No. _____

IN THE
Supreme Court of the United States

PLIVA, INC.,
Petitioner,
v.
SUPERIOR COURT OF CALIFORNIA,
SAN FRANCISCO COUNTY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal First Appellate District

PETITION FOR WRIT OF CERTIORARI

JEFFREY F. PECK
Counsel of Record
LINDA E. MAICHL
ULMER & BERNE LLP
600 VINE ST. SUITE 2800
CINCINNATI, OH 45202
(513) 698-5000
jpeck@ulmer.com
lmaichl@ulmer.com
Counsel for PLIVA, Inc.

June 16, 2017

QUESTION PRESENTED

California, like other states, bundles lawsuits together for purposes of efficiency and administrative ease. The procedure benefits the state courts that invite those lawsuits to reap the revenue from filing and other fees, but need a procedure to avoid being overwhelmed by management of hundreds or thousands of individual lawsuits. Plaintiffs benefit by filing lawsuits en masse without risking individual scrutiny of meritless or marginal cases facilitating their goal of building the case count to promote global settlements. Plaintiffs' increasing use of state coordination procedures to aggregate lawsuits of plaintiffs from throughout the United States raises due process concerns under the Fourteenth Amendment. The constitutional rights of corporate defendants to challenge personal jurisdiction in individual cases cannot be extinguished by state laws that coordinate hundreds, sometimes thousands, of cases before one judge. Yet, that is exactly what the courts did here.

The state court lacks both specific and general jurisdiction over Petitioner in well over a thousand individual lawsuits but employed state coordination proceedings and unprecedented theories of waiver and consent to assert personal jurisdiction over Petitioner without conducting a due process analysis.

The question presented is:

When a state court lacks personal jurisdiction in lawsuits against a defendant, and the state court combines those lawsuits into a coordination proceeding with other lawsuits where personal jurisdiction

exists, does a defendant's participation in the state-court coordination proceeding constitute waiver of the defendant's fundamental right not to be subject to the coercive power of a state court that lacks personal jurisdiction over it or consent to that court's exercise of personal jurisdiction over it in every individual lawsuit coordinated under the state-court procedures?

PARTIES TO THE PROCEEDING

Petitioner is PLIVA, Inc., which was a defendant below in the trial court and the petitioner in the appellate courts.

Respondents are the Superior Court of California, San Francisco County, which was the nominal respondent in the appellate courts below, and Jerryann Miller, who was the plaintiff in the trial court and real party in interest in the appellate courts below.

RULE 29.6 STATEMENT

PLIVA, Inc., is an indirect wholly-owned subsidiary of Teva Pharmaceutical Industries, Ltd., through the following parent companies: Barr Laboratories, Inc., which is directly owned by Barr Pharmaceuticals, LLC, f/k/a Barr Pharmaceuticals, Inc., which is directly owned by Teva Pharmaceuticals USA, Inc. which is directly owned by (i) Orvet UK (Majority Shareholder), which in turn is directly owned by Teva Pharmaceuticals Europe B.V., which in turn is directly owned by Teva Pharmaceutical Industries Ltd.; and (ii) Teva Pharmaceutical Holdings Coöperatieve U.A. (Minority Shareholder), which in turn is directly owned by IVAX LLC, a direct subsidiary of Teva Pharmaceuticals USA, Inc. Teva Pharmaceutical Industries, Ltd. is the only publicly-traded company that owns 10% or more of PLIVA, Inc.

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INTRODUCTION

In recent years, this Court has addressed general personal jurisdiction and specific personal jurisdiction several times, including during this term. Concepts for establishing personal jurisdiction that this Court has not addressed in the recent past are those of "consent" and "waiver." Although this Court's cases set out definitive tests for both, over the years courts have conflated the two and increasingly the concepts are used interchangeably. Yet, they are separate and distinct methods of submitting to a court's jurisdiction. Further, over time, much like general jurisdiction, courts have dispensed or marginalized those tests circumventing this Court's requirements to ensure that assertions of jurisdiction, exposing defendants to the State's coercive power, are compatible with the Fourteenth Amendment's Due Process Clause. This is just such a case; and an egregious example of the deprivations defendants often encounter in mass tort proceedings.

This case involves waiver and consent and what constitutes a defendant's waiver of its due process rights and its concomitant right not to be subject to a State's coercive power in individual lawsuits and what constitutes a defendant's consent to a court's exercise of personal jurisdiction over it. It began in 2009 when Petitioner was called upon to defend a single lawsuit filed in California state court by Mr. and Mrs. Elkins who are California residents. About eighteen months later, Petitioner, who is not at "home" in California, found itself as one of more than 20 entities on the defendant-side of the "v" in proceedings the Elkins initiated under California

state procedures to coordinate their lawsuit with other similar lawsuits pending in California state courts. The number of lawsuits folded into the coordinated proceeding eventually exceeded 4,000—more than 85% of which were brought by plaintiffs who did not reside in California and whose alleged injuries had no connection to California whatsoever. Petitioner was not a named defendant in every lawsuit enfolded into that coordinated proceeding. It was, however, still a defendant in the Elkins' lawsuit and was named as a defendant in other lawsuits filed by California residents, as well as in lawsuits filed by non-California residents.

As is true in coordinated proceedings, whether established under state procedures or under the federal multi-district litigation process, administrative devices, like master complaints and answers, were used to streamline the pleading process, and common issues were slotted to be addressed before issues affecting individual lawsuits. Who the plaintiff is in any single lawsuit or from where that plaintiff hales was not consequential to those processes, just as which defendant is named in which lawsuit was irrelevant. The opening stages of the coordinated proceeding were devoted to organization with attention directed to common questions. Importantly, the order in which issues were addressed was determined by the presiding judge, who opted to address an issue he concluded bore on the court's subject matter jurisdiction before other issues.

In accord with that decision, the parties were directed to address whether the plaintiffs' claims against the manufacturers of generic pharmaceutical

products, as set forth in a Master Complaint, were preempted under this Court's decision in *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011). Notwithstanding that, at the same time, the presiding judge was apprised of this Court's decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), and that the vast majority (approximately 85%) of the lawsuits in the coordinated proceeding were subject to personal jurisdiction challenges, it decided to address the *Mensing* issue first. That decision accorded with the court's power under California's statutes and rules governing coordinated proceedings to "[o]rder any issue or defense to be tried separately and before trial of the remaining issues when it appears that the disposition of any of the coordinated actions might thereby be expedited." Cal. R. Ct. 3.541(b)(3).

Presumably recognizing at the time that rules and orders governing coordinated proceedings trumped other provisions of California law (including the California practice of deeming a defendant who appears in a lawsuit for any purpose whatsoever as subject to the court's jurisdiction), the presiding judge assured Petitioner, repeatedly, that addressing *Mensing* before personal jurisdiction in individual cases would not constitute a waiver of personal jurisdiction defenses. Later, however, when the court turned its attention to personal jurisdiction, that recognition flew out the window, and what started as a directive to address *Mensing* and the court's subject matter jurisdiction turned into consent and a "general appearance" and waiver of Petitioner's personal jurisdiction defenses in *each and every* lawsuit in which it was a named-defendant in the coordinated proceeding. The

court found consent and waiver even though Petitioner took *no action* – filed no answer, no demurrer, no motion, nothing – ***ever*** in any lawsuit in the coordinated proceeding other than *Elkins*, which predated the coordinated proceeding. In short, the court equated – improperly so – Petitioner's compulsory, court-directed participation in the coordinated proceeding as a "general appearance" in every lawsuit in that proceeding.

In the end, the court determined it could assert its coercive power over Petitioner in *every* lawsuit without analyzing whether doing so was compatible with the Fourteenth Amendment's Due Process Clause. That is forbidden. *See Goodyear*, 564 U.S. at 918 ("A state court's assertion of jurisdiction exposes defendants to the State's coercive power, and is therefore subject to review for compatibility with the Fourteenth Amendment's Due Process Clause").

The Due Process Clause cannot be dodged in individual lawsuits through the expedient of administratively combining hundreds or thousands of cases in a mass-tort proceeding. Personal jurisdiction is defendant- and lawsuit-specific. Compulsory participation in a state coordination proceeding is not participation in any individual lawsuit and cannot become the basis for exercising personal jurisdiction over the defendant in individual lawsuits. Personal jurisdiction must be established in each lawsuit separately.

Petitioner is an out-of-state defendant that is not subject to general jurisdiction in California because it is incorporated and has its principal place of business outside the state. Nor is Petitioner subject to specific

jurisdiction in California courts for product-liability claims brought by out-of-state plaintiffs with no connection to California. Notably, the courts below did not attempt to even discuss general or specific jurisdiction. Instead, they turned to different concepts: Waiver and consent. But, their sweeping theories of "waiver" and "consent" fall far short of what is required under this Court's jurisprudence.

Without this Court's review, Petitioner is left without an avenue of redress[1] and will be forced to defend lawsuits having no connection to the forum in a state court that does not have personal jurisdiction over it. This Court must intervene to make clear that courts may not sacrifice defendants' due process rights at the altar of administrative convenience in mass tort actions.

OPINIONS BELOW

The California Superior Court entered the order denying Petitioner's motion to quash service of summons and for lack of personal jurisdiction on September 14, 2106. The unpublished order is reprinted in the Appendix at 5. Petitioner sought discretionary review by the California Court of Appeal, which was

[1]Petitioner cannot seek review in California courts after final judgment. California courts take the position that Petitioner waives any right to later appeal personal jurisdiction and the court's decision asserting jurisdiction over Petitioner in individual non-resident cases is final if Petitioner defends itself in the individual cases. *See State Farm Gen. Ins. Co. v. JT's Frames, Inc.*, 181 Cal. App. 4th 429, 437 (2010) ("It has long been the rule in California that a defendant who chooses to litigate the merits of a lawsuit after its motion to quash has been denied has no right to raise the jurisdictional question on appeal.").

summarily denied on November 9, 2016, and discretionary review by the California Supreme Court, which was denied on January 18, 2017. Those unpublished denials are reprinted in the Appendix at 2, 1, respectively.

JURISDICTION

On April 7, 2017, Justice Kennedy extended the time within which to file a petition for writ of certiorari to and including June 16, 2017. (No. 16A952.)

This Court has jurisdiction pursuant to 28 U.S.C. §1257(a). The Court of Appeal denied a petition for writ of mandate on the grounds that PLIVA did not show that the Superior Court erred in concluding that PLIVA waived its objection to service of process by making a general appearance and failed to show that the Superior Court violated its due process rights. (App. 2-3.) The California Supreme Court denied discretionary review. The state courts will not revisit personal jurisdiction, and the decision below is a "final decision" under Section 1257(a), because it is a "final [ruling] on the federal issue and is not subject to further review in the state courts." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 485 (1975). *See also Calder v. Jones*, 465 U.S. 783, 788 n.8 (1984) (reviewing denial of motion to quash for lack of California court's jurisdiction over defendant); *Kulko v. Superior Court*, 436 U.S. 84 (1978) (same).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the U.S. Constitution provides:

> No state shall … deprive any person of life, liberty, or property, without due process of law ….

U.S. CONST. amend XIV, sec. 1.

The pertinent provisions of California's Civil Procedure Code and California Rules of Court pertaining to California's Judicial Council Coordinated Proceedings are reproduced in the Appendix, App. 13-20.

STATEMENT OF THE CASE

A. CALIFORNIA'S JUDICIAL COUNCIL COORDINATED PROCEEDINGS

As do other states and federal courts, California has a process to coordinate lawsuits pending in different courts that share common questions of fact or law. In California that process is through California's Judicial Council Coordinated Proceedings ("JCCP"). Cal. Code Civ. P. §404. Like federal multidistrict litigation ("MDL"), the purpose of state coordination proceedings is to promote the efficient use of judicial resources and to promote the ends of justice. *See McGhan Medical Corp. v. Superior Court*, 11 Cal. App. 4th 804, 811 (1992). Like an MDL, a JCCP is an administrative mechanism, and each lawsuit retains its individual character.

When the California legislature enacted the provisions permitting the coordination of civil actions, it foresaw that the proceedings would follow a path different than that followed in a single lawsuit. That foresight led the legislature to vest the Judicial Council with the power by rule to order the practice and procedure for coordinated actions "notwithstanding any other provision of law." Cal. Code Civ. P. §404.7; *see also McGhan*, 11 Cal. App. 4th at 812. The legislature explicitly provided that if the Judicial Council's rules conflict with provisions of law applicable to civil actions generally, the Judicial Council's rules prevail. Cal. Civ. P. Code §404.7.

Under that authority, the Judicial Council promulgated rules applicable in coordination proceedings. Among them, four are of particular significance here—Rules 3.504(b), 3.541(a)(4), 3.541(b), and 3.541(b)(3).

Rule 3.504(b) provides: "To the extent that the rules in this chapter conflict with provisions of law applicable to civil actions generally, the rules in this chapter prevail, as provided by Code of Civil Procedure section 404.7." Rule 3.541(a)(4) authorizes the coordination trial judge to "[p]rovide a method and schedule for the submission of preliminary legal questions that might serve to expedite the disposition of the coordinated actions." Rule 3.541(b) directs the coordination trial judge to "assume an active role in managing all steps of the…proceedings to expedite the just determination of the coordinated actions without delay." Towards that purpose, Rule 3.541(b)(3) vests the coordination trial judge with authority to "[o]rder any issue or defense to be tried separately and before trial of the remaining issues

when it appears that the disposition of any of the coordinated actions might thereby be expedited."

Together, the statute and rules vest in the coordination trial judge "great breadth of discretion" in the conduct of coordination proceedings. *McGhan*, 11 Cal. App. 4th at 811. In turn, that discretion, when exercised, alters the normal application of other provisions of law, Cal. Code Civ. P. §404.7, including what constitutes a general appearance, the effect of a general appearance, and the necessity of filing motions to quash in hundreds, and perhaps thousands, of individual lawsuits before participating in a JCCP.

B. PROCEDURAL AND FACTUAL BACKGROUND

1. California Resident Plaintiffs Petition the California Judicial Council to Establish a JCCP

In January 2009, California residents Terri Lynn and Jeffrey Elkins filed a lawsuit in the San Francisco County Superior Court of the State of California captioned *Elkins v. Wyeth, Inc.*, Case No. CGC-09-484539. Petitioner PLIVA, Inc., was a defendant in that lawsuit, which proceeded along a normal course for more than one year.

Then, after the federal Food and Drug Administration announced in February 2009 that it was directing that the labeling for Reglan and its generic metoclopramide equivalents be changed to add a boxed warning regarding tardive dyskinesia, long-term use, and total cumulative dose of the product, thousands of lawsuits were filed. Initially, the majority of lawsuits were filed in New Jersey and Pennsyl-

vania, states in which some of the named defendants either are incorporated or have their principal place of business. Those lawsuits were assigned to a single judge for centralized case management under those states' mass tort coordination procedures.

In early 2010, the locus of the filings shifted to California. On May 24, 2010, the *Elkins* plaintiffs filed a petition for coordination of their suit with the other lawsuits filed in California state courts. The same day the petition was filed, the judge presiding over the *Elkins* lawsuit issued an order staying all action in the case, as well as all action in the other Reglan-metoclopramide lawsuits in San Francisco County Superior Court pending a decision on the coordination petition. (App. 105-108.)

On September 14, 2010, the coordination motion judge designated the cases as complex and recommended they be coordinated into a JCCP. The coordination petition was granted and the coordination trial judge was assigned on September 27, 2010, in JCCP No. 4631, *In re Reglan/Metoclopramide Cases*, San Francisco Superior Court Case No. CJC-10-004631.

2. The JCCP Court Focuses on Organizational Issues and Procedures

The first case management conference following coordination of the ever-growing JCCP (by then, 153 cases involving hundreds of plaintiffs and numerous defendants) was on January 5, 2011. During that conference, the coordination judge discussed preliminary organizational issues and procedures to admin-

ister the JCCP efficiently and cost-effectively. Among the issues discussed was a method of determining which defendants were properly named in the various lawsuits and the implications of this Court's grant of the petition for writ of certiorari in *PLIVA, Inc. v. Mensing*. The coordination judge continued the stay in all cases precluding the filing of motions or other responsive pleadings in any case in the JCCP.

Conferences in February and March 2011 again addressed administrative issues and organization. On April 25, 2011, the coordination judge entered Case Management Order No. 1 ("CMO1") appointing liaison counsel and delineating their responsibilities, asserting its jurisdiction over the coordinated proceedings, and continuing the stay in the lawsuits. (App. 96-105.) CMO1 provided that the "Order, and all case management and other orders of th[e] Court, shall be binding on all parties and their counsel in the [JCCP] No. 4631, *Reglan/Metoclopramide Cases*, including all cases currently in this proceeding and any cases subsequently added to this proceeding." (App. 98.) To preclude the continued action by courts in other counties in lawsuits pending their transfer to the JCCP, as is standard in JCCPs, and in recognition of the proceedings in New Jersey and Pennsylvania, CMO1 included the following:

> **Jurisdiction**. This Court retains sole and complete jurisdiction over the parties, cases and counsel in this coordinated proceeding, including each and every case filed in (or coordinated into) this coordinated proceeding. While cooperation between this Coordinated Proceed-

> ing and coordinated proceedings in other jurisdictions is encouraged, California remains a separate and independent jurisdiction. No party, however, waives any rights or obligations with regard to the conduct of discovery, trial settings, and trials as allowed by California law and this Court.

(App. 102-103.)

3. The JCCP Court Decides to Address the Impact of *PLIVA, Inc. v. Mensing* and Defer Consideration of Personal Jurisdiction Defenses

By the next conference in July 2011,[2] this Court had held in *Mensing* that failure-to-warn lawsuits against generic drug manufacturers are preempted by federal law. For the first time since the JCCP's inception, the JCCP court and parties discussed filing motions or demurrers. In addition to raising *Mensing*, personal jurisdiction was raised during an unrecorded informal conference—colloquially known in the coordination judge's courtroom as a "cookie lunch"—held on July 25, 2011. Before the conference, Petitioner's counsel informed plaintiffs' liaison counsel that he intended to raise the issue of personal jurisdiction challenges. During the conference, Petitioner's counsel told the judge of the decision in *Goodyear*, 564 U.S. 915, and explained that *Goodyear* addressed personal jurisdiction issues impactful on

[2] At that point there were 292 cases in the JCCP with 3825 plaintiffs. That count eventually rose to over 4200 plaintiffs, but by July 2012, more than 1500 of those plaintiffs were dismissed due to lack of product use or injury.

actions in the JCCP. Plaintiffs' liaison counsel commented (incorrectly) that defendants had agreed to waive *forum non conveniens* challenges, but the judge noted that personal jurisdiction challenges differ from *forum non conveniens* challenges. (App. 40-44.)

On July 26, 2011, the coordination judge, using his power to order the manner in which issues would be decided in the JCCP, modified CMO1 solely to allow Generic Defendants[3] to address *Mensing*. The amendment provided that *Mensing* challenges "are without prejudice and do not constitute a waiver of the right to file motions on any issue not related to the impact of the *Mensing* decision after further order of the Court." (App. 91.) The court and plaintiffs' counsel explicitly acknowledged plaintiffs' counsel's mistaken contention that Generic Defendants had agreed to waive personal jurisdiction challenges.

Petitioner filed a *Mensing* challenge on August 18, 2011, in the *Elkins* lawsuit alone—the action by California residents with a specific jurisdictional nexus to California that was the vehicle used to form the JCCP. Subsequently, plaintiffs told the court they would file a master complaint. The court ordered Generic Defendants to address any *Mensing* challenge to that master complaint explaining that "we might be better off having all attacks on the…master complaint…all packaged at the same time for appellate review so that you could have one-stop shopping"

[3] Lawsuits in the JCCP included defendants who manufactured and or distributed the brand-name drug Reglan ("Brand Defendants") as well as those who manufactured and or distributed the generic equivalent metoclopramide ("Generic Defendants").

(App. 83), and "[i]f you're going to have a master complaint, you might as well have a master demurrer." (App. 87.) As a result, the court held the *Elkins* motion in abeyance. Plaintiffs' counsel told the court that all parties would "reserve all of their rights, claims, attacks, arguments, whatever, after they received that master complaint.... [E]verything is reserved; whatever arguments they want to make, whatever arguments we want to make." (App. 82.)

Plaintiffs' liaison counsel filed the master complaint "intended to operate as an administrative device to set forth potential claims Plaintiffs may assert against Defendants in this litigation." (App. 74.) The master complaint did not include information about individual plaintiffs or allegations by any specific plaintiff, but rather was to be adopted by each plaintiff in each individual action, as appropriate—through either a notice of adoption or a short-form complaint ("SFC").

In October 2011, the court directed Generic Defendants to style their *Mensing* challenge as a motion to strike the master complaint. Following that direction, Generic Defendants' liaison counsel filed a "Motion to Revoke Leave to File an Amended Complaint or to Strike Plaintiffs' Master Long Form Complaint" in the JCCP. Except for the motion held in abeyance in *Elkins*, no *Mensing* challenge was filed in any individual lawsuit. In the motion, Generic Defendants' liaison counsel explained that

> [t]his challenge focuses on the federal preemption issue, and the Generic Defendants reserve all defenses and challenges (including jurisdictional, fo-

> rum non conveniens [], and state-law demurrer challenges) more appropriately reserved until individual Plaintiffs file individual Short Form Complaints.

(App. 71-72.) Liaison counsel also explained that the master complaint

> seeks to assert causes of action under California law only and provides no Plaintiff-specific information. Inasmuch as the vast majority of the Plaintiffs in this Coordinated Proceeding are not residents of California and were not injured in California, Defendants cannot assert jurisdictional, [forum non conveniens], or other challenges until Plaintiff-specific facts are alleged and choice-of-law issues are decided.

(App. 72.)

At the motion hearing, the court concluded that a demurrer was the more appropriate procedural vehicle to address the *Mensing* challenge. Accordingly, plaintiffs were instructed to file an amended master complaint separating the allegations against the generic versus non-generic drug manufacturer defendants, to which Generic Defendants could demur. (App. 63-69.) The judge ensured that everyone understood that the demurrer would enable adjudication of the *Mensing* challenge without waiver of other challenges to the master complaint or challenges to personal jurisdiction. The court directed Generic Defendants to address only *Mensing* and that challenge would be "without anybody waiving arguments that would otherwise be appropriate to attack the master

complaint," and "without waiver of a second round of issues." (App. 67.) The court added that "[t]he only issues to be raised are the same [*Mensing*] issues" and "[a]ll other matters are not waived by failing to raise them." (App. 69.)

In the amended master complaint, plaintiffs reiterated that it was an "administrative device" setting forth "potential claims" of individual plaintiffs. (App. 79.) Again, the amended master complaint did not include plaintiff-specific information. As ordered by the coordination judge, a demurrer was filed to the amended master complaint, which included the following:

> This demurrer is directed to the First Amended Long Form Master Complaint only and, as such, is a master pleading challenge. The filing of this pleading is not intended as, and does not constitute an appearance by any defendant in any individual action included in the JCCP, and the filing of this pleading is without waiver of each defendant's rights to challenge personal jurisdiction...in any individual action; said rights are expressly reserved.

(App. 59.)

On April 17, 2012, the *Mensing* demurrer was overruled. Deciding that the issue impacted its subject matter jurisdiction over the actions, the court included language in the order for immediate appellate review. (App. 61 (noting preemption issue impacts court's subject matter jurisdiction).) Generic Defendants filed a petition for review in the Court of Appeal

which was summarily denied, as was Generic Defendants' writ petition to the California Supreme Court.

Throughout that time, plaintiffs' counsel and the court repeatedly reiterated that Generic Defendants' personal-jurisdiction defenses were not waived and would be addressed later in the proceedings. On September 6, 2013, plaintiffs' liaison counsel acknowledged that a second demurrer would not include personal jurisdiction challenges because Generic Defendants had "preserved the jurisdictional issues." (App. 50.)

Meanwhile, the JCCP proceeded as to the Brand Defendants. In July 2012, case management order number 3 ("CMO3") was entered, which addressed filing one master answer on behalf of all Brand Defendants to the amended master complaint. CMO3 provided that filing the master answer "does not constitute an appearance by any Brand Defendant in any action." (App. 54.) CMO3 also addressed the filing of short-form complaints and specifically noted that "any action that is the subject of a SFC shall be stayed as to all non-Brand defendants named therein." (App. 55.) CMO3 required SFCs to be served on the Brand Defendants named in them. Similarly, the discovery provisions in CMO3 applied solely to plaintiffs and Brand Defendants. The court reiterated in CMO3 that all proceedings against the non-Brand defendants continued to be stayed during the appeal of the *Mensing* issue, and that "[u]pon such decision, the Court anticipates entering a further Case Management Order as to such non-Brand defendants that

remain in these proceedings." (App. 53-54.) Petitioner is a "non-Brand defendant."

At a February 11, 2014, conference, the court noted that "there seem to be in personam jurisdiction disputes." (App. 32.) He reiterated that personal jurisdiction challenges were reserved for a later time. When plaintiffs' liaison counsel asked whether Generic Defendants would be "raising jurisdictional challenges" in upcoming briefing, the court answered: "Hold on. It depends on what you mean by jurisdiction. … If you're talking about in personam jurisdiction, that's going to be later." (App. 32-33.)

4. The JCCP Court Turns Its Attention to Personal-Jurisdiction Challenges

Finally, in May 2014, the court instructed the parties to confer on a procedure to address personal jurisdiction. Generic Defendants advocated a test-case approach whereby motions to quash would be filed in one or more individual actions filed by out-of-state residents. Plaintiffs wanted to schedule bellwether trials and force Generic Defendants to challenge personal jurisdiction in those individual lawsuits. The matter remained unresolved for almost a year while the parties met and conferred pursuant to the court's direction.

In February 2015, Generic Defendants repeated their desire to challenge personal jurisdiction when permitted in appropriate individual actions. (App. 29-30.) The court lifted the stay to allow personal jurisdiction challenges and made clear there would not

be a waiver generated by a failure to file a motion. (App. 30.)

On March 3, 2015, plaintiffs filed a single motion in the JCCP asserting that PLIVA and Teva Pharmaceuticals USA, Inc., waived personal jurisdiction challenges. Plaintiffs did not argue, and never have argued, that the court had personal jurisdiction, either general or specific, in the non-resident actions. Instead, they only argued that defendants waived personal jurisdiction defenses. PLIVA moved to quash service of summons in the individual lawsuit of *Bowman v. McKesson Corp*., No. CGC-11-514810, on the ground that it is not subject to personal jurisdiction in California in that action because Mr. and Mrs. Bowman are West Virginia residents and allege no connection to California related to their causes of action. PLIVA argued that the Bowmans (like other non-resident plaintiffs whose lawsuits bear no connection to California) must necessarily depend on general jurisdiction to prosecute claims in California. Yet general jurisdiction does not exist over PLIVA because California is not its place of incorporation or principal place of business and it is not "at home" in California. *Daimler AG v. Bauman*, 134 S. Ct. 746, 749 (2014); *Goodyear*, 564 U.S. at 919.

At the motions hearing, without engaging in any constitutional analysis, the court granted plaintiffs' motion and denied PLIVA's. The court did not conclude that PLIVA had generally appeared in any lawsuit and did not apply its order to any individual lawsuit other than *Bowman*. PLIVA sought a writ, which was not accepted. The presiding judge retired, and the JCCP was reassigned to another judge.

5. The *Gold* Case and Plaintiffs' Short-Form Complaint

On January 20, 2011, Jerryann and Gilbert Miller filed suit in California as part of a multi-plaintiff complaint that improperly combined claims of 34 plaintiffs, only four of whom are California residents, against Brand Defendants and certain Generic Defendants ("Gold Complaint"). PLIVA never filed any pleading in response to the Gold Complaint.

On October 9, 2012, the Millers filed a SFC and adopted and incorporated by reference the causes of action as set forth in Plaintiffs' most recently amended Long Form Master Complaint, which they attached to the SFC. PLIVA never filed any pleading in response to the SFC.

The Millers are Minnesota residents. They do not allege that Reglan® and/or metoclopramide was prescribed, purchased, or ingested in California. The Millers correctly allege PLIVA is a New Jersey corporation with its principal place of business in New Jersey. The Millers do not allege PLIVA engaged in any conduct in California that constitutes "purposeful availment" and that allegedly caused or contributed to their alleged injuries. An amended short form complaint was filed that dropped Gilbert Miller as a plaintiff.

6. Petitioner Moved to Quash the *Miller* Action

Petitioner filed a motion to quash in the *Miller* lawsuit because the court lacks personal jurisdiction over it. By a September 14, 2016, order, that motion was denied. The court concluded PLIVA "agreed to the jurisdiction of the court by agreeing to [CMO1]." (App. 6.) In addition, the court ruled that PLIVA "generally appeared when it participated in the *Mensing* proceedings." (App. 6-7.)

7. The Court of Appeal Summarily Denied Petitioner's Writ Petition

Petitioner filed a writ petition in the Court of Appeal, which was summarily denied on November 9, 2016. (App. 2.) The Court of Appeal stated in the summary denial that Petitioner did not "show the superior court erred in concluding petitioner waived any objection to service of process by making a general appearance." (App. 2-3.) The court noted the filing of the *Mensing* demurrers and the motion to strike plaintiffs' master complaint presumably as acts constituting a general appearance. (App. 3.)

The court also stated that PLIVA "agreed to the jurisdictional provision of Case Management Order No. 1, participated in drafting case management orders, and benefitted from the fact sheet process." (*Id.*) The court then noted, without explaining the significance, that Petitioner "sought writ review of the denial of its *Mensing* demurrer." (*Id.*)

The court stated that Petitioner did not "show that the superior court violated its due process rights," and that PLIVA's "equitable estoppel argument was not preserved for writ review." (*Id.*) Absent from Court of Appeal's order is any statement that Petitioner ever appeared, acted, or in any way participated in the *Miller* lawsuit before moving to quash.

REASONS FOR GRANTING THE WRIT

Coordinated and consolidated proceedings under a state's procedures, like California's JCCPs, are intended to promote efficiency, economy, and to promote the interests of justice. They are not, and should not be, avenues to deprive defendants of their liberty interests and due process rights.

Nonetheless, here the court held that Petitioner consented to the court's jurisdiction and waived its due process right to challenge personal jurisdiction in every lawsuit filed by out-of-state plaintiffs with no connection to the forum based on Petitioner's compulsory participation in a coordination proceeding, despite the court's repeated assurances that personal jurisdiction would be addressed later, despite plaintiffs' repeated agreement that Petitioner's rights were preserved, and despite Petitioner's repeated express reservations of its jurisdictional defenses. No effort was made to square the "waiver" or "consent" holding with this Court's precedents, which require the waiver of constitutional rights to be intentional, voluntary, and knowing, and consent to be express. In the age of mass torts, the question whether states may use participation in compulsory coordination

proceedings as a basis for finding consent and waiver of defendants' liberty interests and due process rights in individual cases is one of great significance that is highly likely to recur. The Court should grant the petition for certiorari.

A. A State May Not Use Mass Tort Coordination Procedures To Avoid A Due Process Analysis

This Court should grant review and declare that defendants cannot be deprived of their liberty interests in freedom from unlawful judicial power, guaranteed by the Due Process Clause, on a theory of involuntary, constructive waiver that short-circuits the necessary due process analysis. Personal jurisdiction restricts "judicial power … as a matter of individual liberty," for due process protects the individual's right to be subject only to lawful power. *Insurance Corp. of Ireland v. Compagnie des Bauxites*, 456 U.S. 694, 702 (1982); *see also J. McIntyre Mach. Ltd. v. Nicastro*, 564 U.S. 873, 880-81 (2011). The courts below refused to conduct any due process analysis on the theory that Petitioner had waived its rights—but the courts based that ruling solely on conduct that the JCCP Court itself directed, and despite repeated assurances that no waiver would result. The Court of Appeal blindly followed suit. That is exactly the type of arbitrary deprivation of liberty that the Due Process Clause forbids.

The JCCP Court directed the course of the proceedings and the manner and sequence in which the parties should address issues. Then, on a global motion filed by plaintiffs in the JCCP and *not* in any in-

dividual lawsuit, the court decided that Petitioner waived its personal jurisdiction defenses in individual lawsuits and agreed to the court's jurisdiction *by complying with the JCCP Court's directions*. Petitioner's motion filed in *Bowman* was denied without any analysis of the basis for a finding of waiver or consent and, following that same approach, Petitioner's motion in this case was denied. In short, without conducting a due process analysis in any case, the court deprived Petitioner of its fundamental due process rights in over one thousand cases.

That ruling was reached even though Petitioner was ordered by the JCCP Court to engage in the proceedings giving rise to the supposed waiver. The coordinated proceeding included lawsuits not subject to personal jurisdiction defenses because there was a specific nexus to the state related to the specific cause of action. Petitioner could not refrain from litigating *Mensing* until after personal jurisdiction was challenged in non-resident cases because not all cases in the JCCP involved personal-jurisdiction objections. [4] Petitioner did not have the option of ignoring the JCCP proceedings, and its legally required partic-

[4] Coordinated proceedings are designed to eliminate the filing of hundreds or thousands of individual motions in individual lawsuits that otherwise would inundate the court system. Under the theory adopted by the courts here in finding "consent" and "waiver" of Petitioner's personal jurisdiction defenses, Petitioner would have been forced to file motions to quash in every individual lawsuit (at significant cost, both in the filing fees California imposes on every defendant dragged into its courts and expenses in preparing the motions) before any other action could be undertaken in the JCCP – including in the more than 1500 lawsuits that eventually were dismissed for lack of use of Petitioner's product.

ipation cannot give rise to either a waiver of its personal-jurisdiction defense or consent to the court's exercise of personal jurisdiction over it in the lawsuits by non-residents injured outside California.

The courts did not apply this Court's test for determining if there has been a waiver of constitutional rights, nor did they examine whether Petitioner expressly consented to jurisdiction in *this lawsuit* or any other non-resident plaintiff lawsuit. The courts declined to conduct an analysis to determine whether exercising personal jurisdiction over Petitioner in each and every lawsuit coordinated in the JCCP comports with "traditional conception[s] of fair play and substantial justice" embodied in the Due Process Clause. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945). Of course it does not.

Instead, the courts determined that Petitioner "generally appeared" because Petitioner participated in the JCCP and complied with the court's orders. But, Petitioner's participation in the JCCP began with *Elkins*—the lawsuit filed by California residents allegedly injured in California that was used to form the JCCP and that was pending for more than a year when the JCCP was formed. That participation cannot give rise to a waiver of Petitioner's personal-jurisdiction defense in this lawsuit or the other lawsuits by non-residents injured outside California in which Petitioner never appeared nor did Petitioner consent to that jurisdiction.

B. A State Cannot Use Compulsory Participation In Mass Tort Proceedings As A Basis For Finding Waiver of Fundamental Constitutional Rights

The Court should grant this petition to make clear that the blanket exercise of personal jurisdiction in mass tort proceedings through a sweeping theory of waiver does not adequately protect defendants' liberty interests against deprivation without due process of law.

"The classic description of an effective waiver of a constitutional right is the 'intentional relinquishment or abandonment of a known right or privilege.'" *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). That standard must be applied in each individual lawsuit to assess whether waiver of a fundamental right has occurred. Importantly, in making that assessment, courts must "indulge every reasonable presumption against waiver" of fundamental rights, *see, e.g., Aetna Ins. Co. v. Kennedy ex rel. Bogash,* 301 U.S. 389, 393 (1937), because "acquiescence in the loss of fundamental rights" is never presumed. *Ohio Bell Tel. Co. v. Public Util. Comm'n of Ohio*, 301 U.S. 292, 307 (1937). Moreover, a waiver of a constitutional right "is not lightly to be inferred" and a waiver cannot be based on "vague and uncertain evidence." *Emspak v. United States*, 349 U.S. 190, 196 (1955) (quoting *Smith v. United States*, 337 U.S. 137, 150 (1949)).

In making a blanket finding and applying waiver in this lawsuit and the thousands of other pending in the coordinated proceeding, the courts did not faithfully apply this Court's standards. Instead, the courts applied an amorphous "benefit" standard that appears nowhere in personal jurisdiction jurisprudence and clearly is not part of this Court's test for waiver of constitutional rights.

This case is an ideal vehicle for this Court's review because the absence of any knowing, intentional, and voluntary waiver is so starkly clear. Petitioner not only was directed by the court to take exactly the steps that later were deemed a waiver of Petitioner's personal jurisdiction defenses, but also the court gave assurances that those very defenses were preserved. At every step of the way, Petitioner raised personal jurisdiction and repeatedly was assured that the defense was preserved. Inexplicably, Petitioner then was found to have waived personal jurisdiction by following the court's direction to address what the court deemed a global issue impacting its subject matter jurisdiction before addressing lawsuit-specific issues.

The amorphous "benefit" standard cannot give rise to a finding of waiver. By definition, a "benefit" is not an "intentional relinquishment or abandonment of a known right or privilege." Moreover, it is the court and plaintiffs who realize a benefit from coordinated proceedings, not defendants. The state courts that invite the filing of massive numbers of lawsuits, like California, benefit from the filing fees imposed on defendants who are forced to defend those lawsuits in forums lacking jurisdiction over

them. For a defendant in California to extract itself from the thousands of improperly-filed lawsuits would cost it hundreds of thousands of dollars in filing fees alone merely to file motions to quash the lawsuits – that is not a "benefit." Plaintiffs benefit from that system because it allows them to file thousands of meritless lawsuits without the risk that any individual lawsuit will be scrutinized thereby enhancing their ability to extract global settlements. Indeed, as one judge in a federal MDL has noted the process of coordinating lawsuits has "produced incentives for the filing of cases that otherwise would not be filed if they had to stand on their own merit as a stand-alone action." *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, MDL Dkt. No. 2004, 4:-08MD-2004 (CDL), 2016 WL 4705807 (D.C. Ga. Sept. 7, 2016).

In any event, during the time Petitioner supposedly realized the "benefit," the court repeatedly assured that challenges to personal jurisdiction in nonresident cases were preserved and were not waived. Nonetheless, through the use of its "benefit" theory, the court then subjected Petitioner to the court's jurisdiction in every case through the ruse of combining lawsuits by in-state residents with lawsuits by out-of-state residents. Defendants' liberty interests cannot be taken away by state action so easily.

Petitioner was dragged into a California court. In its continued defense in *Elkins*, a suit by California residents, Petitioner participated in the JCCP. The JCCP Court chose to address *Mensing* challenges before personal jurisdiction challenges. Petitioner followed the JCCP Court's instructions on the manner

and order in which to address issues applicable to the coordinated actions. Then, Petitioner followed California procedures and requested review of the court's decision, which was not granted. It is wholly improper for the court to assert personal jurisdiction in those lawsuits having no connection to California as a result of some amorphous and illusory benefit in proceedings that Petitioners were dragged into and then *legally obligated* to participate in.

Due process requires more, as this Court's cases demonstrate. The courts improperly employed a "benefit" standard of their own creation in determining there was a waiver and failed to employ this Court's standard for waiver of constitutional rights, thereby depriving Petitioners of the proper protection of their liberty interests and due process rights.

C. A Court May Not Manufacture Consent to the Court's Exercise of Personal Jurisdiction

While explicit consent is one avenue by which defendants may fall under a court's personal jurisdiction, this Court long ago recognized that implied consent is a legal fiction and discarded it. *See J. McIntyre*, 131 S. Ct. at 2787 (plurality opinion); *id.* at 2798-99 (Ginsburg, J., dissenting) (citing *Int'l Shoe*, 326 U.S. at 316; *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977); *Burnham v. Superior Court,* 495 U.S. 604, 618 (1990) (plurality opinion)). And, "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights." *College Sav. Bank*, 527 U.S. at 681 (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)). To the contrary, assertions

of personal jurisdiction based on consent require an examination *of the defendant's actions* to determine if there was consent compliant with the Court's decisions and due process.

Since *International Shoe*, when this Court found consent as the basis of a court's personal jurisdiction over a defendant, the Court relied on the defendant's *explicit* consent. For instance, in *National Equipment Rental Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964), the Court found that the defendant explicitly consented to the court's personal jurisdiction by signing a contract agreeing in advance to submit to the jurisdiction of a given court. The same was true in *Petrowski v. Hawkeye Security Ins. Co.*, 350 U.S. 495, 496 (1956), where a defendant signed a stipulation that "each of the parties to this stipulation voluntarily submits to the jurisdiction of the above entitled Court without service of process ...." Neither case bears any resemblance to the facts here. Petitioners did not sign a contract or stipulation agreeing to jurisdiction in California for cases brought by non-resident plaintiffs.

Similarly, in *Insurance Corp. of Ireland*, the trial court exercised personal jurisdiction over a defendant as a sanction for the defendant's failure to comply with the court's orders relating to jurisdictional discovery. This Court affirmed, holding that by explicitly consenting to have the trial court decide the personal-jurisdiction question, the defendant consented to the court's procedures by which that decision would be made; it, therefore, was not error for the trial court to deem the defendant subject to the court's personal jurisdiction as a sanction for failing

to comply with the court's discovery orders. 456 U.S. at 706-09.

The same was true in *Chicago Life Insurance Company v. Cherry*, 244 U.S. 25, 29 (1917). There, the defendant explicitly consented to have a Tennessee trial court rule on its personal-jurisdiction challenge and appealed the trial court's adverse ruling through the Tennessee appellate courts. The defendant later was precluded from challenging the jurisdiction of the Tennessee court in proceedings in Illinois to enforce a judgment obtained against the defendant in Tennessee. The Court pointed out that the explicit consent to adjudication of personal jurisdiction in the Tennessee court was "thought to stand differently from a tacit assumption or mere declaration in the record that the court had jurisdiction." *Id.* The Court further pointed out that res judicata considerations precluded relitigation of a question decided, at defendant's behest, by a higher court of another state. *Id.* at 30 (citing *Forsyth v. Hammond*, 166 U.S. 506, 517 (1897)).

By contrast, the "consent" decision here was based on action taken by the court itself, and not by Petitioner. In particular, the courts relied on a provision included in a case management order—an order that purported to apply not only to already coordinated actions, but also to later added actions, regardless of the defendants named in those actions. And, the consent finding was based not on any explicit consent, but on actions deemed to constitute constructive consent. Further compounding the due process violation, the decision is contrary to the JCCP Court's repeated assurances that (1) Petitioner had not con-

sented to personal jurisdiction, (2) challenges to personal jurisdiction were forthcoming (the opposite of consent) and preserved, and (3) such challenges would not be waived by participating in the JCCP and would be addressed at the appropriate time after the *Mensing* challenge was resolved.

Furthermore, the conclusion that the provision in CMO1 constituted consent to the court's jurisdiction over *all* defendants in *all* lawsuits is not borne out by CMO3. Although applicable only to the Brand Defendants, CMO3 specifically provided that the filing of a master answer by the Brand Defendants *would not* constitute a general appearance by a Brand Defendant. If the consent of defendants to jurisdiction truly was found in CMO1, the language in CMO3 would be superfluous. The "jurisdiction" provision in the previously entered CMO1 cannot have two different meanings applied to two different sets of defendants.

The decision below is far out-of-step with this Court's jurisprudence prohibiting states from depriving defendants of their constitutional rights. Just as a local practice may not "prevent [a defendant] from laying the appropriate foundation for the enforcement of its constitutional right," a state-court order requiring participation in a state court coordinated proceeding may not require, and cannot result in, relinquishment of Petitioner's due process rights. *Mich. Cent. R. Co. v. Mix*, 278 U.S. 492, 495-96 (1929).

The assertion of personal jurisdiction based on consent does not meet due process and improperly

applied constructive or implied consent, and an unbounded and arbitrary definition of it to boot, to establish jurisdiction. The Court should grant this petition to make clear that a finding of consent to a court's jurisdiction cannot be manufactured in this way and must be made with the same attention to due process applicable to general and specific jurisdiction.

D. Due Process Requires Notice of Conduct That May Render Defendants Subject to Jurisdiction and State-Law Procedures Cannot and Do Not Supplant That Requirement

A fundamental requirement under the Due Process Clause is notice. "By requiring that individuals have 'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign,' the Due Process Clause 'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citations omitted). That requirement applies with equal force to conduct once a lawsuit is filed as it does to conduct before a lawsuit is filed.

State bars to the exercise of constitutional rights must themselves comport with the Constitution. The Court made that plain almost a century ago when it held that "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when

plainly and reasonably made, is not to be defeated under the name of local practice." *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923). To have any effect, a procedural bar to the exercise of a constitutional right must be "'firmly established and regularly followed.'" *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991) (quoting *James v. Kentucky*, 466 U.S. 341, 348-51 (1984)). It cannot be invented mid-way through litigation and imposed against a party.

Here, Petitioner repeatedly asserted its intent to challenge the court's jurisdiction over it in cases of non-resident plaintiffs, yet followed the court's direction to address preemption first. The court then abruptly reversed course. It stripped Petitioner of its right to assert a personal-jurisdiction defense finding found "consent" based on its action and "waiver" based on the very acts it directed and in the absence of any actions in the individual lawsuits. That decision followed the court's repeated assurances that personal-jurisdiction defenses were reserved for "later." Petitioner did not have any, much less fair, warning that following the instructions of the JCCP Court to first resolve what it viewed as an issue of subject matter jurisdiction, while at all times preserving the right to challenge personal jurisdiction, could result in a finding that it consented to jurisdiction or waived its liberty interests and due process rights.

The lack of fair notice continued through the writ proceedings vaguely referenced by the California Court of Appeal. The appellate review sought of the *Mensing* ruling was review the JCCP Court encouraged and which the court articulated was necessary

as the outcome impacted its subject matter jurisdiction over the cases. (App. 61, (deciding the ultimate determination of preemption issue impacted the court's jurisdiction over the actions); *see also* App. 25, 27 (coordination judge noting preemption issue impacts court's subject matter jurisdiction).) That review was sought through California's writ procedures of the issue addressed to a master complaint that included no information as to individual plaintiffs. As required by California rules, the writ identified the "real parties in interest" as the plaintiffs whose suits were pending in the JCCP. There was no notice at all—much less "fair warning"—that merely following the court's instructions and the state's writ review procedures would render Petitioner subject to the jurisdiction of a foreign sovereign in well over one thousand cases brought by non-resident plaintiffs.

This Court should grant review to make clear "the Constitution commands restraint before discarding liberty in the name of expediency." *J. McIntyre*, 131 S. Ct. at 2791. To have any meaning at all, that restraint must apply to wholesale waiver and consent determinations like that made by the courts here. A state cannot use local practices to set "springes" to defeat an assertion of constitutional rights "under the name of local practice." *Davis*, 263 U.S. at 24. A defendant does not have notice compliant with due process that local practices may constitute consent to personal jurisdiction or a waiver of the defendant's liberty interest and due process rights when the local practice does not meet the tests for consent and waiver of Constitutional rights established by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jeffrey F. Peck
Counsel of Record
Linda E. Maichl
Ulmer & Berne LLP
600 Vine Street, Suite 2800
Cincinnati, Ohio 45202
jpeck@ulmer.com
lmaichl@ulmer.com
Tel: 513-698-5000
Counsel for Petitioners PLIVA, Inc.

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Appendix U Reporter's Transcript of Proceedings in the Superior Court of California, Case No. CJC-10-004631 (JCCP 4631)
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Appendix V Notice of Entry of Order CMO 1: Appointment of Liaison Counsel, Jurisdiction and Stay of Discovery in the Superior Court of California, Case No. CJC-10-004631 (JCCP 4631)
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Appendix W Notice Regarding Stay in the Superior Court of California, Case No. CGC-09-484539 (June 22, 2010) . . . . . App. 105

APPENDIX A

IN THE SUPREME COURT OF CALIFORNIA

S238499

En Banc

Court of Appeal, First Appellate District, Division One - No. A149468

[Filed January 18, 2017]

PLIVA INC., Petitioner,	)
	)
v.	)
	)
SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent;	)
	)
JERRYANN MILLER, Real Party in Interest.	)

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

APPENDIX B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION ONE

A149468

(San Francisco County Super. Ct. Nos. JCCP4631 and CGC12525630)

[Filed November 9, 2016]

PLIVA INC.,	)
	)
Petitioner,	)
	)
v.	)
	)
THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,	)
	)
Respondent;	)
	)
JERRYANN MILLER,	)
	)
Real Party in Interest.	)

BY THE COURT:

The petition for writ of mandate and/or prohibition or other appropriate relief is denied. Petitioner fails to

show that the superior court erred in concluding petitioner waived any objection to service of process by making a general appearance. (Code Civ. Proc., § 410.50, subd. (a) ["A general appearance by a party is equivalent to personal service of summons on such party."].)

Petitioner filed demurrers challenging the superior court's subject matter jurisdiction and filed a motion to strike. (Code Civ. Proc., §§ 418.10, subd. (e)(3), 1014; *Roy v. Superior Court* (2005) 127 Cal.App.4th 337, 344; *Janzen v. Workers' Comp, Appeals Bd.* (1997) 61 Cal.App.4th 109, 116; accord, *Raps v. Raps* (1942) 20 Cal.2d 382, 384; *Smith v. Smith* (1950) 120 Cal.App.2d 474, 482-483.) Petitioner also agreed to the jurisdictional provision of Case Management Order No. 1, participated in drafting case management orders, and benefitted from the fact sheet process. *(Factor Health Management v. Superior Court* (2005) 132 Cal.App.4th 246, 251; *Mansour v. Superior Court* (1995) 38 Cal.App.4th 1750, 1757.) Furthermore, petitioner sought writ review of the denial of its *Mensing* demurrer. (Case No. A135804; see *Leone v. Medical Board* (2000) 22 Ca1.4th 660, 666; *Powers v. City of Richmond* (1995) 10 Ca1.4th 85, 92; *Taylor v. Superior Court* (1928) 93 Cal.App. 445, 447.)

Petitioner also fails to show that the superior court violated its due process rights. (*Fireman's Fund Ins. Co. v. Sparks Construction, Inc.* (2004) 114 Cal.App.4th 1135, 1147-1148.) Petitioner's equitable estoppel argument was not preserved for writ review. (*Palmer v. Superior Court* (2014) 231 Cal.App.4th 1214, 1236-1237; *Medical Bd. of California v. Superior Court* (1991) 227 Cal.App.3d 1458, 1462.)

The court notes the current petition raises many of the same arguments petitioner advanced in case Nos. A145555 and A145560. For that additional reason, the petition is denied. (See *Hagan v. Superior Court* (1962) 57 Ca1.2d 767, 770-771 ["in the orderly administration of justice, and in support of a sound judicial policy, a court, in the absence of unusual or changed circumstances, neither of which is here present, is justified, in its discretion, in refusing to consider repetitive applications of the same petition"], disapproved on other grounds, *Kowis v. Howard* (1992) 3 Ca1.4th 888, 895-901.)

Date: NOV 09 2016 s/ HUMES, P.J. P.J.

Before: Humes, P.J., Margulies, J., and Banke, J.

APPENDIX C

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

Judicial Council Coordinated Proceeding No. 4631

Case No. CGC-12-525630

[Filed September 14, 2016]

COORDINATION PROCEEDING SPECIAL TITLE [RULE 3.550 (c)]	)
REGLAN/METOCLOPRAMIDE CASES	)

ORDER DENYING MOTIONS OF PLIVA, INC. TO QUASH SERVICE OF SUMMONS AND TO DISMISS ACTION

I heard argument September 6, 2016 on generic defendant PLIVA's motion to quash service of summons. The motion is denied.

Plaintiff Jerryann Miller and husband Gilbert Miller were part of a multi-plaintiff complaint filed in California against the both brand name and generic manufacturers of Reglan, titled *Leslie Gold, et al. v Wyeth LLC*, et al. Case No. CGC11-507473.[1] Miller is a

[1] Declaration of Thomas M. Frieder in Support of Motion by Specially Appearing Defendant PLIVA, Inc. to Quash Service of Summons of Short Form Complaint Of Plaintiff Jerryann Miller ("Frieder Decl."), Ex. 1

resident of Minnesota and does not allege that she was prescribed, purchased, or had ingested metoclopramide in California. PLIVA is a New Jersey corporation with its principal place of business in New Jersey. Id., Ex. 1, ¶30. PLIVA does not dispute that it was served in the *Gold* case in January 2011.[2] In April, 2011 the parties including PLIVA agreed to the jurisdiction of the court by agreeing to case management order (CMO) No. 1. Crawford Decl. Ex 9 & 36.

On October 9, 2012, the Millers filed a 'Short Form Complaint' or SFC in Case No. CGC-12-525630.[1] That SFC was served electronically, as contemplated by CMO 3. PLIVA participated in the *Mensing* appeals, as discussed in my August 25, 2016 order on motions brought by defendants Teva on the same grounds as offered here. I appended that August 25, 2016 order and adopt its discussions here.

PLIVA argues that Miller's SFC was not properly served because, as a result of its incorporation of the Master Complaint, which contained additional and different purported causes of action than those asserted alone in the *Gold* complaint, the SFC substantially amended the *Gold* complaint such that new service under C.C.P. §416.10 was required. PLIVA cites *Engebretson & Co. v. Harrison*, 125 Cal.App.3d 436 (1981). *Engebretson* relied on C.C.P. § 580 to note that a default could not be taken on a complaint not

---

[2] PLIVA's moving Memorandum of Points of Authorities (MPA) at 3.

[1] SFCs incorporate by reference causes of action set forth in the Long Form Master Complaint, a copy of which is attached to the SFC.

formally served on the party. 125 Cal.App.3d at 444. Its logic is inapplicable where the defendant has appeared.

And PLIVA has indeed appeared. It agreed to the jurisdiction of the court in CM0 No.1 and it generally appeared when it participated in the *Mensing* proceedings.

PLIVA tells me that the *Mensing* proceedings were directed to *subject matter* jurisdiction and that under *Goodwine v. Superior Court of Los Angeles Cty.,* 63 Cal. 2d 481, 484 (1965), an attack on subject matter jurisdiction is just like an attack on personal jurisdiction and does not waive the personal jurisdiction objection. What PLIVA neglects to note is that the *Goodwine* defendant actually made a motion to quash as part of his jurisdictional attack, 63 Cal. 2d at 481, and that in *Goodwine's* context, a family law matter, the subject matter and personal jurisdiction issues were congruent: "In an action for divorce, domicile is dispositive, since "the domicile of one spouse within a State gives power to that State ... to dissolve a marriage wheresoever contracted." 63 Cal. 2d at 483, quoting *Williams v. State of N.C.*, 325 U.S. 226 (1945). Subject matter and personal jurisdiction were exactly the same issue. *Goodwine*, 63 Cal. 2d at 484. See also, *Janzen v. Workers' Comp. Appeals Bd.*, 61 Cal. App. 4th 109, 116-17 (1997) (construing *Goodwine*).

In this case, of course, they are not the same issue.

The motion is denied.

Dated: September 14, 2016

/s/_____
Curtis E.A. Karnow
Judge Of The Superior Court

ATTACHMENT

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

Judicial Council Coordinated
Proceeding No. 4631

Case No. CGC-12-523848
Case No. CGC-11-524286
Case No. CGC-12-523832
Case No. CGC-12-523770

[Filed August 25, 2016]

COORDINATION PROCEEDING	)
SPECIAL TITLE [RULE 3.550 (c)]	)
	)
REGLAN/METOCLOPRAMIDE CASES	)
	)

ORDER DENYING MOTIONS OF TEVA PHARMACEUTICALS USA INC. TO QUASH SERVICE OF SUMMONS AND TO DISMISS ACTIONS, ALL RE: PLAINTIFFS JUANITA CLARK, RAYMOND HOWARD, ELLAREE JOHNSON AND EVELYN MORA

On August 24, 2016 I heard argument on motions brought by defendants Teva[1] to (1) dismiss and (2) quash service of summons regarding four plaintiffs: Juanita Clark, Raymond Howard, Ellaree Johnson, and Evelyn Mora. In each case no complaint was served on

[1] PLIVA originally also filed these motions but has withdrawn its motions.

Teva. No returns of service were filed.[2] The thrust of these motions is to have the actions dismissed because service of process was not timely served, and to quash for lack of personal jurisdiction.

While plaintiffs must serve the summons and complaint within three years as specified by C.C.P. § 583.210, the sanction of dismissal does not apply if the defendant does an act "that constitutes a general appearance in the action." C.C.P. § 583.220. So too with a personal jurisdiction challenge: It is hornbook law that a general appearance moots the issue. Weil & Brown, et al., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶3:158 (Rutter: 2016) (WEIL & BROWN). As the parties recognized at argument, the same issues are posed by all motions, which is whether Teva has generally appeared.

When defendants seek "relief available only if the court has jurisdiction over the defendant, then the appearance is a general one." *Factor Health Mgmt. v. Sup.Ct.* (*Apex Therapeutic Care, Inc.*), 132 Cal.App.4th 246, 250 (2005); see generally WEIL & BROWN at ¶¶ 3:158.1, 10:57.

That's what happened here.

A. Teva participated in the petitions filed with the California Court of Appeal and the Supreme Court, both of which occurred after plaintiffs filed their short form complaints (SFCs) in August of 2012.[1] My

---

[2] Thus it is not clear what 'service of summons' is sought to be quashed in these motions.

[1] These were appellate proceedings on the so-calling *Mensing* grounds, see *PLIVA. v. Mensing,* 131 S.Ct. 2567 (2011).

predecessor Judge Kramer asked Teva if it exempted any specific cases from the petitions on the basis that defendants intended to challenge the jurisdiction in those cases, and defendants confirmed that they did not. M. Crawford Decl. Ex. 68, 24:17-22 and 26:25-27:5. Thus, if the Court of Appeal had reviewed Judge Kramer's decision, and had it reversed, all cases pending against Teva, *including the four cases at issue now*, would have been dismissed. Teva's participation in the writ process is a general appearance. Judge Kramer agreed. *Id.* at 32:5.

B. Defendants also participated in the fact sheet process. All plaintiffs were required to present sufficient evidence within 6 months of filing their SFCs that they ingested the named defendants' products. Plaintiffs that failed to do so within six months of filing the SFC were subject to dismissal. Teva benefited from this process by obtaining extensive fact sheets and medical records from plaintiffs without having to issue any discovery requests and would have obtained dismissals in the cases at issue now had plaintiffs failed in their discovery obligations.

Teva suggests that its participation was limited to the JCCP, and perhaps some of the California resident plaintiff cases only. But the participation I note above was in the specific cases, including the ones at issue here.

The motions are denied.

Dated: August 25, 2016

/s/_____

Curtis E.A. Karnow
Judge Of The Superior Court

* * * [*Certificates of Service Omitted in the Printing of this Appendix*]* * *

APPENDIX D

Cal. Civ. P. Code

§ 404. Civil actions sharing common question of fact or law; petition for coordination or motion for permission to submit petition; supporting declaration; assignment of judge

When civil actions sharing a common question of fact or law are pending in different courts, a petition for coordination may be submitted to the Chairperson of the Judicial Council, by the presiding judge of any such court, or by any party to one of the actions after obtaining permission from the presiding judge, or by all of the parties plaintiff or defendant in any such action. A petition for coordination, or a motion for permission to submit a petition, shall be supported by a declaration stating facts showing that the actions are complex, as defined by the Judicial Council and that the actions meet the standards specified in Section 404.1. On receipt of a petition for coordination, the Chairperson of the Judicial Council may assign a judge to determine whether the actions are complex, and if so, whether coordination of the actions is appropriate, or the Chairperson of the Judicial Council may authorize the presiding judge of a court to assign the matter to judicial officers of the court to make the determination in the same manner as assignments are made in other civil cases.

§ 404.1. Promotion of ends of justice; standards

Coordination of civil actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether the common question of fact or law is predominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and manpower; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and, the likelihood of settlement of the actions without further litigation should coordination be denied.

§ 404.7. Practice and procedure; duty of judicial council

Notwithstanding any other provision of law, the Judicial Council shall provide by rule the practice and procedure for coordination of civil actions in convenient courts, including provision for giving notice and presenting evidence.

Cal. Rules of Court

Rule 3.504. General law applicable

(a) General law applicable

Except as otherwise provided in the rules in this chapter, all provisions of law applicable to civil actions generally apply to an action included in a coordination proceeding.

(b) Rules prevail over conflicting general provisions of law

To the extent that the rules in this chapter conflict with provisions of law applicable to civil actions generally, the rules in this chapter prevail, as provided by Code of Civil Procedure section 404.7.

(c) Manner of proceeding may be prescribed by assigned judge

If the manner of proceeding is not prescribed by chapter 3 (commencing with section 404) of title 4 of part 2 of the Code of Civil Procedure or by the rules in this chapter, or if the prescribed manner of proceeding cannot, with reasonable diligence, be followed in a particular coordination proceeding, the assigned judge may prescribe any suitable manner of proceeding that appears most consistent with those statutes and rules.

(d) Specification of applicable local rules

At the beginning of a coordination proceeding, the assigned judge must specify, subject to rule 3.20, any local court rules to be followed in that proceeding, and thereafter all parties must comply with those rules. Except as otherwise provided in the rules in this chapter or as directed by the assigned judge, the local rules of the court designated in the order appointing the assigned judge apply in all respects if they would otherwise apply without reference to the rules in this chapter.

Rule 3.524. Order assigning coordination motion judge

(a) Contents of order

An order by the Chair of the Judicial Council assigning a coordination motion judge to determine whether coordination is appropriate, or authorizing the presiding judge of a court to assign the matter to judicial officers of the court to make the determination in the same manner as assignments are made in other civil cases, must include the following:

(1) The special title and number assigned to the coordination proceeding; and

(2) The court's address or electronic service address for submitting all subsequent documents to be considered by the coordination motion judge.

(b) Service of order

The petitioner must serve the order described in (a) on each party appearing in an included action and send it to each court in which an included action is pending with directions to the clerk to file the order in the included action.

Rule 3.540. Order assigning coordination trial judge

(a) Assignment by the Chair of the Judicial Council

When a petition for coordination is granted, the Chair of the Judicial Council must either assign a coordination trial judge to hear and determine the

coordinated actions or authorize the presiding judge of a court to assign the matter to judicial officers of the court in the same manner as assignments are made in other civil cases, under Code of Civil Procedure section 404.3. The order assigning a coordination trial judge must designate an address for submission of papers to that judge.

(b) Powers of coordination trial judge

Immediately on assignment, the coordination trial judge may exercise all the powers over each coordinated action that are available to a judge of the court in which that action is pending.

(c) Filing and service of copies of assignment order

The petitioner must file the assignment order in each coordinated action and serve it on each party appearing in each action, and, if the assignment was made by the presiding judge, submit it to the Chair of the Judicial Council. Every paper filed in a coordinated action must be accompanied by proof of submission of a copy of the paper to the coordination trial judge at the designated address. A copy of the assignment order must be included in any subsequent service of process on any defendant in the action.

Rule 3.541. Duties of the coordination trial judge

(a) Initial case management conference

The coordination trial judge must hold a case management conference within 45 days after issuance of the assignment order. Counsel and all self-represented persons must attend the conference and be

prepared to discuss all matters specified in the order setting the conference. At any time following the assignment of the coordination trial judge, a party may serve and submit a proposed agenda for the conference and a proposed form of order covering such matters of procedure and discovery as may be appropriate. At the conference, the judge may:

(1) Appoint liaison counsel under rule 3.506;

(2) Establish a timetable for filing motions other than discovery motions;

(3) Establish a schedule for discovery;

(4) Provide a method and schedule for the submission of preliminary legal questions that might serve to expedite the disposition of the coordinated actions;

(5) In class actions, establish a schedule, if practicable, for the prompt determination of matters pertinent to the class action issue;

(6) Establish a central depository or depositories to receive and maintain for inspection by the parties evidentiary material and specified documents that are not required by the rules in this chapter to be served on all parties; and

(7) Schedule further conferences if appropriate.

(b) Management of proceedings by coordination trial judge

The coordination trial judge must assume an active role in managing all steps of the pretrial, discovery, and trial proceedings to expedite the just determination of the coordinated actions without delay.

The judge may, for the purpose of coordination and to serve the ends of justice:

(1) Order any coordinated action transferred to another court under rule 3.543;

(2) Schedule and conduct hearings, conferences, and a trial or trials at any site within this state that the judge deems appropriate with due consideration to the convenience of parties, witnesses, and counsel; to the relative development of the actions and the work product of counsel; to the efficient use of judicial facilities and resources; and to the calendar of the courts; and

(3) Order any issue or defense to be tried separately and before trial of the remaining issues when it appears that the disposition of any of the coordinated actions might thereby be expedited.

Rule 3.545. Termination of coordinated action

(a) Coordination trial judge may terminate action

The coordination trial judge may terminate any coordinated action by settlement or final dismissal, summary judgment, or judgment, or may transfer the action so that it may be dismissed or otherwise terminated in the court where it was pending when coordination was ordered.

(b) Copies of order dismissing or terminating action and judgment

A certified copy of the order dismissing or terminating the action and of any judgment must be transmitted to:

(1) The clerk of the court in which the action was pending when coordination was ordered, who shall promptly enter any judgment and serve notice of entry of the judgment on all parties to the action and on the Chair of the Judicial Council; and

(2) The appropriate clerks for filing in each pending coordinated action.

(c) Judgment in coordinated action

The judgment entered in each coordinated action must bear the title and case number assigned to the action at the time it was filed.

(d) Proceedings in trial court after judgment

Until the judgment in a coordinated action becomes final or until a coordinated action is remanded, all further proceedings in that action to be determined by the trial court must be determined by the coordination trial judge. Thereafter, unless otherwise ordered by the coordination trial judge, all such proceedings must be conducted in the court where the action was pending when coordination was ordered. The coordination trial judge must also specify the court in which any ancillary proceedings will be heard and determined. For purposes of this rule, a judgment is final when it is no longer subject to appeal.

APPENDIX E

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
HONORABLE RICHARD A. KRAMER,
JUDGE PRESIDING
DEPARTMENT NUMBER 303

Coordination Proceeding
Case No.: CJC-10-004631

[Dated April 10, 2015]

COORDINATION PROCEEDING	)
SPECIAL TITLE [RULE 1550(b)]	)
	)
REGLAN/METOCLOPRAMIDE CASES	)
	)

Reporter's Transcript of Proceedings

Friday, April 10, 2015

REPORTED BY:
MARY ANN SCANLAN-STONE, CRR-RPR-CCRR-CLR CSR NO. 8875

* * *

[p.10]

* * *

THE COURT: . . . .

We have Pliva's motion to quash service of summons in Kasparian; we have Pliva's motion to quash for lack of personal jurisdiction in Bowman; we

have Teva's motion to quash service of summons in Kasparian; we have Teva's motion to quash for lack of personal jurisdiction in Bowman; we have Barr, B-A-R-R, motion to quash for lack of personal jurisdiction in Bowman; and then we have plaintiff's motion to determine that Pliva and Teva waive personal jurisdiction arguments.

* * *

[p.14]

* * *

THE COURT: . . . .

We have two other groupings of motions. One is the motion regarding lack of personal jurisdiction over the defendant moving parties, and the other is the plaintiffs' motion for me to determine that certain activities in this case constituted either a waiver of the arguments in the defendants' motions or consent to

[p.15]

jurisdiction -- same point, different focus.

As to that, the tentative ruling is to grant the motions by the plaintiffs and to deny the motions for the defendants for the following reasons: First of all, I see it as pretty simple, CMO1 says I have jurisdiction over the parties, the cases, and counsel, all of them, and that got served on everybody.

As a matter of fact, some of the participants on the defense side as liaison counsel are counsel in these motions here. And everybody knew at that time what we were about to embark on was an absolutely massive administrative odyssey is the only way to describe it

and that this Court was getting organized and helping to organize you folks, and you were helping to organize me as to what we were going to do with this massive set of cases.

And fundamental to that was I had to have jurisdiction over the participants.

So the order says that and, to me, that recitation alone resolves the issues here, because if anybody disagreed with that, whether or not they individually signed on to it -- but if anybody disagreed with that, they had to say, hey, wait a minute, not us, not us.

And we would have tackled it then, before many

[p.16]

of the procedures that were put in place and relied on by me and relied on by everybody else here. All of that would have stopped and we would have figured out who's playing and who's not. That all by itself, in my view, is sufficient to constitute a waiver of the judicial claims.

Beyond that, if you look at the kinds of activities that followed, it is clear to me that everybody on the defense side was involved with the demurrers on Mensing, was involved with dealing with me on what I did with Mensing, with going up to the Court of Appeal on Mensing and petitioning the Supreme Court on Mensing.

Nobody mentioned in these papers but I am not aware that any defendant claimed that the Mensing ruling I made would not be binding on them for lack of jurisdiction, and I would be surprised had my ruling

gone the other way and then had the -- not just my -- the appeal of my order, but the ultimate one where you got the opinion -- I just forgot the name of that case, the other case.

* * *

THE COURT: I doubt if it had gone the other way if they would have said, no, no, no, that's not

[p.17]

binding on us, there's no jurisdiction. We'll try that again in West Virginia or someplace.

Everybody acted as if what I was doing was going to be the determination of the impact of Mensing on this group of defendants -- as a matter of fact, as I said, liaison counsel in those activities, one of the counsels of record here.

In addition to that, there were actions by the plaintiffs, which follows CMO1 in delivering information in what I had hoped was an efficient economic fashion, saving everybody -- I think the amount of money I calculated it saved was a bazillion dollars. I believe that's the number we all came up with.

But basically, there was no discovery. Basically, we put together these fact sheet packages and turned them over. We didn't -- you folks did, the plaintiffs did. That wouldn't have happened without jurisdiction.

And then accepting them, that's a benefit no matter where the case is going to be tried. That is a huge benefit. It's a benefit of getting the information, which -- well, maybe the plaintiffs would have turned over

that information to anybody, but I can't assume such a thing. More likely it would have required discovery, and nobody had to pay for discovery.

[p.18]

We didn't have 3,000 motions to get access to each plaintiff's hospital records.

We didn't have 3,000 motions to get -- I don't even know if I've got the right number here, but we didn't have lots of motions to get answers to fact sheets. That is a participation in the courts of California resulting in a tangible litigation benefit, and that, to me, accepting those benefits, is consent to jurisdiction.

So that is the basis for denying the defendants' motions and granting the plaintiffs' motions.

* * *

[p.36]

* * *

THE COURT: You have not hidden anything, there have been no weeds to hide in, and it was just what happened. And I said we would do it later because we needed to talk about subject matter jurisdiction separately. That's why I didn't say anything about the argument regarding CCP 418 -- whatever it is -- that talks about 30 days to move to quash.

But you waived -- you waived the jurisdiction by participating. You allowed California's court system to rule on an absolutely crucial part of this case.

* * *

THE COURT: And it's not laying in the weeds, it's not bad, it's not like you tricked me into thinking anything.

It was, I think a -- if it were volitionally thought out and concluded we should do this, it was a good strategy, but the fact is that's what happened.

You came into our California courts and instead of saying we've got to go home because you guys don't have any business doing anything for us -- which

[p.37]

is what jurisdiction is, personal jurisdiction -- instead of doing that, you said, well, let's see if Kramer will throw the whole thing out and let's see what the Court of Appeals does with whatever Kramer does. And if that doesn't work, we'll go to the state Supreme Court.

* * *

[p.41]

* * *

THE COURT: The problem isn't a waiver of challenges. You got to make your challenges. I didn't say you can't even argue. I said you consented to jurisdiction and you waived the substance of your arguments, but you made your motion. We got a record.

* * *

[p.46]

* * *

THE COURT: I said both, waiver and consent.

I was really careful. I did that on purpose.

Waiver sounds like something bad. We should reinvent words.

Basically, you asked California to take a look at a really heady issue that had nothing to do with procedural due process. It had to do with the impact of a United States Supreme Court decision, pretty heady stuff. I mean, that was not an easy case, especially all the judges around the country that had interpreted that.

You said, California, take a look at this. You're saying you didn't and that's -- I'm the judge. I get to figure this one out for now anyway.

* * *

[p.48]

* * *

THE COURT: Right, but the point of all that was to get Mensing done. The point of all that was to give a clear field so we could hopefully get to a Court of Appeal decision as quickly as possible, the point

[p.49]

being to get rid of you guys if you deserve to be out. That's what the stay was all about.

And the stay resulted in a benefit to everybody, including this Court, of figuring out who the real parties were, do the generics belong in here or not -- a whole bunch of cases -- so that was the substantive question. The fact that everything else was stayed doesn't really mean anything from my analysis here.

And you notice I didn't say you sat on your hands too long. I didn't say that, either.

* * *

[p.50]

It could be subject matter jurisdiction, but I could have had procedural and specific or general jurisdiction, but no subject matter jurisdiction because of preemption, and I think what we did made great sense.

* * *

APPENDIX F

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
HONORABLE RICHARD A. KRAMER,
JUDGE PRESIDING
DEPARTMENT NUMBER 303

Coordination Proceeding
Case No.: CJC-10-004631

[Dated February 26, 2015]

COORDINATION PROCEEDING	)
SPECIAL TITLE [RULE 1550(b)]	)
	)
REGLAN/METOCLOPRAMIDE CASES	)
	)

Reporter's Transcript of Proceedings

Thursday, February 26, 2015

REPORTED BY:
MARY ANN SCANLAN-STONE, CRR-RPR-CCRR-CLR CSR NO. 8875

* * *

[p.82]

* * *

[THE COURT:]

But we should resolve the question, especially -- I'm pretty solvent on the question of waiver ought to get resolved. If there is something to be done regarding

what's going on in the state supreme court regarding general jurisdiction or specific jurisdiction -- not waiver -- then somebody ought to look at what is that thing that ought to get resolved and what is going on in the state supreme court and should that be dealt with?

But the precise order is the stay is lifted so that any party can file any motion in any case regarding jurisdiction. Failure to do so will not change the situation as it exists today. So if there was a waiver, there was a waiver. If there's not, there will not be a waiver generated by failure to file a motion.

That's pretty clear and I think that protects everybody.

MR. OETHEIMER: Yes, I think it does, Your Honor, and it avoids the thousand motions.

We probably want to have that reduced to a written order since we'll have a new judge sitting and construing this. We'll have the transcript and I think that's very clear, but — does it make sense to have a written order?

* * *

APPENDIX G

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
HONORABLE RICHARD A. KRAMER,
JUDGE PRESIDING
DEPARTMENT NUMBER 303

Coordination
Case No.: CJC-10-004631

[Dated February 11, 2014]

COORDINATION PROCEEDING	)
SPECIAL TITLE [RULE 1550(b)]	)
	)
Proceeding	)
	)
REGLAN/METOCLOPRAMIDE CASES	)
	)

Reporter's Transcript of Proceedings

Tuesday, February 11, 2014

REPORTED BY:
MARY ANN SCANLAN, RPR, CCRR, CLR, CSR NO. 8875

* * *

[p.32]

* * *

THE COURT: . . . .

There seems like there may be some jurisdictional questions regarding some of the defendants. I don't know if there are subject matter disputes still -- subject matter jurisdiction disputes, but there seem to be in personam jurisdiction disputes.

Have I got that right?

MR. OETHEIMER: Yes. I guess, Your Honor, I'd say there are -- there's the master complaint issue.

THE COURT: Let me do it my way just for a second here.

And there are also, besides in personam jurisdiction attacks, one of the things that you differ on in the draft -- and whoever did that, the revised draft, I greatly appreciated that. It would have been like reading a James Joyce novel if you had just done it as two separate versions, but thank you.

* * *

[pp.43-44]

THE COURT: Do you want me to ask him that question?

Are you going to be raising jurisdictional nonsense?

Answer, no.

MR. SKIKOS: [Plaintiffs' Counsel] Are you going to be raising jurisdictional challenges in this brief, too, because that's what I thought.

THE COURT: Hold on. It depends on what you mean by jurisdiction.

If you're talking about subject matter jurisdiction, that's what it's all about, right?

If you're talking about in personam jurisdiction, that's going to be later.

And if we're talking about procedural jurisdiction, improper service, that's going to be later, , unless you think for some reason any of that is apt only as to the 18th and 19th causes of action, and I don't see how it could be only as to two causes of action, except for the -- well, it won't be apt. The only thing that's apt is subject matter jurisdiction when there's preemption.

Have I got that right?

MR. OETHEIMER: Yes, Your Honor.

We don't see those as master complaint issues. They'll be raised later in individual cases.

THE COURT: That's why I tried to pin down what is the range of attacks that I have to deal with with the master complaint and the individual complaints, and that's why I wanted to see where CMO6 fits into all of this.

MR. OETHEIMER: Right. It's just, as to those counts, whether they are preempted by federal law and whether they state a cognizable claim, in general, not as to -- they're even -- you know, the design defect, even if -- even if the Court finds it is not preempted by Bartlett, there may be in individual cases.

That may not be a viable cause of action under some state's law. I think plaintiffs even concede it's not a viable action under California law, but that's for --

that would come up later in an individual case, depending on what law applies.

* * *

APPENDIX H

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO
CIVIC CENTER DIVISION

JCCP Proceeding No. 4631

[Filed May 2, 2014]

COORDINATION PROCEEDING SPECIAL TITLE [RULE 3.550]	)
REGLAN/METOCLOPRAMIDE CASES	)
PLAINTIFFS,	)
vs.	)
NAME-BRAND DEFENDANTS; GENERIC/OTHER DEFENDANTS.	)

JOSHUA S. GOODMAN (SBN 116576)
jgoodman@gnhllp. com
GOODMAN NEUMAN HAMILTON LLP
417 Montgomery Street, 10th Floor
San Francisco, California 94104
Tel.: 415.705.0400
Fax.: 415.705.0411

TAMMARA N. TUKLOFF (SBN 192200)
ttukloff@mpplaw. com
MORRIS POLICH & PURDY, LLP
600 W. Broadway, Suite 500
San Diego, California 92101
Tel.: 619.557.0404
Fax: 619.557.0460

Liaison Counsel for GENERIC DEFENDANTS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF GENERIC DEFENDANTS' DEMURRER TO THIRD AMENDED LONG FORM MASTER COMPLAINT

Date:	May 2, 2014
Time:	9:30 a.m.
Dept:	303
Judge:	Richard A. Kramer
Third Amended Complaint Filed:	January 31, 2014

* * *

[p.2]

Generic Defendants specifically demur to Plaintiffs' design defect cause of action as to Generic Defendants because, under even the narrowest reading of *Bartlett*, this cause of action is squarely preempted by federal law.[4] Plaintiffs' cause of action for design defect requires that Generic Defendants unilaterally change the design of their drug or its accompanying warnings, neither of which federal law allows; thus, the design defect claim is preempted. (*Mutual Pharmaceutical Co. v. Bartlett*, *supra*, 133 S.Ct. at 2476.) And to the extent Plaintiffs attempt to circumvent preemption by basing their design defect cause of action on failure-to-warn theories of liability, Plaintiffs' failure-to-warn allegations are merely duplicative of those in Plaintiffs' failure-to-warn cause of action and add no additional facts or theories of liability. Accordingly, the Court should sustain the demurrer to the design defect cause of action without leave to amend.

* * *

---

[4] This demurrer is directed to the TALFMC only and, as such, is a master pleading challenge. The filing of this pleading is not intended as, and does not constitute, an appearance by any defendant in any individual action in the JCCP, and the filing of this pleading is without waiver of each defendant's rights to challenge personal jurisdiction or to assert a *forum non conveniens* challenge in any individual action; said rights are expressly reserved, and the Court has recognized that such challenges are not yet ripe. (*See* Feb. 11, 2014 Tr. 43:18-20 ["If you're talking about in personam jurisdiction, that's going to be later. And if we're talking about procedural jurisdiction, improper service, that's going to be later . . . ."].) Generic Defendants also expressly reserve the right to respond via demurrer or motion to any individualized pleading insufficiencies that are more appropriately addressed at the individual Short Form Complaint stage. . . .

APPENDIX I

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO
CIVIC CENTER DIVISION

JCCP Proceeding No. 4631
Superior Court No. CJC-10-004631

[Dated March 6, 2015]

COORDINATED PROCEEDING SPECIAL TITLE [RULE 3.550]	)
REGLAN/METOCLOPRAMIDE CASES	)
PLAINTIFFS,	)
vs.	)
NAME-BRANDED DEFENDANTS; GENERIC/OTHER DEFENDANTS.	)

DECLARATION OF REX A. LITTRELL IN SUPPORT OF MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR DETERMINATION THAT GENERIC DEFENDANTS PLIVA AND TEVA PHARMACEUTICALS WAIVED PERSONAL JURISDICTION CHALLENGES

* * *

Judge: Hon. Richard A. Kramer

[Dated: March 6, 2015]

I, REX A. LITTRELL, declare as follows:

1. I am a partner with the law firm of Ulmer & Berne LLP. I am over eighteen years of age. Unless I state otherwise, I have personal knowledge of the matters stated in this declaration, and, if called as a witness, I could and would competently testify to such matters.

2. I am an attorney at law duly licensed to practice before all courts of the State of Ohio. I serve as counsel for PLIVA, Inc. ("PLIVA"), which has been named as a defendant in a number of cases included in *In re Reglan/Metoclopramide Cases*, JCCP No. 4631 (San Francisco Super. Ct.) (the "JCCP"). I have been admitted *pro hac vice* in the case *Terri Lynn Elkins, et al. v. Wyeth, Inc., et al.* (San Francisco Super. Ct.), No. CGC-09-484539, one of the cases coordinated in the JCCP.

3. This Declaration is made in support of the Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion For Determination that Generic Defendants PLIVA and Teva Pharmaceutical Waived Personal Jurisdiction Challenges.

4. In their motion, Plaintiffs contend that PLIVA and Teva Pharmaceuticals USA, Inc. ("Teva") only recently informed Plaintiffs and the Court that they (like other Generic Defendants in the JCCP) intended to challenge personal jurisdiction in cases

coordinated in the JCCP filed by non-California plaintiffs claiming to be injured by their use of generic metoclopramide outside of California. That contention is incorrect.

5. Generic Defendants (not just Teva and PLIVA) repeatedly have raised with Plaintiffs and the Court their intention to assert personal jurisdiction challenges in individual cases, if necessary, in appropriate cases when they eventually are allowed to respond to Plaintiffs' individual short form complaints after the lifting of applicable stays.

6. I first raised the issue of possible personal jurisdiction challenges with the Court at a "cookie lunch" conducted on July 26, 2011, to discuss with the Court the implications of the United States Supreme Court's decision in *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011). During the cookie lunch, I informed the Court that, in addition to *Mensing*, the Supreme Court had issued two other decisions, *Goodyear Dunlap Tires Operations v. Brown*, 131 S. Ct. 2846 (2011), and *J. McIntyre Machinery, Ltd, v. Nicastro*, 131 S. Ct. 2780 (2011), that addressed personal jurisdiction issues which could impact the JCCP. Prior to the cookie lunch, I had informed Steve Skikos, a member of the Plaintiffs' Liaison Counsel (the "PLC"), that I intended to raise the issue. At the cookie lunch, Mr. Skikos responded to my comments by asserting that defendants had agreed to waive *forum non conveniens* challenges. The Court responded by noting that personal jurisdiction challenges were different than *forum non conveniens* challenges.

7. On multiple occasions after the July 26, 2011 cookie lunch, I discussed with Plaintiffs' counsel the

fact that many Generic Defendants, including PLIVA, intended to assert personal jurisdiction challenges in individual cases once Plaintiffs filed their individual Short Form Complaints and applicable stays were lifted.

8. The parties' discussions regarding potential later personal jurisdiction challenges were part of the basis of defendants' request on July 26, 2011, that the Court enter Amended Case Management Order 1 making clear that the filing of challenges to plaintiffs to-be-filed master complaint "are without prejudice and do not constitute a waiver of the right to file motions on any issue not related to the impact of the *Mensing* decision after further order of the Court."

9. I also attended a cookie lunch with the Court on September 26, 2011, during which time members of the PLC and Defendants' Liaison Counsel discussed Plaintiffs' intent to file a long form master complaint ("LFMC") to use as a vehicle for Generic Defendants' *Mensing* preemption challenge, which originally was going to take the form of a motion to strike the LFMC filed by Generic Defendants Liaison Counsel after Plaintiffs' counsel were provided with a limited period of time to object to the LFMC. At that cookie lunch, the parties and Court confirmed that the motion to strike the LFMC would be filed in the JCCP, not in any individual case.

10. Plaintiffs filed their "JCCP Long Form Master Complaint for Damages" (the "Master Complaint") on October 3, 2011, and Generic Defendants' Liaison Counsel filed a "Motion to Revoke Leave to File an Amended Complaint or to Strike

Plaintiffs' Master Long Form Master Complaint as to Generic Defendants" on November 1, 2011.

11. I also attended a case management conference conducted on February 2, 2012. During that case management conference, the Court expressed concern that the motion to strike filed on November 1, 2011, might not be the proper vehicle for Generic Defendants' preemption challenge to the Master Complaint, and discussions were conducted about the challenge being refiled in the form of a demurrer. The Court confirmed that the filing of the first demurrer to the Master Complaint did not constitute a waiver of other issues at a later time, including "other matters that could be put into a demurrer or motion to strike." (*See* Feb. 2, 2012 Hr'g Tr., at 53:6-15.)

12. Following the Court ruling denying Generic Defendants' demurrer to the Master Complaint and resolution of subsequent appellate proceedings relating to that Order, Generic Defendants attempted to engage the PLC in discussions regarding the entry of a case management order for Generic Defendants similar to Case Management Order 3 applicable to Brand Defendants. As part of those attempts, on June 14, 2013, Generic Defendants Liaison Counsel forwarded to PLC representatives a draft case management order. A true and accurate copy of Generic Defendants Liaison Counsel's June 14, 2013 e-mail communication, with the attached draft case management order, is attached as Exhibit A.

13. Included in the June 14, 2013 draft case management order forwarded to the PLC representatives was a provision providing that a Generic Defendant who is identified in an individual

Plaintiffs Short Form Complaint ("SFC") may file a Short Form Answer or a motion to quash service of summons. (*See* Draft CMO attached to June 14, 2013 E-Mail, Exhibit A, at 6:10-15.) The motions to quash were intended to be the vehicle for raising personal jurisdiction challenges, pursuant to CCP § 418.10, in response to SFCs filed by non-California plaintiffs.

14. The parties' discussions regarding potential later personal jurisdiction challenges were part of the basis of defendants' request on July 26, 2011, that the Court enter Amended Case Management Order 1 making clear that the filing of challenges to plaintiffs to-be-filed master complaint "are without prejudice and do not constitute a waiver of the right to file motions on any issue not related to the impact of the *Mensing* decision after further order of the Court." (*See* Amended CMO 1: Appointment of Liaison Counsel, Jurisdiction and Stay Discovery, Frieder Dec., Ex. 14.) Utilizing its power to order the manner in which issues would be decided in the JCCP, the Court amended CMO1 to lift the stay that had been in place since the petition to form the JCCP was filed for the limited purpose of allowing Generic Defendants to file *Mensing* challenges.

15. Similarly, the first two sentences of the Court's July 26, 2011 Order Re Plaintiffs' Preliminary Disclosures stated that nothing in the order "shall limit or otherwise constitute a waiver of any substantive claim or defense against any party in this coordinated proceeding. All such claims and defenses are preserved." (*See* July 26, 1011 Order Re Plaintiffs' Preliminary Disclosures, Frieder Dec., Ex. 15.)

16. On multiple occasions after the July 26, 2011 cookie lunch, I discussed with Plaintiffs' counsel the fact that many Generic Defendants, including PLIVA, intended to assert personal jurisdiction challenges in individual cases once Plaintiffs filed their individual Short Form Complaints and applicable stays were lifted.

17. A *Mensing* challenge was filed in the form of a motion for judgment on the pleadings on August 18, 2011, in the *Elkins* case alone—the lawsuit by California residents with a specific jurisdictional nexus to California that was the vehicle plaintiffs used to petition for the JCCP. (*See* Notice of Motion and Motion of Generic Defendants for Judgment on the Pleadings in *Elkins v. Wyeth Inc.*, Case No. CGC-09-484539, Frieder Dec., Ex. 16.) At a case management conference conducted on August 23, 2011, plaintiffs told the JCCP court they would file a master complaint. The Court ordered Generic Defendants to address any *Mensing* challenge to that master complaint explaining that "we might be better off having all attacks on the . . . master complaint . . . all packaged at the same time for appellate review so that you could have one-stop shopping" and "[i]f you're going to have a master complaint, you might as well have a master demurrer." (*See* August 23, 2011 Hearing Tr. 17:14-25, 22:20-23, 26:4-27:-2, Frieder Dec., Ex. 17.) As a result, the JCCP court held the *Elkins* motion in abeyance. Plaintiffs' counsel advised the court that all parties would "reserve all of their rights, claims, attacks, arguments, whatever, after they received that master complaint . . . . [E]verything is reserved; whatever

arguments they want to make, whatever arguments we want to make." (*Id.*, at Tr. 16-17.)

* * *

APPENDIX J

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO
CIVIC CENTER DIVISION

JCCP Proceeding No. 4631

[Filed November 18, 2013]

COORDINATION PROCEEDING SPECIAL TITLE [RULE 3.550]	)
REGLAN/METOCLOPRAMIDE CASES	)
PLAINTIFFS,	)
vs.	)
NAME-BRAND DEFENDANTS; GENERIC/OTHER DEFENDANTS,	)

JOSHUA S. GOODMAN (SBN 116576)
jgoodman@gnhllp. com
GOODMAN NEUMAN HAMILTON LLP
417 Montgomery Street, 10th Floor
San Francisco, California 94104
Tel.: 415.705.0400
Fax.: 415.705.0411

TAMMARA N. TUKLOFF (SBN 192200)
ttukloff@mpplaw. com
MORRIS POLICH & PURDY, LLP
600 W. Broadway, Suite 500
San Diego, California 92101
Tel.: 619.557.0404
Fax: 619.557.0460

Liaison Counsel for GENERIC DEFENDANTS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF GENERIC DEFENDANTS' DEMURRER TO SECOND AMENDED LONG FORM MASTER COMPLAINT

Date:	November 18, 2013
Time:	9:30 a.m.
Dept:	303
Judge:	Richard A. Kramer
Second Amended Complaint Filed:	May 16, 2013

* * *

[p.2]

which, under this Court's April 2012 decision and even the narrowest reading of *Bartlett*, there can be no argument that the claims are preempted as to Generic Defendants.[3] For example, Plaintiffs' cause of action for design defect requires that Generic Defendants change the design and/or the warnings on their drug; thus, it is preempted. (*See Bartlett*, 133 S. Ct. 2466.)

* * *

[3] This demurrer is directed to the Second Amended Long Form Master Complaint only and, as such, is a master pleading challenge. The filing of this pleading is not intended as, and does not constitute, an appearance by any defendant in any individual action included in the JCCP, and the filing of this pleading is without waiver of each defendant's rights to challenge personal jurisdiction or to assert a *forum non conveniens* challenge in any individual action; said rights are expressly reserved. Generic Defendants also expressly reserve the right to respond by way of demurrer or motion to any individualized pleading insufficiencies that are more appropriately addressed at the individual Short Form Complaint stage. . . .

APPENDIX K

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
HONORABLE RICHARD A. KRAMER,
JUDGE PRESIDING
DEPARTMENT NUMBER 303

Coordination
Case No.: CJC-10-004631

[Dated September 6, 2013]

COORDINATION PROCEEDING	)
SPECIAL TITLE [RULE 1550(b)]	)
	)
Proceeding	)
	)
REGLAN/METOCLOPRAMIDE CASES	)
	)

Reporter's Transcript of Proceedings

Friday, September 6, 2013

REPORTED BY:
MARY ANN SCANLAN, RPR, CCRR, CLR, CSR NO. 8875

* * *

[p.17]

* * *

THE COURT: . . . .

You want me to do something. You want me to issue an order limiting the legal theories that can be raised by the generic defendants.

MR. CRAWFORD: [Plaintiffs' Counsel] On this round of demurrers and motions to strike.

THE COURT: But they can raise it later?

MR. CRAWFORD: I would say if there is an issue, they could raise it later. They preserved the jurisdictional issues.

* * *

APPENDIX L

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

Judicial Council Coordination
Proceeding No.: 4631

Superior Court No.: CJC-10-004631

[Filed July 9, 2012]

COORDINATION PROCEEDING	)
SPECIAL TITLE [RULE 3.550]	)
	)
REGLAN/METOCLOPRAMIDE CASES	)
	)

STUART M. GORDON (SBN: 037477)
JAMES R. REILLY (SBN: 127804)
REBECCA R. WARDELL (SBN: 272902)
GORDEN & REES LLP
Embarcadcro Center West
275 Battery Street, Suite 2000
San Francisco, CA 94111
Telephone: (415) 986-5900
Facsimile: (415) 986-8054

Attorneys for Defendants Wyeth LLC

NOTICE OF ENTRY OF ORDER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, PLEASE TAKE NOTICE:

On July 6, 2012, the Court entered the Order attached hereto as Exhibit A and captioned: CMO 3: Master Complaint and Master Answer; Short Form Compliant and Short Form Answer as to Brand Defendants.

GORDON & REES LLP

By: /s/_____
Stuart M. Gordon
James R. Reilly
Rebecca R. Wardell
Attorneys for Defendants Wyeth LLC

Dated: July 9, 2012

* * *

[*Proof of Service Omitted in the Printing of this Appendix*]

Exhibit A

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

Judicial Council Coordination
Proceeding No.: 4631

Superior Court No.: CJC-10-004631

[Filed July 6, 2012]

COORDINATION PROCEEDING SPECIAL TITLE [RULE 3.550]	)
REGLAN/METOCLOPRAMIDE CASES	)

CMO 3: MASTER COMPLAINT AND MASTER ANSWER; SHORT FORM COMPLAINT AND SHORT FORM ANSWER AS TO BRAND DEFENDANTS

This Case Management Order is applicable to Plaintiffs and Brand Defendants only. The terms herein are binding upon the representation by plaintiffs' liaison counsel that all plaintiffs counsel have agreed to these terms, to be confirmed in a written stipulation to be filed on or before 14 days from the date of the filing of this Order.

As to all non-Brand defendants, no further action is required in the trial court until a decision is rendered by the court of appeal on its review of the Court's May 25, 2012 Order on Generic Defendants' demurrer and motion to strike. Upon such decision, the Court anticipates entering a further Case Management Order

as to such non-Brand defendants that remain in these proceedings.

I. Master Pleadings.

Plaintiffs, through their liaison counsel, have filed and served on all parties in accordance with the Court's electronic service procedures, an Amended Long Form Master Complaint ("Master Complaint") which will serve as the basis of each action filed in this Coordinated Proceeding. Within 30 days of entry of this Order, Brand Defendants, through their liaison counsel, will file and serve one Master Answer on behalf of all Brand Defendants, which will include a general denial and reserve all available defenses. The filing of the Master Answer on behalf of Brand Defendants does not constitute an appearance by any Brand Defendant in any action.

II. The Plaintiffs' Short Form Complaint

A. Plaintiffs' Short Form Complaints and Mandatory Discovery Responses

Each Plaintiff in a case in this Coordinated Proceeding must file a Short Form Complaint ("SFC") in the form attached to this Order as Exhibit A and respond to discovery requests set forth below. The SFC shall be filed in San Francisco Superior Court, but the Coordination Trial Judge may transfer the case to another venue in California, including the venue in which the transferred case originally was filed, for purposes of trial.

Each SFC shall attach a copy of the Amended Long Form Master Complaint and shall constitute an amended complaint for all purposes, but shall be

assigned a separate case number at the time of filing for administrative purposes. Upon the filing of an SFC, the Master Complaint, as amended by the Plaintiff's SFC with respect to the defendants named and adopted causes of action, shall be the operative pleading.[1] The date on which the Master Complaint is filed shall have no bearing on whether any Plaintiff has satisfied any applicable statutes of limitations. Rather, the date on which an individual Plaintiff's properly-filed original complaint initiating his or her action was filed, and/or the terms of any tolling agreement entered into by the parties pursuant to section II(C)(4) herein or otherwise, shall have such bearing. Brand Defendants named in the Master Complaint but not named in Plaintiff's SFC shall be dismissed from the respective action without prejudice. Plaintiffs may amend the SFC pursuant to stipulation and order regarding additional defendants whose products have been identified as having been ingested by the plaintiff up to thirty (30) days after the parties reach an agreement that product identification has been established pursuant to Section IV(F)(1) or completed the mutual product identification discovery required by Section IV(F)(2). Any such amendment pursuant to the preceding sentence shall relate back to the original filing of the Plaintiff's original complaint. Thereafter, applicable law shall apply with regard to any amendment to add Brand Defendants and relation back to the original filing of the complaint. Any allegation within the Plaintiff's SFC or amended SFC relating to dates of usage cannot be used for purposes of impeachment during pretrial discovery or trial.

[1] Until further order of this Court, any action that is the subject of an SFC shall be stayed as to all non-Brand defendants named therein.

Nothing in this Order shall preclude further case management orders agreed to by the parties and the Court relating to pleadings against the Defendants.

* * *

IT IS SO ORDERED.

Dated: JUL 06, 2012 /s/_____
Honorable Richard A. Kramer
Judge of the Superior Court

APPENDIX M

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

JCCP Proceeding No. 4631
Superior Court Case No. CJC-10-004631

[Filed April 17, 2012]

COORDINATED PROCEEDING SPECIAL TITLE [RULE 3.550]	)
REGLAN/METOCLOPRAMIDE CASES	)
PLAINTIFFS,	)
vs.	)
NAME-BRANDED DEFENDANTS; GENERIC/OTHER DEFENDANTS.	)

Joshua S. Goodman (SBN 116576)
jgoodman@jgn.com
JENKINS GOODMAN NEUMAN & HAMILTON LLP
417 Montgomery Street, 10th Floor
San Francisco, CA 94104

Liaison Counsel for Generic Defendants

Tammara N. Tukloff (SBN 192200)
ttukloff@mpplaw. com
MORRIS POLICH & PURDY LLP
600 W. Broadway, Suite 500
San Diego, CA 92101

Liaison Counsel for Generic Defendants

NOTICE OF DEMURRER AND DEMURRER OF GENERIC DEFENDANTS' TO FIRST AMENDED LONG FORM MASTER COMPLAINT

Accompanying Documents:

- **Memorandum of Points & Authorities**
- **Request for Judicial Notice**
- **Compendium of Non-California Authorities**
- **Proposed Order**

Date:	April 17, 2012
Time:	9:30 a.m.
Dept:	304
Judge:	Hon. Richard A. Kramer
Complaint Filed:	March 2, 2012

* * *

[p.2]

DEMURRER

Pursuant to California Code of Civil Procedure sections 430.10, 430.30 and 430.60, *et seq*., and Generic Defendants' Memorandum of Points and Authorities, Generic Defendants, jointly and severally, hereby

demur, to Plaintiffs' First Amended Long Form Master Complaint as follows:[1, 2]

* * *

[2] This demurrer is directed to the First Amended Long Form Master Complaint only and, as such, is a master pleading challenge. The filing of this pleading is not intended as, and does not constitute an appearance by any defendant in any individual action included in the JCCP, and the filing of this pleading is without waiver of each defendant's rights to challenge personal jurisdiction or to assert a *forum non conveniens* challenge in any individual action; said rights are expressly reserved.

APPENDIX N

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
HONORABLE RICHARD A. KRAMER,
JUDGE PRESIDING
DEPARTMENT NUMBER 304

Coordination Proceeding
Case No.: CJC-10-004631

[Dated April 17, 2012]

COORDINATION PROCEEDING	)
SPECIAL TITLE [RULE 1550(b)]	)
	)
REGLAN/METOCLOPRAMIDE CASES	)
	)

DEMURRERS
MOTIONS TO STRIKE
PETITION FOR COORDINATION
OF ADD-ON CASES
CASE MANAGEMENT CONFERENCE

Reporter's Transcript of Proceedings

Tuesday, April 17, 2012

REPORTED BY:
MARY ANN SCANLAN
RPR, CCRR, CSR NO. 8875

* * *

[p.147]

* * *

THE COURT: . . .

You're talking jurisdiction here, really.

* * *

THE COURT: And if I don't have jurisdiction over these causes of action because they're precluded under federal law, then I don't have jurisdiction to figure out if fraud has been adequately pled or any of the other matters involved.

* * *

[p.151]

* * *

THE COURT: . . . .

What I want to do is get this jurisdictional thing behind us as quickly as we can and not waste money on

[p.152]

things that might be obviated.

* * *

APPENDIX O

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
HONORABLE RICHARD A. KRAMER,
JUDGE PRESIDING
DEPARTMENT NUMBER 304

Coordination Proceeding
Case No.: CJC-10-004631

[Dated February 2, 2012]

COORDINATION PROCEEDING	)
SPECIAL TITLE [RULE 1550(b)]	)
	)
REGLAN/METOCLOPRAMIDE CASES	)
	)

CMC
MOTION TO QUASH
MOTION TO REVOKE ORDER

Reporter's Transcript of Proceedings

Thursday, February 2, 2012

Please note Government Code Section 69954(d):

"Any court, party, or person who has purchased a transcript may, without paying a further fee to the reporter, reproduce a copy or portion thereof as an exhibit pursuant to court order or rule, or for internal use, but shall not otherwise provide or sell a copy or copies to any other party or person."

Reported by: Mary Ann Scanlan-Stone, CSR 8875, RPR, CCRR

* * *

[pp. 26-27]

THE COURT: . . .

The bottom line, then, is in reading the master complaint, my tentative conclusion is that *Mensing* precludes some of it, preempts some of it and doesn't preempt some of it.

Back to the theme song here, if this were a general demurrer, then my ruling would have to be to overrule the demurrer because within this cause of action, the various causes of action, there is something that is actionable and something that is not, but a general demurrer simply looks for if any part of it is actionable, the demurrer has to be overruled.

Here is my suggestion. It might be that notwithstanding a fairly logical case management tool, one size doesn't fit all. And it might be that a long form master complaint is best divided into two segments, causes of action applicable to generic manufacturers that are not -- if I'm right about my interpretation of *Mensing* -- are not preempted by *Mensing* and are clearly distinguished as applicable only to the generic manufacturers.

So that would be claims arising out of a failure or an alleged failure to adhere to the labeling of the nongeneric defendants still with allegations of motives and claimed tortious behavior resulting from those things but eliminating claims relating to generic -- get it? -- duties to disclose to the public and then have

separate causes of action or separate section relating only to the nongeneric defendants that talk about the duties to disclose.

My suggestion is to redo the master complaint on that structure, figure out what we do about service, and then if there's going to be a further demurrer, fine, I will deal with that when I see it.

Do you all want to take five minutes to let this sink in and see what you are going to do?

Maybe what I will do is I will let you take ten minutes to sink in. I will tell you about the other part of what I have in mind here for today. And that is the other two motions.

* * *

[pp.47-48]

THE COURT: . . .

So on a procedural basis, the procedural stuff isn't just academic niceties; it sets the standards.

I don't feel comfortable hearing this. I will, if you want me to -- I will give you a tentative ruling.

Would you like to hear it?

MR. McCAULEY: No, Your Honor, I don't think I want a tentative ruling on anything.

THE COURT: I will give you a hint, there is a comma after the first part, which I won't put on the record, and the comma will say, "without prejudice."

MR. McCAULEY: I hear you, Your Honor.

Okay. Well, then, we will wait to see what the new long form complaint looks like, and presumably we will have an opportunity to make any motions at that time or pleadings at that time that satisfy the need for correct process.

THE COURT: Right.

And I would prefer to see the challenges, if there are going to be any. I don't know why I think there will be, but there probably will be challenges.

I think the best procedural vehicle would be general and special demurrers and motions to strike, if applicable, all filed in accordance with the California Rules of Court and the California Code of Civil Procedures.

And that way I can deal with exactly what's wrong, if anything, that has been refiled.

It was mentioned that perhaps there will be a demurrer; perhaps there will be something else. There aren't too many something elses.

The other thing we have to deal with, which nobody mentioned -- thank you.

Did you want to say anything?

The other thing we have to deal with, there is mention in the generic defendants1 papers that there are other demurrer-like claims here, such as forum non conveniens and the like.

It is conceivable that everybody could stipulate that we divide this into two tranches, the first being the *Mensing* issues and perhaps the issues that were raised

in the other motions, such as whether it is appropriate if that is done next time to have every defendant be in every case. And then later deal with such things as forum non conveniens and the like.

I didn't mention this earlier, but I don't see why we couldn't agree to do it that way. It would certainly be less expensive, or could be less expensive, depending on the ruling the first time.

* * *

[pp. 50-53]

THE COURT: . . .

As to forum non conveniens, my suggestion is at the cookie lunch we address the written agreements that we have submitted to this court on the issue of forum non before we even consider having a motion and hearing and rulings on forum non.

So my suggestion is that we deal with the -- if somebody is going to breech the written agreement we have on a forum non waiver, I need to know about it, and I need to address it with the Court. And I think the best way to do that would be at the CMO3 cookie lunch.

MR. GOODMAN: Judge --

THE COURT: Hold on a second.

I think what you just said, I think, was that you agreed with me --

MR. SKIKOS: I did, but I wanted to make sure --

THE COURT: that the issues that were teed up for

today are the only ones we would deal with in the response to the anticipated amended master complaint and that we would deal with however we deal with them, be it the substance of forum non conveniens or an agreement to not raise it and whether that is an enforceable agreement. I'm aware of that issue. I've heard it several times.

But I think what you said was all we're going to deal with are the *Mensing* issues and the other issues raised by the other moving parties.

That's without anybody waiving arguments that would otherwise be appropriate to attack the master complaint.

Am I right?

MR. SKIKOS: Yes. I think CMO1 actually says the only motions that are going to be heard are the *Mensing* motions at this time.

You amended, Your Honor, CMO1 to say that.

THE COURT: Well, I know that, but we don't have motions. It is really going to be a demurrer, but that is technical.

In any event, are you authorized to speak for all plaintiffs in this regard?

MR. SKIKOS: Mr. Gornick says yes, so I say yes.

THE COURT: Is there any plaintiffs' counsel present in the room here who disagrees with the proposition that what we're going to do is what I just said, and that is, we are separating out the issues raised in the motions today for the first attack on the

anticipated amended master long form complaint, and that is without waiver of a second round of issues.

If you disagree with that, stand up, tell me who your plaintiff is and what it is you want me to do instead.

Hearing none -- and I believe that every plaintiffs' counsel had the opportunity to be here today and should have been here today, that any plaintiffs' counsel who was not here today has waived any argument that what I am about to order is appropriate.

And if somebody ultimately later shows up and wants to argue against such waiver, I will hear it. But for the purposes of creating certainty so that we go forward, I am ordering that in response to the -- we will call it amended long form master complaint, the only thing the defendants are allowed to raise are issues raised in any of the motions set for hearing today.

They are largely the *Mensing* matters, as well as the matters that the other moving parties raised regarding being stuck as parties in all of the lawsuits, when, in fact, they have been dismissed from the ones that were related to them, or that many of the lawsuits do not allege facts that comply with those defendants' delivery mechanism for the alleged drug problem.

It is like a Rubik's cube with words.

So the amended master complaint will be filed -- and we're going to serve it, right?

MR. SKIKOS: Yes.

THE COURT: -- and served by the close of business on March 2nd, 2012.

What I should do, then, is set a hearing date for the attacks on that pleading consistent with what I just ordered.

Let's go off the record to do that, okay?

(Discussion off the record.)

THE COURT: I'm going to schedule what I will call the "demurrer-o-rama," the attacks on the anticipated amended master complaint, Tuesday, April 17, 2012. I'm blocking off the whole day. It starts at 9:30. We will be done at 4:30.

The only issues to be raised are the same issues that were raised in the various matters before me today. All other matters are not waived by failing to raise them. That would include forum non conveniens, other matters that could be put into a demurrer or motion to strike.

Be extremely sensitive, as you file these things, to my concern regarding a very precise standard for me to apply which will be reviewed, should somebody decide to do that.

Next, I don't see why we can't go forward with a number of the anticipated events that would follow from the settling of a master complaint.

* * *

APPENDIX P

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

JCCP Proceeding No. 4631
Superior Court Case No. CJC-10-004631

[Filed December 12, 2011]

COORDINATED PROCEEDING SPECIAL TITLE [RULE 3.550]	)
REGLAN/METOCLOPRAMIDE CASES	)
PLAINTIFFS,	)
vs.	)
NAME-BRANDED DEFENDANTS; GENERIC/OTHER DEFENDANTS.	)

JOSHUA S. GOODMAN, ESQ. (SBN 116576)
jgoodman@jgn. com
JENKINS GOODMAN NEUMAN HAMILTON LLP
417 Montgomery Street, 10th Floor
San Francisco, CA 94104
Tel.: 415.705.0400
Fax: 415.705.0411

Liaison Counsel for Generic Defendants

TAMMARA N. TUKLOFF, ESQ. (SBN 192200)
ttukloff@mpplaw. com
MORRIS POLICH & PURDY LLP
501 W. Broadway, Suite 500
San Diego, California 92101
Tel.: 619.557.0404
Fax: 619.557.0460

Liaison Counsel for Generic Defendants

MOTION TO REVOKE LEAVE TO FILE AN AMENDED COMPLAINT OR TO STRIKE PLAINTIFFS' MASTER LONG FORM COMPLAINT AS TO GENERIC DEFENDANTS; MEMORANDUM OF POINTS AND AUTHORITIES; REQUEST FOR JUDICIAL NOTICE; COMPENDIUM OF NON-CALIFORNIA AUTHORITIES IN SUPPORT THEREOF; [PROPOSED] ORDER

Date:	December 12, 2011
Time:	10:30 a.m.
Dept:	304
Judge:	Hon. Richard A. Kramer
Complaint Filed:	September 30, 2011

* * *

[p.1]

. . . . This challenge focuses on the federal preemption issue, and the Generic Defendants reserve all defenses and challenges (including jurisdictional, *forum non conveniens* ("FNC"), and state-law demurrer challenges) more appropriately reserved until

individual Plaintiffs file individual Short Form Complaints.[3]

* * *

[3] For example, the LFMC seeks to assert causes of action under California law only and provides no Plaintiff-specific information. Inasmuch as the vast majority of the Plaintiffs in this Coordinated Proceedings are not residents of California and were not injured in California, Defendants cannot assert jurisdictional, FNC, or other challenges until Plaintiff-specific facts are alleged and choice-of-law issues are decided. . . .

APPENDIX Q

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

(UNLIMITED JURISDICTION)

JCCP Proceeding No. 4631
Superior Court Case No. CJC-10-004631

[Filed September 31, 2011]

COORDINATION PROCEEDINGS SPECIAL TITLE [RULE 3.550(c)]	)
REGLAN/METOCLOPRAMIDE CASES	)
PLAINTIFFS,	)
vs.	)
NAME-BRANDED DEFENDANTS; GENERIC/OTHER DEFENDANTS.	)

Assigned to Hon. Richard A Kramer, Dept. 304

JCCP LONG FORM MASTER COMPLAINT FOR DAMAGES RESTITUTION AND INJUNCTIVE RELIEF; DEMAND FOR JURY TRIAL

1. Strict Liability - Failure to Warn
2. Strict Liability - Manufacturing Defect
3. Negligence
4. Negligence Per Se
5. Breach of Implied Warranty
6. Breach of Express Warranty
7. Deceit by Concealment - Cal. Civ., Code §§ 1709, 1710
8. Negligent Misrepresentation
9. Fraud and Fraudulent Concealment
10. Violation of Cal. Bus. & Prof. Code § 17200
11. Violation of Cal. Bus. & Prof. Code § 17500
12. Violation of Cal. Civ. Code § 1750
13. Loss of Consortium
14. Wrongful Death
15. Survival

MASTER LONG FORM COMPLAINT AND JURY DEMAND

This Master Long Form Complaint and Jury Demand is filed pursuant to Order of the Court in this Coordinated Proceeding, and is intended to operate as an administrative device to set forth potential claims Plaintiffs may assert against Defendants in this litigation. Pursuant to an anticipated Case Management Order in this Coordinated Proceeding, this Complaint is to "be accompanied by a Notice of Adoption of Master Complaint or a Short Form Complaint form to be filed sometime in the future by each Plaintiff (with any related Plaintiffs) in this Coordinated Proceeding.

Accordingly, Plaintiffs allege as follows:

PARTIES

A. Plaintiffs

1. This Complaint is a Master Long Form Complaint filed for all Plaintiffs, the individuals, in each action, who have suffered personal injuries, as more particularly set forth herein and in individual actions, as a result of either consuming and/or having injected prescription chugs known as Reglan (a registered brand name) and/or generic metoclopramide, and as a direct and proximate result of the intentional and/or negligent dissemination of inaccurate, false and misleading information and the negligent and/or otherwise wrongful misconduct of named Defendants in connection with the design, development, manufacture, testing, packaging, promotion, advertising, warning, marketing, distribution, supply, labeling, prescribing, and/or sale of those drugs, In addition, and where applicable, this Complaint is also filed for Plaintiffs' spouses, children, parents, decedents, wards, heirs and/or their representatives, all as represented by Plaintiffs' counsel. By operation of the anticipated Order of this Court, after the opportunity to object and after any such objections are heard and considered by the Court by the individual Plaintiffs or their counsel, all allegations pled herein are deemed pled in any individual action filed and transferred to these Coordinated Proceedings or which hereafter may be filed by any individual Plaintiff and transferred to this Coordinated Proceeding.

2. Plaintiffs, by the undersigned counsel, hereby submit this Master Long Form Complaint against the named Defendants herein for compensatory and punitive damages, monetary restitution, recovery of

attorneys' fees and costs, and/or injunctive or other equitable relief. Plaintiffs make the following allegations based upon their personal knowledge and upon information and belief, as well as upon their attorneys' investigative efforts, regarding Reglan and the generic metoclopramide products that are therapeutically equivalent to Reglan, and the use, effects, marketing and distribution of those products.

3. This Master Long Form Complaint is submitted pursuant to Order of the Court in this Coordinated Proceeding only to serve the administrative functions of efficiency and economy of presenting certain common claims and common questions of fact and law for consideration by the Court in the context of this proceeding. This Master Complaint does not necessarily include all claims asserted in all of the individual actions filed in California state courts, nor is it intended to consolidate for any purpose the separate claims of the Plaintiffs. The separate claims of individual Plaintiffs are set forth in the actions filed by the respective Plaintiffs and/or set forth and adopted in the Notices of Adoption or Short Form Complaints to be filed by each individual Plaintiff in accordance with an anticipated Case Management Order to be entered in this litigation. This Master Long Form Complaint does not constitute a waiver or dismissal of any actions or claims asserted in those individual actions, nor does any Plaintiff relinquish the right to add or assert or seek leave to add or assert any additional claims or predicates for claims. As more particularly set forth herein, each Plaintiff maintains that the pharmaceutical drug Reglan and its generic equivalents are defective, dangerous to human health, unfit and unsuitable to be advertised, marketed and

sold in each of the individual states comprising the United States, and lacked proper warnings of the dangers associated with then use and/or the dangers associated with their use were not adequately communicated.

4. Plaintiffs herein are all competent individuals ova' the age of 18, are residents of the United States and hereby submit to the jurisdiction of this Court and allege that venue in this Court is proper for the coordinated cases.

5. Plaintiffs have suffered personal injuries as a direct and proximate result of Defendants' negligent and wrongful misconduct in connection with the design, development, manufacture, testing, packaging, promotion, advertising, marketing, distribution, supply, labeling, warning, and sale of the pharmaceutical drug Reglan or its generic equivalents.

* * *

APPENDIX R

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

(UNLIMITED JURISDICTION)

JCCP Proceeding No. 4631
Superior Court Case No. CJC-10-004631

[Filed March 2, 2012]

COORDINATION PROCEEDINGS SPECIAL TITLE [RULE 3.550(c)]	)
REGLAN/METOCLOPRAMIDE CASES	)
PLAINTIFFS,	)
vs.	)
NAME-BRANDED DEFENDANTS; GENERIC/OTHER DEFENDANTS.	)

Assigned to Hon. Richard A Kramer, Dept. 304

JCCP FIRST AMENDED LONG FORM MASTER COMPLAINT FOR DAMAGES, RESTITUTION AND INJUNCTIVE RELIEF; DEMAND FOR JURY TRIAL

1. Strict Liability - Failure to Warn
2. Strict Liability - Manufacturing Defect

3. Negligence
4. Negligence Per Se
5. Breach of Implied Warranty
6. Breach of Express Warranty
7. Deceit by Concealment - Cal. Civ. Code §§ 1709, 1710
8. Negligent Misrepresentation.
9. Fraud and Fraudulent Concealment
10. Violation of Cal, Bus. & Prof. Code § 17200
11. Violation of Cal. Bus. & Prof. Code § 17500
12. Violation of Cal. Civ. Code § 1750
13. Loss of Consortium
14. Wrongful Death
15. Survival

JCCP FIRST AMENDED MASTER LONG FORM COMPLAINT AND JURY DEMAND

This First Amended Master Long Form Complaint and Jury Demand is filed pursuant to Order of the Court in this Coordinated Proceeding, and is intended to operate as an administrative device to set forth potential claims Plaintiffs may assert against Defendants in this litigation. Pursuant to an anticipated Case Management Order in this Coordinated Proceeding, this Complaint is intended to be accompanied by a Notice of Adoption of Master Complaint or a Short Form Complaint form to be filed sometime in the future by each Plaintiff (with any related Plaintiffs) in this Coordinated Proceeding,

Accordingly, Plaintiffs allege as follows:

PARTIES

A. Plaintiffs

1. This Complaint is a Master Long Form Complaint filed for all Plaintiffs, the individuals, in each action, who have suffered personal injuries, as more particularly set forth herein and in individual actions, as a result of either consuming and/or having injected prescription drugs blown as Reglan (a registered brand name) and/or generic metoclopramide, and as a direct and proximate result of the intentional and/or negligent dissemination of inaccurate, false and misleading information and the negligent and/or otherwise wrongful misconduct of named Defendants in connection with the design, development, manufacture, testing, packaging, promotion, advertising, warning, marketing, distribution, supply, labeling, prescribing, and/or sale of those drugs, hi addition, and where applicable, this Complaint is also filed for Plaintiffs' spouses, children, parents, decedents, wards, heirs and/or their representatives, all as represented by Plaintiffs' counsel, by operation of the anticipated Order of this Court, after the opportunity to object and after any such objections are heard and considered by the Court by the individual Plaintiffs or their counsel, all allegations pled herein are deemed pled in any individual action filed and transferred to these Coordinated Proceedings or which hereafter may be filed by any individual Plaintiff and transferred to this Coordinated Proceeding.

* * *

APPENDIX S

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
HONORABLE RICHARD A. KRAMER,
JUDGE PRESIDING
DEPARTMENT NO. 304

JCCP NO. 4631
Superior Court
Case No. CJC-10-004631

[Dated August 23, 2011]

COORDINATION PROCEEDING	)
SPECIAL TITLE [Rule 1550(b)]	)
	)
REGLAN/METOCLOPRAMIDE CASES	)
	)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Tuesday, August 23, 2011

Please note Government Code Section 69954(d):

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Reported by: Janet S. Pond, CSR #5292, CRR
Official Reporter

* * *

[p.17]

* * *

MR. SKIKOS: [Plaintiffs' Counsel] . . . .

So if we file the master complaint, everything is reserved; whatever arguments they want to make, whatever arguments we want to make. . . .

* * *

[pp.22-28]

THE COURT: I'm not so sure about that. We're going to be talking about that as well. I'm not sure you're right.

However, here comes the real technical stuff. A demurrer is not a motion. A demurrer is a pleading. That's point number one.

Point number two is there is California authority against successive general demurrers. It's not exactly clear that I can tell you I believe that there is a prohibition against it, but there is authority that would raise that question. And the claim that the U.S. Supreme Court has obviated the claim is a general demurrer, I believe -- I'm not giving a legal opinion here -- and there may be other general demurrers as well.

My inclination would be to not bifurcate the demurrer questions, one, because of that technical problem I just described as to whether you can have successive general demurrers. I'm not opining on anything, I'm just raising the issue.

Secondly, we might be better off having all attacks on the pleadings and the pleading being a master complaint that applies to all the cases, all packaged at the same time for appellate review so that you could have one-stop shopping.

Otherwise, let's say, for example -- nobody fall off your chair because I only read the *Mensing* case, I have no opinions regarding it -- but if I sustain the demurrer and throw all this stuff out, then you're going up to the Court of Appeals for a year and a half or two years, maybe, and do you really want to come back and then say, hey, now it's time to file some more demurrers?

I mean it's not that much extra briefing. A demurrer is pretty simple. And I would be surprised if all of the plaintiffs' lawyers couldn't put together a technically appropriate master complaint, forget about the *Mensing* issue. But we might as well do it all at once and that way, when you go up to the Court of Appeal, if you do, either on a writ or an appeal, depending on how I rule, when and if you ever come back to the Superior Court, the next step will be respond to the complaints and let's get going.

I could have saved you, by doing it that way, years of litigation because suppose I sustain the *Mensing* demurrer, I get reversed -- I realize none of you think that could happen but it's possible -- it comes back here, and then I sustain a demurrer on some technical grounds. Then you go back up to the Court of Appeal, and four years later when I'm playing in the NBA and you guys are all a lot older, we're finally talking about when we're going to answer this thing.

So I'll listen to you otherwise, but your idea is to save time and money. It's a good idea for that purpose, but I just don't see it saving time and money. I see exactly the opposite.

What do you think?

MR. KILLORAN: Well, I wish I had an opportunity to discuss this agreement which was reached out in the hall with liaison counsel and with my client. Unfortunately, we're kind of caught by surprise with this proposed order. We had brought demurrers on separate grounds but, frankly, if the *Mensing* issue is going to be dispositive, it --

THE COURT: What agreement and what order? I'm doing what I want to do, I'm not doing what you guys want me to do. I was the one that said, here's how we're going to schedule the hearing. Nobody proposed anything to me other than the possibility of or the likelihood of an amended complaint. I'm not doing anything pursuant to agreement of the parties.

What I'm doing is trying to efficiently schedule hearings when at this moment I don't know in which department they will be. All things being equal, if no amended complaint is filed, then the existing demurrers to the presently operative complaints get heard.

MR. KILLORAN: I understand, Your Honor. If they're going to amend their complaint, they're going to amend it and we'll just have to file our demurrers.

THE COURT: Yeah.

MR. KILLORAN: Okay. Thank you, Your Honor.

THE COURT: And, like I said, your idea is a good one but to add -- what else would there be, general demurrers, it's uncertain? It doesn't state a cause of action. Forget about *Mensing*. It's going to be -- it's a personal injury complaint. There's like five elements and that's about it.

If you guys can't put together a master complaint about this stuff, then I'd be shocked. Maybe they can't, I don't know. We'll see.

MR. KILLORAN: We'll see.

THE COURT: And there's really nothing else on a general demurrer.

Plus the other problem. If we're risking the possibility that you can't file successive general demurrers, that, all by itself, is sufficient reason for me to say, no, just go ahead and file the stuff. Okay?

MR. KILLORAN: Okay. Thanks, Your Honor.

THE COURT: Right. And if you think of something else, get the gang together and get hold of me. Okay?

So I am clear, then, and what I said is clear, and the idea is that even if it's not possible on -- at the time that a response to the consolidated amended complaint, response is due, even if it's not possible to set a hearing date, I want this thing fully briefed so that when the new law and motion department is able to deal with this, it's briefed and you can get on to a hearing date pretty quickly.

So what I thought you were going to tell me was that the response and the reply times are all geared to the hearing dates. We're going to set another fake hearing

date at the time that the response to the consolidated amended complaint is due. Just agree on one that's, you know, 35 days out or something, when the revised demurrers get filed, and then it will be subject to rescheduling either in this department or in the new law and motion department.

So that's how you figure out when the response and the reply is due, okay?

MR. GOODMAN: I'm sorry, Your Honor. The next fake hearing date would be for motions that would be filed to challenge the newly filed master complaint?

THE COURT: Or, if there is no master complaint, the ones to the then present operative complaint.

MR. GOODMAN: Well, at that point, wouldn't we be setting real hearing dates for that?

THE COURT: No, because -- well, if I exist, of course, then you can do that. If not, it would have to go into the law and motion department.

And today, I can't tell you how or when to set that. All I can tell you today is I am -- as of today, I am absolutely certain I could cause that to be scheduled efficiently in the new law and motion department.

So you get it briefed and then somewhere along the line, it will get set for hearing. But I think last time I told you it would be impossible to know. I even suggested that if that department is as busy as might be anticipated, you might not get a hearing date for months.

Did I say that to you folks? I've been saying it to other people. That's not going to be the situation, not for this hearing on these demurrers.

I also strongly suggest that the defendants get together. Let's assume it's going to be a newly constituted demurrer based on the consolidated complaint. I suggest you get together, avoid duplicative briefing, stipulate to a master response -- a master demurrer, I mean, or something to that effect.

I doubt, although it is possible, that there will be case-specific iterations. There might be, but to the extent you can put it all together as here's the, forgive me, generic demurrer, and then maybe individual defendants could file individual iterations.

But put it all together. If you're going to have a master complaint, you might as well have a master demurrer. Okay?

MR. SEEGER: Your Honor, I have a question.

THE COURT: Sure.

MR. SEEGER: Ken Seeger. I represent one of the defendant generics, excuse me. And Steve Skikos might be able to answer this, Your Honor, but I'm directing it at you, though.

The question I have is I assume they're going to prepare a master complaint, the plaintiffs are, and they're going to file it as part of a -- you know, an exhibit to a proposed order for a master complaint.

Don't we then need plaintiffs to adopt the master complaint before -- because my client, for example, is not a defendant in every one of the actions. I think

that's the case for most of the generics. Doesn't it somehow have to be adopted? Otherwise, we are demurring to an exhibit.

THE COURT: Well, my expectation is that not only will the pleading be prepared and filed, but all the necessary bells and whistles to make that complaint operative in each case will also be submitted.

Maybe it could be part of the general orders. I think it is. But the answer is, yes, and it will be up to the parties to agree to that. And if some plaintiff says, heck, no, I'm not adopting that, well, fine, I'll figure out what to do about that when and if it happens.

But keep in mind the point of this complaint is to routinize the procedures so that the various disclosures that are geared to the consolidated amended complaint happen. It's the starting point for this whole structure that we're building. And if any plaintiff says, heck, no, I don't want to have any part of that, then I'll listen to what's to be done about that plaintiff. But I don't think that's going to happen. And if it does, then if there's a darn good reason, I'll figure out what to do about it.

MR. GOODMAN: Your Honor, Josh Goodman.

Your expectation is that not only will a master complaint be filed by September 30th but would then be adopted in, for example, the Elkins case such that that would be the new operative complaint that would be challenged, making the pending motion moot.

THE COURT: Right.

MR. GOODMAN: Okay.

THE COURT: Otherwise, you can't demur to it if it's not your complaint.

This is, believe it or not, not the first time this has happened in western jurisprudence. It's not even the first time that this has happened in this courtroom. We've done this before. I've done it with these plaintiffs before, I've done it with other plaintiffs as well. So the concept of a consolidated complaint for a diverse group of plaintiffs such as we have here is not new. They know how to do it. Okay?

* * *

APPENDIX T

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

Judicial Council Coordination Proceeding No. 4631
Superior Court No.: CJC-10-004631

[Filed July 26, 2011]

COORDINATION PROCEEDING SPECIAL TITLE [RULE 3.550]	)
REGLAN/METOCLOPRAMIDE CASES	)

AMENDED CMO 1: APPOINTMENT OF LIAISON COUNSEL, JURISDICTION AND STAY OF DISCOVERY

All provisions in CMO 1 remain in effect, except for what is outlined in this Order. Any Defendant that wishes may file an appropriate motion or motions or other requests for relief (motions) based upon the claimed impact of the *PLIVA, Inc. v. Mensings*, ___ U.S. ___, 131 S. Ct. 2567 (June 23, 2011), decision. These motions will be filed but no responses will be due until further order of this Court. After these motions are filed, there will be a Case Management Conference to discuss the following : (1) the dates oppositions will be due, (2) the hearing date(s) for the filed motions, (3) what discovery if any needs to be conducted in order to provide a response to the motions, and (4) whether any amended complaints or master complaint may be

filed, and if so the process for doing so, and other appropriate matters.

Motions not related to *PLIVA, Inc. v. Mensings* remain stayed as set forth in CMO 1. Any such motions or other papers are without prejudice to and do not constitute a waiver of the right to file motions on any issue not related to the impact of the Mensing decision after further order of the Court.

IT IS SO ORDERED.

Dated: 7-26 , 2011

/s/_____
Honorable Richard A. Kramer
Judge of the Superior Court

APPENDIX U

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
HONORABLE RICHARD A. KRAMER,
JUDGE PRESIDING
DEPARTMENT NO. 304

JCCP NO. 4631
Superior Court
Case No. CJC-10-004631

[Dated August 23, 2011]

COORDINATION PROCEEDING	)
SPECIAL TITLE [Rule 1550(b)]	)
	)
REGLAN/METOCLOPRAMIDE CASES	)
	)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Tuesday, July 26, 2011

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Reported by: Janet S. Pond, CSR #5292, CRR
Official Reporter

* * *

[pp. 23-24]

MR. GOODMAN: No. I have it right here.

MR. GORDON: And Felicia has given it to you. We've all approved that and --

THE COURT: Is there anybody in the room that has no idea what we're talking about?

(Show of hands.)

THE COURT: Good. Do you want to know?

This is Case Management Order Number 1 signed early on where I greatly restricted the usual activities that could occur in these cases. The point was to coordinate it all and make sure there's a structure by which such things as motion discovery, non-formal disclosures of information and the like continues.

One of the matters was certain motions couldn't be brought until we get everything organized.

We've got the *Mensing*, M-e-n-s-i-n-g, case from the Supreme Court, which a number of defendants think that would justify some motion practice. And I agree that that case is of significance, was not anticipated at the time of Case Management Order Number 1, and is therefore worthy of attention. And therefore, I'm going to modify Case Management Order Number 1 to allow for defendants to make motions arising out of the *Mensing* decision.

But what I said yesterday, and what we're going to do, is we're going to just allow for the filing of motions or demurrers. A demurrer is not a motion, it's a separate pleading. And then the idea will be everybody look at what's been filed and see what, if anything, should happen and when. The simplest thing would be a response by plaintiffs, but we would have to figure out how that would work since we have so many plaintiffs. Maybe there would be representative plaintiffs and the like. But if you think about issue preclusion concepts, then it's not quite as simple as it might seem otherwise.

Maybe that that would precipitate some specific discovery. So we could talk about that. It may be something else. So the idea is to file the motions, everybody look at it and figure out what to do next.

In terms of the timing of that, it does not appear impossible that that would happen while I'm still around, according to the present schedule, but that is a shadow over this.

It should also be understood that there will be, if not already, similar motions in the federal cases that are of the same nature as these cases so we ought not to fall too far behind the federal cases. There's also a situation where a defendant could conceivably win in federal court, and that decision wouldn't have any impact here. I'm not giving a legal opinion, I'm just recognizing a possibility, whereas a defendant could lose in federal court and that could have an impact here.

So we just have to think all that out. Therefore, I'm modifying Case Management Order Number 1 to allow for the process that I just described.

That's in front of me under my elbow, right?

MR. GORDON: That's right, Your Honor, right under your elbow, the left elbow.

Very artfully worded, as you requested.

* * *

APPENDIX V

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

Judicial Council Coordination
Proceeding No.: 4631
Superior Court No.: CJC-10-004631

[Filed April 26, 2011]

COORDINATION PROCEEDING	)
SPECIAL TITLE [RULE 3.550]	)
	)
REGLAN/METOCLOPRAMIDE CASES	)
	)

STUART M. GORDON (SBN: 037477)
JAMES R. REILLY (SBN: 127804)
GORDON & REES LLP
Embarcadero Center West
275 Battery Street, Suite 2000
San Francisco, CA 94111
Telephone: (415) 986-5900
Facsimile: (415) 986-8054

Attorneys for Defendants Wyeth LLC,
Pfizer Inc., Schwarz Pharma, Inc. and
Alaven Pharmaceutical LLC

NOTICE OF ENTRY OF ORDER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, PLEASE TAKE NOTICE THAT:

On April 25, 2011, the Court entered the Order attached hereto as Exhibit A and captioned: CMO 1: Appointment of Liaison Counsel, Jurisdiction and Stay of Discovery.

GORDON & REES LLP

By: /s/_____
Stuart M. Gordon
James R. Reilly
Attorneys for Defendants Wyeth LLC, Pfizer Inc., Schwarz Pharma, Inc. and Alaven Pharmaceutical LLC

Dated: April 26, 2011

Exhibit A

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

Judicial Council Coordination
Proceeding No. 4631

Superior Court No.: CJC-10-004631

[Filed April 25, 2011]

COORDINATION PROCEEDING	)
SPECIAL TITLE [RULE 3.550]	)
	)
REGLAN/METOCLOPRAMIDE CASES	)
	)

CMO 1: APPOINTMENT OF LIAISON COUNSEL, JURISDICTION AND STAY OF DISCOVERY

This Order, and all case management and other orders of this Court, shall be binding on all parties and their counsel in the Judicial Council Coordinated Proceeding No. 4631, *Reglan/Metoclopramide Cases*, including all cases currently in this proceeding and any cases subsequently added to this proceeding.

I. Appointment of Plaintiffs' Liaison Counsel. The Court designates the following to serve as Plaintiffs' Liaison Counsel:

Mark Robinson, SBN 54426
Robinson, Calcagnie & Robinson Inc.
620 Newport Center Drive, 7th Floor
Newport Beach, California 92660
Telephone: (949) 720-1288
Facsimile: (949) 720-1292

Lawrence Gornick, SBN 136290
Levin, Simes, Kaiser & Gornick LLP
44 Montgomery Street, 36th Floor
San Francisco, CA 94104
Telephone: (415) 646-7160
Facsimile: (415) 981-1270

Steve Skikos, SBN 148110
Skikos, Crawford, Skikos, Joseph
& Millican LLP
625 Market Street, 11th Floor
San Francisco, CA 94105
Telephone: (415) 546-7300
Facsimile: (415) 546-7301

A. Responsibilities of Plaintiffs' Liaison Counsel. Plaintiffs' Liaison Counsel shall have the following responsibilities:

1. To maintain and distribute to the Court, to counsel for plaintiffs, and to Defendants' Liaison Counsel an up-to-date comprehensive service list of plaintiff's counsel, marked with the date of last revision.

2. To receive and distribute to plaintiffs' counsel, as appropriate, orders, notices and correspondence from the Court and from Defendants' Liaison Counsel.

3. To maintain and to make available to plaintiffs' counsel, on reasonable notice and at reasonable times, a complete set of all pleadings and orders filed and/or served in these coordinated proceedings.

4. To coordinate the filing of notices and papers by plaintiffs, to sign documents submitted to the Court, to communicate with Defendants' Liaison Counsel (including regarding status conference statements and agendas in advance of each status conference), to negotiate case management orders, and to engage in meet and confer sessions.

5. The responsibilities of Plaintiffs' Liaison Counsel, as outlined above, are not intended to create an attorney-client relationship between such counsel and the individual plaintiffs in this proceeding, and do not in any way relieve each attorney's obligations, duties and responsibilities to their own individual clients in this proceeding, or preclude each attorney from signing documents in relation to their individual cases.

II. Appointment of Defendants' Liaison Counsel. The Court designates the following to serve as Defendants' Liaison Counsel for Brand Manufacturers, and Defendants' Liaison Counsel for Generic Manufacturers.

Defendants' Liaison Counsel for Brand Manufacturers:

Stuart Gordon, SBN 37477
Gordon & Rees LLP
275 Battery Street, Suite 2000
San Francisco, CA 94111
Telephone: (415) 986-5900
Facsimile: (415) 986-8054

Defendants' Liaison Counsel for Generic Manufacturers:

Joshua Goodman, SBN 116576
Jenkins Goodman Neuman & Hamilton LLP
417 Montgomery Street, 10th Floor
San Francisco, CA 94104
Telephone: (415) 705-0403
Facsimile: (415) 705-0411

Tammara Tukloff, SBN 192200
Morris, Polich, & Purdy LLP
501 West Broadway, Suite 500
San Diego, CA 92101
Telephone: (619) 557-0404
Facsimile: (619) 557-0460

A. Responsibilities of Defendants' Liaison Counsel. Defendants' Liaison Counsel shall have the following responsibilities:

1. To maintain and distribute to the Court, to counsel for the defendants, and to Plaintiffs' Liaison Counsel an up-to-date comprehensive service list of defendants' counsel, marked with the date of last revision.

2. To receive and distribute to defendants' counsel, as appropriate, orders, notices and correspondence from the Court and from Plaintiffs' Liaison Counsel.

3. To maintain and to make available to defendants' counsel, on reasonable notice and at reasonable times, a complete set of all pleadings and orders filed and/or served in these coordinated proceedings.

4. To coordinate the filing of notices and papers by defendants, to sign documents submitted to the Court, to communicate with Plaintiffs' Liaison Counsel (including regarding status conference statements and agendas in advance of each status conference), to negotiate case management orders, and to engage in meet and confer sessions.

5. The responsibilities of Defendants' Liaison Counsel, as outlined above, are not intended to create an attorney-client relationship between such counsel and the defendants in this proceeding, and do not in any way relieve each attorney's obligations, duties and responsibilities to their own clients in this proceeding, or preclude each attorney from signing documents in relation to the cases in which their clients are named.

III. Steering Committees. Plaintiffs and Defendants may each appoint a steering committee if necessary.

IV. Jurisdiction. This Court retains sole and complete jurisdiction over the parties, cases and counsel in this coordinated proceeding, including each and every case filed in (or coordinated into) this coordinated proceeding. While cooperation between this Coordinated

Proceeding and coordinated proceedings in other jurisdictions is encouraged, California remains a separate and independent jurisdiction. No party, however, waives any rights or obligations with regard to the conduct of discovery, trial settings, and trials as allowed by California law and this Court.

V. Discovery and Bellwether Trials.

A. Discovery. All case specific discovery is hereby stayed, ~~except what is permitted in CMO 3 and CMO 4 (PFS/DFS), by other~~ subject to further order of this Court. ~~or by agreement of the parties.~~ The parties shall address case specific discovery and/or trial settings in separate case management orders. The parties may not proceed with general liability discovery until after April 1, 2011. The California plaintiffs are voluntarily cooperating with the coordinated proceedings in New Jersey and Pennsylvania. As such, any party may cross-notice general liability discovery conducted in California or in New Jersey and Pennsylvania in order to avoid duplication of liability discovery efforts. Nothing in this provision shall limit the right of any party to cross-notice other depositions or the right of any party to object to any deposition notice or cross-notice.

B. Bellwether Process. The parties have agreed to meet and confer on the scope, timing and procedure relating to the bellwether process, including the bellwether case selection process, case specific discovery and law and motion practice in the bellwether and non-bellwether cases, and the conduct of bellwether trials. The parties are reserving their right in all cases to move for trial settings and to bring case specific motions, including dispositive motions, and including motions pursuant to the holding in *Foster v. American*

Home Products, 29 F.3d 165 (1994), as part of an overall agreement and contemplated Case Management Order relating to the bellwether process. Until such time and unless otherwise ordered by this Court, all motions, including dispositive motions and motions for trial setting, are deferred. The parties contemplate that an order of this Court relating to the bellwether process will include: trial settings and the bellwether selection process, discovery and motion practice appropriate for bellwether selected cases, and motion practice that may be appropriate to cases outside of those selected as bellwethers.

IT IS SO ORDERED.

/s/_____
Honorable Richard A. Kramer
Judge of the Superior Court

Dated: 4-25, 2011

APPENDIX W

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

CASE NO. CGC-09-484539

[Dated June 22, 2010]

TERRI LYNN ELKINS and JEFFREY ELKINS,	)
Plaintiffs,	)
vs.	)
WYETH, INC. D/B/A WYETH, INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO A.H. ROBINS, INC. AND AMERICAN HOME PRODUCTS CORPORATION; SCHWARZ PHARMA. INC.; TEVA PHARMACEUTICALS USA, INC.; PLIVA USA. INC.; BAXTER HEALTHCARE CORPORATION D/B/A ESI LEDERLE. INC.; PUREPAC PHARMACEUTICAL CO.; BARR LABORATORIES, INC.; MCKESSON CORPORATION; AND DRUG COMPANY DOES 1 THROUGH 6.	)
Defendants.	)

NOTICE REGARDING STAY

Complaint filed: January 30, 2009

Trial Date: Not set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, PLEASE TAKE NOTICE THAT:

All Reglan/metoclopramide cases filed and to be filed in San Francisco Superior Court are stayed pending the decision on the petition for coordination or until the Case Management Conference currently set for September 8, 2010.*

On instruction from the Court, this notice is given to all counsel known to the undersigned to be involved in this Reglan/metoclopramide litigation. The undersigned should be advised of any additional counsel who should receive notice.

The Reglan/metoclopramide litigation in San Francisco is defined as the captioned-case and as those cases set forth as related cases in

1. Attachment 14a to the Joint CMC Statement filed in the case captioned as *Elkins v. Wyeth*, et al.. No. CGC-09-484539 (this statement is attached hereto as Exhibit A);

2. Notice of Additional Related Cases filed June 2, 2010 (attached as Exhibit B); and

3. First Amended Notice of Additional Related Cases filed June 15. 2010 (attached as Exhibit C).

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* "Reglan/metoclopramide cases" are those cases in which the plaintiffs have alleged injuries as a result of their use of metoclopramide (the chemical, or generic, name for Reglan).

These cases are:

	Case Name	Case No.	Date Filed
1.	Baecht, et al. v. Pfizer, et al.	CGC-10-497030	2/23/10
2.	Bocabella, et al. v. Pfizer, et al.	CGC-10-497160	2/25/10
3.	Hause, et al. v. Wyeth, et al.	CGC-10-497157	2/25/10
4.	Byrd, et al. v. Pfizer, et al.	CGC-10-497878	3/18/10
5.	Jackson, et al. v. Pfizer, et al.	CGC-10-497876	3/18/10
6.	McCraw, et al. v. Pfizer, et al.	CGC-10-497872	3/18/10
7.	Ramsey v. Pfizer, et al.	CGC-10-497875	3/18/10
8.	Snow v. Pfizer, et al.	CGC-10-497877	3/18/10
9.	Sparks, et al. v. Pfizer, et al.	CGC-10-497873	3/18/10
10.	Jacque, et al. v. Wyeth, et al.	CGC-10-497889	3/18/10
11.	Otterstrom v. Wyeth, et al.	CGC-10-498304	4/1/10
12.	Bishop, et al. v. Wyeth, et al.	CGC-10-498517	4/9/10
13.	Fernandez v. Pfizer, et al.	CGC-10-498952	4/22/10
14.	Michael, et al. v. Pfizer, et al.	CGC-10-499056	4/26/10
15.	Stewart, et al. v. Wyeth, et al.	CGC-10-499517	5/5/10
16.	Applebaum v. Wyeth LLC, et al.	CGC-10-500009	5/18/10

17.	Adelman v. Wyeth LLC, et al.	CGC-10-500005	5/18/10
	Williams v.	CGC-10-500006	5/18/10
18.	Wyeth LLC, et al. Ray v.	CGC-10-500013	5/18/10
19.	Wyeth LLC, et al. Biles, et al. v.	CGC-10-500279	5/28/10
20.	Wyeth, LLC, et al. Walling v.	CGC-10-500312	5/28/10
21.	Wyeth LLC, et al. Elkins v.	CGC-09-484539	1/30/2009
22.	Wyeth LLC, et al.		

All parties are further notified that questions regarding this stay are to be brought to the attention of the court by a scheduled telephone conference or personal appearance.

DATED: June 22, 2010

/s/ James R. Reilly
James R. Reilly

Counsel for Wyeth