IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

No. S198616

IN RE CIPRO CASES I AND II

KARYN MCGAUGHEY, *et al*.,
Petitioners,

v.

BAYER CORPORATION, *et al*.,
Respondents.

After a Decision by the Court of Appeal,
Fourth Appellate District, Division One
Case No. D056361

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Of Counsel:
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave., NW
Washington, DC 20036
(202) 588-0302

Mark E. Foster (CA Bar # 101698)
LAW OFFICES OF MARK E. FOSTER
303 Almaden Blvd. Suite 500
San Jose, CA 95110
(408) 291-6219
mfoster@markfoster.com

Counsel for *Amicus Curiae*

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INTERESTS OF *AMICUS CURIAE*

The interests of the Washington Legal Foundation (WLF) are more fully set forth in its accompanying application for leave to file this brief. WLF is a nonprofit, public-interest law and policy center based in Washington, D.C. with members in all fifty States, including California. WLF regularly appears in court proceedings to promote economic liberty, free enterprise, and a limited and accountable government. To that end, WLF has appeared in numerous federal and state courts in cases related to health care delivery.

For example, WLF successfully challenged the constitutionality of Food and Drug Administration (FDA) restrictions on speech relating to off-label uses of FDA-approved drugs. (*Washington Legal Found. v. Friedman* (D.D.C. 1998) 13 F.Supp.2d 51, appeal dism'd, (D.C. Cir. 2000) 202 F.3d 331.) WLF has also filed briefs in earlier cases involving the sort of "reverse payments" at issue here, including the case in which the Eleventh Circuit determined that such patent litigation settlements do not violate federal antitrust law. (*Schering-Plough Corp. v. FTC* (11th Cir. 2005) 402 F.3d 1056, cert. den., (2006) 548 U.S. 919.)

WLF believes that both "innovator" and generic manufacturers play an important role in delivering quality health care to the American public. If advances in health care are to continue, it is vital that innovator companies who develop new drugs are afforded periods of patent protection during which potential competitors are not permitted to market the same product. At the same time, once an appropriate period of patent exclusivity has expired, consumers are well served by policies that encourage other companies to market generic versions of the new drug, thereby ensuring the competition necessary to produce lower prices.

WLF agrees with Respondents that, under California law, a settlement between innovator and generic manufacturers within the scope of the patent is entirely lawful. WLF writes separately to emphasize that federal patent law would preempt the imposition of liability under California law in this case. WLF is also concerned that that the position advanced by Petitioners in this case would, if adopted by the Court, have serious deleterious effects on the settlement of patent disputes and, ultimately, would undermine important incentives for both pioneer and generic drug firms to bring products to market.

STATEMENT OF THE CASE

This case arises out of the settlement of patent litigation between Defendant-Respondents Bayer Corporation (Bayer) and Barr Laboratories, Inc. (Barr).[1] That settlement was completed more than fifteen years ago, in January 1997. (2AA 247, ¶17.)

Bayer held a compound patent (the '444 patent) for Cipro's active ingredient, ciprofloxacin hydrochloride. Because any generic form of Cipro must necessarily contain ciprofloxacin hydrochloride, it would by definition infringe the '444 patent. In 1991, pursuant to the Hatch Waxman Act, 21 U.S.C. § 355, Barr filed an Abbreviated New Drug Application (ANDA) with the FDA, seeking permission to market a generic version of Cipro. In connection with its ANDA, Barr filed a Paragraph IV certification[2] that the '444 patent was either invalid or unenforceable. Bayer responded to the Paragraph IV certification by filing suit against Barr for patent infringement in January 1992. (2AA 346-50.)

Pursuant to the patent litigation settlement, Bayer made settlement payments totaling $398.1 million. (2AA 251, ¶ 24.) Barr

[1] The settlement also included Barr's litigation partners, Hoechst Marion Roussel, Inc. and the Rugby Group, Inc.

[2] *See* 21 U.S.C. § 355(j)(2)(A)(vii).

agreed to a consent judgment affirming the ’444 patent’s validity. (2AA 248, ¶19.) In turn, Bayer agreed to permit Barr to market a generic version of Cipro for at least six months before the ’444 patent expired. (4AA 770-774.) Although, the ’444 patent expired on December 9, 2003, the FDA granted pediatric exclusivity to Bayer until June 9, 2004. (2AA 243, ¶¶ 3-4.) As a result, when Barr began selling its generic version of Cipro on June 9, 2003, it did so a full year before any other generic was authorized to enter. Since June 2004, many other generic versions of Cipro have been marketed.

In 2000, various plaintiffs brought multiple suits in state and federal courts challenging the Cipro settlement on the basis that it violated antitrust and consumer protection laws. Twenty-six federal suits were consolidated in a multi-district litigation (MDL) before the Honorable David Trager in the Eastern District of New York. The instant California state case proceeded parallel to the MDL. In March 2005, Judge Trager granted summary judgment for the MDL defendants, holding that “there is no injury to the market cognizable under existing antitrust law, as long as competition is restrained only within the scope of the patent.” (*In re Ciprofloxacin Hydrochloride Antitrust Lit.* (E.D.N.Y. 2005) 363 F.Supp.2d 514, 535.) When the

MDL plaintiffs appealed that ruling to the U.S. Court of Appeals for the Second Circuit, Plaintiffs/Petitioners agreed to stay this action pending the appeal. (1RA 12.)

The MDL defendants moved to transfer the appeal to the Federal Circuit, which has exclusive jurisdiction over all patent cases. (*See Arkansas Carpenters Health & Welfare Fund v. Bayer AG* (2d Cir. 2010) 604 F.3d 98, 106 rehg. en banc den. (2010) 625 F.3d 779, cert. den. *sub nom. La. Wholesale Drug Co., Inc. v. Bayer AG* (2011) 131 S.Ct. 1606.) The Second Circuit transferred the appeal of the indirect purchasers, who had alleged that Bayer fraudulently obtained the Cipro patent, but retained the appeal of the direct purchasers. (*Ibid*.)

In 2008, the Federal Circuit unanimously affirmed Judge Trager's ruling and held, as a matter of law, that Bayer had not committed fraud in obtaining the Cipro patent. (*In re Ciprofloxacin Hydrochloride Antitrust Lit.* (Fed. Cir. 2008) 544 F.3d 1323, *rehg. en banc den.* (Dec. 23 2008), *cert. den. sub nom. Arkansas Carpenters Health & Welfare Fund v. Bayer AG* (2009) 129 S.Ct. 2828.) In 2010, the Second Circuit likewise affirmed Judge Trager's ruling as to the direct purchasers, holding that the Cipro settlement did not violate

antitrust laws because it did not preclude competition outside the narrow confines of the patent. (*See Arkansas Carpenters Health & Welfare Fund*, *supra*, 604 F.3d at 98.)

Following the Federal Circuit's affirmance, the instant Defendants/Respondents moved for summary judgment in this case in California Superior Court. (1RA 16.) In 2009, the court granted summary judgment for the defendants, holding that "conduct falling within the scope of a patent is not an antitrust violation" under California law. (11AA 2668.) On appeal, the California Court of Appeal, Fourth Appellate District, Division One (Nares, Benke, Aaron, JJ.) unanimously affirmed on the grounds that "an agreement is not unlawful under California and federal antitrust law if it restrains competition only within the exclusionary scope of a patent." (Slip Op. at 34.)

SUMMARY OF ARGUMENT

California law is preempted by federal law whenever it stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress. The relief sought by Petitioners, if granted, would stand as just such an obstacle to Congress's

purposes and objectives—as expressed through the federal patent laws—and therefore is preempted.

Indeed, in 1984 Congress addressed the very issues presented by this lawsuit. On the one hand, Congress sought to facilitate generics to help ensure that prescription drugs remained affordable. On the other hand, Congress wanted to ensure that the patent system provided substantial financial rewards to those whose investments in research and development resulted in the development of new life-saving medications, thereby ensuring continued R&D expenditures. Congress's compromise solution was the Drug Price Competition and Patent Term Restoration Act of 1984 (the "Hatch-Waxman Act"), which attempted to strike a balance among the competing interests of consumers, innovator drug manufacturers, and generic drug manufacturers.

The Hatch-Waxman Act granted certain patent rights to innovator drug companies while simultaneously taking steps to control prescription drug prices by streamlining the approval process for generic drugs. Importantly, none of those steps included prohibiting agreements between innovator and generic drug companies that temporarily restrain competition within the

exclusionary scope of the patent. In carefully crafting a balance among several competing interests, Congress sent an unmistakable message that the measures it adopted provided the appropriate level of constraints on drug manufacturers. Petitioners' attempt to impose additional constraints under California law runs counter to that congressional intent and is therefore preempted.

Quite apart from the invalidity of Petitioners' litigating position under the Supremacy Clause, it also constitutes bad public policy. Of course, sound public policy strongly favors the settlement of litigation. The rule adopted by the court below furthers that policy by conveying a high degree of certainty and finality to patent litigation settlements. In contrast, the rule proposed by Petitioners would significantly inhibit settlements both by calling into question the finality of settlements and by reducing the incentives for patent litigation defendants to enter into settlements. As Judge Richard Posner has pointed out, a prohibition on reverse-payment settlements would "reduce the incentive to challenge patents by reducing the challenger's settlement options should he be sued for infringement, and so might be thought anticompetitive." (*Asahi Glass Co. v. Pentech Pharms, Inc.* (N.D. Ill. 2003) 289 F.Supp. 986, 994.)

Petitioners' approach essentially asks California courts to engage in detailed evaluation of the strength of the patentee's infringement claim. That issue, of course, is precisely what the parties to patent litigation think they are resolving when they enter into a patent settlement. If this court adopts the position urged by Petitioners, the parties will have resolved nothing by their settlement. By calling into question the legality of virtually all patent settlements, Petitioners' approach will actually discourage meritorious challenges by generic companies who are reluctant to undertake expensive litigation of indeterminate duration and outcome knowing that pre-trial settlement may no longer be available. A robust patent system cannot operate under such a cloud of uncertainty.

ARGUMENT

I. THE RULE URGED BY PETITIONERS, IF ADOPTED, WOULD INTERFERE WITH THE PURPOSES CONGRESS SOUGHT TO ACHIEVE IN ADOPTING FEDERAL PATENT LAWS

A principal reason why Congress grants patents is to encourage research and development by providing significant financial rewards to those whose labor leads to the invention of new and useful products. Petitioners seek to undercut that purpose by asking this court to deprive innovators of the rewards Congress intended to

bestow upon them. In light of that conflict, the Supremacy Clause (U.S. Const., art. VI, cl. 2) requires that Petitioners' objectives in this litigation must give way to the will of Congress.

Whether the federal government has preempted an assertion of authority by state or local governments in a given instance is ultimately an issue of the intent of Congress and the operation of the Supremacy Clause. As the Supreme Court has repeatedly emphasized, "Pre-emption fundamentally is a question of congressional intent." (*English v. General Electric Co.* (1990) 496 U.S. 72, 78-79; *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516 ["The purpose of Congress is the ultimate touchstone of preemption analysis."].) In discerning Congressional intent, courts are to look to "the structure and purpose of the statute as whole, . . . as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." (*Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 486.)

Congress's intent to preempt state and local law may be explicitly stated in its statutory language or implicitly contained in the

statute's structure and purpose. (*Cipollone*, *supra*, 505 U.S. at 516.) State law is impliedly preempted if: (1) it actually conflicts with federal law; or (2) federal law so thoroughly occupies a legislative field "as to make reasonable the inference that Congress left no room for the States to supplement it." (*Ibid.* [citations omitted].) State law actually conflicts with federal law "either because compliance with both federal and state regulations is a physical impossibility, or because the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (*Ca. Fed. Sav. & Loan Ass'n v. Guerra* (1987) 479 U.S. 272, 281 [quoting *Hines v. Davidowitz* (1941) 312 U.S. 52, 67].)

Article I, § 8, cl. 8 of the Constitution gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Congress has exercised that power throughout our nation's history, starting with the Patent Act of 1790 (1 Stat. 109), which authorized the grant of 14-year monopolies to those who came up with novel and useful inventions. Congress has also been mindful, however, that if patent monopolies are too freely granted or extended, they tend to stifle rather than promote

competition. Thus, "[f]rom their inception the federal patent laws have embodied a careful balance between the need to promote innovation and the recognition that imitation and refinement are both necessary to invention itself and the very lifeblood of a competitive economy." (*Bonito Boats, Inc. v. Thunder Craft Boats, Inc.* (1989) 489 U.S. 141, 146.) Nothing in federal patent law suggests that Congress intended to permit an individual State, such as California, to alter that balance for the benefit of its citizens alone. The Supreme Court has made clear that federal patent statutes are "the supreme law of the land" and thus preempt conflicting state laws to the same extent as any other validly enacted statute. (*Sears, Roebuck & Co. v. Stiffel Co.* (1964) 376 U.S. 225, 229.)

The Drug Price Competition and Patent Term Restoration Act of 1984 (the "Hatch-Waxman Act") represents Congress's deliberate attempt to strike a balance among the competing interests of consumers, innovator drug manufacturers, and generic drug manufacturers. The Hatch-Waxman Act benefitted generic manufacturers by creating the Abbreviated New Drug Application (ANDA) procedure, which greatly streamlines the process by which generic manufacturers can receive FDA approval to market generic

copies of patented drugs as soon as the patent expires. (21 U.S.C. § 355(j).) The Act also benefitted generic manufacturers by amending patent law to allow them to use patented products in connections with studies designed for the purpose of obtaining FDA approval of an ANDA; that amendment allowed generic manufacturers to begin product testing before expiration of the patent. (35 U.S.C. § 271e(1).) Because entry of the generic competitors into the market leads to significant price reductions, speeding the generic drug approval process benefitted patients and other consumers.

The Act also benefitted innovator drug manufacturers by granting patent-term extensions under certain circumstances to compensate for the fact that the FDA drug approval process generally prevents the marketing of a drug until many years after a patent is issued and thus significantly reduces the period of time during which the inventor of the drug can profit from its exclusive marketing rights. (35 U.S.C. § 156.) By extending the patent term for innovator drugs, Congress hoped to "induc[e] pioneering research and development of new drugs." (*Teva-Pfizer, Inc.* (Fed.Cir. 2005) 395 F.3d 1324, 1327.)

The Federal Circuit has repeatedly recognized that the Hatch-Waxman Act's patent term extensions were designed to "create a new

incentive for increased expenditures for research and development" of new, life-saving therapies. (*Pfizer Inc. v. Dr. Reddy's Laboratories, Ltd.* (Fed.Cir. 2004) 359 F.3d 1361, 1364.) Indeed, the Hatch-Waxman Act emerged from "two conflicting policy objectives," one of which was "to induce name brand pharmaceutical firms to make the investment necessary to research and develop new drug products." (*Mylan Pharmaceuticals, Inc. v. Thompson* (Fed.Cir. 2001) 268 F.3d 1323, 1326 , cert. denied, (2002) 537 U.S. 941.)

In short, the Hatch-Waxman Act addresses competing concerns (a desire to provide affordable prescription drug prices for consumers and a desire to provide financial rewards that would spur research and development of new life-saving medical products) and came up with a balanced solution that included relief for consumers from anti-competitive prices. Importantly, the method adopted to provide such relief focused solely on steps designed to speed approval of generics following expiration of patents. Congress could have alternatively chosen to provide relief to consumers by some other means, such as prohibiting certain conduct within the scope of the patent, but it chose not to do so. Given that Congress was acting to maintain a "balance" among competing interests, Congress must have concluded that steps

designed to streamline approval of generics provided sufficient protection for consumers without the need to impose additional antitrust restrictions.

The ability to settle patent litigation is a critical element of a patentee's exclusionary rights. Indeed, settlement is a critical means by which the benefits of patent rights are realized. As the U.S. Court of Appeals for the Eleventh Circuit has recognized, federal patent law allows "the patentee to exploit whatever degree of market power it might gain thereby as an incentive to induce investment in innovation and the public disclosure of inventions." (*Valley Drug Co. v. Geneva Pharmaceuticals, Inc.* (11th Cir.2001) 344 F.3d 1294, 1304.) That is true even though "such arrangements undoubtedly tend to result in lower production and higher prices of the patented article than if competition were unrestrained." (*Ibid.*)

A unanimous Supreme Court has warned against the adoption of bright-line rules that undermine the settled rights of patent owners. (*Festo Corp. v. Shoketsu Kinzoko Kogyo Kabutshiki Co.*(2002) 535 U.S. 722.) In *Festo*, the Court instructed lower courts to "be cautious before adopting changes that disrupt the settled expectations of the inventing community." (*Id.* at 739 [citing *Warner-Jenkinson v. Hilton*

David Chem. Co. (1997) 520 U.S. 17, 28].) The Court explained, in the context of the patent doctrine of equivalents, that the temporary monopoly granted by a patent is a property right and that a patent owner is entitled, at all times, to understand the boundaries of its property. (*Id.* at 731.) Thus, the Court rejected any attempt to disturb settled patent law principles, concluding that "[f]undamental alterations in these rules risk destroying the legitimate expectations of inventors in their property." (*Id.* at 739.) And it did so by rejecting a lower court's attempt to adopt a bright-line rule that, like the per se rule urged here by Petitioners, would undermine the settled expectations of stakeholders in the inventing community. (*See also Mayo Collaborative Servs. v. Prometheus Lab., Inc.* (2012) 132 S.Ct. 1289, 1305 [explaining that because "patent law's general rules must govern inventive activity in many different fields of human endeavor, . . . we must hesitate before departing from established general legal rules lest a new protective rule that seems t suit the needs of one field produce unforeseen results in another. And we must recognize the role of Congress in creating more finely tailored rules where necessary."].)

Petitioners do not seriously dispute that the Hatch-Waxman Act provides strong evidence of Congress's desire both to streamline the FDA approval process for generics and to encourage innovative research and development by allowing patent settlements between generic and innovator manufacturers. Petitioners insist, however, that this court should now alter the careful balance struck by Congress by curbing a patentee's federal right to settle patent litigation, even if that resulting settlement restrains no competition beyond the scope of the patent itself. That argument falls wide of the mark.

If the Supremacy Clause is to retain any force, a federal patent cannot confer different rights in California than it does in the rest of the country. By adopting the Hatch-Waxman Act, Congress sent an unmistakable message that the measures it adopted provided the proper level of competitive constraints on both innovator and generic drug manufacturers. Accordingly, Petitioners efforts here to impose additional constraints on such manufacturers are preempted because they "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Hines*, *supra*, 312 U.S. at 67.) As the Supreme Court has held, "state regulation of intellectual property must yield to the extent that it clashes with the balance struck

by Congress in our patent laws." (*Bonito Boats, supra*, 489 U.S. at 152.) As a result, California "cannot, under some other law, such as that forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent laws." (*Sears, Roebuck & Co., supra,* 376 U.S. at 231.)

II. THE RULE URGED BY PETITIONERS, IF ADOPTED, WILL DISCOURAGE THE EFFICIENT SETTLEMENT OF PATENT DISPUTES

Granting the relief sought by Petitioners in this case would have significant harmful consequences by discouraging patent settlements. The public policy favoring settlements is so well established that one commentator has deemed it a "truism." (Stephen Bundy, *The Policy in Favor of Settlement in an Adversary System* (1992) 44 Hastings L.J. 1, 48.) The Supreme Court has long recognized that "settlements rather than litigation will serve the interests of plaintiffs as well as defendants." (*Marek v. Chesny* (1985) 473 U.S. 1, 10.) These considerations are only magnified in the patent context:

> Settlement is of particular value in patent litigation, the nature of which is often inordinately complex and time consuming. Settlement agreements should therefore be upheld wherever equitable and policy considerations so permit. By such agreements are the burdens of trial spared to the parties, to other litigants waiting their turn before over-burdened courts, and to the citizens whose taxes support the latter. An amicable compromise

> provides the more speedy and reasonable remedy for the dispute.

(*Aro Corp. v. Allied Witan Co.* (6th Cir. 1976) 532 F.2d 1368, 1372 [citing *D.H. Overmeyer Co. v. Loflin* (5th Cir. 1971) 440 F.2d 1213].) Indeed, studies show that protracted patent litigation tends to be extraordinarily complex and expensive, posing significant risks for both patent holders and alleged infringers. An alleged infringer faces the potential of enormous damages awards, while a patent holder faces the possibility that its patent will be found invalid or unenforceable.

"An average patent case will cost between $3 million and $10 million, and take two to three years to litigate." (Sylvia Hsieh, "More Patent Cases Are Being Taken on Contingency Fee Basis," *Lawyers USA* (August 14, 2006).) In all, "[r]oughly $1 billion is spent annually in the United States on patent litigation," and it takes "an average of more than six years for patent cases to make their way through the trial and appeal process." (Steven C. Carlson, *Patent Pools and the Antitrust Dilemma* (1999) 16 Yale L.J. on Reg. 359, 380; Tom Arnold, *Suggested Form of Contract to Arbitrate a Patent or Other Commercial Dispute* (Spring, 1994) 1 Tex. Intell. Prop. L.J.

205, 208.) As a result, "patent cases have produced some of the largest damages awards in history." (Carlson, *supra*, at 380.)

Experience has shown that most generic companies are reluctant to market their product even after obtaining FDA approval of their ANDAs so long as patent litigation is still pending. The reason for that reluctance is not difficult to understand. The advent of generic competition following expiration of a drug patent generally leads to a sharp drop in price and a corresponding drop in the innovator drug company's profits. But if the generic competitor is found to have infringed an unexpired patent, its liability for repayment of all those lost profits would dwarf any profits it would have derived from selling the drug at the reduced price. Thus, because the threat of ruinous damage awards generally prevents the entry of generic competitors for so long as patent litigation continues, settlements (even ones providing for a delay of a generic company's entry into the market) are often more efficient and in everyone's best interests.

Contrary to the strong public policy favoring settlements, Petitioners' position would discourage the orderly resolution of patent disputes. If the relief Petitioners seek is granted, it will cast a cloud over patent settlements such that patent owners and alleged infringers

will hesitate before entering into an agreement to resolve a patent dispute out of fear that a court will deem their agreement to be unlawful. Much of this hesitation would flow naturally from the practical implications of the *per se* rule urged by Petitioners. Categorizing the settlement below as *per se* unlawful will inevitably provide greater incentives for future litigation. In today's technology-centered marketplace, where prompt, efficient conflict resolution is vital for continued innovation, any increased fear of settlement of patent disputes will have devastating consequences.

Nor can a contrary decision by this Court be dismissed as an aberration that will have little impact elsewhere. Most pharmaceutical companies, including Bayer and Barr, sell their products nationwide. Any nationwide company that does business within California can be sued there and thus can be made subject to its laws and this court's rulings. Unless the decision below is affirmed, parties involved in drug patent litigation will be far more reluctant to enter into settlements, regardless where in the nation the drug patent litigation is pending.

Equally disturbing is the effect that Petitioners' approach is likely to have on innovation within the pharmaceutical industry. Any

rule that decreases a patent holder's flexibility in negotiating with potential infringers renders the patent less valuable. Pharmaceutical companies are less likely to maintain their multi-billion-dollar commitment of resources to the research and development of new products if they are unable to rely on patent laws to protect their intellectual property.

Finally, adopting Petitioners' approach not only might discourage patent litigation settlements (among parties who fear liability), but might even discourage patents from being challenged in the first place. A generic company that knows that it would be unable to settle costly and time-consuming patent litigation might well decide not to file an ANDA for FDA-approved products for which a patent is listed in the Orange Book; the company might well decide that the potential rewards of filing are not worth the cost and time necessary to defend a patent infringement suit to final judgment—even if the company strongly believes that it would ultimately win the infringement suit. This is why Judge Richard Posner warned that "a ban on reverse-payment settlements would reduce the incentive to challenge patents by reducing the challenger's settlement options should he be sued for infringement, and so might well be thought

anticompetitive." (*Asahi Glass Co.*, *supra*, 289 F.Supp. at 994.) Consumers and competition in general will suffer if fewer generics are available due to a reduction in ANDA filings.

CONCLUSION

For the foregoing reasons, *amicus curiae* WLF respectfully requests that the judgment of the Court of Appeal be affirmed.

Respectfully submitted,

Mark E. Foster (CA Bar # 101698)
LAW OFFICES OF MARK E. FOSTER
303 Almaden Blvd.
Suite 500
San Jose, CA 95110
(408) 291-6219
mfoster@markfoster.com

Counsel for *Amicus Curiae*

CERTIFICATE OF COMPIANCE

I, Mark E. Foster, hereby certify that pursuant to Rule 8.520(c)(1) of the California Rules of Court, the enclosed Brief of the Washington Legal Foundation as *amicus curiae* in support of Respondents was created using 14-point Times New Roman type and contains approximately 4,392 words, exclusive of the cover, tables, and certificates. I rely on the word count of the computer software (Microsoft Word 2010) used to prepare this brief.

_____
Mark E. Foster

Date: July 27, 2012

PROOF OF SERVICE

I am over the age of 18 years and not a party to this action. My business address is 2009 Massachusetts Avenue, NW, Washington, D.C. 20036.

On July 27, 2012, I served true copies of the following document(s) described as **Brief of Washington Legal Foundation as *amicus curiae*** on the interested parties in this action as follows:

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I declare under penalty of perjury under the laws of the United States that the above is true and correct.

_____

Cory L. Andrews

Date: July 27, 2012

SERVICE LIST

Dan Drachler
Zwerling, Schacter & Zwerling
1904 Third Avenue, Suite 1030
Seattle, WA 98101
Counsel for Plaintiffs/Appellants

Ralph B. Kalfayan
Krause, Kalfayan, Benink & Slavens, LLP
550 W. C Street, Suite 530
San Diego, CA 92101
Counsel for Plaintiffs/Appellants

Joseph R. Saveri
Lieff Cabraser LLP
275 Battery St., 29th Floor
San Francisco, CA 94111
Counsel for Plaintiffs/Appellants

Jay P. Lefkowitz
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022
Counsel for Defendant Barr Laboratories, Inc.

Joann Rezzo
Edelson & Rezzo
402 West Broadway, Suite 2700
San Diego, CA 92101
Counsel for Defendants Barr Laboratories, Inc., Hoechst Marion Roussel, Inc., The Rugby Group, Inc., and Watson Pharmaceuticals, Inc.

Kathryn E. Karcher
Karcher Harmes LLP
401 B. Street, Suite 2450
Sand Diego, CA 92101
Counsel for Defendants Barr Laboratories, Inc., Hoechst Marion Roussel, Inc., The Rugby Group, Inc., and Watson Pharmaceuticals, Inc.

David E. Everson
Stinson Morrison Hecker LLP
1201 Walnut Street, Suite 2900
Kansas City, MO 64106
Counsel for Defendants Hoechst Marion Roussel, Inc., The Rugby Group, Inc., and Watson Pharmaceuticals, Inc.

Peter B. Bensinger, Jr.
Bartlit Beck Herman Palenchar & Scott LLP
54 W. Hubbard Street, Suite 300
Chicago, IL. 60654
Counsel for Defendant Bayer Corporation

Kevin D. McDonald
Jones Day
51 Louisiana Avenue, NW
Washington, DC 20001
Counsel for Defendant Bayer Corporation

Charles A. Bird
McKenna Long & Aldridge LLP
600 West Broadway, Suite 2600
San Diego, CA 92101
Counsel for Defendant Bayer Corporation

Administrative Office of the Courts
Attention Carlotta Tillman
455 Golden Gate Avenue, 6th Floor
San Francisco, CA 94102

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

Superior Court of California
Clerk of San Diego County Superior Court
330 West Broadway
San Diego, CA 92101

Office of the District Attorney
Appellate Division
P.O. Box X-1011
San Diego, CA 92112

Office of the Attorney General
P.O. Box 85266
San Diego, CA 92186-5266