prevent competition in "manufacturing, sale or purchase of merchandise," etc. (California Kitchens v United Brotherhood of Carpenters & Joiners (1956) 139 Cal App 2d 597)California courts interpreting the Cartwright act recognize the persuasive authority of federal decisions under the Sherman Act and have liberally applied the federal Sherman Act doctrine in interpreting the Cartwright Act. (See, e.g., Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 542; Cellular Plus, Inc. v. Superior Court (1993) 14 Cal. App. 4th 1224, 1242; Bert G. Gianelli Distributing Co. v. Beck & Co. (1985) 172 Cal. App. 3d 1020, 1042, overturned on other grounds by Dore v. Arnold Worldwide, Inc. (2006) 39 Cal.4th 384.) The Cartwright Act, like its federal counterpart, "has not been interpreted to penalize natural monopolies." (Freeman v. San Diego Ass'n of Realtors, 77 Cal.App.4th 171, 200.)

The Cartwright Act and the federal antitrust laws are interpreted to permit restraints of trade as long as those restraints are reasonable under the circumstances. Following federal law, the Cartwright Act recognizes two distinct categories of offenses: "Per Se" violations, and other potentially harmful conduct that is treated under the so-called "Rule of Reason." Under the per se illegal theory, conduct is conclusively presumed to be unlawful because of its pernicious effects on competition and lack of any redeeming virtue. In other words, it is illegal regardless of any alleged business justification or pro-competitive effects. (Marin County Bd. Of Realtors, Inc. v. Palsson, (1976) 16 Cal.3d 920, 930-31.) Under the Rule of Reason analysis, conduct violates the Cartwright Act if the plaintiff shows that the conduct is an unreasonable restraint of trade, meaning conduct that unreasonably impairs competition and harms consumers. The Rule of Reason prohibits only those actions that cause an "unreasonable restraint of trade" (Standard Oil Co. v. United States (1911) 221 US 1, 87; see also People v. Building Maint. Contractors' Ass'n, Inc. (1953) 41 Cal.2d 719, 727.) If an alleged restraint of trade is not per se illegal, the Rule-of-Reason analysis should be applied (see Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal.3d 842, 855-finding the rule of reason to be a factual inquiry into whether a particular action is an unreasonable restraint on trade)].

Plaintiffs allege that the agreement at issue here was a per se violation of the Cartwright Act. (SAC ¶140.) Plaintiffs argue that the agreement at issue is a horizontal agreement between competitors to allocate markets, which have been held to be per se illegal under the Cartwright Act. Plaintiffs urge this Court to find that under California law, "a naked payment from a patent holder to a non-patent holder to abandon its challenge to the patent's validity and stay out of the market for the patented product-thus ensuring supra-competitive prices-must be scrutinized under the rule that agreements not to compete are per se illegal."(Plaintiffs' Opposition, p. 31.)

However, the Court declines to find the agreement is illegal per se, as the per se label is reserved for, "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." (Marin County Bd. Of Realtors, Inc. v. Palsson, (1976) 16 Cal.3d 920, 930-31.) 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. The California Supreme Court has instructed that "before acceding to the demand for such a formidable rule," "applicable case law" must condemn the conduct. (Marin County, 16 Cal.3d at 931.) Given that this appears to be a case of first impression, there is simply no legal basis to support that the Cartwright Act be interpreted in such a manner so as render the agreement per se illegal, as there has been no authority provided by Plaintiffs demonstrating that California courts have historically found that these agreements have a "pernicious effect" on competition which lacks "any redeeming virtue." Moreover, it is well settled that the law favors settlements and this would extend to patent infringement suits as well.
Plaintiffs' reliance on Vulcan Powder Co. v. Hercules Powder Co. (1892) 95 Cal. 510, to support that an agreement like this should be determined to be illegal per se because it constitutes an agreement not to compete is unpersuasive. The Court in Vulcan found an antitrust violation because the agreement exceeded the scope of the patent. The contract at issue in that case, unlike here, was not confined to the product (dynamite) produced under the patents, and involved a collaboration among many industry

members including some that did not have patent rights to establish a commitment to fix prices. As will be discussed in greater detail below, the agreement here was confined to the product produced under the patent and did not exceed the scope of the patent's right to exclude all infringers from marketing a generic version of Cipro.

Nor is there any basis to support that the agreement is per se illegal under federal law. The federal cases under the Sherman Act have found that these types of agreements are not illegal per se violations of federal antitrust law. Under the Sherman Act, the courts have held that a reverse payment settlement agreement like the one at issue here, (See Schering-Plough Corp. v. FTC (11th Cir.2005) 402 F.3d 1056; Valley Drug Co. v. Geneva Pharms., Inc., (11th Cir. 2003) 344 F.3d 1294; In Re Tamoxifen Citrate Antitrust Litig. (2d Cir. 2006) 466 F.3d at 190) and specifically this very agreement (See In Re Ciprofloxacin Hydrochloride Antitrust Litig. ("Cipro II") (E.D.N.Y. 2005) 363 F. Supp. 2d 514, 541; and In Re Ciprofloxacin Hydrochloride Antitrust Litig. ("Cipro III") (Fed. Cir. 2008) 544 F.3d 1323, 1341) are not illegal per se. The Federal Circuit Court in Cipro III held that, "only agreements that have a predictable and pernicious anticompetitive effect and limited potential for procompetitive effect are deemed to be per se unlawful under the Sherman Act. A finding of per se unlawfulness is appropriate once experience with a particular type of restraint enables the Court to predict with confidence that the rule of reason will condemn it." The court found that this specific agreement was not per se illegal under the Sherman Act as it did not restrict more competition than allowed under the scope of the patent. (Cipro III, at 1332.)

Although Plaintiffs argue that the Court should not follow the federal court decisions, arguing that the Cartwright Act is broader (i.e. prohibits more conduct) than the Sherman Act, the Court is not persuaded that it is broader in any way pertinent to the issues before the Court. The Cartwright Act and the federal Sherman Act share similar language and objectives, and California courts often look to federal precedents under the Sherman Act for guidance. (Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363, 369.) Although not identical, "judicial interpretations of the Sherman Act are, nevertheless, often helpful because of the similarity in language and purpose between the federal and state statutes." (Morrison v. Viacom, Inc., (1998) 66 Cal.App.4th 534, 541.) "Because the Cartwright Act is patterned after the federal Sherman Act and both have their roots in the common law, federal cases interpreting the Sherman Act are applicable in construing the Cartwright Act." (Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Constr. Co., (1971) 4 Cal. 3d 354, 362 fn 3, citing to Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 315].) "Although we have referred to federal decisions under the Sherman Act, it is well settled that such cases are authoritative in cases under the Cartwright Act." (Shasta Douglas Oil Co. v. Work (1963) 212 Cal. App. 2d 618, 625, citing to Milton v. Hudson Sales Corp. (1957) 152 Cal.App.2d 418, 440.) "The Cartwright Act prohibits every trust, defined as "a combination of capital, skill or acts by two or more persons" for specified anticompetitive purposes. The federal Sherman Act prohibits every "contract, combination . . . or conspiracy, in restraint of trade." The similar language of the two acts reflects their common objective to protect and promote competition. Since the Cartwright Act and the federal Sherman Act share similar language and objectives, California courts often look to federal precedents under the Sherman Act for guidance." (Chavez v. Whirlpool Corp. (2001)93 Cal. App. 4th 363, 369.)

While the Court recognizes that the federal decisional law is not binding on this Court (unless otherwise indicated herein) the Court considers the federal case law concerning this agreement as persuasive authority, especially in light of the lack of controlling California authority on point. Further, the rule enunciated under the Sherman Act in Cipro III mirrors the law in California that it is only those agreements that have a "historical and pernicious" effect which should be found per se illegal. Although Plaintiffs cite to In re Cardizem CD Antitrust Litigation, as federal authority finding a reverse payment settlement per se illegal, the agreement at issue in that case exceeded the exclusionary scope of the patent involved and restrained non-infringing drugs, and thus does not aid Plaintiffs here. (In re Cardizem CD Antitrust Litigation (6th Cir. 2003) 332 F.3d 896.)

As discussed more fully below, the agreement here does not restrict more competition than allowed under the scope of the patent. To adopt Plaintiffs' argument that horizontal agreements between competitors to allocate markets are traditionally subject to per se illegal treatment wholly ignores that this agreement concerns a patent which gives the patent holder the legal right to exclude infringing competition. Therefore, the Court does not find the agreement to be illegal per se under the Cartwright Act, as there is no legal basis under California law to do so. Nor is there any basis to support a per se illegal determination under federal decisional law.

This Court also finds that the agreement does not violate the Cartwright Act under the Rule of Reason. To state a Cartwright Act antitrust claim, Plaintiffs must show that: 1) an agreement exists between independent entities; 2) the agreement is in restraint of trade; and 3) the restraint is unreasonable. To prove an unreasonable restrain, Plaintiffs must show the agreement had a "substantially adverse effect on competition in the relevant market." (Exxon Corp. v. Superior Court (1997) 51 Cal. App. 4th 1672, 1681.) Plaintiff must show: (1) that an alleged restraint on trade has anticompetitive effects, and (2) that the anticompetitive effects outweigh any pro-competitive benefits. (See Bert G. Gianelli Distrib. Co. v. Beck & Co. (1985) 172 Cal.App.3d 1020, 1048, overturned on other grounds by Dore v. Arnold Worldwide, Inc. (2006) 39 Cal.4th 384.) The focus is on the actual effects that the challenged restraint has had on competition in a relevant market.

As previously discussed, there is no California authority evaluating whether a Hatch Waxman reverse payment settlement agreement violates state antitrust law (Cartwright Act or otherwise). Thus, the Court turns to federal decisions concerning the Sherman Act as persuasive authority to guide its decision. Federal case law is not only instructive in this regard, it is dispositive.

The federal court cases dealing generally with Hatch Waxman settlements, and specifically with this agreement, have uniformly held that settlements within the scope of the patent do not violate antitrust laws. The federal courts have held that in order to determine whether there is an antitrust violation (under the federal antitrust Sherman Act) the Court must first analyze whether the agreement at issue falls within the exclusionary scope of the patent. If it does, there is no anti-trust violation because the settlement agreement did not cause anticompetitive effects beyond those inherent in the patent. As stated in Tamoxifen and quoted in Cipro II, "Unless and until the patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under existing antitrust law, as long as the competition is restrained only within the scope of the patent." (Id. at 213 (quoting Cipro II at 535.) Additionally, the district and appellate court in Cipro II and III have already determined that the settlement at issue here did not exceed the scope of the patent and did not have anti-competitive effects beyond the patent. In Cipro III, the Federal Circuit affirmed the district court's holding that there was no antitrust violation because the settlement agreement fell within the "exclusionary zone" of the patent. The Federal Circuit Court found that because patents are presumed valid and provide the patentee with the right to exclude others (infringers) from the market, the challenged anticompetitive effects of the agreement at issue here were directly attributable to the patent, and therefore, no antitrust remedy was available. (In re Ciprofloxacin Hydrochloride Antitrust Litig. (Cipro III) (Fed. Cir. 2008) 544 F.3d 1323, 1332-1336.)
The Court finds the result should be no different under the Cartwright Act, as we are dealing with the exact same settlement agreement, involving the same type of Plaintiffs (indirect purchasers), and the same theories of liability. Additionally, the standard articulated in the federal cases comports with California law and is consistent with regard to the antitrust liability concerning patents. The district court in Cipro II, affirmed by the Circuit Court in Cipro III, utilized the same framework, i.e. a rule of reason, in its analysis which differs in no significant respect and is not unlike the rule of reason articulated by the courts for purposes of a state antitrust analysis under the Cartwright Act. Although Plaintiffs argue that the Cartwright Act is more restrictive than the Sherman Act, such argument is unavailing as previously discussed above. Further, while the cases cited by Plaintiffs in this regard recognize that the scope of the Cartwright Act may in some situations be broader than or differ from the Sherman Act, there is no authority or support which persuades this Court to conclude that the Cartwright Act was intended to be broader than the Sherman Act on the question of reverse payment settlements.
California cases involving antitrust violations and patents likewise hold that conduct falling within the scope of a patent is not an antitrust violation. The grant of a patent is the grant of a statutory monopoly and is an express exception to laws prohibiting monopolies. (Sears, Roebuck & Co. v. Stiffel Co. (1964) 376 U.S. 225, 229; Aetna Casualty & Sur. Co. v. Superior Court (1993)19 Cal. App. 4th 320, 328.) In Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal.App.2d 748, the California Court of Appeal ruled that in cases in which the exercise of patent rights is involved, a patent holder "brings himself within the proscription of the antitrust laws only when the patentee or his assignee acts beyond that which was necessary or incidental to the scope of this patent." (Fruit Machinery, (1953) 118 Cal.App.2d 748.) In Fruit Machinery, the defendant was a sublicensee of a patented peach-pitting machine who challenged the sublicense agreement on the ground that the plaintiff "created a monopoly" through the sublicense. (Id. at 761.) The Court rejected the argument, noting that, "Defendant has not shown that the parties, in executing and carrying out the sublicense agreement in suit, exercise rights or powers not accorded them by the patent law or abused any rights or powers accorded them by that law." (Id. at 762.) Thus, California law also supports that unless the agreement goes, "beyond the scope of the patent rights"

there is no antitrust violation. (Id.)
The undisputed evidence shows that the agreement here was clearly within the scope of the patent. A patent is presumed valid. (35 U.S.C. 282) The 444 patent issued on June 2, 1987, and expired December 9, 2003 (UMF No. 3, and evidence cited therein). The FDA granted pediatric exclusivity to Bayer's Cipro until June 9, 2004. (UMF No. 4, and evidence cited therein.) Under the federal food and drug laws, no generic Cipro could lawfully enter the market until June 9, 2004. (21 U.S.C. §355a(b)(2)(A)(ii).) The 444 patent is a compound patent and covers the molecule/compound ciprofloxacin hydrochloride, which is the only active ingredient in all ciprofloxacin products however formulated. (UMF No. 2, and evidence cited therein) Claim 12 did not change in reexamination. (UMF Nos. 26-28, and evidence cited therein.) Because the patent covers the ciprofloxacin molecule, Bayer had the right to exclude infringing competition from all forms of generic Cipro. (In Re Ciprofloxacin Hydrochloride Antitrust Litig. ("Cipro I") (E.D.N.Y. 2003) 261 F. Supp. 2d 188, 249.) In 1991 Barr filed an ANDA with a Paragraph 4 certification, alleging the patent was invalid. Barr stipulated that its ANDA product infringed on the 444 patent. (UMF Nos. 5-8, 19, and evidence cited therein.) Thus, the Cipro patent precluded all generic competition, including Barr's admitted infringement. On January 16, 1992, Bayer sued Barr alleging that the ANDA infringed on the patent. Barr answered with claims of invalidity and unenforceability. The parties settled. (UMF Nos. 9-17, and evidence cited therein.) Pursuant to the Cipro Settlement, the Generic Defendants agreed not to infringe Bayer's patent with a competing ciprofloxacin product until six months before Bayer's '444 Patent expired, with settlement payments from Bayer as consideration for the resolution of the Generic Defendants' disputed patent challenge. (UMF Nos. 15-24, and evidence cited therein.) As such, the agreement precluded no more competition than was already precluded under the patent, as under the patent, Bayer had the right to exclude all infringers from marketing a generic version of Cipro prior to the expiration of the patent. As the court in Cipro II found, "this is well within Bayer's rights as the patentee." (Cipro II at 524.) California law compels no different conclusion. Thus, Defendants have established that the settlement agreement fell within the exclusionary scope of the patent.
Therefore, there is no antitrust violation under California law (Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal.App.2d 748) nor under federal law, "Unless and until the patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under existing [federal] antitrust law, as long as competition is restrained only within the scope of the patent." (Tamoxifen, 466 F.3d at 213; In re Ciprofloxacin Hydrochloride Antitrust Litig. (Cipro III) (Fed. Cir. 2008) 544 F.3d 1323.) Whether the underlying infringement lawsuit was "objectively baseless" requires a finding that the suit is so baseless, "that no reasonable litigant could realistically expect success on the merits." (In re Tamoxifen Citrate Antitrust Litig.) (2d Cir. N.Y. 2006) 466 F.3d 187, 213 citing Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., (1993) 508 U.S. 49, 60.)
However, Plaintiffs failed to allege that Bayer's infringement suit was objectively baseless, was sham litigation, or that there was fraud on the PTO in their SAC, and Plaintiffs cannot defeat the motion for summary judgment by doing so now. A plaintiff cannot defeat a motion for summary judgment by bringing new, unpleaded issues in the opposing papers. (Oakland Raiders v. National Football League (2005) 131 Cal.App.4th 621, 648.) Even if such allegations were included in the SAC, there is no evidence or legal support that the suit was objectively baseless or was a sham. "Bayer's success in its litigations against Schein, Mylan, and Carlsbad forecloses any argument that its lawsuits were shams." (UMF Nos. 29-32, and evidence cited therein; Cipro II, 363 F.Supp.2d at 547.)
Similarly, Plaintiffs cannot meet the objectively baseless standard by resorting to allegations of inequitable conduct since the SAC does not allege inequitable conduct, much less that Bayer's infringement suit against Barr was objectively baseless or a sham. Even if there were such allegations, inequitable conduct is only an equitable defense to a patent infringement suit which, if proven, can render the entire patent unenforceable. (See e.g. Hoffmann-La Roche, Inc. v. Promega Corp. (Fed. Cir. 2003) 323 F.3d 1354, 1372.) As such, Bayer's alleged inequitable conduct in procuring the patent is not relevant to the case at hand as it pertains to Plaintiffs' antitrust claims. The Federal Circuit has held that inequitable conduct is a defense to a patent infringement claim, not an affirmative antitrust claim. (Nobelpharma AB v. Implant Innovations, Inc., (Fed. Cir. 1998) 141 F.3d 1059, 1070.) Moreover, the Court finds that the determination of fraud and inequitable conduct would involve substantial questions of patent law, which this Court does not have jurisdiction to decide. (See Lockwood v. Sheppard, 173 Cal.App.4th 675 (2009) (holding that the court lacked jurisdiction to make a determination regarding PTO procedures.)

Concerning Plaintiffs' arguments that the settlement had anticompetitive effects outside of, or expanding, the scope of the patent (manipulation of the 180-day exclusivity period; preventing other generic

challengers from challenging the 444 patent; that the settlement prevented other generic defendants from marketing non-infringing products; or that but for the settlement, Barr "could have won" its case against Bayer and generic Cipro could have come to market earlier(SAC ¶¶117, 122, 145(ii), all courts analyzing this specific agreement and considering these very same arguments found that the agreement extended no further than the scope of what the patent protects. (Cipro I, 261 F. Supp. 2d at 257; Cipro III 544 F.3d at 1338-1339.) Moreover, the FDA did not award Barr the 180-day exclusivity period, there was no evidence of an actual adverse effect on competition due to that provision (Cipro III, 544 F.3d at 1340, n. 14), and it is undisputed that four other generic manufactures challenged the validity of the patent which supports the settlement did not prevent others from challenging the patent. (UMF Nos. 20, 29-33, and evidence cited therein.) Further, since the patent covered the molecule ciprofloxacin, a settlement which precluded only a generic version of Cipro would not restrain or prevent a generic from marketing a non-infringing product. (In Re Tamoxifen Citrate Antitrust Litig. (2d Cir. 2006) 466 F.3d at 190, 214.) Additionally, Plaintiffs' allegations that Barr would have won the patent challenge are speculative, and are dismissed as, "little more than dubious expectations or desires." (Cipro I, 261 F.Supp.2d at 202.)

Thus, to the extent Plaintiffs attack the presumption of patent validity to argue that the infringement suit was objectively baseless, or other inequitable conduct which would remove the protection of the patent, Plaintiffs have not included such claims in the SAC. The SAC is silent as to allegations non-infringement, invalidity, inequitable conduct, or fraud on the PTO. Therefore, Plaintiffs cannot rely on such claims which fall outside of their pleadings to defeat summary judgment. Further, this Court lacks jurisdiction to make such determinations.

Addressing Plaintiffs' argument that this Court should employ a "traditional rule of reason analysis" applied in state trade cases rather than the "objectively baseless" standard, the outcome would be no different as the Court would still need to evaluate at the outset whether the agreement fell within the scope of the patent, because if it does, there is no antitrust violation. (Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal.App.2d 748.) Thus, under California law, like federal law, there is only antitrust liability for conduct which goes beyond the exclusionary scope granted by the patent, a salient point Plaintiffs conveniently ignore. Instead, Plaintiffs urge this Court to analyze the agreement and its effects without taking into account that Bayer had a patent and the legal rights which are granted by the patent. Further, the Court believes that the objectively baseless standard is applicable given the unique nature of the agreement at issue (a pharmaceutical reverse payment settlement that does not arise under state law) which results from a patent infringement action (arising under federal law), and considering that federal courts have utilized this standard in adjudicating such agreements for purposes of determining antitrust liability.

Further, even considering the two "key facts" (size of payment/price hike)upon which Plaintiffs rely to demonstrate the alleged anticompetitive effects on trade under their traditional rule of reason analysis, they either fall within the rights of the patent holder (e.g. the price of the patented product) or are not relevant to the antitrust analysis. Plaintiffs argue that that the size of the payment is a key indicator of the patent's strength and supports a reasonable inference that the patent would have been struck down as invalid. Patent validity is not relevant in the determination of whether the settlement agreements violate antitrust laws. ("The Valley Drug court thus took the position that an antitrust court need not consider the potential invalidity of the patent in an exclusion-payment settlement, except in those extreme cases involving fraud on the Patent Office or assertion of a patent known to be invalid, i.e., in circumstances giving rise to an allegation of Walker Process fraud or sham litigation." (Cipro II (E.D.N.Y. 2005)363 F. Supp. 2d 514, 525) As previously discussed, no such claims were alleged in the SAC. Plaintiffs also assert that since the price increased after the settlement, this also demonstrates the anticompetitive effects of the agreement. However, Bayer had the right to control the price of its product under the patent, and thus, if the settlement was within the scope of the patent, then any price increase is also within the scope of the patent. (Cipro II, (2005) 363 F. Supp. 2d at 540; Fruit Machinery (1953)118 Cal.App.2d at 759; United States v. Masonite Corp. (1942) 16 U.S. 265, 279.)

Therefore, the Court finds that as a matter of law, Plaintiffs cannot establish the agreement unreasonably restrains trade because no triable issue of material fact exists that there are no anticompetitive effects on competition beyond the exclusionary scope of the patent itself. Thus, the Court finds that the agreement does not violate the Cartwright Act. This finding also precludes Plaintiffs' UCL claim and common law monopoly claim as they are based on the same factual allegations that support the Cartwright Act claim. Thus, the Court's determination that the agreement does not violate the Cartwright Act is fatal to both the UCL claim (Belton v. Comcast Cable Holdings, LLC, (2007) 151 Cal.

App. 4th 1224, 1240- quoting Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363, 375; see also RLH Industries, Inc. v. SBC Communications, Inc. (2005) 133 Cal.App.4th 1277, 1286) and the common law monopolization claim. (Eastman Kodak v. Image Tech. Servs, Inc. (1992) 504 U.S. 451, 481-83.) Conduct by a patent holder acting within the scope of the patent is likewise immune from antitrust scrutiny even in the monopolization context. (Fruit Machinery 118 Cal.App.2d 762-63.)

Accordingly, summary judgment is granted.

Defendant's motion to dismiss is denied.

Plaintiffs' evidentiary objections are overruled. Further, to the extent that the objections failed to quote or set forth the objectionable material, they fail to conform to California Rule of Court Rule 3.1354(b)(3).

All requests for judicial notice are granted as to the existence but not truth of the items requested.

Parties wishing to argue before the Court must appear on the date and at the time noticed for the hearing. If none of the parties appears on the date and at the time noticed for the hearing, the tentative ruling shall be adopted as the final ruling of the Court.

Defendants Hoechst Marion Roussel, Inc; The Rugby Group, Inc. and Barr Laboratories, Inc.'s Motion for Summary Judgment

Defendants Hoechst Marion Roussel, Inc; The Rugby Group, Inc.; and Barr Laboratories, Inc.'s Motion for Summary Judgment is GRANTED. Under CCP § 437c, if the parties' papers show there is no triable issue of material fact and the "'moving party is entitled to a judgment as a matter of law'" (CCP § 437c(c)), the court must grant the motion for summary judgment. (Aguilar v. Atlantic Richfield (2001) 25 Cal.4th 826, 843.) Subdivision (p)(2) states: "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action ... cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show a triable issue of one or more material facts exists as to that cause of action or a defense thereto."

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As discussed more fully herein, the Court finds that the agreement does not violate the Cartwright Act. The undisputed evidence establishes that no triable issue of material fact exists that the agreement did not fall outside the exclusionary scope of the patent; there is no evidence that the patent suit by Bayer against Barr was objectively baseless; and Plaintiff cannot establish that the settlement was otherwise unlawful.

The Cartwright Act (§§ 16700-16758) was designed primarily to prevent organization of trusts for control of markets for merchandise, but its definition of trust may, not unreasonably, include any contract "to carry out restrictions in trade or commerce," and to prevent competition in "manufacturing, sale or purchase of merchandise," etc. (California Kitchens v United Brotherhood of Carpenters & Joiners (1956) 139 Cal App 2d 597)California courts interpreting the Cartwright act recognize the persuasive authority of federal decisions under the Sherman Act and have liberally applied the federal Sherman Act doctrine in interpreting the Cartwright Act. (See, e.g., Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 542;

Cellular Plus, Inc. v. Superior Court (1993) 14 Cal. App. 4th 1224, 1242; Bert G. Gianelli Distributing Co. v. Beck & Co. (1985) 172 Cal. App. 3d 1020, 1042, overturned on other grounds by Dore v. Arnold Worldwide, Inc. (2006) 39 Cal.4th 384.) The Cartwright Act, like its federal counterpart, "has not been interpreted to penalize natural monopolies." (Freeman v. San Diego Ass'n of Realtors, 77 Cal.App.4th 171, 200.)

The Cartwright Act and the federal antitrust laws are interpreted to permit restraints of trade as long as those restraints are reasonable under the circumstances. Following federal law, the Cartwright Act recognizes two distinct categories of offenses: "Per Se" violations, and other potentially harmful conduct that is treated under the so-called "Rule of Reason." Under the per se illegal theory, conduct is conclusively presumed to be unlawful because of its pernicious effects on competition and lack of any redeeming virtue. In other words, it is illegal regardless of any alleged business justification or pro-competitive effects. (Marin County Bd. Of Realtors, Inc. v. Palsson, (1976) 16 Cal.3d 920, 930-31.) Under the Rule of Reason analysis, conduct violates the Cartwright Act if the plaintiff shows that the conduct is an unreasonable restraint of trade, meaning conduct that unreasonably impairs competition and harms consumers. The Rule of Reason prohibits only those actions that cause an "unreasonable restraint of trade" (Standard Oil Co. v. United States (1911) 221 US 1, 87; see also People v. Building Maint. Contractors' Ass'n, Inc. (1953) 41 Cal.2d 719, 727.) If an alleged restraint of trade is not per se illegal, the Rule-of-Reason analysis should be applied (see Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal.3d 842, 855-finding the rule of reason to be a factual inquiry into whether a particular action is an unreasonable restraint on trade)].

Plaintiffs allege that the agreement at issue here was a per se violation of the Cartwright Act. (SAC ¶140.) Plaintiffs argue that the agreement at issue is a horizontal agreement between competitors to allocate markets, which have been held to be per se illegal under the Cartwright Act. Plaintiffs urge this Court to find that under California law, "a naked payment from a patent holder to a non-patent holder to abandon its challenge to the patent's validity and stay out of the market for the patented product-thus ensuring supra-competitive prices-must be scrutinized under the rule that agreements not to compete are per se illegal."(Plaintiffs' Opposition, p. 31.)

However, the Court declines to find the agreement is illegal per se, as the per se label is reserved for, "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." (Marin County Bd. Of Realtors, Inc. v. Palsson, (1976) 16 Cal.3d 920, 930-31.) 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. The California Supreme Court has instructed that "before acceding to the demand for such a formidable rule," "applicable case law" must condemn the conduct. (Marin County, 16 Cal.3d at 931.) Given that this appears to be a case of first impression, there is simply no legal basis to support that the Cartwright Act be interpreted in such a manner so as render the agreement per se illegal, as there has been no authority provided by Plaintiffs demonstrating that California courts have historically found that these agreements have a "pernicious effect" on competition which lacks "any redeeming virtue." Moreover, it is well settled that the law favors settlements and this would extend to patent infringement suits as well.
Plaintiffs' reliance on Vulcan Powder Co. v. Hercules Powder Co. (1892) 95 Cal. 510, to support that an agreement like this should be determined to be illegal per se because it constitutes an agreement not to compete is unpersuasive. The Court in Vulcan found an antitrust violation because the agreement exceeded the scope of the patent. The contract at issue in that case, unlike here, was not confined to the product (dynamite) produced under the patents, and involved a collaboration among many industry members including some that did not have patent rights to establish a commitment to fix prices. As will be discussed in greater detail below, the agreement here was confined to the product produced under the patent and did not exceed the scope of the patent's right to exclude all infringers from marketing a generic version of Cipro.

Nor is there any basis to support that the agreement is per se illegal under federal law. The federal cases under the Sherman Act have found that these types of agreements are not illegal per se violations of federal antitrust law. Under the Sherman Act, the courts have held that a reverse payment settlement agreement like the one at issue here, (See Schering-Plough Corp. v. FTC (11th Cir.2005) 402 F.3d 1056; Valley Drug Co. v. Geneva Pharms., Inc., (11th Cir. 2003) 344 F.3d 1294; In Re Tamoxifen Citrate Antitrust Litig. (2d Cir. 2006) 466 F.3d at 190) and specifically this very agreement (See In Re

Ciprofloxacin Hydrochloride Antitrust Litig. ("Cipro II") (E.D.N.Y. 2005) 363 F. Supp. 2d 514, 541; and In Re Ciprofloxacin Hydrochloride Antitrust Litig. ("Cipro III") (Fed. Cir. 2008) 544 F.3d 1323, 1341) are not illegal per se. The Federal Circuit Court in Cipro III held that, "only agreements that have a predictable and pernicious anticompetitive effect and limited potential for procompetitive effect are deemed to be per se unlawful under the Sherman Act. A finding of per se unlawfulness is appropriate once experience with a particular type of restraint enables the Court to predict with confidence that the rule of reason will condemn it." The court found that this specific agreement was not per se illegal under the Sherman Act as it did not restrict more competition than allowed under the scope of the patent. (Cipro III, at 1332.)

Although Plaintiffs argue that the Court should not follow the federal court decisions, arguing that the Cartwright Act is broader (i.e. prohibits more conduct) than the Sherman Act, the Court is not persuaded that it is broader in any way pertinent to the issues before the Court. The Cartwright Act and the federal Sherman Act share similar language and objectives, and California courts often look to federal precedents under the Sherman Act for guidance. (Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363, 369.) Although not identical, "judicial interpretations of the Sherman Act are, nevertheless, often helpful because of the similarity in language and purpose between the federal and state statutes." (Morrison v. Viacom, Inc., (1998) 66 Cal.App.4th 534, 541.) "Because the Cartwright Act is patterned after the federal Sherman Act and both have their roots in the common law, federal cases interpreting the Sherman Act are applicable in construing the Cartwright Act." (Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Constr. Co., (1971) 4 Cal. 3d 354, 362 fn 3, citing to Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 315].) "Although we have referred to federal decisions under the Sherman Act, it is well settled that such cases are authoritative in cases under the Cartwright Act." (Shasta Douglas Oil Co. v. Work (1963) 212 Cal. App. 2d 618, 625, citing to Milton v. Hudson Sales Corp. (1957) 152 Cal.App.2d 418, 440.) "The Cartwright Act prohibits every trust, defined as "a combination of capital, skill or acts by two or more persons" for specified anticompetitive purposes. The federal Sherman Act prohibits every "contract, combination . . . or conspiracy, in restraint of trade." The similar language of the two acts reflects their common objective to protect and promote competition. Since the Cartwright Act and the federal Sherman Act share similar language and objectives, California courts often look to federal precedents under the Sherman Act for guidance." (Chavez v. Whirlpool Corp. (2001)93 Cal. App. 4th 363, 369.)

While the Court recognizes that the federal decisional law is not binding on this Court (unless otherwise indicated herein) the Court considers the federal case law concerning this agreement as persuasive authority, especially in light of the lack of controlling California authority on point. Further, the rule enunciated under the Sherman Act in Cipro III mirrors the law in California that it is only those agreements that have a "historical and pernicious" effect which should be found per se illegal. Although Plaintiffs cite to In re Cardizem CD Antitrust Litigation, as federal authority finding a reverse payment settlement per se illegal, the agreement at issue in that case exceeded the exclusionary scope of the patent involved and restrained non-infringing drugs, and thus does not aid Plaintiffs here. (In re Cardizem CD Antitrust Litigation (6th Cir. 2003) 332 F.3d 896.)

As discussed more fully below, the agreement here does not restrict more competition than allowed under the scope of the patent. To adopt Plaintiffs' argument that horizontal agreements between competitors to allocate markets are traditionally subject to per se illegal treatment wholly ignores that this agreement concerns a patent which gives the patent holder the legal right to exclude infringing competition. Therefore, the Court does not find the agreement to be illegal per se under the Cartwright Act, as there is no legal basis under California law to do so. Nor is there any basis to support a per se illegal determination under federal decisional law.

This Court also finds that the agreement does not violate the Cartwright Act under the Rule of Reason. To state a Cartwright Act antitrust claim, Plaintiffs must show that: 1) an agreement exists between independent entities; 2) the agreement is in restraint of trade; and 3) the restraint is unreasonable. To prove an unreasonable restrain, Plaintiffs must show the agreement had a "substantially adverse effect on competition in the relevant market." (Exxon Corp. v. Superior Court (1997) 51 Cal. App. 4th 1672, 1681.) Plaintiff must show: (1) that an alleged restraint on trade has anticompetitive effects, and (2) that the anticompetitive effects outweigh any pro-competitive benefits. (See Bert G. Gianelli Distrib. Co. v. Beck & Co. (1985) 172 Cal.App.3d 1020, 1048, overturned on other grounds by Dore v. Arnold Worldwide, Inc. (2006) 39 Cal.4th 384.) The focus is on the actual effects that the challenged restraint has had on competition in a relevant market.

As previously discussed, there is no California authority evaluating whether a Hatch Waxman reverse payment settlement agreement violates state antitrust law (Cartwright Act or otherwise). Thus, the Court turns to federal decisions concerning the Sherman Act as persuasive authority to guide its decision. Federal case law is not only instructive in this regard, it is dispositive.

The federal court cases dealing generally with Hatch Waxman settlements, and specifically with this agreement, have uniformly held that settlements within the scope of the patent do not violate antitrust laws. The federal courts have held that in order to determine whether there is an antitrust violation (under the federal antitrust Sherman Act) the Court must first analyze whether the agreement at issue falls within the exclusionary scope of the patent. If it does, there is no anti-trust violation because the settlement agreement did not cause anticompetitive effects beyond those inherent in the patent. As stated in Tamoxifen and quoted in Cipro II, "Unless and until the patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under existing antitrust law, as long as the competition is restrained only within the scope of the patent." (Id. at 213 (quoting Cipro II at 535.) Additionally, the district and appellate court in Cipro II and III have already determined that the settlement at issue here did not exceed the scope of the patent and did not have anti-competitive effects beyond the patent. In Cipro III, the Federal Circuit affirmed the district court's holding that there was no antitrust violation because the settlement agreement fell within the "exclusionary zone" of the patent. The Federal Circuit Court found that because patents are presumed valid and provide the patentee with the right to exclude others (infringers) from the market, the challenged anticompetitive effects of the agreement at issue here were directly attributable to the patent, and therefore, no antitrust remedy was available. (In re Ciprofloxacin Hydrochloride Antitrust Litig. (Cipro III) (Fed. Cir. 2008) 544 F.3d 1323, 1332-1336.)

The Court finds the result should be no different under the Cartwright Act, as we are dealing with the exact same settlement agreement, involving the same type of Plaintiffs (indirect purchasers), and the same theories of liability. Additionally, the standard articulated in the federal cases comports with California law and is consistent with regard to the antitrust liability concerning patents. The district court in Cipro II, affirmed by the Circuit Court in Cipro III, utilized the same framework, i.e. a rule of reason, in its analysis which differs in no significant respect and is not unlike the rule of reason articulated by the courts for purposes of a state antitrust analysis under the Cartwright Act. Although Plaintiffs argue that the Cartwright Act is more restrictive than the Sherman Act, such argument is unavailing as previously discussed above. Further, while the cases cited by Plaintiffs in this regard recognize that the scope of the Cartwright Act may in some situations be broader than or differ from the Sherman Act, there is no authority or support which persuades this Court to conclude that the Cartwright Act was intended to be broader than the Sherman Act on the question of reverse payment settlements.

California cases involving antitrust violations and patents likewise hold that conduct falling within the scope of a patent is not an antitrust violation. The grant of a patent is the grant of a statutory monopoly and is an express exception to laws prohibiting monopolies. (Sears, Roebuck & Co. v. Stiffel Co. (1964) 376 U.S. 225, 229; Aetna Casualty & Sur. Co. v. Superior Court (1993)19 Cal. App. 4th 320, 328.) In Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal.App.2d 748, the California Court of Appeal ruled that in cases in which the exercise of patent rights is involved, a patent holder "brings himself within the proscription of the antitrust laws only when the patentee or his assignee acts beyond that which was necessary or incidental to the scope of this patent." (Fruit Machinery, (1953) 118 Cal.App.2d 748.) In Fruit Machinery, the defendant was a sublicensee of a patented peach-pitting machine who challenged the sublicense agreement on the ground that the plaintiff "created a monopoly" through the sublicense. (Id. at 761.) The Court rejected the argument, noting that, "Defendant has not shown that the parties, in executing and carrying out the sublicense agreement in suit, exercise rights or powers not accorded them by the patent law or abused any rights or powers accorded them by that law." (Id. at 762.) Thus, California law also supports that unless the agreement goes, "beyond the scope of the patent rights" there is no antitrust violation. (Id.)

The undisputed evidence shows that the agreement here was clearly within the scope of the patent. A patent is presumed valid. (35 U.S.C. 282) The 444 patent issued on June 2, 1987, and expired December 9, 2003. The FDA granted pediatric exclusivity to Bayer's Cipro until June 9, 2004. (UMF No. 17, and evidence cited therein.) Under the federal food and drug laws, no generic Cipro could lawfully enter the market until June 9, 2004. (21 U.S.C. §355a(b)(2)(A)(ii).) The 444 patent is a compound patent and covers the molecule/compound ciprofloxacin hydrochloride, which is the only active ingredient in all ciprofloxacin products however formulated. (UMF No. 1, and evidence cited therein) Claim 12 did not change in reexamination. (UMF Nos. 21-22 and evidence cited therein.) Because the patent covers the ciprofloxacin molecule, Bayer had the right to exclude infringing competition from all forms of generic Cipro. (In Re Ciprofloxacin Hydrochloride Antitrust Litig. ("Cipro I") (E.D.N.Y. 2003) 261 F. Supp. 2d 188,

249.) Barr stipulated that its ANDA product infringed on the 444 patent. (UMF Nos. 2-5, and evidence cited therein.) Thus, the Cipro patent precluded all generic competition, including Barr's admitted infringement. Bayer initiated patent litigation against Defendant Barr. (UMF No. 6.) The parties entered into a settlement in 1997. Pursuant to the Cipro Settlement Agreement, Defendants agreed not to infringe Bayer's patent with a competing ciprofloxacin product until six months before Bayer's '444 Patent expired, with settlement payments from Bayer as consideration for the resolution of the Generic Defendants' disputed patent challenge. (UMF Nos. 7-15, and evidence cited therein.) As such, the agreement precluded no more competition than was already precluded under the patent, as under the patent, Bayer had the right to exclude all infringers from marketing a generic version of Cipro prior to the expiration of the patent. As the court in Cipro II found, "this is well within Bayer's rights as the patentee." (Cipro II at 524.) California law compels no different conclusion. Thus, Defendants have established that the settlement agreement fell within the exclusionary scope of the patent.

Therefore, there is no antitrust violation under California law (Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal.App.2d 748) nor under federal law, "Unless and until the patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under existing [federal] antitrust law, as long as competition is restrained only within the scope of the patent." (Tamoxifen, 466 F.3d at 213; In re Ciprofloxacin Hydrochloride Antitrust Litig. (Cipro III) (Fed. Cir. 2008) 544 F.3d 1323.) Whether the underlying infringement lawsuit was "objectively baseless" requires a finding that the suit is so baseless, "that no reasonable litigant could realistically expect success on the merits." (In re Tamoxifen Citrate Antitrust Litig.) (2d Cir. N.Y. 2006) 466 F.3d 187, 213 citing Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., (1993) 508 U.S. 49, 60.)

However, Plaintiffs failed to allege that Bayer's infringement suit was objectively baseless, was sham litigation, or that there was fraud on the PTO in their SAC, and Plaintiffs cannot defeat the motion for summary judgment by doing so now. A plaintiff cannot defeat a motion for summary judgment by bringing new, unpleaded issues in the opposing papers. (Oakland Raiders v. National Football League (2005) 131 Cal.App.4th 621, 648.) Even if such allegations were included in the SAC, there is no evidence or legal support that the suit was objectively baseless or was a sham. "Bayer's success in its litigations against Schein, Mylan, and Carlsbad forecloses any argument that its lawsuits were shams." (UMF Nos. 29-32, and evidence cited therein; Cipro II, 363 F.Supp.2d at 547.)

Similarly, Plaintiffs cannot meet the objectively baseless standard by resorting to allegations of inequitable conduct since the SAC does not allege inequitable conduct, much less that Bayer's infringement suit against Barr was objectively baseless or a sham. Even if there were such allegations, inequitable conduct is only an equitable defense to a patent infringement suit which, if proven, can render the entire patent unenforceable. (See e.g. Hoffmann-La Roche, Inc. v. Promega Corp. (Fed. Cir. 2003) 323 F.3d 1354, 1372.) As such, Bayer's alleged inequitable conduct in procuring the patent is not relevant to the case at hand as it pertains to Plaintiffs' antitrust claims. The Federal Circuit has held that inequitable conduct is a defense to a patent infringement claim, not an affirmative antitrust claim. (Nobelpharma AB v. Implant Innovations, Inc., (Fed. Cir. 1998) 141 F.3d 1059, 1070.) Moreover, the Court finds that the determination of fraud and inequitable conduct would involve substantial questions of patent law, which this Court does not have jurisdiction to decide. (See Lockwood v. Sheppard, 173 Cal.App.4th 675 (2009) (holding that the court lacked jurisdiction to make a determination regarding PTO procedures.)

Concerning Plaintiffs' arguments that the settlement had anticompetitive effects outside of, or expanding, the scope of the patent (manipulation of the 180-day exclusivity period; preventing other generic challengers from challenging the 444 patent; that the settlement prevented other generic defendants from marketing non-infringing products; or that but for the settlement, Barr "could have won" its case against Bayer and generic Cipro could have come to market earlier(SAC ¶¶117, 122, 145(ii), all courts analyzing this specific agreement and considering these very same arguments found that the agreement extended no further than the scope of what the patent protects. (Cipro I, 261 F. Supp. 2d at 257; Cipro III 544 F.3d at 1338-1339.) Moreover, the FDA did not award Barr the 180-day exclusivity period, there was no evidence of an actual adverse effect on competition due to that provision (Cipro III, 544 F.3d at 1340, n. 14), and it is undisputed that four other generic manufactures challenged the validity of the patent which supports the settlement did not prevent others from challenging the patent. (UMF Nos. 23-26, and evidence cited therein.) Further, since the patent covered the molecule ciprofloxacin, a settlement which precluded only a generic version of Cipro would not restrain or prevent a generic from marketing a non-infringing product. (In Re Tamoxifen Citrate Antitrust Litig. (2d Cir. 2006) 466 F.3d at 190, 214.) Additionally, Plaintiffs' allegations that Barr would have won the patent challenge are speculative, and are dismissed as, "little more than dubious expectations or desires." (Cipro I, 261 F.Supp.2d at 202.)

Thus, to the extent Plaintiffs attack the presumption of patent validity to argue that the infringement suit was objectively baseless, or other inequitable conduct which would remove the protection of the patent, Plaintiffs have not included such claims in the SAC. The SAC is silent as to allegations non-infringement, invalidity, inequitable conduct, or fraud on the PTO. Therefore, Plaintiffs cannot rely on such claims which fall outside of their pleadings to defeat summary judgment. Further, this Court lacks jurisdiction to make such determinations.

Addressing Plaintiffs' argument that this Court should employ a "traditional rule of reason analysis" applied in state trade cases rather than the "objectively baseless" standard, the outcome would be no different as the Court would still need to evaluate at the outset whether the agreement fell within the scope of the patent, because if it does, there is no antitrust violation. (Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal.App.2d 748.) Thus, under California law, like federal law, there is only antitrust liability for conduct which goes beyond the exclusionary scope granted by the patent, a salient point Plaintiffs conveniently ignore. Instead, Plaintiffs urge this Court to analyze the agreement and its effects without taking into account that Bayer had a patent and the legal rights which are granted by the patent. Further, the Court believes that the objectively baseless standard is applicable given the unique nature of the agreement at issue (a pharmaceutical reverse payment settlement that does not arise under state law) which results from a patent infringement action (arising under federal law), and considering that federal courts have utilized this standard in adjudicating such agreements for purposes of determining antitrust liability.

Further, even considering the two "key facts" (size of payment/price hike)upon which Plaintiffs rely to demonstrate the alleged anticompetitive effects on trade under their traditional rule of reason analysis, they either fall within the rights of the patent holder (e.g. the price of the patented product) or are not relevant to the antitrust analysis. Plaintiffs argue that that the size of the payment is a key indicator of the patent's strength and supports a reasonable inference that the patent would have been struck down as invalid. Patent validity is not relevant in the determination of whether the settlement agreements violate antitrust laws. ("The Valley Drug court thus took the position that an antitrust court need not consider the potential invalidity of the patent in an exclusion-payment settlement, except in those extreme cases involving fraud on the Patent Office or assertion of a patent known to be invalid, i.e., in circumstances giving rise to an allegation of Walker Process fraud or sham litigation." (Cipro II (E.D.N.Y. 2005)363 F. Supp. 2d 514, 525) As previously discussed, no such claims were alleged in the SAC. Plaintiffs also assert that since the price increased after the settlement, this also demonstrates the anticompetitive effects of the agreement. However, Bayer had the right to control the price of its product under the patent, and thus, if the settlement was within the scope of the patent, then any price increase is also within the scope of the patent. (Cipro II, (2005) 363 F. Supp. 2d at 540; Fruit Machinery (1953)118 Cal.App.2d at 759; United States v. Masonite Corp. (1942) 16 U.S. 265, 279.)

Therefore, the Court finds that as a matter of law, Plaintiffs cannot establish the agreement unreasonably restrains trade because no triable issue of material fact exists that there are no anticompetitive effects on competition beyond the exclusionary scope of the patent itself. Thus, the Court finds that the agreement does not violate the Cartwright Act. This finding also precludes Plaintiffs' UCL claim and common law monopoly claim as they are based on the same factual allegations that support the Cartwright Act claim. Thus, the Court's determination that the agreement does not violate the Cartwright Act is fatal to both the UCL claim (Belton v. Comcast Cable Holdings, LLC, (2007) 151 Cal. App. 4th 1224, 1240- quoting Chavez v. Whirlpool Corp. (2001) 93 Cal.App.4th 363, 375; see also RLH Industries, Inc. v. SBC Communications, Inc. (2005) 133 Cal.App.4th 1277, 1286) and the common law monopolization claim. (Eastman Kodak v. Image Tech. Servs, Inc. (1992) 504 U.S. 451, 481-83.) Conduct by a patent holder acting within the scope of the patent is likewise immune from antitrust scrutiny even in the monopolization context. (Fruit Machinery 118 Cal.App.2d 762-63.)

Accordingly, summary judgment is granted.

Plaintiffs' evidentiary objections are overruled. Further, to the extent that the objections failed to quote or set forth the objectionable material, they fail to conform to California Rule of Court Rule 3.1354(b)(3).

All requests for judicial notice are granted as to the existence but not truth of the items requested.

Parties wishing to argue before the Court must appear on the date and at the time noticed for the

hearing. If none of the parties appears on the date and at the time noticed for the hearing, the tentative ruling shall be adopted as the final ruling of the Court.

Defendant Watson Pharmaceutical Inc.'s Motion for Summary Judgment

Defendant Watson Pharmaceutical Inc.'s Motion for Summary Judgment is GRANTED. Under CCP §437c, if the parties' papers show there is no triable issue of material fact and the '"moving party is entitled to a judgment as a matter of law"' (CCP § 437c(c)), the court must grant the motion for summary judgment. (Aguilar v. Atlantic Richfield (2001) 25 Cal.4th 826, 843.) Subdivision (p)(2) states: "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action ... cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show a triable issue of one or more material facts exists as to that cause of action or a defense thereto."

The Court's ruling on Bayer and the Generic Defendants' Motions for Summary Judgment, finding as a matter of law that the Cipro Settlement Agreement does not unreasonably restrain trade because there are no anticompetitive effects on competition beyond the exclusionary scope of the patent itself, is dispositive as to Defendant Watson's Motion for Summary Judgment. As Defendant Watson's liability is premised on its alleged participation in the agreement, a finding that the agreement does not unreasonably restrain trade defeats Plaintiffs' claims against Defendant Watson. Therefore, the motion can be granted on this basis alone.

However, the undisputed facts and evidence also establish that no triable issue of material fact exists that no agreement or conduct of Defendant Watson restrained trade as to generic ciprofloxacin or caused the injuries claimed by Plaintiffs. Defendant Watson was not involved in the Cipro settlement agreements and had no relationship to HMR or Rugby when those agreements were made. (UMF Nos. 5, 8, 9, and evidence cited therein.) Defendant Watson's relationship with Rugby cannot support Plaintiffs' claims because that purchase caused no restraint on the availability of a generic ciprofloxacin and did not delay the introduction of the generic ciprofloxacin, the only injury alleged by Plaintiffs. (UMF Nos. 6, 7, 9, 10, 13, and evidence cited therein.) Nor can Defendant Watson's relationship with Schein support Plaintiffs' claims that the Cipro agreement prevented Schein from marketing a generic ciprofloxacin. Bayer's patent was upheld in the litigation brought by Bayer over the Schein ANDA. Thus, Defendant Watson's acquisition of Schein in no way restrained the availability of generic ciprofloxacin. (UMF Nos. 17-27, and evidence cited therein) Further, the court in Cipro I held that Defendant Watson never undertook any conduct that changed the obligations of the parties to the agreements as they existed at the time of Defendant Watson's' acquisition of Rugby or that had any effect on when or if a generic version would be available to Plaintiffs. It concluded that it was Bayer's patent that kept Schein generic ciprofloxacin off of the market, rather than any conduct of Watson. (Cipro I, 261 F. Supp.2d at 216-217.)

Accordingly, summary judgment is granted.

Plaintiffs' evidentiary objections are overruled. Further, to the extent that the objections failed to quote or set forth the objectionable material, they fail to conform to California Rule of Court Rule 3.1354(b)(3).

All requests for judicial notice are granted as to the existence but not truth of the items requested.