No. 15-1209

IN THE

Supreme Court of the United States

BARR PHARMACEUTICALS LLC,
TEVA PHARMACEUTICALS USA, INC., AND PLIVA, INC.,
Petitioners,

v.

THE SUPERIOR COURT OF SAN FRANCISCO COUNTY
(PLAINTIFFS LISTED IN "ADDENDUM 1" TO PETITION,
Real Parties in Interest),
Respondents.

On Petition for Writ of Certiorari to the Superior Court of California, County of San Francisco

BRIEF IN OPPOSITION

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INTRODUCTION

This petition is not appropriate for review due to the Court's lack of jurisdiction over the California trial court's interlocutory order. But even beyond the jurisdictional flaw, the decision below does not warrant review because the case does not implicate either a federal question, a conflict among the circuits or any Supreme Court Rule 10 consideration warranting review. Moreover, the questions are straightforward civil procedure questions and were correctly decided on the merits.

For these reasons, as discussed more fully below, the Court should deny the petition.

STATEMENT

Real Parties' actions were brought for injuries they sustained as a result of ingesting Petitioners' generic metoclopramide drug products. Metoclopramide (also known by its brand name Reglan) is used to treat heartburn caused by gastroesophageal reflux. Use of metoclopramide more than 90 days greatly increases the risk of contracting a serious and potentially permanent condition known as tardive dyskinesia, which is a neurological disorder that causes uncontrollable, rapid movements of the face and body.

In 2003 and 2004, the name-brand manufacturer updated the Reglan label to warn doctors that elderly patients were more susceptible to developing tardive dyskinesia, and that patients should not use the drug more than 90 days. Petitioners delayed updating their generic drug labels to reflect these changes (Petitioner PLIVA never even bothered to update its label), and moreover failed to

communicate these label changes to Plaintiffs' doctors so they knew to exercise care in treating elderly patients and not to prescribe the drug over 90 days. Because of Petitioners' inaction, Real Parties and their doctors were unaware of the label changes when Real Parties were prescribed metoclopramide. As a result, Real Parties ingested Petitioners' drugs more than 90 days and developed irreversible tardive dyskinesia and related movement conditions.

A. Petitioners Agreed to Jurisdiction, and Brought Their *Mensing* Demurrers Seeking Dismissal of Real Parties' Cases on the Merits.

Real Parties filed their cases in California state courts, which in turn were coordinated before the San Francisco County Superior Court through a coordinated proceeding called a Judicial Counsel Coordinated Proceeding, or JCCP. The procedures for petitioning for a JCCP coordination and the manner in which the coordinating trial judge handles such coordinations are found at California Rules of Court 3.501 *et seq*. ("Coordination of Complex Actions").

Shortly after Real Parties' cases were coordinated, the trial court appointed liaison counsel for Plaintiffs and Defendants. One of Defendants' court appointed liaison counsel was counsel for Petitioner Teva Pharmaceuticals. With input from the trial court, liaison counsel negotiated a series of case management orders for the efficient handling of the litigation. The first case management order negotiated by liaison counsel and entered by the trial court (CMO 1) included a provision whereby the parties specifically agreed the trial court would have

jurisdiction over all the parties, cases and counsel in the JCCP coordinated proceedings:

> **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.

Pet. App. A.

Shortly after CMO 1 was negotiated and entered, this Court decided *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011), which held that an action against a generic drug company was barred under the implied conflict preemption doctrine when the plaintiff's failure to warn claims required a generic drug label to be different from the name-brand label, thereby conflicting with federal drug regulations which required generic drug labels to be the same as name-brand labels.

Petitioners immediately contended to the trial court in July 2011 "that the *Mensing* decision decisively ends the Generic Defendants' involvement in this litigation and that all Generic Defendants immediately should be dismissed from all cases pending in this consolidated litigation." App. E hereto. They then requested "a procedure whereby the Generic Defendants are permitted to seek dismissal of all claims against them." *Id*. The parties and the trial court thereafter set up a procedure whereby Plaintiffs' liaison counsel would file a master complaint, Defendants would file their "*Mensing*" demurrer on the preemption issue, and the trial court would make a ruling that would be binding on all the cases in the

JCCP. On April 17, 2012, the JCCP court overruled the demurrer as to the *Mensing* issues, holding the failure to warn claims asserted by Plaintiffs were not violative of *Mensing* and the impossibility preemption doctrine because it was possible under the allegations for Petitioners to have issued warnings and communications about safety issues ***after*** those warnings were put into the name-brand Reglan labels in 2003 and 2004.[1]

B. Petitioners' Appeal of *Mensing* Demurrer Ruling.

Petitioners petitioned the California court of appeal for a writ of mandate with regard to the trial court's decision on the *Mensing* preemption demurrer. Addendum A of the petition identified all three Petitioners here (Teva, PLIVA and Barr) as Petitioners in that petition, and Addendum B identified by Plaintiff name and case number approximately 3000 real parties in interest in that petition. App. D hereto, pp.10-11 and "Addendum A" and "Addendum B" thereto (the first 5 pages of

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[1] Real Parties note Petitioner Teva Pharmaceuticals was the Petitioner in another JCCP case (the Fosamax JCCP), wherein the trial court made the same ruling on a similar *Mensing* demurrer in that case. The trial court's decision was upheld by the California court of appeal in *Teva Pharmaceuticals v. Superior Court*, 217 Cal.App.4th 96 (2013), *cert. denied*, 2015 U.S. LEXIS 687 (U.S., Jan. 20, 2015). This Court denied Teva's petition for certiorari after inviting briefing from the FDA (through the Solicitor General) on the petition. The FDA in it's brief agreed with the California court of appeal that the plaintiff's claims were not barred because it was possible for a generic manufacturer to warn and communicate the risks after the name-brand manufacturer changed its label, and the plaintiff's state court failure to warn claims paralleled any federal duty to change the label.

Addendum B are excerpted here as an example, and continue for 79 pages listing every single case in the JCCP including non-resident cases). Petitioners requested the court of appeal grant the writ "and issue a decision directing the superior court to vacate its order overruling petitioners' demurrers and directing the superior court to sustain the demurrers in their entirety and to dismiss these cases as against petitioners in their entirety." *Id.* at p.53. In seeking to persuade the court of appeal to grant review, Petitioners noted "approximately 90% of the plaintiffs in these coordinated cases are out-of-state plaintiffs," and the trial court's decision would require "these thousands of cases to go to trial" and force the parties to spend substantial sums "through years of discovery, further motions practice and trial." *Id.* at p.6. The petition was signed by Petitioner Teva's trial counsel. *Id.* at p.54. The court of appeal denied the petition.

Petitioners then petitioned the California Supreme Court for review of the trial court's *Mensing* preemption demurrer ruling. Petitioners made the same pitch as they did to the court of appeal that the trial court's decision "will allow nearly 3,000 plaintiffs (the overwhelming majority of who are not California residents) to continue pursuing claims against the generic drug manufacturers-petitioners in California state court …." App. C hereto, p.3. Petitioners further stated "allowing these cases to proceed will push the state's courts to the breaking point with full-blown discovery, motions practice, and the prospect of literally thousands of trials …." *Id.* at p.5. The petition also was signed by Petitioner Teva, PLIVA and Barr's trial counsel. *Id.* at unnumbered signature lines. The Supreme Court denied the petition.

C. Petitioners First Raised any Intent to Challenge Jurisdiction as to Non-Resident Cases (85% of the Cases) on February 10, 2014.

The first time Petitioners (or any Defendant in the JCCP) informed the trial court they intended to file motions to quash challenging the trial court's personal jurisdiction over non-resident plaintiffs was on February 10, 2014. On that date, counsel for Petitioner Teva sent a letter to the Court attaching their proposed case management order adding "motion to quash" as an alternative to filing an answer or objecting to proof of product identification, and – buried in the marginalia of the attachment – stating that it was "anticipated that generic defendants will challenge personal jurisdiction over non-California defendants in cases brought by non-California residents ...."

Petitioners reference no point in the record before the trial court that they or any other Defendant ever raised with the trial court the prospect of challenging the court's jurisdiction – much less to 85% of the cases before it – until their February 10, 2014 letter, 3½ years into the litigation.

Petitioners, to the contrary, assert that by the July 2011 status conference (the one immediately after *Mensing* was decided) "Petitioners … raised *Mensing* and also advised the court that many of the lawsuits in the JCCP (approximately 85%) were subject to personal jurisdiction challenges." Pet. Brief p.11. This assertion is patently false, and conspicuously there is no reference by Petitioners to any part of the contemporaneous record documenting this statement. That is because there is none.

Instead, the actual record reflects Petitioners in their July 25, 2011 status conference statement requested ***only*** that a process be put in place to decide the *Mensing* issue for all cases (resident and non-resident), and that Plaintiffs provide them with discovery in all cases while their *Mensing* issue was being decided. App. E hereto. Petitioners made no reference in their Statement or at the July 26, 2011 hearing they intended to challenge personal jurisdiction as to any Plaintiff, let alone request the stay be lifted or set up any process to make those challenges – it was 100% about *Mensing* challenges and wanting discovery. The Court granted their requests in full, and lifted the stay to allow Petitioners to file their *Mensing* demurrer and ordered Plaintiffs to provide Petitioners with discovery as to their individual cases. Amended CMO 1 (Pet. App. M) says nothing about later challenges to personal jurisdiction, and the reference to further motions "not related to *PLIVA, Inc. v. Mensing*" was to the ability to file later non-*Mensing* demurrers and motions to strike in order to overcome the rule against deciding those motions piecemeal rather than all at once.

The reason why Petitioners did not inform the trial court of any intent to challenge personal jurisdiction (especially challenges to 85% of the cases) was they had all the fish in one barrel (the JCCP coordination), so to speak, where they anticipated with one shot they could get all the cases dismissed through their *Mensing* demurrer. In fact, as indicated above with regard to Petitioners' attempt to convince the court of appeal and California Supreme Court to review the issue, Petitioners informed those courts the opposite of what they claim now – that if those courts did not grant their petitions and direct the trial court

to dismiss all the cases – Petitioners would be required to litigate all the cases in the California courts through trial. Despite ample opportunities to inform the trial court, court of appeal and Supreme Court they had no jurisdiction over Petitioners in 85% of the cases, there is no record in the filings, briefs or hearings that such issue was ever raised with any of those courts in the course of their *Mensing* challenges.[2]

D. The Jurisdiction Waiver Motions.

After Petitioners first indicated in their February 10, 2014 letter they intended to challenge

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[2] Though not referenced in or attached to their Petition here, Petitioner PLIVA submitted in the underlying trial court proceedings on the consent and waiver issue the declaration of their counsel Rex Littrell, who purported that at an informal ***off-the-record*** meeting with the trial court and Plaintiffs' counsel on July 26, 2011 (at the same time as Petitioners' ***on-the-record*** status conference statement and the Case Management Hearing, where Petitioners and Mr. Littrell only raised the *Mensing* issue), he "broached the subject of personal jurisdiction" and "informed Judge Kramer of the *Goodyear* decision and explained that it could affect the JCCP."

There is no record verifying this assertion or setting forth what purportedly was stated. Mr. Littrell conspicuously omits any response from the trial court to his purported comments. Further, it contradicts what Petitioners told the court of appeal and Supreme Court in their *Mensing* petition briefs – that they would be litigating and trying the non-resident cases in the California courts if the petitions were denied. Even if the statements are taken at face value, they are a far cry from informing the trial court of any intention to file challenges to jurisdiction as to non-resident plaintiffs representing 85% of the cases in the JCCP. As set forth above, the first time there is any record of Petitioners or any Defendant raising any personal jurisdiction issue is nearly 3 years later on February 10, 2014.

personal jurisdiction for the non-resident plaintiffs, the trial court stated "There seems like there may be some jurisdictional questions regarding some of the defendants." Pet. App. S. This is the first reference anywhere in the record that the trial court was aware of any intent by any defendant to challenge the trial court's jurisdiction. And even the trial court's statements indicate it was not fully aware of the nature of the jurisdictional challenges. *Id.* It is apparent from the court's statements it was dealing with other matters in the case at that moment, and put off any newly raised jurisdiction issues saying "that's going to be later." *Id*.

Any implication Petitioners try to draw from the trial court's statements at the February 10, 2014 hearing that it decided at the outset of the case to hold off from deciding the jurisdiction issue affecting over 85 percent of the cases before it – over 3 years after the start of the litigation when their statutes of limitations undoubtedly would have expired in any other jurisdiction, and nearly 2 years after deciding the *Mensing* preemption issue – is simply nonsensical.

Petitioners began to more earnestly push the jurisdiction issue a year later at the February 26, 2015 case management hearing – not coincidentally the month after this Court denied certiorari for the California court of appeal decision in *Teva Pharmaceuticals, USA v. Superior Court*, referenced *supra* at note 1, which aligned with the trial court's decision on the *Mensing* issue. Plaintiffs asserted Petitioners had consented to jurisdiction by agreeing to jurisdiction in CMO 1, and further waived the issue by filing their *Mensing* demurrers seeking dismissal of each non-resident Plaintiff's case. App. B hereto.

Petitioners mischaracterize what happened next, by making it seem as if the trial court then opened up motions for filing substantive personal jurisdiction challenges. At the time, the California Supreme Court had granted review of the California court of appeal's decision finding personal jurisdiction existed with regard to non-resident Plaintiffs in a similar pharmaceutical drug case, namely, *Bristol-Myers Squibb Co. v. Superior Court*, 228 Cal.App.4th 605 (2014), which was decided by the trial court's appellate district here. Thus, the parties and the court agreed it did not make sense to proceed with deciding the personal jurisdiction issue on the merits while the *Bristol-Myers* case was pending. The trial court, however, recognized that if Plaintiffs were correct on their consent and waiver assertions, the cases could proceed without having to wait for the Supreme Court to decide the substantive personal jurisdiction issue in *Bristol-Myers*. App. B hereto. Thus, the trial court did not invite the parties to file motions deciding the substantive personal jurisdiction issue, but rather to file any appropriate motion that would decide the consent and waiver issues. *Id*.

Real Parties, through Plaintiffs' liaison counsel, filed a motion on March 3, 2015 seeking a determination Petitioners had consented to the trial court's jurisdiction, and also had waived any personal jurisdiction challenges based on filing their *Mensing* demurrers and seeking discovery in each of Real Parties' cases. Petitioners elected to file on that same date a motion to quash based on lack of personal jurisdiction in a single Plaintiff's case (the *Bowman* case).

Both motions were heard on April 10, 2015. The trial court found Petitioners had consented to the jurisdiction of the Court when it agreed to the Court's jurisdiction in CMO 1. The Court found, in addition, Petitioners had waived their jurisdictional challenges by seeking dismissals of all the individual cases through their *Mensing* demurrers, and by requesting and receiving discovery in each of the individual cases.

In finding consent, the court stated:

> First of all, I see it as pretty simple, CMO 1 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 could have tackled it then, before many 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 [jurisdictional] claims.
>
> . . .
>
> If a judge tells you, by the way, I think I have jurisdiction over all of you, every bit of all of you, if a judge says that to you in writing as an order, somebody ought to stand up and say, hey, wait a minute, with all due respect that's the way it would come out.

App. A hereto.

The Court, in deciding the waiver issue, noted a positive ruling on Petitioners' *Mensing* demurrer would have resulted in the dismissal of all Real Parties' cases:

> [T]he way the law works is if the demurring parties had won, all the cases would have been thrown out, all of the generic cases would be gone, and

> everybody would be out of this Court, and the Court of Appeal, on plaintiffs' appeal from the sustaining of a demurrer, would have impacted all of the cases.

App. A hereto.

The trial court further noted at no point in Petitioners' briefing did they inform the court, the court of appeal or the California Supreme Court their rulings would not apply to 85% of the cases because the courts lacked personal jurisdiction as to any of the defendants for any of the cases. The court stated what it would have done in the event Real Parties lost the *Mensing* demurrer and were unsuccessful on appeal is "Xerox the Court of Appeal opinion, stick it in all the files, and electronically get rid of all the cases." *Id.* at p.44. Even Petitioners' counsel admitted if Petitioners had won "Your Honor would have had to apply your ruling on the demurrer in the master complaint to the individual cases." *Id.*

Petitioners sought a writ of mandate from the California court of appeal, which in turn requested briefing from Real Parties. After Real Parties submitted briefing and supporting documentation, the court of appeal denied the petition on August 19, 2015. Pet. Apps. 3 and 5. The California Supreme Court denied review on November 10, 2015. Pet. Apps. 1 and 2.

REASONS FOR DENYING THE PETITION

I. This Court Lacks Jurisdiction Because the Decision Below Is Not Final.

A. The Decision Is Not Final.

Under 28 U.S.C. §1257(a), this Court has jurisdiction to review "[f]inal judgments or decrees" of state courts. As the Court has explained, this limitation on its certiorari jurisdiction is no mere formality:

> This provision establishes a firm final judgment rule. To be reviewable by this Court, a state court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945). As we have recognized, the finality rule "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945).

Jefferson v. City of Tarrant, 522 U.S. 75, 81 (1997).

The judgments below are not final in either of the two relevant senses. First of all, they are not an "effective determination of the litigation," but are "merely interlocutory or intermediate." *Id.* The cases consist of trial court decisions finding Petitioners consented to jurisdiction and waived attempts over 4 years into the cases to challenge personal jurisdiction under well-established rules of civil procedure. Pet. Apps. E and F. The case is far from over.

Secondly, the decision is not one that is "subject to no further review or correction in any state tribunal." *Jefferson,* 522 U.S. at 81. The appellate court denied Petitioners' petition for writ of mandate and/or prohibition, and the California Supreme Court denied review. If ultimately Petitioners do not prevail in the case, they could again appeal the issue up through the California state-court system, seeking review by the California Supreme Court, and then by this Court if their appeals in the California system were unsuccessful.

In sum, the decision neither terminates the litigation nor is subject to no further review by the California state court system: It is not the "final word of a final court." *Market Street*, 324 U.S. at 551.

B. No Exception to the Finality Requirement Applies.

This Court has exercised its certiorari jurisdiction over state-court judgments that do not terminate a case in only a "limited set of situations in which we have found finality as to the federal issue despite the ordering of further proceedings in the lower state courts." *O'Dell v. Espinoza*, 456 U.S. 430 (1982) (per curiam). In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court identified "four categories" of such cases. *Florida v. Thomas*, 532 U.S. 774, 777 (2001). This case fits none of those narrow categories.

Before even reaching the *Cox* categories, this case does not even meet the standard of deciding a federal issue. Rather, the issues to be decided in this case are ones of state civil procedure, namely, whether Petitioners consented to jurisdiction of the court by

stipulating to jurisdiction in an agreed case management order and, further, waived their ability to file jurisdictional challenges by first filing a demurrer seeking dismissal of Real Parties' cases in their entirety based on the *Mensing* preemption issue. But even if the issue somehow could be considered a federal issue, the *Cox* categories still would not apply in this case.

The first *Cox* category covers cases in which "there are further proceedings – even entire trials – yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained," and "the judgment of the state court on the federal issue is deemed final" because "the case is for all practical purposes concluded." *Cox*, 420 U.S. at 479. Real Parties prevailed as to the jurisdiction consent and waiver issue, but will still need to prove each element of their claims in litigation on the merits.

Cox's second category is confined to cases where "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of the future state-court proceedings." *Cox*, 420 U.S. at 480. Here, any federal issue has not been finally decided by the state's highest court, which denied review but could later take up the issue. Moreover, if Real Parties do not ultimately prevail in the trial court, any federal issue here would not survive and require decision.

Cox category three comprises those unusual "situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate

outcome of the case." *Cox*, 420 U.S. at 481. This category encompasses cases in which state law offers no subsequent opportunity to obtain a court judgment over which this Court could exercise jurisdiction. *Id.* at 481-82. The parties here do not face such a situation. As explained above, Petitioners can seek further appellate review if they do not prevail. Because the California Supreme Court's denial of review "is to be given no weight insofar as it might be deemed that we have acquiesced in the law as enunciated in a published opinion of a Court of Appeal," *Trope v. Katz*, 11 Cal.4th 274, 287 n. 1 (1995), the California Supreme Court could also take up the merits of Petitioners' arguments against consent and waiver in a later appeal. But even if the California courts in a subsequent appeal were to treat the trial court's "interlocutory ruling as 'law of the case,' that determination [would] in no way limit [this Court's] ability to review the issue on final judgment." *Jefferson*, 522 U.S. at 83. The third exception is thus inapplicable. *Id.*

Lastly, "the fourth category of such cases identified in *Cox* … covers those cases in which 'the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review' might prevail on nonfederal grounds," and "'reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action,' and 'refusal immediately to review the state-court decision might seriously erode federal policy.'" *Nike, Inc. v. Kasky*, 539 U.S. 654, 658-59 (2003) (opinion concurring in dismissal of writ) (quoting *Cox*, 420 U.S. at 482-83). This case falls well outside the fourth category. Again, because the California Supreme Court did not address

the merits of the issue here, the issue has not been "finally decided in the state courts."

Moreover, denial of immediate review would not "seriously erode federal policy." With regard to trial court decisions of factual issues of consent to jurisdiction and waiver of personal jurisdiction challenges under state law as is the case here, no federal policy or issue was directly decided by the court. Since only interlocutory appellate review was sought, Petitioners ultimately still can appeal or petition for review of the decision by the California courts later in the case.

A thorough review of the *Cox* categories thus confirms that this case does not in any way present this Court with the opportunity to review "the final word of the court." *Market Street*, 324 U.S. at 551. Consequently, the Court lacks jurisdiction under section 1257(a), and the petition must be denied.

II. The Petition Presents No Consideration Governing Review of Certiorari Referenced in Supreme Court Rule 10.

It is difficult to see how this petition even remotely implicates any of the considerations governing review of certiorari set forth in Supreme Court Rule 10.

Subdivision (a) is not implicated because this is not a decision by a federal court of appeals, nor do petitioners cite to any circuit court that has ever decided an issue of consent and waiver of jurisdiction presented here.

Subdivision (b) is not implicated because this is not a decision of a "state court of last resort" deciding "an important federal question" conflicting with

another decision of a state court of last resort or federal court of appeals.

Subdivision (c) is not implicated because the decision is not one by a state court deciding "an important question of federal law" that has not been but should be settled by this Court, or has decided a federal question conflicting with the decisions of this Court.

Instead, Petitioners try to shoehorn this case into a tenuous link to Fourteenth Amendment Due Process rights "merely because the defendant participates in the coordination proceeding, absent a knowing, voluntary, and intentional waiver of the defense." Pet. Quest. Presented, p.ii. But Petitioners' consent to and waiver of jurisdictional challenges is a factual issue decided by the trial court that had handled the case for nearly 5 straight years before deciding that issue. And as set forth above and discussed more fully below, there is ample evidence supporting its decision of consent based on Petitioners' agreement to jurisdiction in CMO 1, and waiver based on the fact that it invoked the jurisdiction of the California trial, appellate and Supreme courts to dismiss Real Parties' cases on substantive preemption grounds, without any record of informing those courts it intended later to challenge those courts' jurisdiction to even decide those issues.

As Rule 10 concludes, "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of properly stated law." That is precisely what Petitioners are asserting here – and wrongly too – in seeking certiorari. As this petition

raises no Rule 10 consideration warranting review, it must be denied.

III. The Trial Court Correctly Determined the Civil Procedure Issues of Consent and Waiver.

The trial court answered only elementary questions of civil procedure rules concerning consent and waiver, all of which are straightforward, time tested and unremarkable, and not deserving of discretionary review by this Court, especially in light of the fact that the analysis of these questions at the federal circuit court and state high court levels is nonexistent.

A. Petitioners Consented to Jurisdiction in CMO 1.

The first question is whether Petitioners consented to personal jurisdiction when they agreed to entry of CMO 1, which provides "**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."

As stated above, the Court found Petitioners had consented to jurisdiction of the trial court at the outset by agreeing and acquiescing to the jurisdiction provision in CMO 1. The court stated it relied on the jurisdiction provision so that it could proceed with organizing the litigation and deciding issues, knowing the parties had agreed to be before it. The court stated it would have tackled any personal jurisdiction issue at the outset had it been raised by the parties, before proceeding with any other issues. The trial court's approach is in line with the California statutes, which

are designed to require resolution of jurisdiction issues at the outset before any substantive matters are decided by the court.

The Court's finding and decision are supported by California Supreme Court authority, namely *General Ins. Co. v. Superior Court,* 15 Cal.3d 449 (1975), and extensive case law history. "A written stipulation between attorneys recognizing jurisdiction of the court over the parties constitutes a general appearance by [a] defendant." *Id.* at 453 (citing numerous cases in support). Here, despite the presence of Petitioners' counsel at the April 29, 2011 hearing in which CMO 1 was entered, not one voiced any objection to CMO 1 or raised any objection to the Court's jurisdiction in the case. Since Petitioners consented to the jurisdiction of the JCCP court over "each and every case filed in (or coordinated into) this coordinated proceeding" as set forth in CMO 1, they therefore made a general appearance in all those cases and cannot file motions to quash and make jurisdictional challenges 4 years after this fact.

Petitioners also are estopped from making personal jurisdiction challenges in Plaintiffs' cases. The doctrine of estoppel "affirms that 'a person may not lull another into a false sense of security by conduct causing the latter to forebear to do something which he otherwise would have done and then take advantage of the inaction caused by his own conduct.'" *Tresway Aero v. Superior Court,* 5 Cal.3d 431, 437-38 (1971). Here, Real Parties reasonably relied on Petitioners' actions by paying filing, service and other fees and costs, making their preliminary disclosures, opposing their *Mensing* demurrer and motion to strike and putting possible dismissals of their cases on the

line, and forgoing filing their cases in other jurisdictions while their cases were being actively litigated in this jurisdiction. The trial court also relied on their actions by spending considerable time and resources in managing the thousands of cases filed in this action and deciding Petitioners' *Mensing* demurrer and other motions and actions, all of which the trial court was led by Petitioners to believe were subject to his jurisdiction and decisions. Thus, Petitioners were estopped from challenging jurisdiction as to non-resident Plaintiffs late in the litigation, when such challenges should have been a threshold issue to be raised and specifically resolved by the parties and the trial court.

Based on the foregoing, Plaintiffs submit substantial evidence supports the court's factual findings and therefore its decision should not be disturbed.

B. Petitioners Waived Jurisdiction Challenges by Seeking Dismissal of Real Parties' Cases on the Merits and by Obtaining Discovery in Their Cases.

The second question is whether Petitioners waived later challenges to the trial court's personal jurisdiction after asking the trial court, court of appeal and California Supreme Court to dismiss Real Parties claims on the merits and in their entirety based on the *Mensing* issue, and concurrently obtaining discovery about each of their cases if they did not prevail.

Code of Civil Procedure section 418.10 requires a defendant before his or her time to plead to file a motion "[t]o quash service of summons on the ground

of lack of jurisdiction of the court over him or her." Section 418.10, subdivision (e) permits a defendant to file an answer or a demurrer or motion to strike the complaint when filed "simultaneously" with a motion to quash for lack of personal jurisdiction, and that such simultaneous filing does not constitute a general appearance in the action until the motion to quash is denied or a petition for writ of mandate is concluded.

"[I]t has long been the rule in California that a party waives any objection to the court's exercise of personal jurisdiction when the party makes a general appearance in the action." *Roy v. Superior Court*, 127 Cal.App.4th 337, 341 (2005). "A general appearance by a party is equivalent to personal service of summons on such party. *Hamilton v. Asbestos Corp.*, 22 Cal.4th 1127, 1147 (2000). Filing a demurrer or motion to strike in a case constitutes a general appearance. *Id.*, citing Cal. Code Civ. Proc. 1014. "What is determinative is whether the defendant takes a part in the particular action which in some manner recognizes the authority of the court to proceed." *Id.*; *see also State Farm Gen. Ins. Co. v. JT's Frames,* 181 Cal.App.4th 429, 441 (2010). "If the defendant raises an issue for resolution or seeks relief available only if the court has jurisdiction over the defendant, then the appearance is a general one." *Factor Health Management v. Superior Court,* 132 Cal.App.4th 246, 250 (2005). Whether a party has engaged in an act constituting a general appearance in a given case is a fact specific determination by the trial court. *Hamilton,* 22 Cal.4th at 1147.

In order to determine whether a party makes a general appearance, the court "look[s] not to whether a party expressed an intent that the appearance be

considered general or special, but rather to the 'character of the relief asked.'" *Cal. Overseas Bank v. French Am. Banking Corp.,* 154 Cal.App.3d 179, 184 (1984). The defendant in *Roy, supra,* made a similar argument that it could challenge the Court's personal jurisdiction late in the case by asserting that defense in its answer without filing a simultaneous motion to quash. The court found that section 418.10 precluded a defendant from "burying" a personal jurisdiction in its response, and then "vigorously, and no doubt expensively … litigat[ing] the action" by "filing numerous appearances" before bringing a "jurisdictional question up for actual review and decision …." *Roy,* 127 Cal.App.4th at 344. The Court stated that enforcement of section 418.10's simultaneous filing requirement serves judicial economy by "confirming the defendant's obligation to raise the jurisdiction issue at the first possible instance" and to prevent the previous activity in the case from being wasted. *Id.*

Here, Petitioners invoked the jurisdiction of the California courts – the trial court, court of appeal and all the way to the California Supreme Court – to seek dismissal on substantive preemption grounds of all pending cases against them, including the non-resident Plaintiff cases. As set forth above, Petitioners' petition for writ of mandate to the California court of appeal on the *Mensing* demurrer issue requested the court direct the trial court to dismiss all the cases, and stated that if it did not do so Petitioners would be required to litigate all those cases – including the 85% non-resident cases – through trial in California. Now, Petitioners are asserting that the cases should not even be before the California courts due to lack of personal jurisdiction.

So Petitioners either were being dishonest with the California courts then by asserting they would be required to try the non-resident cases through trial if the *Mensing* petition was denied, or they are being dishonest with the California courts and this Court now by asserting that the California trial court has no personal jurisdiction over them and cannot try the non-resident cases. The point is, Petitioners cannot have it both ways – that is why the California rules of civil procedure require defendants to raise personal jurisdiction challenges early and unequivocally in the case before they may proceed on substantive issues.

Petitioners assert they were demurring to the master complaint, not to any particular Plaintiff's action in the JCCP coordination. This assertion is belied by their request in their court of appeal brief on the *Mensing* issue that the court direct the trial court to dismiss all the cases including the non-resident cases on preemption grounds. App. D hereto. Lest there is any confusion that they were not seeking to dismiss individual cases, Plaintiffs attach hereto excerpts from Petitioners "Addendum B" showing that they listed all 3000 cases pending in the JCCP (including the non-resident cases) as real parties to that petition, and seeking dismissal of their individual cases by way of their demurrer and petition. *Id.* Nearly all those Plaintiffs are listed by Petitioners in this petition as Real Parties to their jurisdictional challenges – years after listing them as real parties in their *Mensing* petition.

Under California law and under elementary rules of civil procedure, a party must raise and make its challenges to personal jurisdiction before invoking the forum court's jurisdiction to decide a substantive

issue in the case (and here, a dispositive issue). The reason is clear: A party cannot seek the forum's ruling on a key substantive issue in the case, and then if it is not happy with that decision erase it and try again in another forum.

CONCLUSION

For the foregoing reasons, Real Parties respectfully request the Court deny the petition.

May 23, 2016

Respectfully submitted,

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APPENDIX A

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	)
	)

Excerpts From Reporter's Transcript of Proceedings

Friday, April 10, 2015

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

* * *

[p.15]

* * *

THE COURT: 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]

* * *

THE COURT:....

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.

* * *

[p.30]

* * *

THE COURT: the way the law works is if the demurring parties had won, all the cases would have been thrown out, all of the generic cases would be gone, and everybody would be out of this Court, and then the Court of Appeal, on the plaintiffs' appeal from the sustaining of a demurrer, would have impacted all of the cases.

* * *

[p.42]

* * *

THE COURT: If a judge tells you, by the way, I think I have jurisdiction over all of you, every bit of all of you, if a judge says that to you in writing as an order, somebody ought to stand up and say, hey, wait a minute, with all due respect, that's the way it would come out.

* * *

[p.43]

* * *

MR. LITTRELL: If we would have won, Your Honor would have had to apply your ruling on the demurrer on the master complaint to individual cases.

* * *

[p.44]

* * *

THE COURT: Do you have authority for the fact that I would have had to have several thousand hearings to see if that ruling from, say, the Supreme Court applied to each and every one of those cases? Do you have any authority for that?

Because that's not how I do it and I've been doing it for a long time. What I do is I say, how about we Xerox the Court of Appeal opinion, stick it in all the files, and electronically get rid of all the cases.

* * *

APPENDIX B

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	)
	)

Excerpts From Reporter's Transcript of Proceedings

Thursday, February 26, 2015

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

* * *

[p.53]

* * *

THE COURT: Is part of what will be involved in this jurisdictional thing, … that this was waived?

MR. SKIKOS: Yes.

MR. OETHEIMER: Yes, I'm sure.

THE COURT: So that could go forward.

MR. SKIKOS: Yes.

* * *

[p.56]

* * *

THE COURT: Would it make any sense to go forward on the waiver argument anyway?

MR. SKIKOS: I think it would.

MR. OETHEIMER: We don't believe so.

THE COURT: But it would have to be done anyway, no matter what the result is of the supreme court -- whichever supreme court we're talking about, if the supreme court says we hereby abolish international shoes and we hereby abolish specific jurisdiction except…

* * *

[p.57]

* * *

THE COURT: in the following limited situations, a complete victory for out-of-state defendants, there would still be a need to have the hearing on whether personal jurisdiction was waived. No matter what, that would have to happen.

Conversely, if personal jurisdiction was waived, there's no need to wait for what the supreme courts do. If it was not waived, then whatever happens in the supreme courts would happen and its impact would be determined anyway.

* * *

[p.79]

* * *

THE COURT: But I think be we have to resolve at least the question of waiver in order to avoid what looks to me like it could be a two- to four-year delay in whether or not there's jurisdiction over anybody who might have waived it.

Whether or not what's pending is in front of the California Supreme Court is sufficiently identical to what would be here in the non-waiver arguments remains to be seen, because nobody has told me exactly what it is.

So here's what I'm going to do. I've decided.

I'm going to lift the stay as to all of the cases in the JCCP, to the extent that any party who wishes to can file a motion regarding the jurisdiction of this Court to proceed in any one or more of the cases, and you do whatever you want.

* * *

APPENDIX C

IN THE SUPREME COURT OF CALIFORNIA

After A Summary Denial By The Court of Appeal, First Appellate District Division One – No. A135804

EXCERPTS FROM PETITION FOR REVIEW

[Dated October 9, 2012]

GENERIC DEFENDANTS, Petitioners,	)
	)
v.	)
	)
THE SUPERIOR COURT OF SAN FRANCISCO COUNTY, Respondent	)
	)

* * *

[p.3]

* * *

Despite this tidal wave of authority, the Superior Court hearing these consolidated cases in San Francisco refused to follow *Mensing* and overruled petitioners' demurrer in its entirety. Left intact, that sharp deviation from this overwhelming nationwide consensus will allow nearly 3,000 plaintiffs (the overwhelming majority of whom are not California residents) to continue pursuing claims against the generic drug manufacturers-petitioners in

California state court-even though those plaintiffs' claims are exactly the same as the ones pressed and rejected by the U.S. Supreme Court in *Mensing*.

* * *

[p.5]

* * *

No factual development is necessary to enable judicial review; yet allowing these cases to proceed will push this state's courts to the breaking point with full-blown discovery, motions practice, and the prospect of literally thousands of trials in a resource-strapped judicial system-particularly in San Francisco, where months ago the…

* * *

[p.6]

* * *

…superior court barely averted an emergency plan to close 25 courtrooms, lay off 40 percent of its workforce, and shutter the very same complex litigation department from which this petition (which involves over 2,000 claims by out-of-state plaintiffs) arises.

Dated: October 9, 2012 Respectfully submitted,

/s/ Joshua S. Goodman

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APPENDIX D

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

(From the Superior Court for San Francisco County, JCCP 4631, Case No. CJC-10-004631 Richard A. Kramer, Judge)

Excerpts From PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF

[Dated June 26, 2012]

GENERIC DEFENDANTS, Petitioners,	)
	)
v.	)
	)
THE SUPERIOR COURT OF SAN FRANCISCO COUNTY, Respondent	)
	)
COORDINATED PROCEEDING SPECIAL TITLE [RULE 3.550]	)
	)
REGLAN/METOCLOPRAMIDE CASES	)
	)

* * *

[p.6]

* * *

Given this state of affairs, the trial court's apparent decision to have these thousands of cases proceed to trial despite *Mensing* not only is wrong on the merits; deferring review would impose an extraordinary and unreasonable burden on this State's already-strained judicial system.[2]

* * *

[p.10]

* * *

A. Petitioners, Respondent and Real Parties in Interest.

1. The petitioners are defendants in hundreds of personal injury actions brought by approximately 3,000 plaintiffs now pending under rule 3.550 of the California Rules of Court as JCCP 4631 in respondent court entitled In re Reglan/Metoclopramide Cases, San Francisco Superior Court Case No. CJC-10-004631. (For a complete list of petitioners, …

* * *

[p.11]

* * *

…please see Addendum A to this petition.) The plaintiffs are named here as the real parties in

[2] Petitioners also note that approximately 90 percent of the plaintiffs in these coordinated cases are out-of-state residents, which presumably impacts the California court system's ability to accommodate Californians.

interest. (For a complete list of plaintiffs, please see Addendum B to this petition.)

* * *

[p.53]

* * *

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this court grant the writ and issue a decision directing the superior court to vacate its order overruling petitioners' demurrers and directing the superior court to sustain the demurrers in their entirety and to dismiss these cases as against petitioners in their entirety; or, in the alternative, directing the superior court to vacate its order denying petitioners' motion to strike and directing the superior court to reconsider that motion in accordance with this court's decision.

Dated: June 26, 2012

Respectfully submitted,

HOROVITZ & LEVY LLP
JON B. EISENBERG

GOODMAN NEUMAN HAMILTON LLP
JOSHUA S. GOODMAN

KIRKLAND & ELLIS LLP
JAY P. LEFKOWITZ, P.C.

By: /s/ Joshua S. Goodman
Attorneys for Petitioners

ADDENDUM A

PETITIONERS

Actavis Elizabeth LLC

Acura Pharmaceuticals, Inc. f/kJa/ Halsey Drug Company, Inc.

ANI Pharmaceuticals

Barr Laboratories, Inc.

Beach Products, Inc.

Bedford Laboratories, a division of Ben Venue Laboratories, Inc.

Boehringer Ingelheim Roxane, Inc., f/k/a Roxane Laboratories, Inc.

Bristol-Myers Squibb and Apothecon

Generics Bidco I, LLc

Hospira, Inc.

Ipca Pharmaceuticals, Inc.

King Pharmaceuticals, Inc.

McKesson

Morton Grove Pharmaceuticals, Inc.

Mutual Pharmaceutical Company, Inc. & United Research Laboratories, Inc.

Northstar RX, LLC

Paco Pharmaceutical Services, Inc.

Pharmaceutical Associates, Inc.

Pliva, Inc.

Qualitest Pharmaceuticals, Inc.

Ranbaxy, Pharmaceuticals, Inc.

Richmond Pharmaceuticals, Inc

Rugby Laboratories, Inc.

Sandoz Inc.

Silarex Pharmaceuticals, Inc.

Smith and Nephew, Inc.

Teva Pharmaceuticals USA, Inc.

The Harvard Drug Group LLC dba Major Pharmace

Vintage Pharmaceuticals, LLC

VistaPharm, Inc.

Watson Laboratories, Inc.

Wochkardt USA, LLC

ADDENDUM B

CA MCP Litigation – Active Plaintiffs

	Plaintiff Name	**Short Case Name**	**Case No.**	**Date complaint Filed**
1	Abrams, Gilda	Abrams v. Wyeth	CGC-11-508508	2/23/11
2	Boisvert. Michael (represented by legal guardian Anne Miller)	Abrams v. Wyeth	CGC-11-508508	2/23/11
3	Cowart, Ruth	Abrams v. Wyeth	CGC-11-508508	2/23/11
4	Emmons, Kennith	Abrams v. Wyeth	CGC-11-508508	2/23/11
5	Emmons, Laura	Abrams v. Wyeth	CGC-11-508508	2/23/11
6	Finster, George	Abrams v. Wyeth	CGC-11-508508	2/23/11
7	Finster, Tonya	Abrams v. Wyeth	CGC-11-508508	2/23/11
8	Fleming, Donald	Abrams v. Wyeth	CGC-11-508508	2/23/11

9	Fleming, Jane	Abrams v. Wyeth	CGC-11-508508	2/23/11
10	Fredericks, Edward	Abrams v. Wyeth	CGC-11-508508	2/23/11
11	Grayson, Darenthia	Abrams v. Wyeth	CGC-11-508508	2/23/11
12	Greene, Derric	Abrams v. Wyeth	CGC-11-508508	2/23/11
13	Hamer, Tina	Abrams v. Wyeth	CGC-11-508508	2/23/11
14	Helrwig, Gordon	Abrams v. Wyeth	CGC-11-508508	2/23/11
15	Hellwig, Wilma	Abrams v. Wyeth	CGC-11-508508	2/23/11
16	Hudson, Dawndra	Abrams v. Wyeth	CGC-11-508508	2/23/11
17	Hudson, Russel!	Abrams v. Wyeth	CGC-11-508508	2/23/11
18	Johnson, Johnnie	Abrams v. Wyeth	CGC-11-508508	2/23/11
19	Kasparian, Malcolm	Abrams v. Wyeth	CGC-11-508508	2/23/11

20	Kasparian, Opal	Abrams v. Wyeth	CGC-11-508508	2/23/11
21	Layman, Melissa	Abrams v. Wyeth	CGC-11-508508	2/23/11
22	Lett, Joyce	Abrams v. Wyeth	CGC-11-508508	2/23/11
23	Lett, Mack, Jr.	Abrams v. Wyeth	CGC-11-508508	2/23/11
24	Longfellow, Tamara	Abrams v. Wyeth	CGC-11-508508	2/23/11
25	Mccann, Robert	Abrams v. Wyeth	CGC-11-508508	2/23/11
26	McCulloug h, Floyd	Abrams v. Wyeth	CGC-11-508508	2/23/11
27	Miller, Anne (legal guardian of Michael Boisvert)	Abrams v. Wyeth	CGC-11-508508	2/23/11
28	Pierce, Mary Jean	Abrams v. Wyeth	CGC-11-508508	2/23/11
29	Queen, Roscoe	Abrams v. Wyeth	CGC-11-508508	2/23/11
30	Reichert, Lawrence	Abrams v. Wyeth	CGC-11-508508	2/23/11

31	Sanders, Alma	Abrams v. Wyeth	CGC-11-508508	2/23/11
32	Sanders, Leslie	Abrams v. Wyeth	CGC-11-508508	2/23/11
33	Short-Dille, Earlene	Abrams v. Wyeth	CGC-11-508508	2/23/11
34	Spaulding, Jeanne	Abrams v. Wyeth	CGC-11-508508	2/23/11
35	Wilder, Gerald	Abrams v. Wyeth	CGC-11-508508	2/23/11
36	Winnegan, Latoya	Abrams v. Wyeth	CGC-11-508508	2/23/11
37	Winnegan, Raymond, Sr.	Abrams v. Wyeth	CGC-11-508508	2/23/11
38	Winnegan, Stephanie	Abrams v. Wyeth	CGC-11-508508	2/23/11
39	Zimmer, Keith	Abrams v. Wyeth	CGC-11-508508	2/23/11
40	Zimmer, Norma	Abrams v. Wyeth	CGC-11-508508	2/23/11
41	Adams, Cynthia	Adams (Cynthia) v. Wyeth	CGC-11-515783	11/8/11
42	Chambers, Verla	Adams (Cynthia) v. Wyeth	CGC-11-515783	11/8/11

43	Clawson, Clint	Adams (Cynthia) v. Wyeth	CGC-11-515783	11/8/11
44	Holcomb, Diana	Adams (Cynthia) v. Wyeth	CGC-11-515783	11/8/11
45	Wales, Sharon	Adams (Cynthia) v. Wyeth	CGC-11-515783	11/8/11
46	Acosta, Mary	Abrams v. Wyeth	CGC-11-510074	4/11/11
47	Adams, Janet	Abrams v. Wyeth	CGC-11-510074	4/11/11
48	Adams, Naomi	Abrams v. Wyeth	CGC-11-504766	10/20/10
49	Adkins, Jessilynne	Abrams v. Wyeth	CGC-11-510074	4/11/11
50	Ali, Gladys	Abrams v. Wyeth	CGC-11-510074	4/11/11
51	Anderson, Thelma	Abrams v. Wyeth	CGC-11-510074	4/11/11
52	Aubin, Cheyanne	Abrams v. Wyeth	CGC-11-510074	4/11/11
53	Bach, Peggy	Abrams v. Wyeth	CGC-11-510074	4/11/11
54	Bailey, Aaron	Abrams v. Wyeth	CGC-11-510074	4/11/11
55	Bailey, Wandeleen	Abrams v. Wyeth	CGC-11-510074	4/11/11
56	Bendinelli, Trey	Abrams v. Wyeth	CGC-11-510074	4/11/11
57	Bond, John	Abrams v. Wyeth	CGC-11-510074	4/11/11
58	Adcock, Ruby	Adock v. Wyeth	CGC-11-512681	7/21/11

59	Adelman, Gladell	Aldeman v. Wyeth	CGC-11-500005	5/18/10
60	Agnew, Kenneth	Agnew v. Wyeth	CGC-11-508459	2/22/11
61	Baker, Nora	Agnew v. Wyeth	CGC-11-508459	2/22/11
62	Balkom, Thomas	Agnew v. Wyeth	CGC-11-508459	2/22/11
63	Barron, Aray	Agnew v. Wyeth	CGC-11-508459	2/22/11
64	Batson, Linda	Agnew v. Wyeth	CGC-11-508459	2/22/11
65	Behr, Diane	Agnew v. Wyeth	CGC-11-508459	2/22/11
66	Bonner, Rudis	Agnew v. Wyeth	CGC-11-508459	2/22/11
67	Brasher, Angela (individually and on behalf of Shawn Lowrey)	Agnew v. Wyeth	CGC-11-508459	2/22/11
68	Burris, Georgia	Agnew v. Wyeth	CGC-11-508459	2/22/11
69	Catanzano-McKenzie, Mary	Agnew v. Wyeth	CGC-11-508459	2/22/11
70	Clark, Juanita	Agnew v. Wyeth	CGC-11-508459	2/22/11
71	Decker, Georgia	Agnew v. Wyeth	CGC-11-508459	2/22/11

72	Dilascio, Joseph	Agnew v. Wyeth	CGC-11-508459	2/22/11
73	Dowels, Izabella	Agnew v. Wyeth	CGC-11-508459	2/22/11
74	Drakeford, Janie	Agnew v. Wyeth	CGC-11-508459	2/22/11
75	Elder, Elsie	Agnew v. Wyeth	CGC-11-508459	2/22/11
76	Fallis,Barbara	Agnew v. Wyeth	CGC-11-508459	2/22/11
77	Farnham, Justine	Agnew v. Wyeth	CGC-11-508459	2/22/11
78	Ferrer, Ana	Agnew v. Wyeth	CGC-11-508459	2/22/11
79	Gambino, Elizabeth	Agnew v. Wyeth	CGC-11-508459	2/22/11
80	Gray, Nona	Agnew v. Wyeth	CGC-11-508459	2/22/11
81	Guerino, James	Agnew v. Wyeth	CGC-11-508459	2/22/11
82	Hart, Keith	Agnew v. Wyeth	CGC-11-508459	2/22/11

83	Howard, Raymond	Agnew v. Wyeth	CGC-11-508459	2/22/11
84	Humberger, Ricka	Agnew v. Wyeth	CGC-11-508459	2/22/11
85	Hunter, Kathleen	Agnew v. Wyeth	CGC-11-508459	2/22/11
86	Johnson, Ellaree	Agnew v. Wyeth	CGC-11-508459	2/22/11
87	Jones, Kenneth	Agnew v. Wyeth	CGC-11-508459	2/22/11
88	Kema, Peter	Agnew v. Wyeth	CGC-11-508459	2/22/11
89	Kirkland, Danny	Agnew v. Wyeth	CGC-11-508459	2/22/11
90	Lewis, Thomas	Agnew v. Wyeth	CGC-11-508459	2/22/11
91	Logsdon, Susann	Agnew v. Wyeth	CGC-11-508459	2/22/11
92	Lovins-Kappler, Debra	Agnew v. Wyeth	CGC-11-508459	2/22/11
93	Lowrey, Shawn (represented by Angela Brasher)	Agnew v. Wyeth	CGC-11-508459	2/22/11

94	Lusby, Kathryn	Agnew v. Wyeth	CGC-11-508459	2/22/11
95	McFarlin, Rene	Agnew v. Wyeth	CGC-11-508459	2/22/11
96	Meacham, Carrie	Agnew v. Wyeth	CGC-11-508459	2/22/11
97	Mickens, Rozella	Agnew v. Wyeth	CGC-11-508459	2/22/11
98	Mitchell, Velma	Agnew v. Wyeth	CGC-11-508459	2/22/11
99	Moore, Connie	Agnew v. Wyeth	CGC-11-508459	2/22/11
100	Mora, Evelyn	Agnew v. Wyeth	CGC-11-508459	2/22/11
101	Padgett, Mary	Agnew v. Wyeth	CGC-11-508459	2/22/11
102	Phillips, Cleo	Agnew v. Wyeth	CGC-11-508459	2/22/11
103	Porter, Tarkesha	Agnew v. Wyeth	CGC-11-508459	2/22/11
104	Powell, Mark	Agnew v. Wyeth	CGC-11-508459	2/22/11

105	Raper, Wyvan	Agnew v. Wyeth	CGC-11-508459	2/22/11
106	Rull, Marcia	Agnew v. Wyeth	CGC-11-508459	2/22/11
107	Sampson, Earnest	Agnew v. Wyeth	CGC-11-508459	2/22/11
108	Sams, Gladys	Agnew v. Wyeth	CGC-11-508459	2/22/11
109	Thomas, Judy	Agnew v. Wyeth	CGC-11-508459	2/22/11
110	Wheaton, Buddy	Agnew v. Wyeth	CGC-11-508459	2/22/11
111	Williams, Loretta	Agnew v. Wyeth	CGC-11-508459	2/22/11
112	Wolinsky, Debra	Agnew v. Wyeth	CGC-11-508459	2/22/11
113	Aguero, Juana	Aguero v. Wyeth	CGC-12-521349	6/4/12
114	Aguero, Rubin	Aguero v. Wyeth	CGC-12-521349	6/4/12
115	Akers, Tonya	Akers v. Wyeth	CGC-11-512518	7/13/11

116	Bickham, Ivory	Akers v. Wyeth	CGC-11-512518	7/13/11
117	Buice, Dana	Akers v. Wyeth	CGC-11-512518	7/13/11
118	Clifford, Bobby	Akers v. Wyeth	CGC-11-512518	7/13/11
119	Colson, Ulonda	Akers v. Wyeth	CGC-11-512518	7/13/11
120	Deborah Kiddy (Individually and on Behalf of Retha Kiddy)	Akers v. Wyeth	CGC-11-512518	7/13/11
121	Dickerson, Richard	Akers v. Wyeth	CGC-11-512518	7/13/11
122	Harrison, Ruth	Akers v. Wyeth	CGC-11-512518	7/13/11
123	Harsson, Margaret	Akers v. Wyeth	CGC-11-512518	7/13/11
124	Hinojosa, Hilda	Akers v. Wyeth	CGC-11-512518	7/13/11
125	Hungate, Janet	Akers v. Wyeth	CGC-11-512518	7/13/11

126	Hunter, Jacqueline	Akers v. Wyeth	CGC-11-512518	7/13/11
127	Kiddy, Retha (represented by Deborah Kiddy)	Akers v. Wyeth	CGC-11-512518	7/13/11
128	Lamont, William	Akers v. Wyeth	CGC-11-512518	7/13/11
129	Mayfield, Cathey	Akers v. Wyeth	CGC-11-512518	7/13/11
130	Nicole Butler (on Behalf of Jersie McInerney)	Akers v. Wyeth	CGC-11-512518	7/13/11
131	Patton, Carolina	Akers v. Wyeth	CGC-11-512518	7/13/11
132	Rouse, Joyce	Akers v. Wyeth	CGC-11-512518	7/13/11
133	Sandel, James	Akers v. Wyeth	CGC-11-512518	7/13/11
134	Stewart, Georgia	Akers v. Wyeth	CGC-11-512518	7/13/11
135	Trestman, Lisa	Akers v. Wyeth	CGC-11-512518	7/13/11

136	Wigland, Yvonne	Akers v. Wyeth	CGC-11-512518	7/13/11
137	Alexander, Ester	Alexander v. Wyeth	CGC-11-508509	2/23/11
138	Baker, Naomi	Alexander v. Wyeth	CGC-11-508509	2/23/11
139	Behnk, Donna	Alexander v. Wyeth	CGC-11-508509	2/23/11
140	Behnk, Kenneth	Alexander v. Wyeth	CGC-11-508509	2/23/11
141	Berg, Geraldine	Alexander v. Wyeth	CGC-11-508509	2/23/11
142	Bonds, Billie	Alexander v. Wyeth	CGC-11-508509	2/23/11
143	Bonds, Rudie	Alexander v. Wyeth	CGC-11-508509	2/23/11
144	Boney, Ruth	Alexander v. Wyeth	CGC-11-508509	2/23/11
145	Bradford, Dolores	Alexander v. Wyeth	CGC-11-508509	2/23/11
146	Brummer, Jeanie	Alexander v. Wyeth	CGC-11-508509	2/23/11

147	Bryant, Joyce (legal guardian of Maggie Dean)	Alexander v. Wyeth	CGC-11-508509	2/23/11
148	Church, Nathan	Alexander v. Wyeth	CGC-11-508509	2/23/11
149	Church, Oneta	Alexander v. Wyeth	CGC-11-508509	2/23/11
150	Clement, Carol	Alexander v. Wyeth	CGC-11-508509	2/23/11
151	Cobb, Brenda	Alexander v. Wyeth	CGC-11-508509	2/23/11
152	Coggin, Sarah	Alexander v. Wyeth	CGC-11-508509	2/23/11
153	Cox, Jim	Alexander v. Wyeth	CGC-11-508509	2/23/11
154	Cox, Rita	Alexander v. Wyeth	CGC-11-508509	2/23/11
155	Cruz, Diana Santa	Alexander v. Wyeth	CGC-11-508509	2/23/11
156	Dean, Maggie (represented by legal guardian	Alexander v. Wyeth	CGC-11-508509	2/23/11

	Joyce Brant)			
157	Deweese, Jack	Alexander v. Wyeth	CGC-11-508509	2/23/11
158	Deweese, Nancy	Alexander v. Wyeth	CGC-11-508509	2/23/11
159	Fillmore, Jeri	Alexander v. Wyeth	CGC-11-508509	2/23/11
160	Findley, Pamela	Alexander v. Wyeth	CGC-11-508509	2/23/11
161	Findley, Paul	Alexander v. Wyeth	CGC-11-508509	2/23/11
162	Gee, Shelly	Alexander v. Wyeth	CGC-11-508509	2/23/11
163	Gibson, James	Alexander v. Wyeth	CGC-11-508509	2/23/11
164	Gibson, Loyce	Alexander v. Wyeth	CGC-11-508509	2/23/11
165	Glensor, Charles	Alexander v. Wyeth	CGC-11-508509	2/23/11
166	Glensor, Helga	Alexander v. Wyeth	CGC-11-508509	2/23/11

167	Gomez, Marco	Alexander v. Wyeth	CGC-11-508509	2/23/11
168	Grant, Katherine	Alexander v. Wyeth	CGC-11-508509	2/23/11
169	Harris, Gale Lee	Alexander v. Wyeth	CGC-11-508509	2/23/11
170	Harris, Paul	Alexander v. Wyeth	CGC-11-508509	2/23/11
171	Hicks, Johnie	Alexander v. Wyeth	CGC-11-508509	2/23/11
172	Hudson, Emma	Alexander v. Wyeth	CGC-11-508509	2/23/11
173	Hudson, Moses, Jr.	Alexander v. Wyeth	CGC-11-508509	2/23/11
174	Johnson, Joel	Alexander v. Wyeth	CGC-11-508509	2/23/11
175	Johnson, Shelly	Alexander v. Wyeth	CGC-11-508509	2/23/11
176	Jones, Opal	Alexander v. Wyeth	CGC-11-508509	2/23/11
177	Jordan, Amanda	Alexander v. Wyeth	CGC-11-508509	2/23/11

178	King, Faith Leavon	Alexander v. Wyeth	CGC-11-508509	2/23/11

Last Updated: 6/22/2012

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[Addendum B, p.79]

3098	Zimmer, Ellen	Zimmer v. Wyeth	CGC-11-509772	4/1/11

[Note: The above represents an excerpt from "Addendum B" of the California court of appeal petition for a writ of mandate concerning the trial court's ruling on Petitioners' *Mensing* demurrer (the first 5 pages and final entry of the chart, and without the counsel name column). The un-excerpted portion of "Addendum B" continues listing the 3098 Real Parties until the Addendum ends at entry 3098 at page 79.]

APPENDIX E

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

[Dated July 25, 2011]

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

DEFENDANTS' CASE MANAGEMENT CONFERENCE STATEMENT

Date: July 26, 2011
Time: 9:30 a.m.
Dept.: 304
The Honorable Richard A. Kramer

AGENDA

A. Case Management Orders

- CMOs Previously Entered
  - CMO-1: Appointment of Liaison Counsel, Jurisdiction and Stay of Discovery
  - Order re Electronic Service
  - Protective Order

- CMO re Plaintiffs' Initial Disclosures

B. Status of San Francisco Superior Court Management and Judge Kramer's continued over sight of these coordinated proceedings.

C. Process for Streamlining the Add-On Procedure

- Request to add on recent cases pending
- Transfer of cases previously coordinated

D. The *Mensing* Opinion

E. Defendant Hospira's Motion and Demurrer

CASE MANAGEMENT ORDERS

The Court previously entered a set of pretrial orders on various issues, including the following:

1. CMO-1: Appointment of Liaison Counsel, Jurisdiction, and Stay of Discovery;
2. Order re Electronic Service; and
3. Protective Order

The Defendants submit the following process governing the preliminary disclosures required of each plaintiff and submit the [Proposed] Order re Plaintiffs' Preliminary Disclosures for the Court's approval (Exhibit A). Following the disposition of the issues relating to the *Mensing* decision (see below), the parties will continue to meet and confer on a process initialing the filing of a Master Complaint and a short

form pleadings relating thereto. In the interim, Defendants also request that the Court address issues raised by the recent United States Supreme Court in *PLIVA, Inc. v. Mensing*, ---U.S. ---, 131 S.Ct. 2567 (June 23, 2011) (slip op.) (a copy of this opinion is attached as Exhibit B).

Position

a. Preliminary Disclosures

Defendants recommend a two-pronged approach in light of the recent U.S. Supreme Court holding in *Mensing*. First, defendants have proposed to the Plaintiffs Liaison Committee a scaled-down version of the draft case management order the parties have been negotiating for several months. Defendants' proposal (Exhibit A) is as follows: Plaintiffs provide preliminary disclosures in each, including the following documents and information, within six months:

1. All pharmaceutical and other records that document the Plaintiff's use of each metoclopramide product with which the Plaintiff alleges that his/her metoclopramide prescriptions were filed.

2. All medical and other records that document any metoclopramide-related injury or otherwise support the allegation that the Plaintiff incurred an injury as a result of ingestion of metoclopramide.

3. All medical and pharmacy records in the possession of Plaintiff or Plaintiff's counsel,

other than those records that are privileged (e.g., they pertain to psychiatric care) and those that pertain to experts and consultants.

4. All records and information available to Plaintiff as to what his or her prescribing physician relied on in prescribing metoclopramide to him or her when said prescribing physician first learned about the metoclopramide and from what source.

5. HIPAA-compliant authorizations for any of the pharmacies or healthcare providers identified in the documents produced in response to Requests Nos. 1 to 3 above.

b. Procedure for Briefing and Argument re *Mensing*

Second, Defendants request that the Court address the issues raised in the *Mensing* opinion and set a briefing schedule therefor. The Generic Defendants maintain that the Supreme Court found unequivocally in *Mensing* that claims against generic drug companies are preempted under the Supremacy Clause of the United States Constitution. Therefore, the Generic Defendants maintain that the *Mensing* decision decisively ends the Generic Defendants' involvement in this litigation and that all generic defendants immediately should be dismissed from all cases pending in this consolidated litigation.

However, based upon statements made by plaintiffs' counsel in the Pennsylvania and New

Jersey coordinated metoclopramide proceedings – many of whom also represent plaintiffs in this coordinated litigation – the Generic Defendants anticipate some plaintiffs may attempt to assert that some limited claims against generic defendants may not be preempted despite the *Mensing* decision. The swift resolution of this threshold issue will enable the Court to proceed with the coordinated actions before it in an efficient and timely manner.

Accordingly, the defendants request the Court authorize a procedure whereby the Generic Defendants are permitted to seek dismissal of all claims against them. The procedure may be dependent upon whether the plaintiffs (1) intend to stand on their claims asserted in the various individual complaints currently pending before the Court or (2) wish to amend their claims in an attempt to assert causes of action not previously asserted against the Generic Defendants. The procedure also maybe dependent upon whether the Court wishes to address such issues via independent motions filed by each Generic Defendant in each case or via some representative challenge to plaintiffs' claims against the Generic Defendants.[1] Nevertheless, the Defendants believe a procedure should be discussed and authorized at the case management conference.

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[1] The defendants note that, on July 8, 2011, Defendant Hospira, Inc., filed a demurrer in the case of *Corte v. Wyeth, LLC, et al.*, No CGC-11-509518, in which, inter alia, Hospira cites the *Mensing* decision and maintains that all claims against it are preempted by federal law. The defendants understand that demurrer is scheduled for hearing before this Court on August 1, 2011.

Dated: June 25, 2011 /s/ Stuart M. Gordon
Stuart M. Gordon, Esq.
James R. Reilly, Esq.
Brand-Name Manufacturers'
Liaison Counsel

Dated: June 25, 2011 /s/ Joshua Goodman
Joshua Goodman, Esq.
Generic Manufacturers'
Liaison Counsel

Dated: June 25, 2011 /s/ Tammara Tukloff
Tamara Tukloff, Esq.
Generic Manufacturers'
Liaison Counsel