IN THE SUPREME COURT

OF THE STATE OF NEVADA

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Elizabeth A. Brown
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Supreme Court Case No.: 81024

Dist. Court Case No.: A-18-778471-C
Consolidated with: A-18-781820-C
A-18-782023-C

TEVA PARENTERAL MEDICINES, INC., fka SICOR, INC.; BAXTER HEALTHCARE CORPORATION; and MCKESSON MEDICAL-SURGICAL INC.,

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; THE HONORABLE TREVOR ATKINS, DISTRICT JUDGE, DEPT. 8; THE HONORABLE NANCY ALLF, DEPT. 27; and THE HONORABLE JIM CROCKETT, DISTRICT JUDGE, DEPT. 24,

Respondents,

And concerning:

YVETTE ADAMS; MARGARET ADYMY; THELMA ANDERSON; JOHN ANDREWS; MARIA ARTIGA; LUPITA AVILA-MEDEL; HENRY AYOUB; JOYCE BAKKEDAHL; DONALD BECKER; JAMES BEDINO; EDWARD BENAVENTE; MARGARITA BENAVENTE; SUSAN BIEGLER; KENNETH BURT; MARGARET CALAVAN; MARCELINA CASTANEDA; VICKIE COLE-CAMPBELL; SHERRILL COLEMAN; NANCY COOK; JAMES DUARTE;

PETITIONER'S APPENDIX

VOL. VI OF VII (APP1213-1454)

and

SOSSY ABADJIAN; GLORIA ACKERMAN; VIRGINIA ADARVE; FRANCIS ADLER; CARMEN AGUILAR; RENE NARCISO; RHEA ALDER; GEORGE ; ALLSHOUSE SOCORRO ALLSHOUSE; LINDA ALPY; JOYCE ALVAREZ; REBECCA L. ANDERSON ANDREI; EMANUEL; TERRIE ANTLES; KELLIE APPLETON-HULTZ; ANTHONY ARCHULETA; ESTEBAN ARELLANOS; RICKIE ARIAS; MARK ARKENBURG; ROGER ARRIOLA; MARIA ARTIGA; ROBIN ASBERRY; WINIFRED BABCOCK; ROBERT BACH; SUSAN F. BACHAND; ELAINE BAGLEY-TENNER; MELISSA BAL; BRYAN BALDRIDGE; RONALD BARKER; RONALD BARNCORD; PEGGY JO BARNHART; DONALD BARTLETT; SHERYLE BARTLETT; JOSEPH BAUDOIN; BARBARA BAXTER; VENUS BEAMON; BARBARA ROBIN BEATTY; RODNEY BEHLINGS; CRISTINA BEJARAN; TOMAS BENEDETTI; VERNA BENFORD; RICHARD BENKERT; MARSHALL BERGERON; DONNA BERGERON; SYLVIA BIVONA; ROBERT BLAIR; HARRY BLAKELEY; DAWN BLANCHARD; BONNIE BLOSS; DARRELL BOLAR; ROY BOLDEN; VICTOR BONILLA; GRACIELA BORRAYES; BILLY BOWEN; SHIRLEY BOWERS; SHIRLEY BRADLEY; CARLA BRAUER; CAROLYN BROWN; JACK BROWN; LESLIE BROWN; MICHAEL BROWN; ROBERTA BROWN; AMELIA B.

BRUNS; CARL L. BURCHARD; TRACI BURKS; ELIZABETH BURTON; ANGELITE BUSTAMANTE- RAMIREZ; ANASTASIO BUSTAMANTE; DOROTHY ANN BUTLER; LEE CALCATERRA; EVELYN CAMPBELL; MARIA CAMPOS; BOONYUEN CANACARIS; MELISSA CAPANDA; MARTIN CAPERELL; PEDRO CARDONA; SUSIE CARNEY; TERESA CARR; BERNARDINO CARRASCO; TRUMAN CARTER; XANDRA CASTO; SPENCE CAUDLE; MARGARET CAUSEY; XAVIER CEBALLOS; ROBERT CEDENO; DINORA CENTENO; ROY CHASE; CARIDAD CHEA; ELSA CHEVEZ; LUCILLE CHILDS; ALICIA CLARK; CAROL CLARK; PATRICIA CLARK; RICHARD COIRO; PERCELL COLLINS, JR.; ERNEST CONNER; SUSAN COREY; PATRICIA CORREA; PAUL A. COULOMBE; AMBER CRAWFORD; RONALD CROCKER; HOWARD CROSS; ROSSLYN CROSSLEY; WILLIAM R. DANIELS.; EVELYN DAVIS; MARY JEAN DAVIS; VIRGINIA A. DAVIS; JESSIE L. DAWSON; EMELYN DELACRUZ; SILVIA DERAS; SHERIDA DEVINE; CLAIRE DIAMOND; JOSE DIAZ-PEREZ; OTIS L. DIXON; EMILIO DOLPIES; PAMELA DOMINGUEZ; EUQENA DOMKOSKI; JOSEPH DONATO; HUGO DONIS; PATRICIA L. DONLEY; LJUBICA DRAGANIC; DELORIS K. DUCK; KATHLEEN J. DUHS; LILLIAN DUNCAN; HAROLD DUSYK; ALLYSON R. DYER, JR.; LOIS EASLEY; DEISY ECHEVERRIA; ROLAND E. ELAURIA; DARIO E. ESCALA; ENGARCIA B. ESCALA; KATHY A. ESCALERA; MARIA ESCOBEDO; TERESA I. ESPINOSA; LEON EVANS;

MARY FAULKNER; ABRAHAM FEINGOLD; MURIEL FEINGOLD; OSCAR FENNELL; MARIETTA FERGUSON; WILLIE FERGUSON; DANIEL FERRANTE; CAROLYN FICKLIN; JOE FILBECK; ETHEL FINEBERG; MADELINE C. FINN; ALBERT L. FITCH; ADRIAN FLORES; MARIA FLORES;; RAUNA FOREMASTER; JOSEPH E. FOSTER; PHYLLIS G. FOSTER; CYNTHIA D. FRAZIER; VICTORIA FREEMAN; LAWRENCE FRIEL; BONITA M. FRIESEN; NESS FRILLARTE; NANCY C. FRISBY; JODI GAINES; ESPERANZA GALLEGOS; NEOHMI GALLEGOS; BRENDA GARCIA; MARTHA GARCIA; SANDRA GARDNER; MICHAEL GARVEY; E THERESA GEORG; TINA GIANNOPOULOS; ARIS GIANNOPOULOS; WANDA GILBERT; JEAN GOLDEN; GOLOB LUCIANO; PASTOR GONZALES; JESUS GONZALEZ-TORRES; JEFF GOTLIEB; ALLEN GOUDY; BILL GRATTAN; ARNOLD GRAY; BONNIE GRAY; TANIA GREEN; ROY GREGORICH; WILLIE GRIFFIN; VERNA GRIMES; CANDELARIO GUEVARA; NICHOLAS GULLI; JULIA GUTIERREZ; DENISE F. HACHEZ; SUE HADJES; FRANK J. HALL; TINA HALL; CHARDAI C. HAMBLIN; ROBERT HAMILTON, JR.; JOANN HARPER; DORIS HARRIS; GLORICE HARRISON; SHARA HARRISON; RONALD K. HARTLEY; ESTHER A. HAYASHI; SAMUEL HAYES; CANDIDO HERNANDEZ; MARIA HERNANDEZ; THOMAS HERROLD; LUZ HERRON; SUSAN M. HILL; ISHEKA HINER; ARLENE HOARD; BETH HOBBS; MICHELLE HOLLIS; JAQUELINE A. HOLMES; JAMES HORVATH; ANA

HOSTLER; AUGUSTAVE HOULE; CARL II; HOWARD HOVIETZ; RUTH HOWARD; MICHELE HOWFORD; EDWARD L. HUEBNER; LOVETTE M. HUGHES; VIRIGINIA M. HUNTER; PATRICIA HURTADO-MIGUEL; ANGELA HYYPPA; JOSEPH INFUSO; FRANK INTERDONATI; BRIAN IREY; CECIL JACKSON; ROLANDO JARAMILLO; RICHARD JILES; LETHA JILES; CLIFTON JOHNSON; DORIS JOHNSON; JOHNNY JOHNSON; JOYCE JOHNSON; ARNOLD JONES; ANN KABADAIAN; ANTHONY K. KALETA; ARUN KAPOOR; LINDA J. KEELER; MICHAEL F. KELLY; DARRELL KIDD; CONNIE KIM; SOO-OK KIM; TAESOOK KIM; SONDRA I. KIMBERS; ELIZABETH I. KINDLER; IRIS L KING; JOANNA KOENIG; MICHAEL J. KRACHENFELS; CORINNE M. KRAMER; DAVID KROITOR; OLGA KUNIK; KAREN A. KUNZIG; ANEITA LAFOUNTAIN; BARBARA LAKE; BERTHA LAUREL; ANGES G. LAURON; MARIE LAWSON; PHYLLIS LEBLANC; ARLENE LETANG; JAMES A. LEWIS; JOAN LIEBSCHUTZ; MINERVA L. LIM; EDWARD LINDSEY; WILLIAM LITTLE; DOROTHY LIVINGSTON-STEEL; FELISA LOPEZ; IRAIDA LOPEZ; NOE LOPEZ; FLORENCE LUCAS; DARLENE LUTHER; FRANK L LYLES; DEBORAH MADRID; MARWA MAIWAND**; DOROTHY J. MAJOR; MARIO MALDONADO; IDA MALWITZ; AUDREY MANUEL; GABRIEL MARES; CAROL A. MARQUEZ.; HUGO MARTINEZ; JORGE B. MARTINEZ; JOSE MARTINEZ; MARY LOUISE MASCARI; LUCY MASTRIAN; LEROY MAYS; LISA MAYS; VIRGINIA A. MCCALL ; STELLA

MCCRAY; LAURENCE MCDANIEL; JOHN MCDAVID, JR.; DOLORES MCDONNELL; DENISE ANNE MCGEE; MAE MCKINNEY; JANET MCKNIGHT; FRED MCMILLEN, III; MYRON MEACHAM; AIDA A. MEKHJIAN; CHELSEY L. MELLOR; JIGGERSON MENDOZA; SUSAN MERRELL-CLAPP; JAMES MIDDAUGH; SYLVIA MILBURN; CORINNE MILLER; JANICE MITCHEL; MIKHAIL MIZHIRITSKY; KIRK MOLITOR; MARY MOORE; JOSE MORA; YOLANDA MORALES; ELIZABETH CASTRO MORALES;YOLANDA MORCIGLIO; BIVETTA MORENO; DAVID MORGAN; DENISE M. MORGAN; DOUGLAS MORGAN; SONIA MORGAN; ANDREW MORICI; BARRY MORRIS; JAMES MORRIS; JUANITA E. MORRIS; MICHELE MORSE; DAN R. MORTENSEN; MIGDALIA MOSQUEDA; ANDREA MOTOLA; ANNIE MUNA; LUCILA MUNGUIA; WILLIE MURRAY; JOSEPH NAGY; BONNIE NAKONECZNY; ERLINDA NATINGA; LEEANNE NELSON; LANITA NEWELL ; ROSEMARIE NORLIN; MARSHALL NYDEN; WADE OBERSHAW; JOSEPH O'CONNELL; DIGNA OLIVA; JOHN O'MARA; L NORMA J. O'NEA; LINDA ORCULLO; PAULA OROZCO-GALAN; ANGELA PACHECO; DENIS PANKHURST; MATT PARK; KATHY PARKINSON; JESUS PAZOS; TERESA PECCORINI; PHYLLIS PEDRO; JOSE O. PENA; PATRICIA PEOPLES; DELMY C. PERDOMO; DORA PEREZ; LOUISE PEREZ; LUIS PEREZ; MARIA PEREZ; MERCEDES PEREZ; AGUSTIN PEREZ-ROQUE; ANDRE PERRET; JANET P. PERRY; ALAN K.

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and

MAUREEN BRIDGES; MARIA LISS; MARY CATTLEDGE; FRANKLIN CORPUZ; BARBARA EDDOWES; ARTHUR EINHORN; CAROL EINHORN;

WOODROW FINNEY; JOAN FRENKEN; EMMA FUENTES; JUDITH GERENCES; ANNIE GILLESPIE; CYNTHIA GRIEM-RODRIGUEZ; DEBBIE HALL; LLOYD HALL; SHANERA HALL; VIRGINIA HALL; ANNE HAYES; HOMERO HERNANDEZ; SOPHIE HINCHLIFF; ANGEL BARAHONA; MARTA FERNANDEZ VENTURA; WILLIAM FRALEY; RICHARD FRANCIS; GEORGINA HETHERINGTON; JANICE HOFFMAN; GEORGE JOHNSON; LINDA JOHNSON; SHERON JOHNSON; STEVE JOHNSON; SEAN KEENAN; KAREN KEENEY; DIANE KIRCHER; ORVILLE KIRCHER; STEPHANIE KLINE; KIMBERLY KUNKLE; PATRICIA LEWIS-GLYNN; BETTE LONG; PETER LONGLY; DIANA LOUSIGNONT; MARIA KOLLENDER; DAVID MAGEE; FRANCISCO MANTUA; DANA MARTIN; MARIA MARTINEZ; JOHN MAUIZIO; ANGA MCCLAIN; BARRY MCGIFFIN; MARIAN MILLER; HIEP MORAGA; SONDRA MORENO; JIMMY NIX; NANCY NORMAN; GEORGIA OLSON; MARK OLSON; BEVERLY PERKINS; MARYJANE PERRY; RICKY PETERSON; BRANDILLA PROSS; DALLAS PYMM; LEEANN PINSON; SHIRLEY PYRTLE; EVONNE QUAST; RONALD QUAST; LEANNE ROBIE; ELEANOR ROWE; RONALD ROWE; DELORES RUSS; MASSIMINO RUSSELLO; GEOLENE SCHALLER; JAN MICHAEL SHULTZ; FRANCINE SIEGEL; MARLENE SIEMS; RATANAKORN SKELTON; WALLACE STEVENSON; ROBERT STEWART; RORY SUNDSTROM; CAROL SWAN; SONY SYAMALA; RICHARD TAFAYA;

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COYNE; NIKKI DAWSON; LOU DECKER; PETER DEMPSEY; MARIA DOMINGUEZ; CAROLYN DONAHUE; LAWRENCE DONAHUE; CONRAD DUPONT; DEBORAH ESTEEN; LUPE EVANGELIST; KAREN FANELLI; LAFONDA FLORES; MADELINE FOSTER; ELOISE FREEMAN; ELLAMAE GAINES; LEAH GIRMA; ANTONIO GONZALES; FRANCISCO GONZALES; RICHARD GREEN; ISABEL GRIJALVA; JAMES HAMILTON; BRENDA HARMAN; DONALD HARMAN; SUSAN HENNING; JOSE HERNANDEZ; MARIE HOEG; JAMES H. MCAVOY; MARGUARITE M. MCAVOY; WILLIAM DEHAVEN; VELOY E. BURTON; SHIRLEY CARR; MARY DOMINGUEZ; CAMILLE HOWEY; LAVADA SHIPERS; JANNIE SMITH; MILDRED J. TWEEDY; KATHERINE HOLZHAUER; ALICIA HOSKINSON; GREG HOUCK; DIONNE JENKINS; JOHN JULIAN; WILLIAM KADER; MARY ELLEN KAISER; VASILIKI KALKANTZAKOS; WILLIAM KEELER; ROBERT KELLAR; SHIRLEY KELLAR; MELANIE KEPPEL; ANITA KINCHEN; PETER KLAS; LINDA KOBIGE; LINDA KORSCHINOWSKI; DURANGO LANE; JUNE LANGER; NANCY LAPA; EDWARD LEVINE; MERSEY LINDSEY; ZOLMAN LITTLE; STEVE LYONS; MARSENE MAKSYMOWSKI; PAT MARINO; BILLIE MATHEWS; KRISTINE MAYEDA; CARMEN MCCALL; MICHAEL MCCOY; ANNETTE MEDLAND; JOSPEHINE MOLINA; LEN MONACO; RACHEL MONTOYA; THEODORE MORRISON; XUAN MAI NGO; JACQUELINE NOVAK; FAITH O'BRIEN; DENISE ORR; JAVIER

PACHECO; ELI PINSONAULT; FLORENCE PINSONAULT; STEVE POKRES; TIMOTHY PRICE; STEVEN RAUSCH; CLIFTON ROLLINS; JOHN ROMERO; JEAN ROSE; RONALD RUTHER; JUAN SALAZAR; PRISCILLA SALDANA; BUDDIE SALSBURY; BERNICE SANDERS; DANNY SCALICE; CARL SMITH; VICKIE SMITH; WILLIAM SNEDEKER; EDWARD SOLIS; MARY SOLIZ; ROGER SOWINSKI; CYNTHIA SPENCER; STEPHEN STAGG; TROY STATEN; LINDA STEINER; GWEN STONE; PHAEDRA SUNDAY; CLARENCE TAYLOR; CATHERINE THOMPSON; MARGRETT THOMPSON; VERNON THOMPSON; DAVID TOMLIN; VON TRIMBLE; CHUONG VAN TRONG; JOHN VICCIA; STEVEN VIG; JANET VOPINEK; KATHY WALENT; LINDA WALKER; SHIRLEY WASHINGTON; MARY WENTWORTH; BETTY WERNER; SALLY WEST; DEE LOUISE WHITNEY; SHIRLEY WOODS; TONY YUTYATAT; CATALINA ZAFRA; METRO ZAMITO; CHRISTINA ZEPEDA; ANDREW ZIELINSKI; CAROLYN ARMSTRONG; BETTY BRADLEY; CHARLEEN DAVIS-SHAW; REBECCA DAY; DION DRAUGH; VINCENZO ESPOSITO,

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25.1 certify that I am an employee of GREENBERG TRAURIG, LLP, that in accordance therewith, on April 17, 2020, I caused a copy of ***Petitioner's Appendix*** to be served via U.S. Mail, first class postage prepaid, and via the 8th Judicial District Court's e-service system, to

Glen J. Lerner, Esq. GLEN LERNER INJURY ATTORNEYS 4795 South Durango Drive Las Vegas, NV 89147 *Attorneys for Real Parties in Interest*	Peter C. Wetherall, Esq. WETHERALL GROUP, LTD. 9345 w. Sunset Rd., Ste. 100 Las Vegas, NV 89148 *Attorneys for Real Parties in Interest*
With courtesy copies via email (pursuant to March 20, 2020 order of the Chief Judge of the EDJC that courtesy copies be submitted via email) :	
Hon. Nancy Allf Eighth Judicial District Court Clark County, Nevada Regional Justice Center Department 27 200 Lewis Avenue Las Vegas, NV 89155 Hon. Trevor Atkins Eighth Judicial District Court Clark County, Nevada Regional Justice Center Department 8 200 Lewis Avenue Las Vegas, NV 89155, and	Hon. Jim Crockett Eighth Judicial District Court Clark County, Nevada Regional Justice Center Department 24 200 Lewis Avenue Las Vegas, NV 89155

/s/ Andrea Lee Rosehill
An Employee of Greenberg Traurig LLP

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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

YVETTE ADAMS; MARGARET ADYMY; THELMA ANDERSON; JOHN ANDREWS; MARIA ARTIGA; LUPITA AVILA-MEDEL; HENRY AYOUB; JOYCE BAKKENDAHL; DONALD BECKER; JAMES BEDINO; EDWARD BENEVENTE; MARGARITA BENEVENTE; SUSAN BIEGLER; KENNETH BURT; MARGARET CALAVAN; MARCELINA CASTENADA; VICKIE COLE-CAMPBELL; SHERRILL COLEMAN; NANCY COOK; JAMES DUARTE,

Plaintiffs,

v.

TEVA PARENTERAL MEDICINES, INC., formerly known as SICOR PHARMACEUTICALS, INC.; SICOR, Inc., a Delaware Corporation; BAXTER HEALTHCARE CORPORATION, a Delaware Corporation; McKESSON MEDICAL-SURGICAL INC., a Delaware Corporation,

Defendants.

CASE NO: A-18-778471-C

DEPT.: 8

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Date of Hearing: November 5, 2019

Time of Hearing: 8:30am

Plaintiffs, by and through their attorneys of record, Peter C. Wetherall, Esq., and Wetherall Group, Ltd., hereby submit their Opposition to Defendants' Motion to Dismiss. Said Opposition is made and based on the following Memorandum of Points and Authorities, the exhibits thereto, the pleadings and papers filed herein, and all other matters properly of record. [1]

DATED this 3rd day of October, 2019.

WETHERALL GROUP, LTD.

By: */s/ Peter Wetherall*
PETER C. WETHERALL, ESQ.
Nevada Bar No.: 4414
9345 W. Sunset Rd., Ste. 100
Las Vegas, NV 89148
Attorneys for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION:

Defendants' Motion to Dismiss contains no acknowledgement *whatsoever* of Defendants' well-documented wrongdoing, no acknowledgement of the multiple Clark County "Endoscopy" verdicts (and settlements) obtained against these Defendants which confirm their wrongdoing, and no acknowledgement of the fact that multiple judges in this jurisdiction have already heard and resolved Defendants' preemption arguments in Plaintiffs' favor (both before and after the aforementioned trials).

Defendants' Motion further contains no acknowledgement that Judges Mahan and Navarro of the Federal District Court similarly *rejected* Defendants' preemption arguments only weeks ago when remanding this and two companion cases back to state court. Lastly, Defendants' Motion

[1] The undersigned Counsel recognizes that the inclusion of exhibits outside the pleadings is normally inappropriate in this context, but in light of the arguments and exhibits proffered in Defendants Motion, Plaintiffs urge the Court to take Judicial Notice of Plaintiffs' exhibits as well.

does not bother informing this Court that District Judge Crockett denied this Motion *in its entirety* at a hearing argued before him on September 17 in the *Bridges* case (Order pending). [2]

Against this audacious backdrop, Defendants seek this Court's Order dismissing Plaintiffs' claims and depriving them of any measure of justice for the harm done to them, which is admittedly less harm than that suffered by the Hepatitis-infected victims, but nevertheless significant.

Selling FDA-approved single-dose vials (as opposed to multi-use vials) does not render it impossible for Defendants' to comply with the United States Federal Food, Drug, Device and Cosmetic Act ("FDCA") and Nevada state law. This is a design defect case with no sustainable impossibility preemption defense available to these Defendants **under these circumstances**. For these reasons, Defendants' Motion should be denied.

II. STATEMENT OF FACTS:

Plaintiffs herein constitute but a handful of the tens of thousands of recipients of the CDC/SNHD letters sent in 2008 which warned Endoscopy Center patients who treated at specific Gastroenterology Centers in Clark County, Nevada of possible infection with Hepatitis B, Hepatitis C, and HIV. CDC Press Release, **Exh. 1**. Plaintiffs herein were encouraged by that letter – and the ensuing publicity this public health catastrophe occasioned – to get tested for these communicable infections. Plaintiffs herein dutifully obtained the necessary testing, and remained in mortal fear of a life-altering infection until such time as their testing sufficiently confirmed no infection. Thus, Plaintiffs are all "non-infected Endoscopy Plaintiffs" who have sued to obtain compensation for the costs of their testing as well as the pain and suffering associated with their need to be tested, sometimes retested, and awaiting the results before being assured they and their loved ones did not suffer the fate of actual infection created by the aforementioned outbreak which befell so many others. Plaintiffs' cases were all tolled until recently, when the Parties' longstanding efforts to reach a settlement resulted in impasse.

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[2] There are hundreds of other Endo "non-infected" Plaintiffs in two other Complaints also removed to federal court and thereafter returned on Plaintiffs' Motions to Remand. The other two cases are *Bridges*, et al., proceeding in Dept. 24, and *Abadjian*, et al., proceeding in Dept. 4.

This lawsuit was originally filed in state court on October 1, 2018. Defendants removed this case to federal court on December 10, 2018. Defendants specifically cited in their Notice of Removal "impossibility preemption" as one reason why this case belonged in federal court. Immediately thereafter, on December 17, 2018, Defendants filed a Motion to Dismiss **virtually identical to the instant Motion** in the *Bridges* non-infection case (also filed by the undersigned counsel, identical to this one except with different Plaintiffs, and also removed) premised predominantly on "impossibility preemption".

Plaintiffs filed their Motion for Remand on January 9, 2019, based solely upon Defendants' failure to meet the amount in controversy requirement for federal jurisdiction. In response, Defendants filed their Opposition to Plaintiffs' Motion to Remand on January 23, 2019, again arguing extensively that "impossibility preemption" not only warranted federal court jurisdiction, but also the dismissal of Plaintiffs' lawsuit entirely. This was an admittedly clever strategy on Defendants' part – to telegraph to the federal court judges that they could assume jurisdiction over these cases only to then clear their dockets of them on preemption grounds, but it backfired.

While Plaintiffs' Motion to Remand was pending, the Parties stipulated to stay briefing on Defendants' Motion to Dismiss, as that Motion would be rendered moot (in federal court) if remand back to state court was granted. Thereafter, on April 12, 2019, the Federal District Court, Honorable James C. Mahan presiding, entered an Order granting remand in the *Bridges* case. On August 23, 2019, Judge Mahan entered an Order granting remand in the *Abadjian* case. On August 26, 2019, the Federal District Court, Chief Judge Gloria M. Navarro presiding, entered an Order granting remand in this case. In each Order granting remand, the Court felt compelled to address Defendants' multiple efforts to argue that "impossibility preemption" not only justified federal jurisdiction, but the outright dismissal of Plaintiffs' Complaint. In his two Orders, Judge Mahan stated:

> The court notes that defendants' arguments are unclear, incoherent, and at times confused. **Some paragraphs from defendants' brief appear to assert that the court has jurisdiction because the FDCA preempts plaintiffs' state law claims. To ensure complete**

> **adjudication of all pertinent issues that the parties raise, the court will consider this argument**.
>
> The "complete preemption doctrine" allows district courts to exercise federal question jurisdiction over state law claims when a federal statute completely preempts the relevant state law. *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1107 (9th Cir. 2000) (citation omitted). Courts consider the factual allegations in the complaint and the petition of removal to determine whether federal law completely preempts a state law claim. *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 191 (9th Cir. 1983).
>
> It is well established that the FDCA does not completely preempt state law. *See Oregon ex rel. Kroger v. Johnson & Johnson*, 832 F. Supp. 2d 1250, 1259–60 (D. Or. 2011); *see also Perez v. Nidek Co. Ltd.*, 657 F. Supp. 2d 1156, 1161 (S.D. Cal. 2009); *see also Alaska v. Eli Lilly & Co.*, No. 3:06-cv-88 TMB, 2006 WL 2168831 at *3–4 (D. Ala July 28, 2006). **Therefore, the court does not have federal question jurisdiction under the complete preemption doctrine**.

See Order [Granting Remand] in *Bridges*, dated April 12, 2019, attached hereto as **Exh. 2**, at 6:8-22 (bold and underline emphasis added).

Judge Mahan went on to conclude, "[T]he FDCA does not completely preempt plaintiffs' state law claims." *Id*., at 8:26. Judge Mahan's Order in Abadjian is near identical. *See* Order [Granting Remand] in *Abadjian*, dated August 23, 2019, attached hereto as **Exh. 3**, at 6:25-7:11; and 7:15.

Judge Navarro independently reached the same conclusions in the case at bar, albeit while also citing Judge Mahan's Order in *Bridges* with approval. *See* Order [Granting Remand] in *Adams*, dated August 26, 2019, attached hereto as **Exh. 4**, at 9:7-10; see also 8:1-9:16.

Immediately upon the remand of the *Bridges* case, Defendants again sought to ply their preemption arguments in state court in an identical Motion to Dismiss as has now been filed here and in *Abadjian*. Judge Crockett denied Defendants' Motion to Dismiss in *Bridges* at a hearing occurring on September 17, and the Order from that ruling is now pending. **In sum, Defendants are serially pursuing their preemption grounds for dismissal, despite two federal judges (on three occasions) and one district judge ruling against them thus far.**

Consistent with prior lawsuits filed in this litigation, Plaintiffs' Complaint asserts claims for: 1) strict products liability; 2) breach of the implied warranty of fitness for a particular purpose; 3) negligence; 4) violation of the Nevada Deceptive Trade Practices Act; and 5) punitive damages.

III. LEGAL ARGUMENT

A complaint should be dismissed for failure to state a claim "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev... 252, 256, 321 P.3d 912, 914 (2014), citing *Buzz Stew, L.L.C. v. City of N. Las Vegas*, 124 Nev. 224, 227–28, 181 P.3d 670, 672 (2008).

Defendants' arguments for dismissal boil down to three assertions: First, "Defendants were not the wrongdoers". *See* Motion, at 1:19. Second, "every claim against Defendants must be dismissed because they are preempted by federal law" pursuant to the doctrine of "impossibility preemption". *Id*., at 1:20-22, 2:16. Third, in the alternative, each of Plaintiffs' causes of action are "missing the essential element of causation or is otherwise invalid as a matter of law". *Id*., at 3:16-17.

None of Defendants' grounds for dismissal have merit, and all should therefore be denied for the reasons that follow.

A. DEFENDANTS ARE CONFIRMED WRONGDOERS WITH REGARD TO THE SALE AND DISTRIBUTION OF PROPOFOL TO THE SUBJECT ENDOSCOPY CLINICS.

It is incomprehensible how Defendants can contend with a straight face that they cannot and should not be liable for the harm done to Plaintiffs merely because others were criminally tried and convicted for contributing to the harm done. Defendants made this same argument while litigating and trying the infection cases, and never prevailed before any judge or jury on this point.

These Defendants' civil liability, and the Endoscopy Clinic owners/operators criminal liability, are not mutually exclusive. The bad acts of the Endoscopy Clinic owners/operators does not provide immunity to these product Defendants. Despite recounting in excruciating detail the criminal proceedings against others which paralleled the civil lawsuits brought against these

Defendants, nowhere in their Motion is any case authority supporting Defendants' asserted immunity from suit for reasons relating to the various criminal convictions.

Nonetheless, Defendants urge the Court to evaluate Plaintiffs' claims "against this factual backdrop". Motion, at 5:19. That sounds like a plea for sympathy under circumstances where these Defendants are entitled to none.

The gravity of Defendants' wrongdoing is perhaps no better reflected than in the multiple verdicts and judgments obtained against them, for identical grounds as being asserted here, which constitute the largest personal injury verdicts in Nevada history. *See*, *Chanin* Judgment, dated June 1, 2010 w/Verdict(s) dated May 5 and 7, 2010, attached hereto as **Exh. 5**; *Sacks, Arnold, Devito* Judgment, dated November 16, 2011 w/Verdict(s), dated October 6 and 10, 2011, attached hereto as **Exh. 6**; and *Washington* Judgment, dated October 19, 2011 w/Verdict(s) dated October 10 and 12, 2011, attached hereto as **Exh. 7**.

Notably, each of these verdicts was obtained long after the U.S. Supreme Court's seminal preemption decision in *Wyeth v. Levine*, 555 U.S. 555 (2009), a case upon which Defendants here rely. Motion, at 8:20, 9:14. The *Sacks, et al*. and *Washington* verdicts were obtained after the U.S. Supreme Court's decision in *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011) was handed down June 23, 2011, another case upon which Defendants rely extensively. Rather than proceeding to trial on hundreds of other infection cases, or pressing appeals against the aforementioned verdicts in order to vindicate their preemption arguments, these Defendants bought their peace for amounts "widely reported in the media to be hundreds of millions of dollars." https://armadr.com/hon-jennifer-togliatti-ret-2/.

A threshold question for this Court becomes, has anything changed between the date of Defendants' last foray into Clark County District Court and now? The answer is "no". The facts

giving rise to these non-infected Plaintiffs' claims are identical to the infection cases, the claims are the same, and the cases relied upon by Defendants in seeking dismissal now are the same as those which were unsuccessfully proffered to various District Court judges previously. The only substantive difference is the damages here are less severe, because these Plaintiffs did not get infected by Hepatitis, they were "only" caused (by the actions of these Defendants) to fear infection for as long a period of time as it took their testing to clear and their concerns to be allayed. These types of damages are actionable. *Sadler v. Pacificare of Nev., Inc.*, 130Nev.990,. 340 P.3d 1264 (2014) (Non-infected Endoscopy claimants suffered a cognizable "injury" despite not being infected and can pursue damage claims, including medical monitoring).

B. "IMPOSSIBILITY PREEMPTION" DOCTRINE DOES NOT IMMUNIZE DEFENDANTS FROM LIABILITY HERE.

In the case at bar, Judge Navarro's Order granting remand has already concluded that Plaintiffs' claims are not preempted. In previous Endoscopy cases litigated after the *Pliva* decision, the District Court has already concluded that federal preemption does <u>not</u> bar Plaintiffs' claims. *See*, Decision and Order: Plaintiffs' Motion for Partial Summary Judgment on Preemption Defense for the Dear Doctor Liability … Product Defendants' Pre-Trial Motion #4, Motion for Summary Judgment on Grounds of Federal Preemption on Order Shortening Time, *Sacks, et al. v. Endoscopy Center of Southern Nevada, LLC, et al.*, Dist. Ct. Case # 08A572315 (Consolidated with 08A576071 and 09A583058), entered July 28, 2011, attached hereto as **Exh. 8**; *see also*, Order Denying Product Defendants' Motion in Limine No. 9 to Exclude Testimony, References or Arguments That Challenge the Sufficiency or Adequacy of the Propofol Warnings Federal Law Compelled Product Defendants to Use, *Washington v. Teva Parenteral Medicines, Inc., et al.*, Dist. Ct. Case # A558164, entered September 9, 2011, attached hereto as **Exh. 9**; see also, Order Granting in Part and Denying in Part Product Defendants' Pre-Trial Motion #7 to Admit Evidence

and Expert Testimony of the Hatch-Waxman Act, FDA Regulations, Pharmaceutical Industry Practice, and Product Defendants' Compliance Therewith for Propofol, *Washington v. Teva Parenteral Medicines, Inc., et al.*, entered September 20, 2011, attached hereto as **Exh. 10.** Under these circumstances, the doctrine of claim preclusion should serve to estop Defendants from their repeated assertion of these arguments.

Nonetheless, Defendants' motion implies that the entire case at bar should be dismissed because Plaintiffs' Complaint is allegedly an improper effort at shrouding a failure to warn claim that should be preempted by the FDCA as indicated in *PLIVA* cited *supra*, and *Mutual Pharmaceutical, Co., Inc. v. Bartlett*. 570 U.S. 472 (2013). This is simply untrue.

The Complaint does present factual statements and allegations about warnings and knowledge with which Plaintiffs charge the Defendants, but it is in the context of alleging the defective design of the vials Defendants provided to the endoscopy clinic at the heart of this case, i.e., multi-dose vials of propofol which the Defendants and the medical and public health community at large knew subjected patients to infection of blood borne diseases.

It is well established, as recognized by Judge Mahan and Judge Navarro, cited *supra*, that the FDCA does not completely preempt all of a plaintiffs' state law claims, nor does it provide blanket immunity. *In re: Fosamax Products Liab. Litig.,* 965 F.Supp.2d 413, 417-18 (S.D.N.Y. 2013); *Phelps v. Wyeth, Inc., Pliva USA, Inc., et al.*, 938 F.Supp.2d 1055, 1061 (D. Or. 2013); *Johnson v. Teva Pharmaceuticals USA, Inc.*, 2012 WL 1866839, at *3 (W.D. La. May 21, 2012) aff'd, 785 F.3d 605 (5th Cir. 2014). In this regard, Plaintiffs' Complaint pleads narrow and precise strict liability design defect and negligence design claims both of which survive Defendants' federal preemption defense as these allegations do not offend these generic drug manufacturers' duties of sameness or allege that they should have stopped selling propofol.

Allegations of a design defect against a manufacturer of a generic drug which could have only been avoided by altering the active ingredients, route of administration, dosage form, strength or labelling of the brand-name drug, are preempted by the FDCA. *Bartlett*, 570 U.S., at 484. The theory is that because the FDCA requires the generic drug to have the same active ingredients, route of administration, dosage form, strength, and labelling as the brand-name drug on which the generic is based, it is impossible for a generic manufacturer to comply with both federal and state law because it is impossible to lawfully redesign the generic form rendering it different from the brand-name drug to avoid liability; the practice is forbidden under federal law. *Id*. This is called the duty of sameness, a duty to which all generic drug manufacturers are subject. *PLIVA,* 564 U.S., at 613.

Plaintiffs' allegations in the case at bar, however, do not allege Defendants should have acted contra to these federal prohibitions. Rather, the plaintiffs allege that had Defendants simply utilized the FDA-approved design that was available to it and branded manufacturers, i.e., single-dose vials, Plaintiffs would not have suffered the injuries they claim. Plaintiffs stand on the facts and allegations in the operative Complaint to be taken as true, but more specifically, the allegations that the single-dose designed vials were available to them while knowing the risk of not utilizing that design to avoid contamination, are as follows:

- Multiple medical, scientific and public health sources reported whilst Defendants manufactured and sold its generic propofol that infections due to multi-dose vial were reported associated with contamination and patient-to-patient infection, and that the practice of re-using these bottles in clinics was well documented. Complaint, at ¶¶ 20, 22, 23, 24, 28, 34.

- In 2001, Defendants submitted and received FDA-approval for single--dose vials of propofol stating that "a smaller size is safer in the at it may reduce the temptation for dosing multiple patients from a single container thereby reducing opportunities for microbial contamination." Complaint, at ¶ 30.

- Defendants sold its multi-dose vials to the Clinic where Plaintiffs received propofol. ¶ 8.

Selection of the single-dose vial design would not have involved altering the active ingredient in propofol, nor are there any allegations in Plaintiffs' complaint that Defendants should have changed the route of administration, the strength of the drug, or the labelling. Selecting the single-dose design also would not have required defendants to alter the dosage form as prohibited by the FDCA without violating the duty of sameness as the single-dose design was already FDA-approved specifically via an application of one of the defendants at bar.

Plaintiffs have not alleged any fact or claim where avoidance of such would have required Defendants to act in a manner to violate their duties of sameness or require them to stop selling their product[3]. They simply could have elected to utilize the alternative design available to them which would have avoided Plaintiffs' claims. Nevada has adopted the consumer expectation test in determining if a product is defectively designed. *Ford Motor Company v. Trejo*, 133 Nev. 520, 525, 402 P.3d 649, 653 (2017). In the context of proving that a product was defective under the consumer expectation test, an "[a]lternative design is one factor for the jury to consider when evaluating whether a product is unreasonably dangerous." *Ford Motor Company*, 133 Nev. at 525-526 (citing *McCourt v. J.C. Penney Co.,* 103 Nev. 101, 104, P.2d 696, 698 (1987)). Therefore, a plaintiff may choose to support their case with evidence "that a safer alternative design was feasible at the time of manufacture." *Fyssakis v. Knight Equip. Corp.*, 108 Nev. 212, 214, 826 P.2d 570, 572 (1992). Taking all facts and allegations in the complaint as true, this safer alternative was available to Defendants which clears the standard to survive a motion to dismiss for failure to state a claim,

[3] *Bartlett* rejected the "stop-selling" rationale put forth by Plaintiffs in that matter stating that in the midst of satisfying both federal and state law obligations, no manufacturer is required to cease acting altogether in order to avoid liability. *Id*., at 570 U.S. at 488. Defendants in the case at bar would not have had to stop selling their product to avoid liability, they simply could have selected the FDA-approved alternative design.

i.e., that it is beyond a doubt that Plaintiffs could ever prove facts that would lead to entitlement of relief. *Buzz Stew,* , 124 Nev. at 227–28.

Moreover, even if the Court were to adopt Defendants' interpretation of Plaintiffs' Complaint – that it includes inappropriate failure to warn allegations – dismissal is not warranted at this stage since implied preemption is not an absolute defense if in fact there was another, updated FDA-approved warning or Dear Doctor letter that Defendants failed to adopt or send, which could only be determined via discovery. *PLIVA*, 564 U.S. at 613. The duty for a manufacturer of generic drugs is to ensure that its warning label is identical to the label of the brand-name drug and without moving to the discovery phase of this case Plaintiffs would be barred from learning whether the Defendants complied with any such updates. *Id*.

C. DEFENDANTS' VARIOUS CRITICISMS OF PLAINTIFFS' CAUSES OF ACTION ARE UNTENABLE IN LIGHT OF PAST JUDICIAL DECISIONS AND VERDICTS, AND OTHERWISE BARRED BY THE DOCTRINE OF ISSUE PRECLUSION.

A corollary to claim preclusion, issue preclusion is applied to conserve judicial resources, maintain consistency, and avoid harassment or oppression of the adverse party. *Alcantara,* 321 P.3d at 916. For issue preclusion to apply, the following four elements must be met:

> (1) the issue decided in the prior litigation must be identical to the issue presented in the current action;
>
> (2) the initial ruling must have been on the merits and have become final;
>
> (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and
>
> (4) the issue was actually and necessarily litigated.

Id. See also, *Parklane Hosiery Co., Inc.. v. Shore*, 439 U.S. 322 (1979), the seminal case approving "offensive" use of collateral estoppel, cited with approval in *Servaites v. Lowden*, 99 Nev. 240, 660 P.2d 1008, 1012 (1983).

In three Endoscopy trials against these Defendants, Judgment was entered on verdicts which specifically found in Plaintiffs' favor on claims of: 1) Strict Liability for Defective Design (*Washington*); 2) Strict Liability for Failure to Warn (*Chanin*); 3) Breach of Implied Warranty of Fitness for a Particular Purpose (*Chanin, Sacks, et al.*); 4) Negligence (*Washington*), 5) Duty to Monitor (*Sacks, et al.*); 6) Failure to Send Dear Doctor Letter (*Sacks, et al.*), and 7) Punitive Damages (*Chanin, Sacks, et al.*, and *Washington*).

On identical facts as will be presented in this case (on the issue of Defendants' liability and amenability to suit), these Defendants have appeared in multiple courts in this jurisdiction, briefed and argued identical legal theories for their absolution, and in each instance those efforts yielded verdicts and judgments against them.

Plaintiffs' burden in the face of the instant Motion to Dismiss is a modest one. Plaintiffs here do not need to prove they will win verdicts against these Defendants. Plaintiffs need not even prove that Defendants' previously-litigated defenses are subject to offensive collateral estoppel – although they arguably are. The point here is simply that the very claims which Defendants assert are legally deficient each passed muster all the way to trial and judgment in three different Clark County courtrooms. Defendants ignore that precedent and provide no basis upon which to disregard or distinguish it, opting instead to once again pursue the same arguments before this Court.

Regrettably, Defendants take their inauthenticity in this endeavor to an extreme. For example, they contend (in the alternative) that Plaintiffs' strict liability claims are "barred by the learned intermediary doctrine". Motion, 15:18-19. The case Defendants cite for this assertion is *Klasch v. Walgreen Co.*, 127 Nev. 832, 264, P.3d 1155, 1158 (2011). However, the *Klasch* opinion makes explicit in **three** separate places that the learned intermediary doctrine is only being adopted "in the context of pharmacist/customer tort litigation". *Id.* at 1157, 1159, 1161 ("Because we believe that

these public-policy considerations are sound, we adopt the learned-intermediary doctrine in the context of pharmacist/customer tort litigation").

While it may be that the Nevada Supreme Court would adopt the learned intermediary doctrine more broadly to include drug companies in a different case, *Klasch* is not that case. For Defendants to claim that *Klasch* warrants the dismissal of Plaintiffs' strict products liability claims on learned intermediary grounds is an unjustified stretch. Even at that, *Klasch* sets forth a relevant exception to the doctrine, namely:

> Following the modern trend of case law, we conclude that the learned-intermediary doctrine does not foreclose a pharmacist's potential for liability when the pharmacist has knowledge of a customer-specific risk. Instead, under these circumstances, a pharmacist has a duty to exercise reasonable care in warning the customer or notifying the prescribing doctor of the risk.

Id. at 1158.

Replacing "pharmacist" with "drug company" in the excerpt above, it is clear that these Defendants' superior knowledge of the risk of double-dipping into the larger 50ml bottles of propofol at ambulatory surgical centers, and Defendants' specific knowledge of previous incidents of infection occasioned thereby, likely renders the protections of the learned intermediary doctrine unavailable to them – in similar fashion as the Court found against Walgreens in *Klasch*. In short, the learned intermediary doctrine is not absolute, it requires the teasing out of facts, and Defendants' reliance upon it here is misplaced.

As discussed above, all of Plaintiffs' other claims have previously been allowed to proceed to trial and judgment in this jurisdiction. To the extent there are technical pleading deficiencies that in the Court's view warrant the amending of Plaintiffs' Complaint, Plaintiffs respectfully request leave of Court to cure any arguable deficiencies, as no prejudice to these Defendants would be incurred thereby.

IV. CONCLUSION

For each of the foregoing reasons, Plaintiffs respectfully request that Defendants' Motion to Dismiss be Denied.

DATED this 3rd day of October, 2019.

WETHERALL GROUP, LTD.

By: */s/ Peter Wetherall*
PETER C. WETHERALL, ESQ.
Nevada Bar No.: 4414
9345 W. Sunset Rd., Ste. 100
Las Vegas, NV 89148
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of **Wetherall Group, Ltd.**, and on the 3rd day of October, 2019, I served the foregoing ***PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS*** as follows:

☒ Electronic Service – By serving a copy thereof through the Court's electronic service system; and/or

☐ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below; and/or

☐ Facsimile—By facsimile transmission pursuant to EDCR 7.26 to the facsimile number(s) shown below and in the confirmation sheet filed herewith. Consent to service under NRCP 5(b)(2)(D) shall be assumed unless an objection to service by facsimile transmission is made in writing and sent to the sender via facsimile within 24 hours of receipt of this Certificate of Service.

/s/ Miriam Alvarez
An employee of

EXHIBIT 1

EXHIBIT 1

Centers for Disease Control and Prevention
CDC 24/7: Saving Lives, Protecting People™

Hepatitis C Investigation in a Las Vegas, Nevada Endoscopy

In January 2008, investigators from CDC's Division of Viral Hepatitis and Division of Health Care Quality Promotion responded to a request from the Southern Nevada Health District (SNHD) to help investigate three persons reported to the local surveillance program with acute Hepatitis C virus (HCV) infection; all three persons had undergone procedures at a Las Vegas endoscopy clinic. Since beginning the investigation, CDC and SNHD have identified a total of six cases of HCV infection among patients who had undergone procedures at the clinic in the 35–90 days prior to onset of symptoms. These patients did not have other risks for HCV infection. Molecular diagnostic testing conducted by CDC confirmed the relatedness of several of these infections.

On investigation of the clinic, CDC and SNHD observed practices that had the potential to transmit HCV. On the basis of these findings, SNHD is notifying 40,000 past patients who were potentially exposed to HCV and other infectious diseases. CDC is providing ongoing support to SNHD for this investigation.

Health care associated transmission of HCV infection accounts for a small proportion of infections in the United States. Since 2001, CDC has identified other HCV outbreaks in health care settings associated with syringe reuse and other lapses in recommended infection control practices.

In response to these investigations, patients with possible exposures associated with these outbreaks were notified and directed to testing for HIV, HBV, and HCV.

For more information about the investigation, visit:

Southern Nevada Health District (http://www.southernnevadahealthdistrict.org/hepc-investigation/index.php)
http://www.southernnevadahealthdistrict.org/outbreaks/index.htm
If you have additional concerns, you may contact the Southern Nevada Health District at 702-759-INFO (4636).

Information about viral hepatitis, HIV, and syringe safety are available on the CDC website at:

Viral Hepatitis
http://www.cdc.gov/hepatitis

HIV Questions and Answers (Q&A)
http://www.cdc.gov/hiv/basics/index.html

A Patient Safety Threat — Syringe Reuse
Division of Health Care Quality Promotion, February 2008

Quick Links to Hepatitis ...
A | B | C | D | E

APP1230

Viral Hepatitis Home

Statistics & Surveillance

Populations & Settings

Outbreaks

State and Local Partners & Grantees

Policy and Programs

Resource Center

Page last reviewed: May 31, 2015

Page last updated: May 31, 2015

Content source: Division of Viral Hepatitis (/hepatitis) and

National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention (/nchhstp)

EXHIBIT 2

EXHIBIT 2

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

A-18-782023-C

MAUREEN BRIDGES, *et al.*,

Plaintiffs,

v.

TEVA PARENTERAL MEDICINES, INC., *et al.*,

Defendants.

Case No. 2:18-cv-02310-JCM-VCF

ORDER

Presently before the court is individual plaintiffs' motion to remand. (ECF No. 9). Defendants Baxter Healthcare Corporation; McKesson Medical-Surgical Inc.; Sicor, Inc.; and Teva Parenteral Medicines, Inc. (collectively "defendants") responded (ECF No. 11), to which plaintiffs replied (ECF No. 12).

Also before the court is defendants' motion for leave to file surreply. (ECF No. 14).

I. Facts

The plaintiffs in this action are individuals that received medical care at the Endoscopy Center ("clinic") located at 700 Shadow Land, Clark County, Nevada. (ECF No. 1). Defendants supplied the clinic with medical products that the clinic would use in providing various anesthesia services. *Id.* The clinic improperly administered defendants' medical products by re-using injection syringes and anesthesia bottles, which created a foreseeable risk of infection or cross-contamination. *Id.*

On or about February 28, 2008, the Southern Nevada Health District sent plaintiffs and approximately 60,000 others a letter informing them that the clinic placed them at a risk of possible exposure to bloodborne pathogens. *Id.* The Health District recommended that

plaintiffs' get tested for hepatitis C, hepatitis B, and HIV. *Id.* Plaintiffs followed the Health District's recommendation and eventually discovered that they did not contract any of the aforementioned diseases. *Id.*

Plaintiffs believe that defendants' improper packaging of their medical products caused the clinic to improperly re-use syringes and bottles. *Id.* On April 11, 2016, plaintiffs offered to settle their claims in exchange for $4,252,500, which amounts to $2,500 per plaintiff. (ECF No. 9). Defendants rejected plaintiffs' offer. *Id.*

On October 1, 2018, plaintiffs initiated this action in state court, asserting four causes of action: (1) strict product liability; (2) breach of the implied warranty of fitness for a particular purpose; (3) negligence; and (4) violation of the Nevada Deceptive Trade Practices Act. (ECF No. 1).

On December 10, 2018, defendants removed this action to federal court. *Id.* The court now determines whether it has subject matter jurisdiction.

II. Legal Standard

Pursuant to 28 U.S.C. § 1441(a), "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes of Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989).

Upon notice of removability, a defendant has thirty days to remove a case to federal court once he knows or should have known that the case was removable. *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006) (citing 28 U.S.C. § 1446(b)(2)). Defendants are not charged with notice of removability "until they've received a paper that gives them enough information to remove." *Id.* at 1251.

Specifically, "the 'thirty-day time period [for removal] . . . starts to run from defendant's receipt of the initial pleading only when that pleading affirmatively reveals on its face' the facts necessary for federal court jurisdiction." *Id.* at 1250 (quoting *Harris v. Bankers Life & Casualty*

Co., 425 F.3d 689, 690–91 (9th Cir. 2005) (alterations in original)). "Otherwise, the thirty-day clock doesn't begin ticking until a defendant receives 'a copy of an amended pleading, motion, order or other paper' from which it can determine that the case is removable. *Id.* (quoting 28 U.S.C. § 1446(b)(3)).

A plaintiff may challenge removal by timely filing a motion to remand. 28 U.S.C. § 1447(c). On a motion to remand, the removing defendant faces a strong presumption against removal, and bears the burden of establishing that removal is proper. *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 403–04 (9th Cir. 1996); *Gaus v. Miles, Inc.*, 980 F.2d 564, 566–67 (9th Cir. 1992).

III. Discussion

As a preliminary matter, the court notes that plaintiffs have filed a surreply in opposition to defendants' motion to remand (ECF No. 13) and defendants now move for leave to file their own surreply (ECF No. 14). Because the filings pertain to legal authority that is not binding on this court and "motions for leave to file a surreply are discouraged[,]" the court will strike plaintiffs surreply (ECF No. 13) and deny defendants' motion (ECF No. 14). LR 7-2(b).

Plaintiffs move to remand, arguing that the court does not have diversity jurisdiction. (ECF No. 9). Defendants' contend that the court has both diversity and federal question jurisdiction. (ECF No. 11). The court will address both of defendants' purported grounds for subject matter jurisdiction in turn.

a. Diversity jurisdiction

28 U.S.C. § 1332 allows federal courts to exercise diversity jurisdiction in civil actions between citizens of different states where the amount in controversy exceeds $75,000. *See* 28 U.S.C. § 1332(a). "In determining the amount in controversy, courts first look to the complaint. Generally, 'the sum claimed by the plaintiff controls if the claim is apparently made in good faith.'" *Ibarra v. Manheim Invests., Inc.* 775 F.3d 1193, 1197 (9th Cir. 2015) (citing *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938)). At the time of removal, parties may submit supplemental evidence to show that the amount in controversy is in excess of $75,000. *Id.* (citing *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997).

Plaintiffs allege in the complaint that their claims are each valued in excess of $15,000 in general damages. (ECF No. 1). This figure is well below the amount in controversy threshold under § 1332(a) and defendants have not submitted any evidence showing that a greater amount is in dispute.

Nevertheless, defendants contend that the amount in controversy is in excess of $75,000 because plaintiffs also seek attorney's fees and punitive damages. (ECF No. 11). The court now must determine whether defendants have proven by a preponderance of the evidence that punitive damages and attorney's fees, coupled with general damages, will exceed the jurisdiction minimum. *See Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 403-04 (9th Cir. 1996).

i. Punitive damages

Courts consider punitive damages in determining the amount in controversy when a plaintiff can recover punitive damages as a matter of law. *Gibson v. Chrysler Corp.*, 261 F.3d 927, 945 (9th Cir. 2001). Under Nevada law, a plaintiff can recover punitive damages only by proving with clear and convincing evidence that the defendant is guilty of oppression, fraud, or malice. Nev. Rev. Stat. 42.005(1). In light of NRS 42.005, the court will consider punitive damages for jurisdictional purposes.

Courts generally look to jury awards in analogous cases in determining how to consider punitive damages towards satisfying the jurisdictional minimum. *See Campbell v. Hartford Life Ins. Co.*, 825 F. Supp. 2d 1005, 1008 (E.D. Cal. 2011). Here, defendants have not provided any factual support, other than citing statutes, pertaining to the probable amount of punitive damages. Therefore, defendants have not shown by a "preponderance of the evidence" that punitive damages increase the amount in controversy. *See Sanchez*, 102 F.3d at 404.

ii. Attorney's fees

Courts consider attorney's fees in determining the amount in controversy if a plaintiff can recover such fees pursuant to a contract or statute. *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir. 1998). Nevada law allows courts to award attorney's fees when (1) the prevailing party has not recovered more than $20,000 or (2) when the opposing party's defense was "brought or maintained without reasonable grounds or to harass the prevailing party." Nev. Rev.

Stat. 18.010(2). Because each plaintiff appears to seek less than $20,000 in damages, the court will consider attorney's fees in determining the amount in controversy.

Defendants' argue that attorney's fees will spike the cost of this action because this case involves hundreds of plaintiffs. (ECF No. 11). The complex nature of this lawsuit compels the court to conclude that plaintiffs will incur significant attorney's fees. However, defendants' once again have not provided evidence showing the extent that attorney's fees increase the amount in controversy. Indeed, the court does not find that attorney's fees would quadruple or quintuple the ultimate award.

In sum, defendants have not shown by a preponderance of the evidence an amount in controversy in excess of $75,000. Accordingly, the court cannot exercise subject matter jurisdiction under § 1332(a).

b. Federal question jurisdiction

The "well-pleaded complaint rule" governs federal question jurisdiction. This rule provides that district courts can exercise jurisdiction under 28 U.S.C. § 1331 only when a federal question appears on the face of a well-pleaded complaint. *See, e.g.*, *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Thus, a plaintiff "may avoid federal jurisdiction by exclusive reliance on state law." *Id.* Moreover, "an anticipated or actual federal defense generally does not qualify a case for removal[.]" *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999).

The well-pleaded complaint rule does not require a plaintiff to assert a federal cause of action. District court also have jurisdiction over state law claims that raise "some substantial, disputed question of federal law[.]" *Indep. Living Ctr. of Southern California, Inc. v. Kent*, 909 F.3d 272, 279 (9th Cir. 2018). Indeed, federal question jurisdiction exists when a federal issue is "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disturbing the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013).

Defendants argue that plaintiffs' state tort claims, which allege that defendants improperly packaged medical products, raise a substantial issue of federal law because the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 301 *et seq.*, governs the

packaging of medical products. (ECF No. 11). The court disagrees.

In *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, the Supreme Court held that state law claims which allege violations of the FDCA do not raise a substantial federal question because Congress did not intend to create a private right of action for violation of the FDCA. *Wander v. Kaus*, 304 F.3d 856, 859 (9th Cir. 2002) (citing *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 808 (1986)). As the circumstances of this case fall well within *Merrell Dow*, the court concludes that plaintiffs' complaint does not raise a substantial federal question.

The court notes that defendants' arguments are unclear, incoherent, and at times confused. Some paragraphs from defendants' brief appear to assert that the court has jurisdiction because the FDCA preempts plaintiffs' state law claims. To ensure complete adjudication of all pertinent issues that the parties raise, the court will consider this argument.

The "complete preemption doctrine" allows district courts to exercise federal question jurisdiction over state law claims when a federal statute completely preempts the relevant state law. *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1107 (9th Cir. 2000) (citation omitted). Courts consider the factual allegations in the complaint and the petition of removal to determine whether federal law completely preempts a state law claim. *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 191 (9th Cir. 1983).

It is well established that the FDCA does not completely preempt state law. *See Oregon ex rel. Kroger v. Johnson & Johnson*, 832 F. Supp. 2d 1250, 1259–60 (D. Or. 2011); *see also Perez v. Nidek Co. Ltd.*, 657 F. Supp. 2d 1156, 1161 (S.D. Cal. 2009); *see also Alaska v. Eli Lilly & Co.*, No. 3:06-cv-88 TMB, 2006 WL 2168831 at *3–4 (D. Ala July 28, 2006). Therefore, the court does not have federal question jurisdiction under the complete preemption doctrine.

IV. Conclusion

The court does not have subject matter jurisdiction because the amount in controversy is not in excess of $75,000, plaintiffs' complaint does not raise a substantial federal question, and the FDCA does not completely preempt plaintiffs' state law claims.

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Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that plaintiffs' motion to remand (ECF No. 9) be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that defendants' motion for leave to file surreply (ECF No. 14) be, and the same hereby is, DENIED, consistent with the foregoing.

IT IS FURTHER ORDERED that defendants' motion to dismiss (ECF No. 3) be, and the same hereby is, DENIED without prejudice.

IT IS FURTHER ORDERED that the matter of *Bridges et al. v. Teva Parenteral Medicines, Inc. et al.*, case number 2:18-cv-02310-JCM-VCF, be, and the same hereby is, REMANDED.

The clerk shall strike plaintiffs' surreply (ECF No. 13) and close the case accordingly.

DATED THIS 12th day of April 2019.

James C. Mahan

JAMES C. MAHAN
UNITED STATES DISTRICT JUDGE

I hereby attest and certify on 4/12/2019 that the foregoing document is a full, true and correct copy of the original on file in my legal custody.

CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA

By MONICA REYES Deputy Clerk

I hereby attest and certify on _____
that the foregoing document is a full, true
and correct copy of the original on file in my
legal custody.

CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA

By _____ Deputy Clerk

CLOSED

United States District Court
District of Nevada (Las Vegas)
CIVIL DOCKET FOR CASE #: 2:18-cv-02310-JCM-VCF

Bridges et al v. Teva Parenteral Medicines, Inc. et al
Assigned to: Judge James C. Mahan
Referred to: Magistrate Judge Cam Ferenbach
Case in other court: Eighth Judicial District Court, Clark County, NV, A-18-782023-C
Cause: 28:1441 Petition for Removal- Product Liability

Date Filed: 12/05/2018
Date Terminated: 04/12/2019
Jury Demand: None
Nature of Suit: 367 Personal Injury: Health Care/Pharmaceutical Personal Injury Product Liability
Jurisdiction: Diversity

Plaintiff

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Plaintiff

Carol Einhorn

represented by **Peter C Wetherall**
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Plaintiff

Anne Hayes represented by **Peter C Wetherall**
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Plaintiff

Homero Hernandez represented by **Peter C Wetherall**
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Plaintiff

Sophie Hinchliff represented by **Peter C Wetherall**
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Plaintiff

Angel Barahona represented by **Peter C Wetherall**
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Plaintiff

Marta Fernandez–Ventura represented by **Peter C Wetherall**
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Plaintiff

William Fraley represented by **Peter C Wetherall**
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Plaintiff

Richard Francis represented by **Peter C Wetherall**
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Plaintiff

Georgina Hetherington represented by **Peter C Wetherall**
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Plaintiff

Janice Hoffman represented by **Peter C Wetherall**
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Plaintiff

George Johnson represented by **Peter C Wetherall**
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Plaintiff

Linda Johnson represented by **Peter C Wetherall**
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Plaintiff

Sheron Johnson represented by **Peter C Wetherall**
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Plaintiff

Steve Johnson represented by **Peter C Wetherall**
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Plaintiff

Sean Keenan represented by **Peter C Wetherall**
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Plaintiff

Karen Keeney represented by **Peter C Wetherall**
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Plaintiff

Diane Kircher represented by **Peter C Wetherall**
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Plaintiff

Orville Kircher represented by **Peter C Wetherall**
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Plaintiff

Stephanie Kline represented by **Peter C Wetherall**
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Plaintiff

Kimberly Kunkle represented by **Peter C Wetherall**
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Plaintiff

Patricia Lewis-Glynn represented by

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Plaintiff

Bette Long represented by **Peter C Wetherall**
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Plaintiff

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Plaintiff

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Plaintiff

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Plaintiff
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Plaintiff
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Jimmy Nix
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Plaintiff
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Plaintiff
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Ronald Quast
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Leanne Robie
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Josephine Lozano
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Deborah Madison
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Michael Malone
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Ann Marie Morales

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Loraine Turrell

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Graham Tye

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Plaintiff

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Washington

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Plaintiff

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Plaintiff
Steve Willis represented by **Peter C Wetherall**
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Benyam Yohannes represented by **Peter C Wetherall**
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Michal Zookin represented by **Peter C Wetherall**
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Plaintiff
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Plaintiff
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Plaintiff

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Plaintiff
Michelle Boyce
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Noranne Brumagan
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Plaintiff

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John Julian represented by **Peter C Wetherall**
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Mary Ellen Kaiser represented by **Peter C Wetherall**
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V.

Defendant

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formerly known as
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Sicor, Inc.

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Defendant

Baxter Healthcare Corporation

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Defendant

McKesson Medical-Surgical Inc.

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Date Filed	#	Docket Text
12/10/2018	1	PETITION FOR REMOVAL from Eighth Judicial District Court, Clark County, Nevada, Case Number A-18-782023-C, (Filing fee $ 400 receipt number 0978-5353020) by Baxter Healthcare Corporation, McKesson Medical-Surgical Inc., Sicor, Inc., and Teva Parenteral Medicines, Inc. Proof of service due by 12/30/2018. (Attachments: # 1 Civil Cover Sheet)(Hymanson, Philip)

		NOTICE of Certificate of Interested Parties requirement: Under Local Rule 7.1−1, a party must immediately file its disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court. Modified to include all filers on 12/10/2018 (EDS). (Entered: 12/10/2018)
12/10/2018		Case assigned to Judge James C. Mahan and Magistrate Judge Cam Ferenbach. (MR) (Entered: 12/10/2018)
12/10/2018	2	MINUTE ORDER IN CHAMBERS of the Honorable Judge James C. Mahan on 12/10/2018. Statement regarding removed action is due by 12/25/2018. Joint Status Report regarding removed action is due by 1/9/2019. (Copies have been distributed pursuant to the NEF − MR) (Entered: 12/10/2018)
12/17/2018	3	MOTION to Dismiss by Defendants Baxter Healthcare Corporation, McKesson Medical−Surgical Inc., Sicor, Inc., Teva Parenteral Medicines, Inc.. Responses due by 12/31/2018. (Attachments: # 1 Exhibit Index and Exhibits A through N) (Hymanson, Philip) (Entered: 12/17/2018)
12/20/2018	4	CERTIFICATE of Interested Parties by Baxter Healthcare Corporation, McKesson Medical−Surgical Inc., Sicor, Inc., Teva Parenteral Medicines, Inc. that identifies all parties that have an interest in the outcome of this case. Corporate Parent Teva Pharmaceutical Industries Ltd., Corporate Parent Sicor, Inc., Corporate Parent Teva Pharmaceuticals USA, Inc., Corporate Parent Orvet UK, Corporate Parent Teva Pharmaceuticals Europe B.V., Corporate Parent Teva Pharmaceutical Holdings Cooperatieve U.A., Corporate Parent IVAX LLC for Teva Parenteral Medicines, Inc.; Corporate Parent McKesson Corporation for McKesson Medical−Surgical Inc.; Corporate Parent Teva Pharmaceutical Industries Ltd., Corporate Parent Teva Pharmaceuticals USA, Inc., Corporate Parent Orvet UK, Corporate Parent Teva Pharmaceuticals Europe B.V., Corporate Parent Teva Pharmaceutical Holdings Cooperatieve U.A., Corporate Parent IVAX LLC for Sicor, Inc.; Corporate Parent Baxter International, Inc. for Baxter Healthcare Corporation added. (Hymanson, Philip) (Entered: 12/20/2018)
12/23/2018	5	CERTIFICATE of Interested Parties by Lidia Aldanay, Maridee Alexander, Carolyn Armstrong, Elsie Ayers, Jack Ayers, Angel Barahona, Catherine Barber, Levelyn Barber, Frank Beall, Jacqueline Beattie, Matthew Beauchamp, Sedra Beckman, Thomas Beem, Emma Ruth Bell, Nathania Bell, Pamela Bertrand, Prentice Besore, Vicki Beverly, Peter Billitteri, Irene Bilski, Fred Blackington, Barbara Blair, Phyllis J. Bodell, Michelle Boyce, Betty Bradley, Maureen Bridges, Viola Brottlund−Wagner, Noranne Brumagan, Howard Bugher, Veloy E. Burton, Robert Buster, Irene Cal, Shirley Carr, Winifred Carter, Mary Cattledge, Codell Chavis, Patrick Christopher, Bonnie Clark, Cindy Cook, Kip Cooper, Michel Cooper, Franklin Corpuz, Christa Coyne, Charleen Davis−Shaw, Nikki Dawson, Rebecca Day, William DeHaven, Lou Decker, Peter Dempsey, Paul Denorio, Maria Dominguez, Mary Dominguez, Carolyn Donahue, Lawrence Donahue, David Donner, Dion Draugh, Conrad Dupont, Timothy Dyer, Evelyn Ealy, Barbara Eddowes, Arthur Einhorn, Carol Einhorn, Vincenzo Esposito, Deborah Esteen, Lupe Evangelist, Karen Fanelli, Marta Fernandez−Ventura, Woodrow Finney, LaFonda Flores, Kristen Foster, Madeline Foster, William Fraley, Richard Francis, Eloise Freeman, Joan Frenken, Emma Fuentes, Ellamae Gaines, Phillip Garcia, Judith Gerences, Annie Gillespie, Leah Girma, Demecio Giron, Antonio Gonzales, Francisco Gonzales, Richard Green, Cynthia Griem−Rodriguez, Isabel Grijalva, Audrey Gum, James Gum, Helen Hackett, Debbie Hall, Lloyd Hall, Lola Hall, Shanera Hall, Virginia Hall, James Hamilton, Angela Hamler, Brenda Harman, Donald Harman, Anne Hayes, Susan Henning, Homero Hernandez, Jose Hernandez, Georgina Hetherington, Carol Hiel, Sophie Hinchliff, Kenneth D. Hinman, Muriel Carol Hinman, Marie Hoeg, Janice Hoffman, Katherine Holzhauer, Alicia Hoskinson, Greg Houck, Camille Howey, Dionne Jenkins, George Johnson, June Johnson, Larry Johnson, Linda Johnson, Sheron Johnson, Steve Johnson, John Julian, William Kader, Mary Ellen Kaiser, Vasiliki Kalkantzakos, Julie Kalsnes, William Keeler, Sean Keenan, Karen Keeney, Robert Kellar, Shirley Kellar, William Kepner, Melanie Keppel, Anita Kinchen, Diane Kircher, Orville Kircher, Peter Klas, Stephanie Kline, Linda Kobige, Maria Kollender, Linda Korschinowski, Kimberly Kunkle, Carolyn Lamyer, Durango Lane, June Langer, Nancy Lapa, Peggy Legg, Rebecca Lerma, Edward Levine, Joseph Lewandowski, Patricia Lewis−Glynn, Mersey Lindsey, Maria Liss, Zolman Little, Bette Long, Peter Longly, Diana Lousignont, Jose Lozano, Josephine Lozano, Steve Lyons, Deborah Madison, David Magee, Marsene

		Maksymowski, Michael Malone, Francisco Mantua, Pat Marino, Dana Martin, Maria Martinez, Billie Mathews, John Mauizio, Kristine Mayeda, James H. McAvoy, Marguarite M. McAvoy, Carmen McCall, Anga McClain, Michael McCoy, Barry McGiffin, Annette Medland, Marian Miller, Josephine Molina, Len Monaco, Rachel Montoya, Hiep Moraga, Ann Marie Morales, Sondra Moreno, Theodore Morrison, Xuan Mai Ngo, Jimmy Nix, Nancy Norman, Jacqueline Novak, Faith O'Brien, Georgia Olson, Mark Olson, Denise Orr, Javier Pacheco, Beverly Perkins, Carole Lee Perrelli, Joseph Perrelli, Maryjane Perry, Ricky Peterson, Leeann Pinson, Eli Pinsonault, Florence Pinsonault, Steve Pokres, Fanny Poor, Timothy Price, Brandilla Pross, Franco Provinciali, Dallas Pymm, Shirley Pyrtle, Evonne Quast, Ronald Quast, Steven Rausch, Leanne Robie, Clifton Rollins, John Romero, Jean Rose, Eleanor Rowe, Ronald Rowe, Robert Rugg, Delores Russ, Massimino Russello, Gina Russo, Ronald Ruther, Juan Salazar, Priscilla Saldana, Buddie Salsbury, Bernice Sanders, Salvatore J. Sberna, Danny Scalice, Geolene Schaller, Joellen Shelton, Lavada Shipers, Jan Michael Shultz, Francine Siegel, Marlene Siems, Ratanakorn Skelton, Carl Smith, Jannie Smith, Vickie Smith, William Snedeker, Patrick Snyder, Edward Solis, Mary Soliz, Roger Sowinski, Cynthia Spencer, Stephen Stagg, Troy Staten, Frank Stein, Janet Stein, Linda Steiner, Wallace Stevenson, Robert Stewart, Gwen Stone, Phaedra Sunday, Rory Sundstrom, Edward Suter, Carol Swan, Sony Syamala, Richard Tafaya, Clarence Taylor, Catherine Thompson, Lois Thompson, Margrett Thompson, Vernon Thompson, Michael Titmuss, Nancy Titmuss, David Tomlin, Frank Torres, Colleen Tranquill, Von Trimble, Chuong Van Trong, Martha Turner, Loraine Turrell, Mildred J. Tweedy, Graham Tye, Scott Vandermolin, Louise Verdel, John Viccia, Steven Vig, Janet Vopinek, Kathy Walent, Linda Walker, J. Holland Wallis, Shirley Washington, Janice Welsh, Mary Wentworth, Betty Werner, Sally West, Dee Louise Whitney, Sharon Wilkins, Mark Williamson, Steve Willis, Shirley Woods, Benyam Yohannes, Tony Yutyatat, Catalina Zafra, Metro Zamito, Christina Zepeda, Andrew Zielinski, Michal Zookin. There are no known interested parties other than those participating in the case (Wetherall, Peter) (Entered: 12/23/2018)
12/26/2018	6	STATEMENT REGARDING REMOVAL by Defendants Baxter Healthcare Corporation, McKesson Medical-Surgical Inc., Sicor, Inc., Teva Parenteral Medicines, Inc.. (Hymanson, Philip) (Entered: 12/26/2018)
12/31/2018	7	STIPULATION FOR EXTENSION OF TIME (First Request) TO CONTINUE (First Request) re 3 Motion to Dismiss, by Plaintiffs Lidia Aldanay, Maridee Alexander, Carolyn Armstrong, Elsie Ayers, Jack Ayers, Angel Barahona, Catherine Barber, Levelyn Barber, Frank Beall, Jacqueline Beattie, Matthew Beauchamp, Sedra Beckman, Thomas Beem, Emma Ruth Bell, Nathania Bell, Pamela Bertrand, Prentice Besore, Vicki Beverly, Peter Billitteri, Irene Bilski, Fred Blackington, Barbara Blair, Phyllis J. Bodell, Michelle Boyce, Betty Bradley, Maureen Bridges, Viola Brottlund-Wagner, Noranne Brumagan, Howard Bugher, Veloy E. Burton, Robert Buster, Irene Cal, Shirley Carr, Winifred Carter, Mary Cattledge, Codell Chavis, Patrick Christopher, Bonnie Clark, Cindy Cook, Kip Cooper, Michel Cooper, Franklin Corpuz, Christa Coyne, Charleen Davis-Shaw, Nikki Dawson, Rebecca Day, William DeHaven, Lou Decker, Peter Dempsey, Paul Denorio, Maria Dominguez, Mary Dominguez, Carolyn Donahue, Lawrence Donahue, David Donner, Dion Draugh, Conrad Dupont, Timothy Dyer, Evelyn Ealy, Barbara Eddowes, Arthur Einhorn, Carol Einhorn, Vincenzo Esposito, Deborah Esteen, Lupe Evangelist, Karen Fanelli, Marta Fernandez-Ventura, Woodrow Finney, LaFonda Flores, Kristen Foster, Madeline Foster, William Fraley, Richard Francis, Eloise Freeman, Joan Frenken, Emma Fuentes, Ellamae Gaines, Phillip Garcia, Judith Gerences, Annie Gillespie, Leah Girma, Demecio Giron, Antonio Gonzales, Francisco Gonzales, Richard Green, Cynthia Griem-Rodriguez, Isabel Grijalva, Audrey Gum, James Gum, Helen Hackett, Debbie Hall, Lloyd Hall, Lola Hall, Shanera Hall, Virginia Hall, James Hamilton, Angela Hamler, Brenda Harman, Donald Harman, Anne Hayes, Susan Henning, Homero Hernandez, Jose Hernandez, Georgina Hetherington, Carol Hiel, Sophie Hinchliff, Kenneth D. Hinman, Muriel Carol Hinman, Marie Hoeg, Janice Hoffman, Katherine Holzhauer, Alicia Hoskinson, Greg Houck, Camille Howey, Dionne Jenkins, George Johnson, June Johnson, Larry Johnson, Linda Johnson, Sheron Johnson, Steve Johnson, John Julian, William Kader, Mary Ellen Kaiser, Vasiliki Kalkantzakos, Julie Kalsnes, William Keeler, Sean Keenan, Karen Keeney, Robert Kellar, Shirley Kellar, William Kepner, Melanie Keppel, Anita Kinchen, Diane Kircher, Orville Kircher, Peter Klas, Stephanie Kline, Linda Kobige, Maria Kollender, Linda Korschinowski, Kimberly Kunkle, Carolyn Lamyer, Durango Lane, June

		Langer, Nancy Lapa, Peggy Legg, Rebecca Lerma, Edward Levine, Joseph Lewandowski, Patricia Lewis-Glynn, Mersey Lindsey, Maria Liss, Zolman Little, Bette Long, Peter Longly, Diana Lousignont, Jose Lozano, Josephine Lozano, Steve Lyons, Deborah Madison, David Magee, Marsene Maksymowski, Michael Malone, Francisco Mantua, Pat Marino, Dana Martin, Maria Martinez, Billie Mathews, John Mauizio, Kristine Mayeda, James H. McAvoy, Marguarite M. McAvoy, Carmen McCall, Anga McClain, Michael McCoy, Barry McGiffin, Annette Medland, Marian Miller, Josephine Molina, Len Monaco, Rachel Montoya, Hiep Moraga, Ann Marie Morales, Sondra Moreno, Theodore Morrison, Xuan Mai Ngo, Jimmy Nix, Nancy Norman, Jacqueline Novak, Faith O'Brien, Georgia Olson, Mark Olson, Denise Orr, Javier Pacheco, Beverly Perkins, Carole Lee Perrelli, Joseph Perrelli, Maryjane Perry, Ricky Peterson, Leeann Pinson, Eli Pinsonault, Florence Pinsonault, Steve Pokres, Tammy Poor, Timothy Price, Brandilla Pross, Franco Provinciali, Dallas Pymm, Shirley Pyrtle, Yvonne Quast, Ronald Quast, Steven Rausch, Leanne Robie, Clifton Rollins, John Romero, Jean Rose, Eleanor Rowe, Ronald Rowe, Robert Rugg, Delores Russ, Massimino Russello, Gina Russo, Ronald Ruther, Juan Salazar, Priscilla Saldana, Butche Sasbeng, Bernice Sanders, Salvatore J. Sberna, Danny Scalice, Geolene Schaffer, Joellen Shelton, Lavada Shipers, Jan Michael Shultz, Francine Siegel, Marlene Siems, Ratanakorn Skelton, Carl Smith, Jannie Smith, Vickie Smith, William Snedeker, Patrick Snyder, Edward Solis, Mary Soliz, Roger Sowinski, Cynthia Spencer, Stephen Stagg, Troy Staten, Frank Stein, Janet Stein, Linda Steiner, Wallace Stevenson, Robert Stewart, Gwen Stone, Phaedra Sunday, Rory Sundstrom, Edward Suter, Carol Swan, Sony Syamala, Richard Tafaya, Clarence Taylor, Catherine Thompson, Lois Thompson, Margrett Thompson, Vernon Thompson, Michael Titmuss, Nancy Titmuss, David Tomlin, Frank Torres, Colleen Tranquill, Von Trimble, Chuong Van Trong, Martha Turner, Loraine Turrell, Mildred J. Tweedy, Graham Tye, Scott Vandermolin, Louise Verdel, John Viccia, Steven Vig, Janet Vopinck, Kathy Walent, Linda Walker, J. Holland Wallis, Shirley Washington, Janice Welsh, Mary Wentworth, Betty Werner, Sally West, Dee Louise Whitney, Sharon Wilkins, Mark Williamson, Steve Willis, Shirley Woods, Benyam Yohannes, Tony Yutyatat, Catalina Zafra, Metro Zamito, Christina Zepeda, Andrew Zielinski, Michal Zookin. (Wetherall, Peter) (Entered: 12/31/2018)
01/03/2019	8	ORDER Granting 7 Stipulation for Extension of Time re 3 Motion to Dismiss (First Request). Signed by Judge James C. Mahan on 1/3/2019. (Copies have been distributed pursuant to the NEF – MR) (Entered: 01/03/2019)
01/09/2019	9	MOTION to Remand to State Court by Plaintiffs Elsie Ayers, Jack Ayers, Angel Barahona, Catherine Barber, Levelyn Barber. Responses due by 1/23/2019. (Wetherall, Peter) (Entered: 01/09/2019)
01/09/2019	10	STATUS REPORT RE REMOVAL; filed by Defendants Baxter Healthcare Corporation, McKesson Medical-Surgical Inc., Sicor, Inc., Teva Parenteral Medicines, Inc.. (Hymanson, Philip) (Entered: 01/09/2019)
01/23/2019	11	RESPONSE to 9 Motion to Remand to State Court by Defendants Baxter Healthcare Corporation, McKesson Medical-Surgical Inc., Sicor, Inc., Teva Parenteral Medicines, Inc.. Replies due by 1/30/2019. (Hymanson, Philip) (Entered: 01/23/2019)
01/29/2019	12	REPLY to Response to 9 Motion to Remand to State Court by Plaintiffs Lidia Aldanay, Maridee Alexander, Carolyn Armstrong, Elsie Ayers, Jack Ayers, Angel Barahona, Catherine Barber, Levelyn Barber. (Wetherall, Peter) (Entered: 01/29/2019)
03/18/2019	13	**STRICKEN per 15 Order. (MR)** ~~ADDENDUM to 9 Motion to Remand to State Court by Plaintiffs Lidia Aldanay, Maridee Alexander, Carolyn Armstrong, Elsie Ayers, Jack Ayers, Angel Barahona, Catherine Barber, Levelyn Barber. (Wetherall, Peter)~~ (Entered: 03/18/2019)
03/26/2019	14	MOTION for Leave to File *Response to Plaintiffs' Supplemental Authority and Request for Judicial Notice of Supplemental Authority* re 13 Addendum by Defendants Baxter Healthcare Corporation, McKesson Medical-Surgical Inc., Sicor, Inc., Teva Parenteral Medicines, Inc.. (Hymanson, Philip) (Entered: 03/26/2019)
04/12/2019	15	ORDER. IT IS HEREBY ORDERED, ADJUDGED, and DECREED that 9 plaintiffs' motion to remand be, and the same hereby is, GRANTED. IT IS FURTHER ORDERED that 14 defendants' motion for leave to file surreply be, and the same hereby is, DENIED

		IT IS FURTHER ORDERED that 3 defendants' motion to dismiss be, and the same hereby is, DENIED without prejudice. The clerk shall strike 13 plaintiffs' surreply and close the case accordingly. Signed by Judge James C. Mahan on 4/12/2019. (Copies have been distributed pursuant to the NEF – cc: Certified Copy of Order and Docket Sheet sent to State Court – MR) (Entered: 04/12/2019)

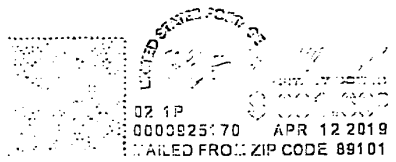
I hereby attest and certify on 4/12/2019 that the foregoing document is a full, true and correct copy of the original on file in my legal custody.

CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA

By MONICA REYES Deputy Clerk

CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
LLOYD D. GEORGE U.S. COURTHOUSE
333 LAS VEGAS BLVD. SO. – RM 1334
LAS VEGAS, NV 89101

OFFICIAL BUSINESS



Eighth Judicial District Court
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89101

EXHIBIT 3

EXHIBIT 3

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ABADJIAN, SOSSY, et al., Plaintiff(s), v. TEVA PARENTERAL MEDICINES, INC., et al., Defendant(s).	Case No. 2:18-CV-2321 JCM (NJK) ORDER

Presently before the court is individual plaintiffs' motion to remand. (ECF No. 21). Defendants Baxter Healthcare Corporation; McKesson Medical-Surgical Inc.; Sicor, Inc.; and Teva Parenteral Medicines, Inc. (collectively "defendants") responded (ECF No. 23), to which plaintiffs replied (ECF No. 24).

Also before the court is defendants' motion for leave to file response to plaintiffs' supplemental authority (ECF No. 25) and request for judicial notice of supplemental authority (ECF No. 26). Plaintiffs have not replied.

I. Facts

The plaintiffs in this action are individuals who received medical care at the Endoscopy Center ("clinic") located at 700 Shadow Land, Clark County, Nevada. (ECF No. 1). Defendants supplied the clinic with medical products that the clinic would use in providing various anesthesia services. *Id.* The clinic improperly administered defendants' medical products by re-using injection syringes and anesthesia bottles, which created a foreseeable risk of infection or cross-contamination. *Id.*

On or about February 28, 2008, the Southern Nevada Health District sent plaintiffs and approximately 60,000 others a letter informing them that the clinic placed them at a risk of possible exposure to bloodborne pathogens. *Id.* The Health District recommended that plaintiffs' get tested for hepatitis C, hepatitis B, and HIV. *Id.* Plaintiffs followed the Health District's recommendation and eventually discovered that they did not contract any of the aforementioned diseases. *Id.*

Plaintiffs believe that defendants' improper packaging of their medical products caused the clinic to improperly re-use syringes and bottles. *Id.* On April 11, 2016, plaintiffs offered to settle their claims in exchange for $4,252,500, which amounts to $2,500 per plaintiff. (ECF No. 9). Defendants rejected plaintiffs' offer. *Id.*

On October 1, 2018, plaintiffs initiated this action in state court, asserting four causes of action: (1) strict product liability; (2) breach of the implied warranty of fitness for a particular purpose; (3) negligence; and (4) violation of the Nevada Deceptive Trade Practices Act. (ECF No. 1).

On December 10, 2018, defendants removed this action to federal court. *Id.* The court now determines whether it has subject matter jurisdiction.

II. Legal Standard

Pursuant to 28 U.S.C. § 1441(a), "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes of Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989).

Upon notice of removability, a defendant has thirty days to remove a case to federal court once he knows or should have known that the case was removable. *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006) (citing 28 U.S.C. § 1446(b)(2)). Defendants are not charged with notice of removability "until they've received a paper that gives them enough information to remove." *Id.* at 1251.

Specifically, "the 'thirty day time period [for removal] . . . starts to run from defendant's receipt of the initial pleading only when that pleading affirmatively reveals on its face' the facts necessary for federal court jurisdiction." *Id.* at 1250 (quoting *Harris v. Bankers Life & Casualty Co.*, 425 F.3d 689, 690–91 (9th Cir. 2005) (alterations in original)). "Otherwise, the thirty-day clock doesn't begin ticking until a defendant receives 'a copy of an amended pleading, motion, order or other paper' from which it can determine that the case is removable. *Id.* (quoting 28 U.S.C. § 1446(b)(3)).

A plaintiff may challenge removal by timely filing a motion to remand. 28 U.S.C. § 1447(c). On a motion to remand, the removing defendant faces a strong presumption against removal, and bears the burden of establishing that removal is proper. *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 403–04 (9th Cir. 1996); *Gaus v. Miles, Inc.*, 980 F.2d 564, 566–67 (9th Cir. 1992).

III. Discussion

As a preliminary matter, the court notes that plaintiffs have filed an addendum in support of their motion to remand (ECF No. 25) and defendants now move for leave to file their own response (ECF No. 26). Because the filings pertain to legal authority that is not binding on this court, the court will strike plaintiffs addendum (ECF No. 25) and deny defendants' motion (ECF No. 26).

Plaintiffs move to remand, arguing that the court does not have diversity jurisdiction. (ECF No. 21). Defendants' contend that the court has both diversity and federal question jurisdiction. (ECF Nos. 1, 23). The court will address both of defendants' purported grounds for subject matter jurisdiction in turn.

a. Diversity jurisdiction

First, the parties do not dispute that there is diversity of citizenship. (*See* ECF Nos. 1, 10, 21, 23, 24). Teva Parenteral Medicines, Inc., and SICOR, Inc. are incorporated in Delaware, and their principal places of business are in California. (ECF No. 1 at 9). Baxter Healthcare Corporation is incorporated in Delaware, and its principal place of business is in Illinois. *Id.* Plaintiffs are all residents of Nevada. *Id.* Thus, complete diversity exists between the parties.

The only issue before the court is whether the amount in controversy satisfies 28 U.S.C. § 1332, which allows federal courts to exercise diversity jurisdiction in civil actions between citizens of different states where the amount in controversy exceeds $75,000. *See* 28 U.S.C. § 1332(a). "In determining the amount in controversy, courts first look to the complaint. Generally, 'the sum claimed by the plaintiff controls if the claim is apparently made in good faith.'" *Ibarra v. Manheim Invests., Inc.* 775 F.3d 1193, 1197 (9th Cir. 2015) (citing *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938)). At the time of removal, parties may submit supplemental evidence to show that the amount in controversy is in excess of $75,000. *Id.* (citing *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997).

Plaintiffs allege in the complaint that their claims are each valued in excess of $15,000 in general damages. (ECF No. 1). This figure is well below the amount in controversy threshold under § 1332(a) and defendants have not submitted any evidence showing that a greater amount is in dispute.

Nevertheless, defendants contend that the amount in controversy is in excess of $75,000 because plaintiffs also seek attorney's fees and punitive damages. (ECF No. 11). The court now must determine whether defendants have proven by a preponderance of the evidence that punitive damages and attorney's fees, coupled with general damages, will exceed the jurisdiction minimum. *See Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 403-04 (9th Cir. 1996).

i. Punitive damages

Courts consider punitive damages in determining the amount in controversy when a plaintiff can recover punitive damages as a matter of law. *Gibson v. Chrysler Corp.*, 261 F.3d 927, 945 (9th Cir. 2001). Under Nevada law, a plaintiff can recover punitive damages only by proving with clear and convincing evidence that the defendant is guilty of oppression, fraud, or malice. Nev. Rev. Stat. 42.005(1). In light of NRS 42.005, the court will consider punitive damages for jurisdictional purposes.

Courts generally look to jury awards in analogous cases in determining how to consider punitive damages towards satisfying the jurisdictional minimum. *See Campbell v. Hartford Life Ins. Co.*, 825 F. Supp. 2d 1005, 1008 (E.D. Cal. 2011). Here, defendants have not provided any

factual support, other than citing statutes, pertaining to the probable amount of punitive damages. Therefore, defendants have not shown by a "preponderance of the evidence" that punitive damages increase the amount in controversy. *See Sanchez*, 102 F.3d at 404.

ii. Attorney's fees

Courts consider attorney's fees in determining the amount in controversy if a plaintiff can recover such fees pursuant to a contract or statute. *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir. 1998). The Nevada Supreme Court has held that "in the absence of legislation specifically providing for attorney's fees, such fees cannot be awarded." *Consumers League v. Southwest Gas*, 576 P.2d 737 (Nev. 1978). Notably, Nevada law does not expressly provide for attorney's fees in class action suits. "It is for the legislature . . . to make a special provision for class actions within NRS 18.010." *Schouweiler v. Yancey Co.*, 712 P.2d 786, 788 (Nev. 1985) (holding that the district court was correct in denying the award of attorney's fees pursuant to NRS 18.010).

Nevada law does allow courts to award attorney's fees when (1) the prevailing party has not recovered more than $20,000 or (2) when the opposing party's defense was "brought or maintained without reasonable grounds or to harass the prevailing party." Nev. Rev. Stat. 18.010(2). Because each plaintiff appears to seek less than $20,000 in damages, the court will consider attorney's fees in determining the amount in controversy.

Defendants' argue that attorney's fees will spike the cost of this action because this case involves hundreds of plaintiffs. (ECF No. 11). The complex nature of this lawsuit compels the court to conclude that plaintiffs will incur significant attorney's fees. However, defendants once again have not provided evidence showing the extent that attorney's fees increase the amount in controversy. Indeed, the court does not find that attorney's fees would quadruple or quintuple the ultimate award.

In sum, defendants have not shown by a preponderance of the evidence an amount in controversy in excess of $75,000. Accordingly, the court cannot exercise subject matter jurisdiction under § 1332(a).

. . .

b. Federal question jurisdiction

The "well-pleaded complaint rule" governs federal question jurisdiction. This rule provides that district courts can exercise jurisdiction under 28 U.S.C. § 1331 only when a federal question appears on the face of a well-pleaded complaint. *See, e.g., Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Thus, a plaintiff "may avoid federal jurisdiction by exclusive reliance on state law." *Id.* Moreover, "an anticipated or actual federal defense generally does not qualify a case for removal[.]" *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999).

The well-pleaded complaint rule does not require a plaintiff to assert a federal cause of action. District court also have jurisdiction over state law claims that raise "some substantial, disputed question of federal law[.]" *Indep. Living Ctr. of Southern California, Inc. v. Kent*, 909 F.3d 272, 279 (9th Cir. 2018). Indeed, federal question jurisdiction exists when a federal issue is "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disturbing the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013).

Defendants argue that plaintiffs' state tort claims, which allege that defendants improperly packaged medical products, raise a substantial issue of federal law because the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 301 *et seq.*, governs the packaging of medical products. (ECF No. 11). The court disagrees.

In *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, the Supreme Court held that state law claims which allege violations of the FDCA do not raise a substantial federal question because Congress did not intend to create a private right of action for violation of the FDCA. *Wander v. Kaus*, 304 F.3d 856, 859 (9th Cir. 2002) (citing *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 808 (1986)). As the circumstances of this case fall well within *Merrell Dow*, the court concludes that plaintiffs' complaint does not raise a substantial federal question.

The court notes that defendants' arguments are unclear, incoherent, and at times confused. Some paragraphs from defendants' brief appear to assert that the court has jurisdiction because the FDCA preempts plaintiffs' state law claims. To ensure complete adjudication of all pertinent issues that the parties raise, the court will consider this argument.

The "complete preemption doctrine" allows district courts to exercise federal question jurisdiction over state law claims when a federal statute completely preempts the relevant state law. *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1107 (9th Cir. 2000) (citation omitted). Courts consider the factual allegations in the complaint and the petition of removal to determine whether federal law completely preempts a state law claim. *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 191 (9th Cir. 1983).

It is well established that the FDCA does not completely preempt state law. *See Oregon ex rel. Kroger v. Johnson & Johnson*, 832 F. Supp. 2d 1250, 1259–60 (D. Or. 2011); *see also Perez v. Nidek Co. Ltd.*, 657 F. Supp. 2d 1156, 1161 (S.D. Cal. 2009); *see also Alaska v. Eli Lilly & Co.*, No. 3:06-cv-88 TMB, 2006 WL 2168831 at *3–4 (D. Ala July 28, 2006). Therefore, the court does not have federal question jurisdiction under the complete preemption doctrine.

IV. Conclusion

The court does not have subject matter jurisdiction because the amount in controversy is not in excess of $75,000, plaintiffs' complaint does not raise a substantial federal question, and the FDCA does not completely preempt plaintiffs' state law claims.

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that plaintiffs' motion to remand (ECF No. 21) be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that defendants' motion for leave to file a response (ECF No. 26) be, and the same hereby is, DENIED, consistent with the foregoing.

IT IS FURTHER ORDERED that defendants' motion to dismiss (ECF No. 8) be, and the same hereby is, DENIED without prejudice.

IT IS FURTHER ORDERED that the matter of *Abadjian et al. v. Teva Parental Medicines, Inc. et al.*, case number 2:18-cv-02321-JCM-VCF, be, and the same hereby is, REMANDED.

. . .

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. . .

James C. Mahan
U.S. District Judge

The clerk shall strike plaintiffs' addendum (ECF No. 25) and close the case accordingly.

DATED August 23, 2019.

James C. Mahan

UNITED STATES DISTRICT JUDGE

EXHIBIT 4

EXHIBIT 4

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

YVETTE ADAMS, *et al.*,

Plaintiffs,

vs.

TEVA PARENTERAL MEDICINES, INC., *et al.*,

Defendants.

Case No.: 2:18-cv-02305-GMN-BNW

ORDER

Pending before the Court is the Motion to Remand, (ECF No. 9),[1] filed by Plaintiffs Yvette Adams, Margaret Adymy, Thelma Anderson, John Andrews, Maria Artiga, Lupita Avila-Medel, Henry Ayoub, Joyce Bakkedahl, Donald Becker, James Bedino, Edward Benavente, Margarita Benavente, Susan Biegler, Kenneth Burt, Margaret Calavan, Marcelina Castaneda, Vickie Cole-Campbell, Sherrill Coleman, Nancy Cook, and James Duarte (collectively "Plaintiffs"). Defendants Teva Parenteral Medicines, Inc., Sicor, Inc., Baxter Healthcare Corporation, and McKesson Medical Surgical, Inc. (collectively "Defendants") filed a Response, (ECF No. 14), and Plaintiffs filed a Reply, (ECF No. 15).

For the reasons that follow, the Court **GRANTS** Plaintiffs' Motion to Remand.

I. BACKGROUND

Plaintiffs are adult individuals who underwent treatment at a medical center in Las Vegas, Nevada (the "Clinic") between 2004 and 2008 for endoscopy procedures. (*See* Compl. ¶¶ 7–8, Ex. A to Pet. for Removal, ECF No. 1-1). Under the care of the Clinic's health care

[1] Prior to Plaintiffs filing the instant Motion, Defendants filed a Motion to Dismiss, (ECF No. 4). Subsequently, the Court granted the parties' stipulation to stay the briefing schedule on the Motion to Dismiss until the instant Motion to Remand is resolved, (ECF Nos. 8, 13). Because the Court remands this action in this Order, the Motion to Dismiss is **DENIED as moot**.

providers, Plaintiffs were injected with propofol, an anesthetic drug manufactured, marketed, distributed, and sold by Defendants to the Clinic. (*Id.* ¶¶ 2–4, 7, 12).

On February 28, 2008, the Southern Nevada Health District sent a letter to 60,000 former Clinic patients, including Plaintiffs, stating they were at risk of exposure to bloodborne pathogens. (*Id.* ¶ 15). The letter recommended that all persons who received an injection at the [Clinic] between March of 2004 and January of 2008," as well as their spouses, be tested for Hepatitis B, Hepatitis C, and HIV. (*Id.* ¶ 11). Plaintiffs obtained the recommended testing and ultimately learned they were infection-free. (*Id.* ¶ 13). In doing so, Plaintiffs incurred medical bills and other out-of-pocket expenses, and endured emotional distress, anxiety, and fear during the pendency of their respective test results. (*Id.* ¶ 17). According to the Complaint, at all relevant times to this action, Defendants knew or should have known that the Clinic's practices "involved the re-use of injection syringes and anesthesia bottles," creating a "foreseeable risk of infection/cross-contamination between patients with whom said syringes and anesthesia bottles were shared." (*Id.* ¶ 9).

Plaintiffs filed this action in state court on July 26, 2018, bringing the following causes of action against Defendants: (1) strict product liability; (2) breach of the implied warranty of fitness for a particular purpose; (3) negligence; (4) violation of the Nevada Deceptive Trade Practices Act; and (5) punitive damages. (*Id.* ¶¶ 19–60). On December 10, 2018, Defendants removed the case here on the grounds of diversity and federal-question jurisdiction. (*See* Pet. for Removal, ECF No. 1). Shortly thereafter, Plaintiffs filed the instant Motion requesting that the Court remand this action back to state court. (*See* Mot. to Remand, ECF No. 9).

II. LEGAL STANDARD

Federal courts are courts of limited jurisdiction, possessing only those powers granted by the Constitution and by statute. *See United States v. Marks*, 530 F.3d 799, 810 (9th Cir. 2008) (citation omitted). For this reason, "[i]f at any time before final judgment it appears that the

district court lacks subject-matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). District courts have subject-matter jurisdiction in two instances. First, district courts have subject-matter jurisdiction over civil actions that arise under federal law. 28 U.S.C. § 1331. Second, district courts have subject-matter jurisdiction over civil actions where no plaintiff is a citizen of the same state as a defendant and the amount in controversy exceeds $75,000. 28 U.S.C. § 1332(a).

A defendant may remove an action to federal court only if the district court has original jurisdiction over the matter. 28 U.S.C. § 1441(a). "Removal statutes are to be 'strictly construed' against removal jurisdiction." *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 667 (9th Cir. 2012) (quoting *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002)). "The 'strong presumption against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper,' and that the court resolves all ambiguity in favor of remand to state court." *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1042 (9th Cir. 2009) (quoting *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir.1992) (per curiam)).

III. DISCUSSION

Plaintiffs move to remand this action on the basis that the Court is without subject-matter jurisdiction. (*See generally* Mot. to Remand, ECF No. 9). Defendants oppose Plaintiffs' Motion, contending this Court enjoys both diversity jurisdiction, as well as federal-question jurisdiction. (Defs.' Resp. to Mot. to Remand ("Resp.") 4:6–9:13, ECF No. 14).

The Court begins with diversity jurisdiction, followed by federal-question jurisdiction.

A. Diversity Jurisdiction

Federal courts have diversity jurisdiction over all civil actions in which the amount in controversy: (1) exceeds the sum or value of $75,000; and (2) is between citizens of different states. 28 U.S.C. § 1332(a). In the present case, it is undisputed that complete diversity of citizenship exists because no Plaintiff is a citizen of the same state as any Defendant. (*See* Pet.

for Removal ¶¶ 8–11, ECF No. 1); (Compl. ¶¶ 1–4, ECF No. 1-1). Therefore, the question is whether the amount in controversy exceeds $75,000.

1. Amount in Controversy

In determining the amount in controversy, the Court's "starting point is whether it is facially apparent from the complaint that the jurisdictional amount is in controversy." *Lowdermilk v. United States Bank Nat'l Ass'n*, 479 F.3d 994, 998 (9th Cir. 2007). "[W]hen a complaint filed in state court alleges on its face an amount in controversy sufficient to meet the federal jurisdictional threshold, such requirement is presumptively satisfied unless it appears to a 'legal certainty' that the plaintiff cannot actually recover that amount." *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 699 (9th Cir. 2007) (quoting *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 402 (9th Cir. 1996)). "Where it is not facially evident from the complaint that more than $75,000 is in controversy, the removing party must prove, by a preponderance of the evidence, that the amount in controversy meets the jurisdictional threshold." *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090–91 (9th Cir. 2003) (per curiam).

Here, the amount in controversy is not facially evident from the Complaint. Plaintiffs' prayer for relief includes a request for general damages "in excess of $15,000," and unspecified sums for punitive damages, attorneys' fees, and costs. (*See* Compl. 13:7–13). Though Plaintiffs request special damages "in excess of $15,000," within four of the Complaint's substantive claims, those requests employ identical language and expressly seek the same damages arising from the same injury. (*See id.* ¶ 41) ("Plaintiffs have incurred special damages in the form of medical expense as well as emotional distress, anxiety, and fear during the pendency of their test results and for some time after . . . ."); (*see also id.* ¶¶ 48, 53, 56) (same). Given the overlapping requested relief, the value of special damages on the face of the Complaint is uncertain. *See Singh v. Glenmark Phargenerics, Inc.*, No. 2:14-cv-154-GMN-CWH, 2014 WL 4231364, at *2 (D. Nev. Aug. 26, 2014) ("[T]hese causes of action seek recovery for the same

injuries. Therefore, it would be fallacious to mechanically add these values in determining the total amount in controversy, as Plaintiffs cannot recover multiple times for the same harm.") (citing *Elyousef v. O'Reilly & Ferrario, LLC*, 443, 245 P.3d 547, 549 (Nev. 2010) ("[A] plaintiff may not recover damages twice for the same injury simply because he or she has two legal theories.")).

Aside for the $15,000 Plaintiffs seek in general damages and the $15,000 requested in special damages, the remaining categories of relief do not assign dollar amounts. Thus, because the jurisdictional amount is not facially evident, Defendants must show, by a preponderance of the evidence, that it is more likely than not that $75,000 is at stake. *Matheson*, 319 F.3d at 1090–91. On this point, Defendants point to Plaintiffs' prayer for punitive damages and attorneys' fees to satisfy the jurisdictional threshold.

a. Punitive Damages

Where punitive damages are recoverable under state law, such damages may be considered in determining the amount in controversy. *Gibson v. Chrysler Corp.*, 261 F.3d 927, 945 (9th Cir. 2001). Because Nevada permits recovery of punitive damages, NRS 42.005, Plaintiffs' prayer for the same may be considered in calculating the amount in controversy. In situations where the value of punitive damages is unclear, "[t]he defendant bears the burden of actually proving the facts to support jurisdiction." *Gaus*, 980 F.2d at 567. To establish the probable amount of punitive damages, a defendant must come forward with evidence, which may include jury verdicts or settlements in substantially similar cases. *See, e.g., Flores v. Standard Ins. Co.*, No. 3:09-cv-00501-LRH-RAM, 2010 WL 185949, at *5 (D. Nev. Jan. 15, 2010); *Campbell v. Hartford Life Ins. Co.*, 825 F. Supp. 2d 1005, 1008 (E.D. Cal. 2011).

Here, Defendants' argument with respect to punitive damages is too speculative to be credited. Defendants contend that the Complaint's reference to NRS 42.005, which permits an award of up to $300,000 when a plaintiff's compensatory damages do not exceed $100,000,

establishes that more than $75,000 is in on controversy. (Resp. 6:9–17). Defendants, however, neglect to support its argument with facts from this case or any analogous case to demonstrate the likelihood of a punitive damages award. "Mere allusion, in the absence of supplementary evidence, is insufficient for the Court to determine a probable punitive damages amount." *Cayer v. Vons Cos.*, No. 2:16-cv-02387-GMN-NJK, 2017 WL 3115294, at *3 (D. Nev. July 21, 2017); *see also Hannon v. State Farm Mut. Auto. Ins. Co.*, No. 2:14-cv-1623-GMN-NJK, 2014 WL 7146659, at *3 (D. Nev. Dec. 12, 2014) (excluding punitive damages in the amount in controversy given the defendant's "fail[ure] to identify any particular facts or allegations which might warrant a large punitive damage award."). Because Defendants have not met their burden, the Court will not include punitive damages in determining the amount in controversy.

b. Attorneys' Fees

"[W]here an underlying statute authorizes an award of attorneys' fees, either with mandatory or discretionary language, such fees may be included in the amount in controversy." *Guglielmino*, 506 F.3d at 700 (quoting *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir. 1998)). "This Court considers attorneys' fees to be within the amount in controversy if the removing party: (1) identifies 'an applicable statute which could authorize an award of attorneys' fees and (2) provide[s] an estimate as to the time the case will require and opposing counsel's hourly billing rate.'" *Cayer*, 2017 WL 3115294, at *2 (quoting *Hannon*, 2014 WL 7146659, at *2).

Here, Defendants neither identify a statute nor provide an estimate of Plaintiffs' counsel's billing rate. Instead, Defendants limit their argument to hypothesizing that because the parties have been in settlement negotiations going back to April 2016, Plaintiffs' attorneys' fees "as a practical matter" have likely surged. (Resp. 6:5–8). Such speculation is not enough to warrant inclusion of attorneys' fees in the amount in controversy. *See, e.g., Surber v. Reliance Nat. Indent. Co.*, 110 F. Supp. 2d 1227, 1232 (N.D. Cal. 2000) (declining to add

attorneys' fees to the amount-in-controversy calculation where "Defendant has not estimated the amount of time that the case will require, nor has it revealed plaintiff's counsel's hourly billing rate."); *see also Wilson v. Union Sec. Life Ins. Co.*, 250 F. Supp. 2d 1260, 1264 (D. Idaho 2003) (stating a defendant "must do more than merely point to [a plaintiff's] request for attorney's fees; upon removal it must demonstrate the probable amount of attorney's fees").

To summarize, Defendants have not met their burden of showing, by a preponderance of the evidence, that more than $75,000 is at stake in this case. Accordingly, the Court cannot exercise diversity jurisdiction over this matter.

B. Federal-Question Jurisdiction

28 U.S.C. § 1331 vests federal district courts with original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." "To remove a case as one falling within federal-question jurisdiction, the federal question ordinarily must appear on the face of a properly pleaded complaint; an anticipated or actual federal defense generally does not qualify a case for removal." *Jefferson Cty. v. Acker*, 527 U.S. 423, 430–31 (1999); *see also Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) ("The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.").

Defendants do not contest that the Complaint, on its face, is solely comprised of state-law claims. Rather, Defendants appear to advance two distinct theories to support federal-question jurisdiction: (1) Plaintiffs' claims are preempted because they rely on state-law duties that conflict with those imposed by federal law; and (2) the Complaint necessarily raises a substantial federal question because resolution of the claims requires examination of federal issues that fall within the exclusive authority of the U.S. Food and Drug Administration ("FDA"). (Resp. 6:19–9:13). The Court addresses each argument in turn.

1. Federal Preemption

According to Defendants, the Complaint necessarily raises a federal issue because the Supremacy Clause preempts Plaintiffs' state law claims. (*Id.* 7:18–23). Defendants explain that the wrongful conduct alleged—Defendants' improper packaging and distribution of propofol—is governed exclusively by the FDA, which has promulgated regulations establishing baseline manufacturing requirements for the preparation of drug products. (*Id.* 4:26–5:18) (citing 21 C.F.R. § 211). And because Plaintiffs' claims rely upon state-law duties that go beyond what the FDA requires, the issue of federal preemption is necessarily raised. (*Id.* 7:15–23, 8:11–9:13).

To the extent Defendants invoke "defensive preemption," the Court is unconvinced. It is well settled that "a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption." *In re NOS Commc'ns*, 1357, 495 F.3d 1052, 1057 (9th Cir. 2007) (emphasis in original) (quoting *Caterpillar*, 482 U.S. at 392). This rule applies "even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar*, 482 U.S. at 392.

Insofar as Defendants advance a "complete preemption" argument, it necessarily fails. The U.S. Supreme Court has recognized that the "preemptive force of some statutes is so strong that they 'completely preempt' an area of state law." *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1107 (9th Cir. 2000) (citing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)). "Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar*, 482 U.S. at 393 (internal citation and quotation marks omitted). Complete preemption is "rare" and has only been endorsed by the U.S. Supreme Court with respect to three federal statutes: § 301 of the Labor Relations Act; §§ 85 and 86 of the National Bank Act; and § 502 of the Employee Retirement Income Security Act.

See Retail Prop. Tr. v. United Bhd. of Carpenters & Joiners of Am., 768 F.3d 938, 948 n.5 (9th Cir. 2014).

In the present case, Defendants have not made any showing as to why the Federal Food, Drug, and Cosmetic Act ("FDCA") should be counted as a completely preemptive statutory scheme. In any event, the Court is persuaded by the overwhelming weight of authority holding that Congress's endorsement of *some* state-law claims arising from FDCA regulations conclusively defeats arguments in favor of complete preemption. *See, e.g.*, *Bridges v. Teva Parenteral Medicines, Inc.*, No. 2:18-cv-02310-JCM-VCF, 2019 WL 1585109, at *4 (D. Nev. Apr. 12, 2019) (collecting Ninth Circuit district court cases holding that "the FDCA does not completely preempt state law"); *see also Mihok v. Medtronic, Inc.*, 119 F. Supp. 3d 22, 32 (D. Conn. 2015) ("Congress anticipated and approved of limited state court analysis and application of the FDA regulations when it decided not to completely preempt parallel state law claims.") (citing *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 330 (2008) (holding that 21 U.S.C. § 360 of the FDCA does not "prevent a State from providing a damages remedy for claims premised on a violation of FDA regulations; the state duties in such a case 'parallel' rather than add to, federal requirements.")).

Next, the Court turns to Defendants' contention that Plaintiffs' claims necessarily turn on a question of federal law.

2. Jurisdiction Under *Gunn-Grable*

The U.S. Supreme Court has identified a "special and small category" of cases that arise under federal-question jurisdiction notwithstanding a complaint's sole reliance on state-law claims. *Gunn v. Minton*, 568 U.S. 251, 258 (2013) (citation omitted). "Federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Id.* (citing *Grable & Sons Metal Prod., Inc. v. Darue Eng'g &*

Mfg., 545 U.S. 308, 313–14 (2005)). To support federal-question jurisdiction, all four *Gunn-Grable* requirements must be satisfied. *Id.*

Defendants contend that the Complaint requires examination of the FDCA's "duty of sameness," under 21 U.S.C. § 355 and 21 C.F.R. § 314, which requires that generic drug manufactures label their products identically to the respective brand manufacturer's label. (Resp. 5:23–6:1). According to Defendants, this duty "applies to every portion of Plaintiffs' complained-of conduct, including labeling, warnings, route of administration, dosage form, and strength." (*Id.* 6:1–3). Therefore, because the duty of sameness required that Defendants' labeling conform to that of the brand-name product, the Complaint necessarily touches upon Defendants' compliance with federal law. (*Id.* 6:3–17).

The problem for Defendants is that the Complaint does not allege that Defendants violated the FDCA's duty of sameness, or any federal duty for that matter.[2] Tellingly, Defendants do not cite to any portion of the Complaint for this proposition. Even if Plaintiffs raised the FDCA or the duty of sameness as an element of a claim, that would still not end the federal-question inquiry. For one thing, it is axiomatic that "the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 813 (1986). Furthermore, it is well established that "[w]hen a claim can be supported by alternative and independent theories—one of which is a state law theory and one of which is a federal law theory—federal question jurisdiction does not attach because federal law is not a necessary element of the claim." *Bank of Am. Corp.*, 672 F.3d at 675 (quoting *Rains v. Criterion Sys., Inc.*, 80 F.3d 339, 346 (9th Cir.

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[2] On this basis, Defendants' proffered supplemental authority is readily distinguishable. *See Bowdrie v. Sun Pharm. Indus. Ltd.*, 909 F. Supp. 2d 179, 183–84 (E.D.N.Y. 2012) (holding a federal issue was necessarily raised in the FDCA context where the complaint repeatedly and expressly alleged the "ongoing federal duty of sameness," as elements of the state-law claims). Additionally, *Bowdrie* concerned a generic manufacturer's failure to update its labeling to be consistent with the brand-name manufacturer's modified label. *Id.* at 181. In this case, by contrast, no such facts are alleged.

1996)). Indeed, each of Plaintiffs' claims refer only to common law duties under Nevada law and, consequently, do not appear to require federal analysis for their resolution. As Defendants have not articulated how any *specific* claim necessitates resort to federal law, Defendants have failed to meet their burden of showing otherwise. *See Cruz v. Preferred Homecare*, No. 2:14-cv-00173-MMD-CWH, 2014 WL 4699531, at *3 (D. Nev. Sept. 22, 2014) (rejecting the defendants' reliance on FDA regulation to establish the first *Gunn-Grable* element as "wholly insufficient, especially when contrasted with *Grable* and *Gunn*, in which the removing parties demonstrated that plaintiffs' *specific* claims hinged on a court's adjudication of a federal issue.") (emphasis in original).

Thus, Defendants have failed to establish the first element of the *Gunn-Grable* test. As the party asserting federal jurisdiction, Defendants bear the burden of showing removal is proper. *Gaus*, 980 F.2d 566. This burden is of enhanced significance in this context, where the weight of authority suggests no federal-question jurisdiction exists. *See, e.g.*, *Merrell Dow*, 478 U.S. at 817 (holding that a complaint's state-law claims against a drug manufacturer, premised upon FDCA misbranding violations, do not support federal-question jurisdiction); *Grable*, 545 U.S. at 316–20 (discussing *Merrell Dow*'s holding and reiterating "if the federal labeling standard without a federal cause of action could get a state claim into federal court, so could any other federal standard without a federal cause of action."); *Burrell v. Bayer Corp.*, 918 F.3d 372, 381 (4th Cir. 2019) (concluding a plaintiff's state-law claims regarding FDA-regulated medical devices do not satisfy the third and fourth prongs of *Gunn-Grable*, and expressing doubt as to whether such claims necessarily raise federal issues under the first prong); *see also Nunes v. Affinitylifestyles.com, Inc.*, No. 2:16-cv-02265-APG-NJK, 2017 WL 359178 (D. Nev. Jan. 23, 2017); *Brandle v. McKesson Corp.*, No. C 12-cv-05970 WHA, 2013 WL 1294630 (N.D. Cal. Mar. 28, 2013). Because Defendants have not put forth a thorough, meaningful case

for application of the *Gunn-Grable* exception, the strong presumption against removal jurisdiction remains undisturbed.

In short, Defendants have not satisfied the Court that it may exercise diversity jurisdiction or federal-question jurisdiction. Consequently, this action must be remanded back to state court for want of subject-matter jurisdiction. Plaintiffs' Motion to Remand is therefore granted.

IV. CONCLUSION

IT IS HEREBY ORDERED that Plaintiffs' Motion to Remand, (ECF No. 9), is **GRANTED**.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss, (ECF No. 4), is **DENIED as moot**.

IT IS FURTHER ORDERED that this matter is hereby **REMANDED** to the Eighth Judicial District Court for the State of Nevada, County of Clark.

The Clerk of Court is instructed to close this case.

DATED this 26 day of August, 2019.

Gloria M. Navarro, Chief Judge
United States District Judge

EXHIBIT 5

ORIGINAL

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CLERK OF THE COURT

JGJV
ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
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MAINOR EGLET COTTLE
TRIAL LAWYERS

DISTRICT COURT
CLARK COUNTY, NEVADA

HENRY CHANIN and LORRAINE CHANIN, husband and wife

Plaintiffs,

vs.

TEVA PARENTERAL MEDICINES, INC.,, formerly known as SICOR PHARMACEUTICALS, INC., a Delaware Corporation; SICOR, INC., a Delaware Corporation; BAXTER HEALTHCARE CORPORATION, a Delaware Corporation

Defendants.

CASE NO.: A571172
DEPT.NO.: X

JUDGMENT UPON THE JURY VERDICT

JUDGMENT UPON THE JURY VERDICT

This action came on for trial before the Court and the jury, the Honorable Jessie Walsh, District Judge, presiding, and the issues having been duly tried and the jury having

duly rendered their verdict[1] and also special verdict[2],

IT IS ORDERED AND ADJUDGED that Plaintiffs, HENRY CHANIN and LORRAINE CHANIN, have and recover of the Defendants, TEVA PARENTERAL MEDICINES, INC., formerly known as SICOR PHARMACEUTICALS, INC., a Delaware Corporation, SICOR, INC., a Delaware Corporation; and BAXTER HEALTHCARE CORPORATION, a Delaware Corporation, the following sums:

COMPENSATORY DAMAGES:

Henry Chanin against TEVA & BAXTER	$ 3,250,000.00
Lorraine Chanin against TEVA & BAXTER	$ 1,850,000.00
Total Compensatory Damages:	**$ 5,100,000.00**

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs' compensatory damages in the amount of Five Million One Hundred Thousand and 00/100 Dollars ($5,100,000.00), shall bear prejudgment interest in accordance with *Lee v. Ball, 116 P.3d 64*, (2005) at the rate of 5.25% per annum from the date of service of the Summons and Complaint, on October 6, 2008 through May 21, 2010 as follows:

PREJUDGMENT INTEREST:

10/06/08 through 05/28/10 =	$ 439,402.44
(599 days x $733.56 per day)	

PUNITIVE DAMAGES:

Henry and Lorraine Chanin against TEVA	$ 356,000,000.00
Henry and Lorraine Chanin against BAXTER	$ 144,000,000.00
Total Punitive Damages:	**$ 500,000,000.00**

1 Exhibit 1, Verdict
2 Exhibit 2, Special Verdict

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs' punitive damages in the amount of Five Hundred Million and 00/100 Dollars ($500,000,000.00), shall bear postjudgment interest in accordance with *Lee v. Ball, 116 P.3d 64*, (2005) at the rate of 5.25% per annum from the time of entry of judgment until satisfied as follows:

POSTJUDGMENT INTEREST:

$71,917.80 per day

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs shall be awarded their costs of the action, the amount of which to be determined by the Court.

NOW, THEREFORE, Judgment Upon the Verdict in favor of Plaintiffs, HENRY AND LORRAINE CHANIN, is hereby given for Five Hundred Five Million, Five Hundred Thirty-Nine Thousand Four Hundred Two and 44/100 Dollars (**$505,539,402.44**) against Defendants which shall bear postjudgment interest at the current rate of 5.25% or $72,651.36 per day, until satisfied.

DATED this 1st day of June, 2010.

DISTRICT COURT JUDGE

Respectfully Submitted by:

MAINOR EGLET COTTLE

ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
ROBERT W. COTTLE, ESQ.
Nevada Bar No. 4576
ROBERT M. ADAMS, ESQ.
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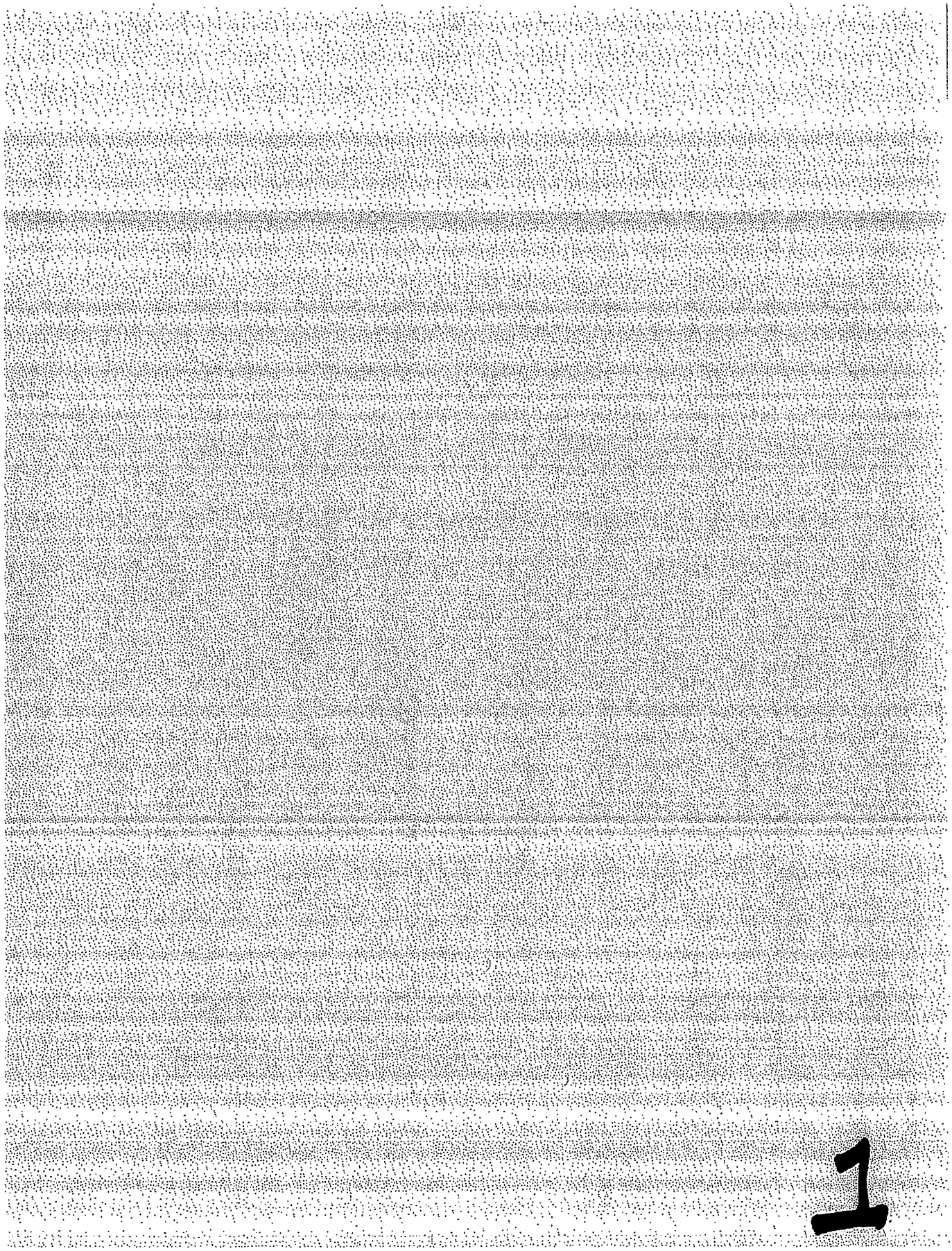


STEVEN D. GRIERSON
CLERK OF THE COURT

MAY 05 2010

BY TERI BRAEGELMANN, DEPUTY

DISTRICT COURT

CLARK COUNTY, NEVADA

HENRY CHANIN and LORRAINE CHANIN, husband and wife Plaintiffs. vs. TEVA PARENTERAL MEDICINES, INC., formerly known as SICOR PHARMACEUTICALS, INC., a Delaware Corporation; SICOR, INC., a Delaware Corporation; BAXTER HEALTHCARE CORPORATION, a Delaware Corporation Defendants.	CASE NO.: A571172 DEPT.NO.: X A571172 Henry Chanin, et al. v. Teva Parenteral Medicines, Inc., et al.

VERDICT FORM

If you find that the Defendant(s) are liable to the Plaintiff(s) set forth below under any one of the different liability claims for compensatory damages against such Defendants, check YES in the appropriate box and fill in the amount of compensation that you deem appropriate for each Plaintiff(s) for compensatory damages.

If you find that the Defendant(s) are not liable to the Plaintiff(s) set forth below under any of the different liability claims for compensatory damages, check NO in the appropriate box.

1. TEVA is liable to Henry Chanin for the following claims, if any:

   a. Strict liability for defective design.

   YES ___ NO X

   b. Failure to warn.

   YES X NO ___

   c. Breach of the implied warranty of fitness for a particular purpose.

   YES X NO ___

2. BAXTER is liable to Henry Chanin the following claims, if any:

a. Strict liability for defective design.

YES ___ NO X

b. Failure to warn.

YES X NO ___

c. Breach of the implied warranty of fitness for a particular purpose.

YES X NO ___

3. If you find TEVA is liable to HENRY CHANIN, you must also determine if TEVA is liable to LORRAINE CHANIN for loss of consortium.

YES X NO ___

4. If you find BAXTER is liable to HENRY CHANIN, you must also determine if BAXTER is liable to LORRAINE CHANIN for loss of consortium.

YES X NO ___

5. If you found TEVA is liable to HENRY CHANIN or to LORRAINE CHANIN for compensatory damages, you must also determine if TEVA is liable for punitive damages.

YES X NO ___

6. If you found BAXTER is liable to HENRY CHANIN or to LORRAINE CHANIN for compensatory damages, you must also determine if BAXTER is liable for punitive damages.

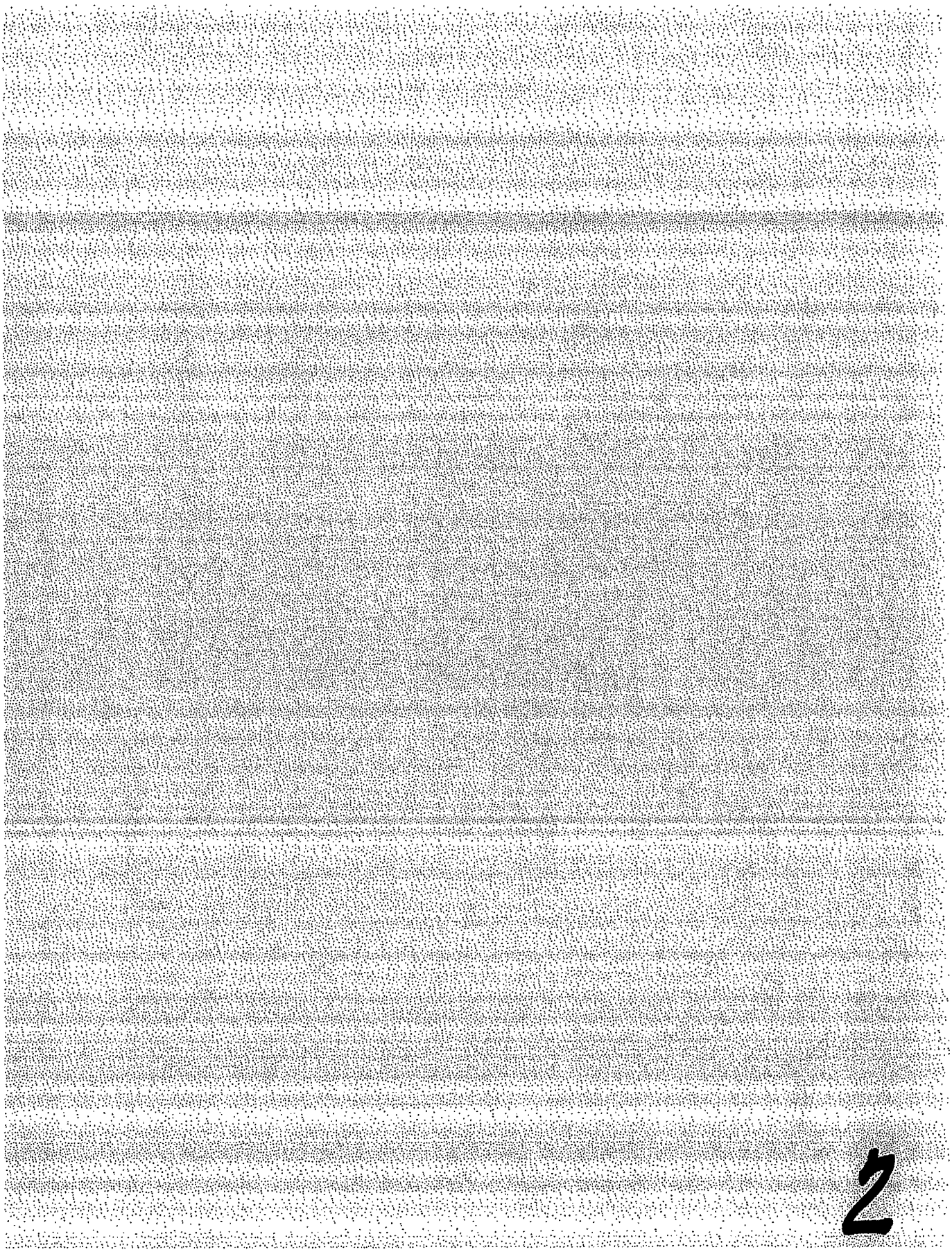
YES X NO ___

HENRY CHANIN COMPENSATORY DAMAGES $ 3.25 million

LORRAINE CHANIN COMPENSATORY DAMAGES $ 1.85 million

DATED this 5th day of May, 2010.

(FOREPERSON)



FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

MAY 07 2010

BY, _____ TERI BRACKELMANN DEPUTY

DISTRICT COURT

CLARK COUNTY, NEVADA

HENRY CHANIN and LORRAINE CHANIN, husband and wife

Plaintiffs,

vs.

TEVA PARENTERAL MEDICINES, INC., formerly known as SICOR PHARMACEUTICALS, INC., a Delaware Corporation; SICOR, INC., a Delaware Corporation; BAXTER HEALTHCARE CORPORATION, a Delaware Corporation

Defendants.

CASE NO.: A571172
DEPT.NO.: X

SPECIAL VERDICT

We, the jury in the above entitled action, assess the amount of punitive damages as follows:

Punitive Damages Against TEVA $ 356,000,000

Punitive Damages Against BAXTER $ 144,000,000

DATED this 7th day of May, 2010.

FOREPERSON

EXHIBIT 6

JGJV
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Attorney for Plaintiffs, Sacks and Devito

MAINOR EGLET

DISTRICT COURT
CLARK COUNTY, NEVADA

RICHARD C. SACKS, individually Plaintiff, vs. SICOR, INC., a Delaware Corporation; TEVA PARENTERAL MEDICINES, INC., formerly known as SICOR PHARMACEUTICALS, INC., A Delaware Corporation, BAXTER HEALTHCARE CORPORATION, a Delaware Corporation. Defendants.	CASE NO.: A572315 DEPT. NO.: XXVIII **JUDGMENT UPON THE JURY VERDICT**
ANNE ARNOLD and JAMES ARNOLD, individually and as husband and wife Plaintiffs, vs. SICOR, INC., a Delaware Corporation; TEVA PARENTERAL MEDICINES. INC., formerly known as SICOR PHARMACEUTICALS, INC., A Delaware Corporation, BAXTER HEALTHCARE CORPORATION, a Delaware Corporation; Defendants.	CASE NO.: A576071 DEPT. NO.: XXVIII

☐ Voluntary Dis	☐ Stip Dis	☐ Sum Jdgmt	FINAL D
☐ Involuntary (stat) Dis	☐ Stip Jdgmt	☐ Non-Jury Trial	☐ Time
☐ Jdgmt on Arb Award	☐ Default Jdgmt	☒ Jury Trial	☐ Disn
☐ Mtn to Dis (by deft)	☐ Transferred		☐ Judg

11/7/11 (28)

ANTHONY V. DEVITO and DONNA JEAN DEVITO, individually and as husband and wife, Plaintiffs, vs. SICOR, INC., a Delaware Corporation; TEVA PARENTERAL MEDICINES, INC., formerly known as SICOR PHARMACEUTICALS, INC., A Delaware Corporation, MCKESSON CORPORATION, a Delaware Corporation. Defendants.	CASE NO.: A583058 DEPT. NO.: XXVIII

JUDGMENT UPON THE JURY VERDICT

This action came on for trial before the Court and the jury, the Honorable Ronald J. Israel, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered their verdict[1] and also special verdict[2],

IT IS ORDERED AND ADJUDGED that Plaintiffs, RICHARD SACKS, ANNE ARNOLD and JAMES ARNOLD, ANTHONY V. DEVITO and DONNA JEAN DEVITO, have and recover of the Defendants, TEVA PARENTERAL MEDICINES, INC., formerly known as SICOR PHARMACEUTICALS, INC., a Delaware Corporation, SICOR, INC., a Delaware Corporation, BAXTER HEALTHCARE CORPORATION, a Delaware Corporation, and MCKESSON CORPORATION, a Delaware Corporation, the following sums:

COMPENSATORY DAMAGES FOR RICHARD SACKS:

Richard Sacks against TEVA & BAXTER	$ 5,000,000.00
Total Compensatory Damages for Richard Sacks:	**$ 5,000,000.00**

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's compensatory damages in the amount of Five Million 00/100 Dollars ($5,000,000.00), shall bear prejudgment interest in accordance with *Lee v. Ball, 116 P.3d 64*, (2005) at the rate of 5.25% per annum from the date of

[1] Exhibit 1, Verdict
[2] Exhibit 2, Special Verdict

MAINOR EGLET

service of the Summons and Complaint on Baxter Healthcare Corporation on September 29, 2008, and Sicor Pharmaceuticals, Inc. on January 20, 2009 and through November 9, 2011 as follows:

PREJUDGMENT INTEREST FOR RICHARD SACKS:

09/29/08 through 11/09/11 = $ 816,986.30
(1136 days x $719.17 per day)

COMPENSATORY DAMAGES FOR ANNE ARNOLD AND JAMES ARNOLD:

Anne Arnold against TEVA & BAXTER	$ 8,500,000.00
James Arnold against TEVA & BAXTER	$ 900,000.00
Total Compensatory Damages for Anne and James Arnold:	**$ 9,400,000.00**

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs' compensatory damages in the amount of Nine Million Four Hundred Thousand and 00/100 Dollars ($9,400,000.00), shall bear prejudgment interest in accordance with *Lee v. Ball, 116 P.3d 64*, (2005) at the rate of 5.25% per annum from the date of service of the Summons and Complaint on Baxter Healthcare Corporation on December 23, 2008, and Sicor Pharmaceuticals, Inc. on January 16, 2009 and through November 9, 2011 as follows:

PREJUDGMENT INTEREST FOR ANNE ARNOLD AND JAMES ARNOLD:

12/23/08 through 11/09/11 = $ 1,421,009.58
(1051 days x $1,352.05 per day)

MAINOR EGLET

COMPENSATORY DAMAGES FOR ANTHONY DEVITO AND DONNA JEAN DEVITO:

Anthony Devito against TEVA & MCKESSON	$ 5,000,000.00
Donna Jean Devito against TEVA & MCKESSON	$ 700,000.00
Total Compensatory Damages for Anne and James Arnold:	**$ 5,700,000.00**

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs' compensatory damages in the amount of Five Million Seven Hundred Thousand and 00/100 Dollars ($5,700,000.00), shall bear prejudgment interest in accordance with *Lee v. Ball, 116 P.3d 64*, (2005) at the rate of 5.25% per annum from the date of service of the Summons and Complaint on McKesson Corporation on March 5, 2009, and Sicor Pharmaceuticals, Inc. on March 7, 2009 and through November 9, 2011 as follows :

PREJUDGMENT INTEREST FOR ANTHONY DEVITO AND DONNA JEAN DEVITO:

03/05/09 through 11/09/11 =	$ 802,645.89
(979 days x $819.86 per day)	

PUNITIVE DAMAGES:

Richard Sacks, Anne Arnold, James Arnold, Anthony Devito and Donna Jean Devito against TEVA:	$ 89,375,000.00
Richard Sacks, Anne Arnold and James Arnold Against BAXTER:	$ 55,250,000.00
Anthony Devito and Donna Jean Devito against McKESSON	$ 17,875,000.00
Total Punitive Damages:	**$ 162,500,000.00**

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs' punitive damages in the amount of One Hundred Sixty Two Million, Five Hundred Thousand and 00/100 Dollars ($162,500,000.00), shall bear postjudgment interest in accordance with *Lee v. Ball, 116 P.3d 64*,

MAINOR EGLET

(2005) at the rate of 5.25% per annum from the time of entry of judgment until satisfied as follows:

POSTJUDGMENT INTEREST:

$23,373.28 per day

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs may be awarded their costs of the action, the amount of which to be determined by the Court.

NOW, THEREFORE, Judgment Upon the Verdict in favor of Plaintiffs, RICHARD SACKS, ANNE ARNOLD and JAMES ARNOLD, ANTHONY V. DEVITO and DONNA JEAN DEVITO, is hereby given for One Hundred Eighty Five Million, Six Hundred Forty Thousand Six Hundred Forty One and 77/100 Dollars (**$185,640,641.77**) against Defendants which shall bear post judgment interest at the current rate of 5.25% or $26,701.73 per day, until satisfied.

DATED this 16 day of November, 2011.

DISTRICT COURT JUDGE

JV

Respectfully Submitted by:

Dated this 9th day of November, 2011.

ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
ARTEMUS W. HAM, ESQ.
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WILLIAM S. KEMP, ESQ.
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Attorney for Plaintiffs

EXHIBIT "1"

ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
OCT 0 6 2011
643pm
BY, KATHY KLEIN, DEPUTY

DISTRICT COURT

CLARK COUNTY, NEVADA

RICHARD C. SACKS, individually Plaintiff, vs. SICOR, INC., a Delaware Corporation; TEVA PARENTERAL MEDICINES, INC., formerly known as SICOR PHARMACEUTICALS, INC., A Delaware Corporation, BAXTER HEALTHCARE CORPORATION, a Delaware Corporation. Defendants.	CASE NO.: A572315 DEPT. NO.: XXVIII
ANNE ARNOLD and JAMES ARNOLD, individually and as husband and wife Plaintiffs, vs. SICOR, INC., a Delaware Corporation; TEVA PARENTERAL MEDICINES, INC., formerly known as SICOR PHARMACEUTICALS, INC., A Delaware Corporation, BAXTER HEALTHCARE CORPORATION, a Delaware Corporation; Defendants.	CASE NO.: A576071 DEPT. NO.: XXVIII
ANTHONY V. DEVITO and DONNA JEAN DEVITO, individually and as husband and wife, Plaintiffs, vs. SICOR, INC., a Delaware Corporation; TEVA PARENTERAL MEDICINES, INC., formerly known as SICOR PHARMACEUTICALS, INC., A Delaware Corporation, MCKESSON CORPORATION, a Delaware Corporation. Defendants.	CASE NO.: A583058 DEPT. NO.: XXVIII

VERDICT

We, the jury in the above-entitled action, return the following verdict:

Question No. 1: Is TEVA liable to ANNE ARNOLD for any of the following claims?

a. Duty to monitor

YES X NO _____

b. Defective product design

YES _____ NO X

c. Failure to send Dear Doctor letter

YES X NO _____

d. Breach of the implied warranty of fitness for particular purpose

YES X NO _____

Question No. 2: Is BAXTER liable to ANNE ARNOLD for any of the following claims?

a. Defective product design

YES _____ NO X

b. Failure to send Dear Doctor letter

YES X NO _____

c. Breach of the implied warranty of fitness for particular purpose

YES X NO _____

Question No. 3: If you find TEVA is liable to ANNE ARNOLD, is TEVA also liable to JAMES ARNOLD for loss of consortium?

YES X NO _____

Question No. 4: If you find BAXTER is liable to ANNE ARNOLD, is BAXTER also liable to JAMES ARNOLD for loss of consortium?

YES X NO _____

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Question No. 5: Is TEVA liable to ANTHONY DEVITO for any of the following claims?

a. Duty to monitor

YES X NO _____

b. Defective product design

YES _____ NO X

c. Failure to send Dear Doctor letter

YES X NO _____

d. Breach of the implied warranty of fitness for particular purpose

YES X NO _____

Question No. 6: Is MCKESSON liable to ANTHONY DEVITO for any of the following claims?

a. Defective product design

YES _____ NO X

b. Failure to send Dear Doctor letter

YES X NO _____

c. Breach of the implied warranty of fitness for particular purpose

YES X NO _____

Question No. 7: If you find TEVA is liable to ANTHONY DEVITO, is TEVA also liable to DONNA DEVITO for loss of consortium?

YES X NO _____

Question No. 8: If you find MCKESSON is liable to ANTHONY DEVITO, is MCKESSON also liable to DONNA DEVITO for loss of consortium?

YES X NO _____

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Question No. 9: Is TEVA liable to RICHARD SACKS for any of the following claims?

a. Duty to monitor

YES X NO ____

b. Defective product design

YES ____ NO X

c. Failure to send Dear Doctor letter

YES X NO ____

d. Breach of the implied warranty of fitness for particular purpose

YES X NO ____

Question No. 10: Is BAXTER liable to RICHARD SACKS for any of the following claims?

a. Defective product design

YES ____ NO X

b. Failure to send Dear Doctor letter

YES X NO ____

c. Breach of the implied warranty of fitness for particular purpose

YES X NO ____

Question No. 11: Do you find that any of the Plaintiffs have suffered damages as a result of any Defendants' conduct? If so, please state the damages, if any:

ANNE ARNOLD COMPENSATORY DAMAGES $ 8,500,000

JAMES ARNOLD COMPENSATORY DAMAGES $ 900,000

ANTHONY DEVITO COMPENSATORY DAMAGES $ 5,000,000

DONNA DEVITO COMPENSATORY DAMAGES $ 400,000

RICHARD SACKS COMPENSATORY DAMAGES $ 5,000,000

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Question No. 12: If you found that TEVA is liable to RICHARD SACKS, ANNE ARNOLD and/or ANTHONY DEVITO for compensatory damages, is TEVA also liable for punitive damages?

YES X NO _____

Question No. 13: If you found that BAXTER is liable to ANNE ARNOLD and/or RICHARD SACKS for compensatory damages, is BAXTER also liable for punitive damages?

YES X NO _____

Question No. 14: If you found that MCKESSON is liable to ANTHONY DEVITO for compensatory damages, is MCKESSON also liable for punitive damages?

YES X NO _____

DATED this 10th day of October, 2011.

Jerry L. Foster
FOREPERSON

EXHIBIT "2"

ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

RICHARD C. SACKS, individually Plaintiff, vs. SICOR, INC., a Delaware Corporation; TEVA PARENTERAL MEDICINES, INC., formerly known as SICOR PHARMACEUTICALS, INC., A Delaware Corporation, BAXTER HEALTHCARE CORPORATION, a Delaware Corporation. Defendants.	CASE NO.: A572315 DEPT. NO.: XXVIII
ANNE ARNOLD and JAMES ARNOLD, individually and as husband and wife Plaintiffs, vs. SICOR, INC., a Delaware Corporation; TEVA PARENTERAL MEDICINES, INC., formerly known as SICOR PHARMACEUTICALS, INC., A Delaware Corporation. BAXTER HEALTHCARE CORPORATION, a Delaware Corporation; Defendants.	CASE NO.: A576071 DEPT. NO.: XXVIII
ANTHONY V. DEVITO and DONNA JEAN DEVITO, individually and as husband and wife, Plaintiffs. vs. SICOR, INC., a Delaware Corporation; TEVA PARENTERAL MEDICINES, INC., formerly known as SICOR PHARMACEUTICALS, INC., A Delaware Corporation, MCKESSON CORPORATION, a Delaware Corporation. Defendants.	CASE NO.: A583058 DEPT. NO.: XXVIII

SPECIAL VERDICT

We, the jury in the above-entitled action, assess the amount of punitive damages as follows:

Punitive Damages TEVA $89,375,000

Punitive Damages BAXTER $55,250,000

Punitive Damages MCKESSON $17,875,000

DATED this 10th day of October, 2011.

FOREPERSON

EXHIBIT 7

JUJV
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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY NEVADA

MICHAEL WASHINGTON and JOSEPHINE WASHINGTON,	)	CASE NO. A558164
	)	DEPT NO. XV
Plaintiffs,	)	
vs.	)	
TEVA PARENTERAL MEDICINES, INC.; SICOR, INC.; BAXTER HEALTHCARE CORPORATION,	)	
Defendants.	)	

JUDGMENT UPON THE JURY VERDICT

This action came on for trial before the Court and the jury, the Honorable Abbi Silver, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered their verdict[1].

IT IS ORDERED AND ADJUDGED that Plaintiffs, MICHAEL WASHINGTON and JOSEPHINE WASHINGTON, have and recover of the Defendants, TEVA PARENTERAL MEDICINES, INC. (hereinafter "TEVA"), SICOR, INC. (hereinafter "SICOR"), and BAXTER HEALTHCARE CORPORATION (hereinafter "BAXTER"), jointly and severally the following sums:

COMPENSATORY DAMAGES:

Michael Washington against TEVA, SICOR and BAXTER $ 7,000,000.00

Josephine Washington against TEVA, SICOR and BAXTER $ 7,000,000.00

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff MICHAEL WASHINGTON have and recover of Defendants TEVA and SICOR, jointly and severally, the following sum as Punitive Damages:

PUNITIVE DAMAGES:

Michael Washington against TEVA and SICOR $ 60,000,000.00

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff MICHAEL WASHINGTON have and recover of Defendant BAXTER the following sum as Punitive Damages:

PUNITIVE DAMAGES:

Michael Washington against BAXTER $ 30,000,000.00

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[1] *See* Special Verdict Forms attached as Exhibit "1".

EDWARD M. BERNSTEIN & ASSOCIATES
ATTORNEYS AT LAW
500 SO. FOURTH ST.
LAS VEGAS,
NEVADA 89101
(702) 240-0000

IT IS FURTHER ORDERED AND ADJUDGED that this Judgment Upon the Verdict shall bear postjudgment interest as provided by NRS 17.130 from the date of entry of judgment until satisfied.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs shall be awarded their costs of the action jointly and severally against the Defendants, the amount of which is to be determined by the Court upon Plaintiffs' Memorandum of Costs, to be filed within five (5) days of entry of this Judgment Upon the Verdict. Plaintiffs may also bring any motion for prejudgment interest and attorneys' fees pursuant to NRCP 68 and NRS 17.115 within ten (10) days of notice of entry of this Judgment.

NOW, THEREFORE, Judgment Upon the Verdict in favor of Plaintiff MICHAEL WASHINGTON, jointly and severally against TEVA, SICOR and BAXTER is hereby given for **Seven Million and 00/100 Dollars ($7,000,000.00)**, plus costs.

In addition, Judgment Upon the Verdict in favor of Plaintiff JOSEPHINE WASHINGTON, jointly and severally against TEVA, SICOR and BAXTER is hereby given for **Seven Million and 00/100 Dollars ($7,000,000.00)**, plus costs.

In addition, Judgment Upon the Verdict in favor of Plaintiff MICHAEL WASHINGTON, jointly and severally against TEVA and SICOR is hereby given for **Sixty Million and 00/100 Dollars ($60,000,000.00).**

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EDWARD M. BERNSTEIN & ASSOCIATES
ATTORNEYS AT LAW
500 SO. FOURTH ST.
LAS VEGAS,
NEVADA 89101
(702) 240-0000

In addition, Judgment Upon the Verdict in favor of Plaintiff MICHAEL WASHINGTON against BAXTER is hereby given for **Thirty Million and 00/100 Dollars ($30,000,000.00).**

DATED this 19th day of October, 2011.

DISTRICT COURT JUDGE

Respectfully Submitted by:

EDWARD M. BERNSTEIN & ASSOCIATES

BY: _____

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Telephone: (702) 384-4000
Facsimile: (702) 385-4640
Attorneys for Plaintiffs WASHINGTON

A558164

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ATTORNEYS AT LAW
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EXHIBIT 1

EXHIBIT 1

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
3:50 PM
OCT 10 2011
BY JENNIFER KIMMEL, DEPUTY

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL WASHINGTON and JOSEPHINE WASHINGTON, Plaintiffs, v. SICOR PHARMACEUTICALS, INC., et al., Defendants.	CASE NO. A558164 DEPT. NO. XV **SPECIAL VERDICT FORM**

08A558164
SJV
Special Jury Verdict
1546432

3

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL WASHINGTON and JOSEPHINE WASHINGTON, Plaintiffs, v. SICOR PHARMACEUTICALS, INC., et al., Defendants.	CASE NO. A558164 DEPT. NO. XV

Special Verdict

We the Jury in the above-entitled action find the following Special Verdict on the questions submitted to us:

1. Is Teva Parenteral Medicines, Inc. liable to Michael Washington for the following claims, if any:

   a. Negligence

   Yes ✓ No ___

   b. Strict Liability for Defective Design of 50ml Propofol vial

   Yes ✓ No ___

2. Is Baxter Healthcare Corporation liable to Michael Washington for the following claims, if any:

   a. Negligence

   Yes ✓ No ___

   b. Strict Liability for Defective Design of 50ml Propofol vial

   Yes ✓ No ___

3. If you find Teva Parenteral Medicines, Inc. is liable to Michael Washington, you must also determine if Teva Parenteral Medicines, Inc. is liable to Josephine Washington for loss of consortium.

   Yes ✓ No ___

4. If you find Baxter Healthcare Corporation is liable to Michael Washington, you must also determine if Baxter Healthcare Corporation is liable to Josephine Washington for loss of consortium.

Yes ✓ No ___

5. What amount of damages, if any, do you find was sustained by:

Michael Washington compensatory damages $ 7million

Josephine Washington compensatory damages $ 7million

6. If you found that Teva Parenteral Medicines, Inc. is liable to Michael Washington, you must also determine if Teva Parenteral Medicines Inc. is liable for punitive damages:

Yes ✓ No ___

7. If you found that Baxter Healthcare Corporation is liable to Michael Washington for compensatory damages you must also determine if Baxter Healthcare Corporation is liable for punitive damages:

Yes ✓ No ___

Dated this 10th day of October, 2011.

FOREPERSON

DISTRICT COURT

CLARK COUNTY, NEVADA

*****

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
2:18 P.M.
OCT 12 2011
BY Jennifer Kimmel
JENNIFER KIMMEL, DEPUTY

MICHAEL WASHINGTON and JOSEPHINE WASHINGTON,

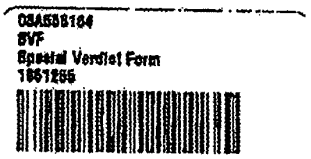
Plaintiffs,

vs.

TEVA PARENTERAL MEDICINES, INC.; SICOR, INC.; BAXTER HEALTHCARE CORPORATION,

Defendants.

CASE NO. A558164
DEPT NO. XV



SPECIAL VERDICT

We, the jury in the above entitled action, award punitive damages to plaintiff Michael Washington as follows:

Punitive Damages Against Teva Parenteral Medicines, Inc.: $ 60 million

Punitive Damages Against Baxter Healthcare Corporation: $ 30 million

DATED this 12 day of October, 2011.

FOREPERSON

EXHIBIT 8

ORIGINAL

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CLERK OF THE COURT

ORDR
Judge Ronald J. Israel
Eighth Judicial District Court
Department XXVIII
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155
(702)671-3631
(702)366-1407 Facsimile

DISTRICT COURT

CLARK COUNTY, NEVADA

RICHARD C. SACKS, individually, et al, Plaintiff(s), vs. ENDOSCOPY CENTER OF SOUTHERN NEVADA, LLC, et al. Defendant(s), And All Related/Consolidated Matters.	Case No. 08A572315 (LEAD) CONSOLIDATED with 08A576071 and 09A583058 DEPT. NO. XXVIII ***ELECTRONIC FILING CASE***

DECISION AND ORDER: PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PREEMPTION DEFENSE FOR DEAR DOCTOR LETTER LIABILITY ... PRODUCT DEFENDANTS' PRE-TRIAL MOTION #4, MOTION FOR SUMMARY JUDGMENT ON GROUNDS OF FEDERAL PREEMPTION ON ORDER SHORTENING TIME

This case arises out of the transmission of Hepatitis C from patient to patient at various endoscopy clinics in Las Vegas. Causation of the transmission is highly contested by the parties; however, the main theories are either the transmission by means of "double dipping" regarding the use of Propofol as an anesthetic in the procedures or improper cleaning and sterilization of the medical equipment at the time of the procedures. This motion is regarding summary judgment based on *Pliva, Inc. v. Mensing*, 131 S. Ct. 2567 (2011).

The *Mensing* Decision was announced by the United States Supreme Court (herein after "Supreme Court") approximately two (2) weeks ago. The parties agree that the Supreme Court has precluded claims against a generic drug manufacturer for failure to warn as long as the generic warning is equivalent to the brand name warning. The Supreme Court based their Decision on the fact that federal law preempts state law. Plaintiffs have agreed that a failure to warn claim is no longer at issue; however, they argue that the *Mensing* Decision does not preclude a "Dear Doctor letter" that is consistent with the federal warning label.

In the *Mensing* Decision the parties did not dispute that state law required the manufacturers to use a different and safer label. In the *Sacks* case, Plaintiffs claim the state law does not require a stronger warning and, therefore, preemption does not apply. If state law is not preempted, then the generic manufacturers should have issued a "Dear Doctor letter" reiterating the single-use warning on the Propofol bottle. The *Mensing* Court states, "What is in dispute is whether, and to what extent, generic manufacturers may change their labels after initial FDA approval." The Plaintiffs in *Mensing* clearly seek a stronger warning than was previously approved and, therefore, the Supreme Court ruled that the federal law prevented them from changing the label and the claims were dismissed.

The facts in the *Sacks* case differ, in that, first of all, we are not talking about the medicine contained in the bottle but, in fact, the means of accessing the medicine in the bottle; i.e., the single- or multi-use container. In the *Mensing* case at Page 8, Part 2, the Court states, "The FDA argues that "Dear Doctor letters" qualify as "labeling" ... Thus any such letters must be "consistent with and not contrary to [the drugs] approved labeling." Once again, the United States Supreme Court draws a distinction between additional and/or stronger warnings that were the subject of the *Mensing* case and not the subject of the *Sacks* case.

The Supreme Court in *Mensing* for a third time states at Page 12, "...State law imposed on

the Manufacturers a duty to attach a safer label (emphasis added) to their generic metoclopramide." This, once again, is not the same as we have in the *Sacks* case at issue. The Supreme Court states at Page 13, "The question for "impossibility" is whether the private party could independently do under federal law what state law requires of it." In the *Sacks* case it is clear the allegations are that the generic manufacturer could have done a "Dear Doctor letter" that does not violate federal law. The issue as to whether or not the "Dear Doctor letter" would have made a difference is a question of fact to be determined by the Jury and, therefore, Defendants' Motion For Summary Judgment is DENIED.

Defendants also seek to lump the Second and Third Causes of Action regarding design defect and breach of implied warranty of fitness for a particular purpose together and base their argument on the *Mensing* case. If the Supreme Court had intended to preclude all tort claims against generic manufacturers then they would have said so. This is certainly not the interpretation by this Court, and, therefore their arguments regarding the other Causes of Action are DENIED.

Plaintiffs' Motion For Summary Judgment is also DENIED as there are questions of fact to be determined by the Jury at the time of trial.

DATED AND DONE this 28 day of July, 2011.

DISTRICT JUDGE RONALD J. ISRAEL

EXHIBIT 9

EXHIBIT 9

ODM
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Attorneys for Plaintiffs

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09/09/2011 10:07:10 AM

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

*****

MICHAEL WASHINGTON and JOSEPHINE WASHINGTON, Plaintiffs, vs. TEVA PARENTERAL MEDICINES, INC.; SICOR, INC.; BAXTER HEALTHCARE CORPORATION, Defendants.	CASE NO. A558164 DEPT NO. XV

ORDER DENYING PRODUCT DEFENDANTS' MOTION IN LIMINE NO. 9 TO EXCLUDE TESTIMONY, REFERENCES OR ARGUMENTS THAT CHALLENGE THE SUFFICIENCY OR ADEQUACY OF THE PROPOFOL WARNINGS FEDERAL LAW COMPELLED PRODUCT DEFENDANTS TO USE

EDWARD M. BERNSTEIN & ASSOCIATES
ATTORNEYS AT LAW
500 SO. FOURTH ST.
LAS VEGAS,
NEVADA 89101
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AUG 29 2011

Product Defendants' Motion in Limine No. 9 to Exclude Testimony, References or Arguments that Challenge the Sufficiency or Adequacy of the Propofol Warnings Federal Law Compelled Product Defendants to Use, having come before this Hon. Court on August 17, 2011, Plaintiffs Michael and Josephine Washington, appearing by and through their attorneys of record, Richard Friedman, Esq., Lincoln Sieler, Esq., of the law firm Friedman | Rubin, and Patti S. Wise, Esq., of the law firm of Edward M. Bernstein and Associates, and Defendants Teva Parenteral Medicines, Inc., formerly known as Sicor Pharmaceuticals, Inc., Sicor, Inc., and Baxter Healthcare Corporation, appearing by and through their attorneys of record, Glenn Kerner, Esq. of the law firm Goodwin Procter, Michael Stoberski, Esq., of the law firm Olson, Cannon, Gormley & Desruisseaux, and Michael Shumsky, Esq., of the law firm Kirkland & Ellis LLP, the Court having considered argument of counsel and the papers and pleadings on file, the Court finds:

Pliva, Inc. v. Mensing, 79 USLW 4606, 564 U.S. --, 2011 WL 247290 (June 23, 2011), held that plaintiffs are foreclosed from bringing claims against a generic pharmaceutical manufacturer based on failure to use a better warning due to preemption. The United States Supreme Court did not rule that a generic warning the FDA previously approved is "sufficient" or "adequate" as a matter of law. Thus, evidence relating to alleged flaws or defects in the existing labels is relevant to Plaintiffs' claims for design defect, negligence claims and the Defendants' intervening superseding cause defense.

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EDWARD M. BERNSTEIN & ASSOCIATES
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NEVADA 89101
(702) 240-0000

Accordingly, **IT IS HEREBY ORDERED** that, Product Defendants' Motion in Limine No. 9 to Exclude Testimony, References or Argument that Challenges the Sufficiency of Adequacy of the Propofol Warnings Federal Law Compelled Product Defendants to Use **IS DENIED** as that is a question for the Jury to determine.

DATED this 8 day of September, 2011.

DISTRICT COURT JUDGE Abbi Silver

Submitted by:

EDWARD M. BERNSTEIN & ASSOCIATES

BY: _____

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Attorneys for Plaintiffs WASHINGTON

A558164

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EXHIBIT 10

EXHIBIT 10

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CLERK OF THE COURT

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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

*****

MICHAEL WASHINGTON and JOSEPHINE WASHINGTON, Plaintiffs, vs. TEVA PARENTERAL MEDICINES, INC.; SICOR, INC.; BAXTER HEALTHCARE CORPORATION, Defendants.	CASE NO. A558164 DEPT NO. XV

ORDER GRANTING IN PART AND DENYING IN PART PRODUCT DEFENDANTS' PRE-TRIAL MOTION #7 TO ADMIT EVIDENCE AND EXPERT TESTIMONY OF THE HATCH-WAXMAN ACT, FDA REGULATIONS, PHARMACEUTICAL INDUSTRY PRACTICE, AND PRODUCT DEFENDANTS' COMPLIANCE THEREWITH FOR PROPOFOL

EDWARD M. BERNSTEIN & ASSOCIATES
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LAS VEGAS, NEVADA 89101
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THIS COURT, having entertained Product Defendants' Pretrial Motion #7 to Admit Evidence and Expert Testimony of the Hatch-Waxman Act, FDA Regulations, Pharmaceutical Industry Practice, and Product Defendants' Compliance Therewith for Propofol on August 17, 2011, with Plaintiffs Michael and Josephine Washington, appearing by and through their attorneys of record, Richard Friedman, Esq., Lincoln Sieler, Esq., of the law firm Friedman | Rubin, and Patti S. Wise, Esq., of the law firm of Edward M. Bernstein and Associates, and Defendants Teva Parenteral Medicines, Inc., formerly known as Sicor Pharmaceuticals, Inc., Sicor, Inc., and Baxter Healthcare Corporation, appearing by and through their attorneys of record, Glenn Kerner, Esq. of the law firm Goodwin Procter, Michael Shumsky, Esq. of the law firm of Kirkland & Ellis, LLP, and Michael Stoberski, Esq., of the law firm Olson, Cannon, Gormley & Desruisseaux, the Court having considered argument of counsel and the papers and pleadings on file, the Court finds:

Subject to the Product Defendants' specific offers of proof and the proper laying of a foundation, the Product Defendants shall be generally entitled to offer evidence regarding the following: (1) Propofol is a generic version of the brand pharmaceutical product Diprivan; (2) Propofol and its label are FDA approved; (3) Propofol and Diprivan have the same language for their labels and warnings; (4) by law Propofol cannot unilaterally change its warnings and labels; (5) Propofol was in compliance with FDA requirements at the time of Michael Washington's treatment; (6) the FDA did not prohibit the sale of 50 mL vials to ambulatory surgical centers and, in fact, approved the Product Defendants' labeling and products as suitable for use during outpatient surgical procedures; and (7) other manufacturers used the same warnings.

However, the Court also finds the following: (1) Federal law does not place the responsibility solely upon brand name pharmaceuticals to monitor medical literature and to disseminate warnings to health care providers; (149:22-24) (2) *Mensing* does not prohibit generic

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manufacturers from sending "Dear Doctor" letters so long as they do not alter or change the existing warnings; and (3) the parties may not present evidence as to industry customs regarding what a medical professional would expect a marketing representative to do or not to do regarding the use of the product.

The court declined to rule that any specific evidence was admissible and said it would wait to rule on that until more specifics were provided. See. p. 167:19-25, 169:25-170:1, 171:5-11, 172:1-15, 190:15-193:22.

DATED this 20 day of Sept., 2011.

DISTRICT COURT JUDGE Abbi Silver

Submitted by:

EDWARD M. BERNSTEIN & ASSOCIATES

BY: _____

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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

YVETTE ADAMS; MARGARET ADYMY; THELMA ANDERSON; JOHN ANDREWS; MARIA ARTIGA; LUPITA AVILA-MEDEL; HENRY AYOUB; JOYCE BAKKENDAHL; DONALD BECKER; JAMES BEDINO; EDWARD BENEVENTE; MARGARITA BENEVENTE; SUSAN BIEGLER; KENNETH BURT; MARGARET CALAVAN; MARCELINA CASTENADA; VICKIE COLE-CAMPBELL; SHERRILL COLEMAN; NANCY COOK; JAMES DUARTE,

Plaintiffs,

v.

TEVA PARENTERAL MEDICINES, INC., formerly known as SICOR PHARMACEUTICALS, INC.; SICOR, Inc., a Delaware Corporation; BAXTER HEALTHCARE CORPORATION, a Delaware Corporation; McKESSON MEDICAL-SURGICAL INC., a Delaware Corporation,

Defendants.

CASE NO: A-18-778471-C
DEPT.: 8

ERRATA TO THE EXHIBITS ATTACHED TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Date of Hearing: November 5, 2019
Time of Hearing: 8:30am

Plaintiffs, by and through their attorneys of record, Peter C. Wetherall, Esq., and Wetherall Group, Ltd., hereby corrects the exhibits attached the their Opposition to Defendants' Motion to Dismiss filed October 3, 2019, with the attached.

The Court may disregard the previous exhibits attached to the filed Opposition as this Errata replaces those exhibits entirely.

DATED this 7th day of October, 2019.

WETHERALL GROUP, LTD.

By: */s/ Peter Wetherall*
PETER C. WETHERALL, ESQ.
Nevada Bar No.: 4414
9345 W. Sunset Rd., Ste. 100
Las Vegas, NV 89148
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of **Wetherall Group, Ltd.**, and on the 7th day of October, 2019, I served the foregoing ***ERRATA TO EXHIBITS ATTACHED TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS*** as follows:

☒ Electronic Service – By serving a copy thereof through the Court's electronic service system; and/or

☐ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below; and/or

☐ Facsimile—By facsimile transmission pursuant to EDCR 7.26 to the facsimile number(s) shown below and in the confirmation sheet filed herewith. Consent to service under NRCP 5(b)(2)(D) shall be assumed unless an objection to service by facsimile transmission is made in writing and sent to the sender via facsimile within 24 hours of receipt of this Certificate of Service.

/s/ Miriam Alvarez
An employee of

EXHIBIT 1

EXHIBIT 1

Centers for Disease Control and Prevention
CDC 24/7: Saving Lives, Protecting People™

Hepatitis C Investigation in a Las Vegas, Nevada Endoscopy

In January 2008, investigators from CDC's Division of Viral Hepatitis and Division of Health Care Quality Promotion responded to a request from the Southern Nevada Health District (SNHD) to help investigate three persons reported to the local surveillance program with acute Hepatitis C virus (HCV) infection; all three persons had undergone procedures at a Las Vegas endoscopy clinic. Since beginning the investigation, CDC and SNHD have identified a total of six cases of HCV infection among patients who had undergone procedures at the clinic in the 35–90 days prior to onset of symptoms. These patients did not have other risks for HCV infection. Molecular diagnostic testing conducted by CDC confirmed the relatedness of several of these infections.

On investigation of the clinic, CDC and SNHD observed practices that had the potential to transmit HCV. On the basis of these findings, SNHD is notifying 40,000 past patients who were potentially exposed to HCV and other infectious diseases. CDC is providing ongoing support to SNHD for this investigation.

Health care associated transmission of HCV infection accounts for a small proportion of infections in the United States. Since 2001, CDC has identified other HCV outbreaks in health care settings associated with syringe reuse and other lapses in recommended infection control practices.

In response to these investigations, patients with possible exposures associated with these outbreaks were notified and directed to testing for HIV, HBV, and HCV.

For more information about the investigation, visit:

Southern Nevada Health District (http://www.southernnevadahealthdistrict.org/hepc-investigation/index.php)
http://www.southernnevadahealthdistrict.org/outbreaks/index.htm
If you have additional concerns, you may contact the Southern Nevada Health District at 702-759-INFO (4636).

Information about viral hepatitis, HIV, and syringe safety are available on the CDC website at:

Viral Hepatitis
http://www.cdc.gov/hepatitis

HIV Questions and Answers (Q&A)
http://www.cdc.gov/hiv/basics/index.html

A Patient Safety Threat — Syringe Reuse
Division of Health Care Quality Promotion, February 2008

Quick Links to Hepatitis ...
A | B | C | D | E

APP1348

Viral Hepatitis Home

Statistics & Surveillance

Populations & Settings

Outbreaks

State and Local Partners & Grantees

Policy and Programs

Resource Center

Page last reviewed: May 31, 2015

Page last updated: May 31, 2015

Content source: Division of Viral Hepatitis (/hepatitis) and

National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention (/nchhstp)

EXHIBIT 2

EXHIBIT 2

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

A-18-782023-C

MAUREEN BRIDGES, *et al.*,

Plaintiffs,

v.

TEVA PARENTERAL MEDICINES, INC., *et al.*,

Defendants.

Case No. 2:18-cv-02310-JCM-VCF

ORDER

Presently before the court is individual plaintiffs' motion to remand. (ECF No. 9). Defendants Baxter Healthcare Corporation; McKesson Medical-Surgical Inc.; Sicor, Inc.; and Teva Parenteral Medicines, Inc. (collectively "defendants") responded (ECF No. 11), to which plaintiffs replied (ECF No. 12).

Also before the court is defendants' motion for leave to file surreply. (ECF No. 14).

I. Facts

The plaintiffs in this action are individuals that received medical care at the Endoscopy Center ("clinic") located at 700 Shadow Land, Clark County, Nevada. (ECF No. 1). Defendants supplied the clinic with medical products that the clinic would use in providing various anesthesia services. *Id.* The clinic improperly administered defendants' medical products by re-using injection syringes and anesthesia bottles, which created a foreseeable risk of infection or cross-contamination. *Id.*

On or about February 28, 2008, the Southern Nevada Health District sent plaintiffs and approximately 60,000 others a letter informing them that the clinic placed them at a risk of possible exposure to bloodborne pathogens. *Id.* The Health District recommended that

plaintiffs' get tested for hepatitis C, hepatitis B, and HIV. *Id.* Plaintiffs followed the Health District's recommendation and eventually discovered that they did not contract any of the aforementioned diseases. *Id.*

Plaintiffs believe that defendants' improper packaging of their medical products caused the clinic to improperly re-use syringes and bottles. *Id.* On April 11, 2016, plaintiffs offered to settle their claims in exchange for $4,252,500, which amounts to $2,500 per plaintiff. (ECF No. 9). Defendants rejected plaintiffs' offer. *Id.*

On October 1, 2018, plaintiffs initiated this action in state court, asserting four causes of action: (1) strict product liability; (2) breach of the implied warranty of fitness for a particular purpose; (3) negligence; and (4) violation of the Nevada Deceptive Trade Practices Act. (ECF No. 1).

On December 10, 2018, defendants removed this action to federal court. *Id.* The court now determines whether it has subject matter jurisdiction.

II. Legal Standard

Pursuant to 28 U.S.C. § 1441(a), "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes of Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989).

Upon notice of removability, a defendant has thirty days to remove a case to federal court once he knows or should have known that the case was removable. *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006) (citing 28 U.S.C. § 1446(b)(2)). Defendants are not charged with notice of removability "until they've received a paper that gives them enough information to remove." *Id.* at 1251.

Specifically, "the 'thirty-day time period [for removal] . . . starts to run from defendant's receipt of the initial pleading only when that pleading affirmatively reveals on its face' the facts necessary for federal court jurisdiction." *Id.* at 1250 (quoting *Harris v. Bankers Life & Casualty*

Co., 425 F.3d 689, 690–91 (9th Cir. 2005) (alterations in original)). "Otherwise, the thirty-day clock doesn't begin ticking until a defendant receives 'a copy of an amended pleading, motion, order or other paper' from which it can determine that the case is removable. *Id.* (quoting 28 U.S.C. § 1446(b)(3)).

A plaintiff may challenge removal by timely filing a motion to remand. 28 U.S.C. § 1447(c). On a motion to remand, the removing defendant faces a strong presumption against removal, and bears the burden of establishing that removal is proper. *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 403–04 (9th Cir. 1996); *Gaus v. Miles, Inc.*, 980 F.2d 564, 566–67 (9th Cir. 1992).

III. Discussion

As a preliminary matter, the court notes that plaintiffs have filed a surreply in opposition to defendants' motion to remand (ECF No. 13) and defendants now move for leave to file their own surreply (ECF No. 14). Because the filings pertain to legal authority that is not binding on this court and "motions for leave to file a surreply are discouraged[,]" the court will strike plaintiffs surreply (ECF No. 13) and deny defendants' motion (ECF No. 14). LR 7-2(b).

Plaintiffs move to remand, arguing that the court does not have diversity jurisdiction. (ECF No. 9). Defendants' contend that the court has both diversity and federal question jurisdiction. (ECF No. 11). The court will address both of defendants' purported grounds for subject matter jurisdiction in turn.

a. Diversity jurisdiction

28 U.S.C. § 1332 allows federal courts to exercise diversity jurisdiction in civil actions between citizens of different states where the amount in controversy exceeds $75,000. *See* 28 U.S.C. § 1332(a). "In determining the amount in controversy, courts first look to the complaint. Generally, 'the sum claimed by the plaintiff controls if the claim is apparently made in good faith.'" *Ibarra v. Manheim Invests., Inc.* 775 F.3d 1193, 1197 (9th Cir. 2015) (citing *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938)). At the time of removal, parties may submit supplemental evidence to show that the amount in controversy is in excess of $75,000. *Id.* (citing *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997).

Plaintiffs allege in the complaint that their claims are each valued in excess of $15,000 in general damages. (ECF No. 1). This figure is well below the amount in controversy threshold under § 1332(a) and defendants have not submitted any evidence showing that a greater amount is in dispute.

Nevertheless, defendants contend that the amount in controversy is in excess of $75,000 because plaintiffs also seek attorney's fees and punitive damages. (ECF No. 11). The court now must determine whether defendants have proven by a preponderance of the evidence that punitive damages and attorney's fees, coupled with general damages, will exceed the jurisdiction minimum. *See Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 403-04 (9th Cir. 1996).

i. Punitive damages

Courts consider punitive damages in determining the amount in controversy when a plaintiff can recover punitive damages as a matter of law. *Gibson v. Chrysler Corp.*, 261 F.3d 927, 945 (9th Cir. 2001). Under Nevada law, a plaintiff can recover punitive damages only by proving with clear and convincing evidence that the defendant is guilty of oppression, fraud, or malice. Nev. Rev. Stat. 42.005(1). In light of NRS 42.005, the court will consider punitive damages for jurisdictional purposes.

Courts generally look to jury awards in analogous cases in determining how to consider punitive damages towards satisfying the jurisdictional minimum. *See Campbell v. Hartford Life Ins. Co.*, 825 F. Supp. 2d 1005, 1008 (E.D. Cal. 2011). Here, defendants have not provided any factual support, other than citing statutes, pertaining to the probable amount of punitive damages. Therefore, defendants have not shown by a "preponderance of the evidence" that punitive damages increase the amount in controversy. *See Sanchez*, 102 F.3d at 404.

ii. Attorney's fees

Courts consider attorney's fees in determining the amount in controversy if a plaintiff can recover such fees pursuant to a contract or statute. *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir. 1998). Nevada law allows courts to award attorney's fees when (1) the prevailing party has not recovered more than $20,000 or (2) when the opposing party's defense was "brought or maintained without reasonable grounds or to harass the prevailing party." Nev. Rev.

Stat. 18.010(2). Because each plaintiff appears to seek less than $20,000 in damages, the court will consider attorney's fees in determining the amount in controversy.

Defendants' argue that attorney's fees will spike the cost of this action because this case involves hundreds of plaintiffs. (ECF No. 11). The complex nature of this lawsuit compels the court to conclude that plaintiffs will incur significant attorney's fees. However, defendants' once again have not provided evidence showing the extent that attorney's fees increase the amount in controversy. Indeed, the court does not find that attorney's fees would quadruple or quintuple the ultimate award.

In sum, defendants have not shown by a preponderance of the evidence an amount in controversy in excess of $75,000. Accordingly, the court cannot exercise subject matter jurisdiction under § 1332(a).

b. Federal question jurisdiction

The "well-pleaded complaint rule" governs federal question jurisdiction. This rule provides that district courts can exercise jurisdiction under 28 U.S.C. § 1331 only when a federal question appears on the face of a well-pleaded complaint. *See, e.g.*, *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Thus, a plaintiff "may avoid federal jurisdiction by exclusive reliance on state law." *Id.* Moreover, "an anticipated or actual federal defense generally does not qualify a case for removal[.]" *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999).

The well-pleaded complaint rule does not require a plaintiff to assert a federal cause of action. District court also have jurisdiction over state law claims that raise "some substantial, disputed question of federal law[.]" *Indep. Living Ctr. of Southern California, Inc. v. Kent*, 909 F.3d 272, 279 (9th Cir. 2018). Indeed, federal question jurisdiction exists when a federal issue is "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disturbing the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013).

Defendants argue that plaintiffs' state tort claims, which allege that defendants improperly packaged medical products, raise a substantial issue of federal law because the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 301 *et seq.*, governs the

packaging of medical products. (ECF No. 11). The court disagrees.

In *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, the Supreme Court held that state law claims which allege violations of the FDCA do not raise a substantial federal question because Congress did not intend to create a private right of action for violation of the FDCA. *Wander v. Kaus*, 304 F.3d 856, 859 (9th Cir. 2002) (citing *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 808 (1986)). As the circumstances of this case fall well within *Merrell Dow*, the court concludes that plaintiffs' complaint does not raise a substantial federal question.

The court notes that defendants' arguments are unclear, incoherent, and at times confused. Some paragraphs from defendants' brief appear to assert that the court has jurisdiction because the FDCA preempts plaintiffs' state law claims. To ensure complete adjudication of all pertinent issues that the parties raise, the court will consider this argument.

The "complete preemption doctrine" allows district courts to exercise federal question jurisdiction over state law claims when a federal statute completely preempts the relevant state law. *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1107 (9th Cir. 2000) (citation omitted). Courts consider the factual allegations in the complaint and the petition of removal to determine whether federal law completely preempts a state law claim. *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 191 (9th Cir. 1983).

It is well established that the FDCA does not completely preempt state law. *See Oregon ex rel. Kroger v. Johnson & Johnson*, 832 F. Supp. 2d 1250, 1259–60 (D. Or. 2011); *see also Perez v. Nidek Co. Ltd.*, 657 F. Supp. 2d 1156, 1161 (S.D. Cal. 2009); *see also Alaska v. Eli Lilly & Co.*, No. 3:06-cv-88 TMB, 2006 WL 2168831 at *3–4 (D. Ala July 28, 2006). Therefore, the court does not have federal question jurisdiction under the complete preemption doctrine.

IV. Conclusion

The court does not have subject matter jurisdiction because the amount in controversy is not in excess of $75,000, plaintiffs' complaint does not raise a substantial federal question, and the FDCA does not completely preempt plaintiffs' state law claims.

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Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that plaintiffs' motion to remand (ECF No. 9) be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that defendants' motion for leave to file surreply (ECF No. 14) be, and the same hereby is, DENIED, consistent with the foregoing.

IT IS FURTHER ORDERED that defendants' motion to dismiss (ECF No. 3) be, and the same hereby is, DENIED without prejudice.

IT IS FURTHER ORDERED that the matter of *Bridges et al. v. Teva Parenteral Medicines, Inc. et al.*, case number 2:18-cv-02310-JCM-VCF, be, and the same hereby is, REMANDED.

The clerk shall strike plaintiffs' surreply (ECF No. 13) and close the case accordingly.

DATED THIS 12th day of April 2019.

James C. Mahan

JAMES C. MAHAN
UNITED STATES DISTRICT JUDGE

I hereby attest and certify on 4/12/2019 that the foregoing document is a full, true and correct copy of the original on file in my legal custody.

CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA

By MONICA REYES Deputy Clerk

EXHIBIT 3

EXHIBIT 3

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ABADJIAN, SOSSY, et al., Plaintiff(s), v. TEVA PARENTERAL MEDICINES, INC., et al., Defendant(s).	Case No. 2:18-CV-2321 JCM (NJK) ORDER

Presently before the court is individual plaintiffs' motion to remand. (ECF No. 21). Defendants Baxter Healthcare Corporation; McKesson Medical-Surgical Inc.; Sicor, Inc.; and Teva Parenteral Medicines, Inc. (collectively "defendants") responded (ECF No. 23), to which plaintiffs replied (ECF No. 24).

Also before the court is defendants' motion for leave to file response to plaintiffs' supplemental authority (ECF No. 25) and request for judicial notice of supplemental authority (ECF No. 26). Plaintiffs have not replied.

I. Facts

The plaintiffs in this action are individuals who received medical care at the Endoscopy Center ("clinic") located at 700 Shadow Land, Clark County, Nevada. (ECF No. 1). Defendants supplied the clinic with medical products that the clinic would use in providing various anesthesia services. *Id.* The clinic improperly administered defendants' medical products by re-using injection syringes and anesthesia bottles, which created a foreseeable risk of infection or cross-contamination. *Id.*

On or about February 28, 2008, the Southern Nevada Health District sent plaintiffs and approximately 60,000 others a letter informing them that the clinic placed them at a risk of possible exposure to bloodborne pathogens. *Id.* The Health District recommended that plaintiffs' get tested for hepatitis C, hepatitis B, and HIV. *Id.* Plaintiffs followed the Health District's recommendation and eventually discovered that they did not contract any of the aforementioned diseases. *Id.*

Plaintiffs believe that defendants' improper packaging of their medical products caused the clinic to improperly re-use syringes and bottles. *Id.* On April 11, 2016, plaintiffs offered to settle their claims in exchange for $4,252,500, which amounts to $2,500 per plaintiff. (ECF No. 9). Defendants rejected plaintiffs' offer. *Id.*

On October 1, 2018, plaintiffs initiated this action in state court, asserting four causes of action: (1) strict product liability; (2) breach of the implied warranty of fitness for a particular purpose; (3) negligence; and (4) violation of the Nevada Deceptive Trade Practices Act. (ECF No. 1).

On December 10, 2018, defendants removed this action to federal court. *Id.* The court now determines whether it has subject matter jurisdiction.

II. Legal Standard

Pursuant to 28 U.S.C. § 1441(a), "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes of Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989).

Upon notice of removability, a defendant has thirty days to remove a case to federal court once he knows or should have known that the case was removable. *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006) (citing 28 U.S.C. § 1446(b)(2)). Defendants are not charged with notice of removability "until they've received a paper that gives them enough information to remove." *Id.* at 1251.

Specifically, "the 'thirty day time period [for removal] . . . starts to run from defendant's receipt of the initial pleading only when that pleading affirmatively reveals on its face' the facts necessary for federal court jurisdiction." *Id.* at 1250 (quoting *Harris v. Bankers Life & Casualty Co.*, 425 F.3d 689, 690–91 (9th Cir. 2005) (alterations in original)). "Otherwise, the thirty-day clock doesn't begin ticking until a defendant receives 'a copy of an amended pleading, motion, order or other paper' from which it can determine that the case is removable. *Id.* (quoting 28 U.S.C. § 1446(b)(3)).

A plaintiff may challenge removal by timely filing a motion to remand. 28 U.S.C. § 1447(c). On a motion to remand, the removing defendant faces a strong presumption against removal, and bears the burden of establishing that removal is proper. *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 403–04 (9th Cir. 1996); *Gaus v. Miles, Inc.*, 980 F.2d 564, 566–67 (9th Cir. 1992).

III. Discussion

As a preliminary matter, the court notes that plaintiffs have filed an addendum in support of their motion to remand (ECF No. 25) and defendants now move for leave to file their own response (ECF No. 26). Because the filings pertain to legal authority that is not binding on this court, the court will strike plaintiffs addendum (ECF No. 25) and deny defendants' motion (ECF No. 26).

Plaintiffs move to remand, arguing that the court does not have diversity jurisdiction. (ECF No. 21). Defendants' contend that the court has both diversity and federal question jurisdiction. (ECF Nos. 1, 23). The court will address both of defendants' purported grounds for subject matter jurisdiction in turn.

a. Diversity jurisdiction

First, the parties do not dispute that there is diversity of citizenship. (*See* ECF Nos. 1, 10, 21, 23, 24). Teva Parenteral Medicines, Inc., and SICOR, Inc. are incorporated in Delaware, and their principal places of business are in California. (ECF No. 1 at 9). Baxter Healthcare Corporation is incorporated in Delaware, and its principal place of business is in Illinois. *Id.* Plaintiffs are all residents of Nevada. *Id.* Thus, complete diversity exists between the parties.

The only issue before the court is whether the amount in controversy satisfies 28 U.S.C. § 1332, which allows federal courts to exercise diversity jurisdiction in civil actions between citizens of different states where the amount in controversy exceeds $75,000. *See* 28 U.S.C. § 1332(a). "In determining the amount in controversy, courts first look to the complaint. Generally, 'the sum claimed by the plaintiff controls if the claim is apparently made in good faith.'" *Ibarra v. Manheim Invests., Inc.* 775 F.3d 1193, 1197 (9th Cir. 2015) (citing *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938)). At the time of removal, parties may submit supplemental evidence to show that the amount in controversy is in excess of $75,000. *Id.* (citing *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997).

Plaintiffs allege in the complaint that their claims are each valued in excess of $15,000 in general damages. (ECF No. 1). This figure is well below the amount in controversy threshold under § 1332(a) and defendants have not submitted any evidence showing that a greater amount is in dispute.

Nevertheless, defendants contend that the amount in controversy is in excess of $75,000 because plaintiffs also seek attorney's fees and punitive damages. (ECF No. 11). The court now must determine whether defendants have proven by a preponderance of the evidence that punitive damages and attorney's fees, coupled with general damages, will exceed the jurisdiction minimum. *See Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 403-04 (9th Cir. 1996).

i. Punitive damages

Courts consider punitive damages in determining the amount in controversy when a plaintiff can recover punitive damages as a matter of law. *Gibson v. Chrysler Corp.*, 261 F.3d 927, 945 (9th Cir. 2001). Under Nevada law, a plaintiff can recover punitive damages only by proving with clear and convincing evidence that the defendant is guilty of oppression, fraud, or malice. Nev. Rev. Stat. 42.005(1). In light of NRS 42.005, the court will consider punitive damages for jurisdictional purposes.

Courts generally look to jury awards in analogous cases in determining how to consider punitive damages towards satisfying the jurisdictional minimum. *See Campbell v. Hartford Life Ins. Co.*, 825 F. Supp. 2d 1005, 1008 (E.D. Cal. 2011). Here, defendants have not provided any

factual support, other than citing statutes, pertaining to the probable amount of punitive damages. Therefore, defendants have not shown by a "preponderance of the evidence" that punitive damages increase the amount in controversy. *See Sanchez*, 102 F.3d at 404.

ii. Attorney's fees

Courts consider attorney's fees in determining the amount in controversy if a plaintiff can recover such fees pursuant to a contract or statute. *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir. 1998). The Nevada Supreme Court has held that "in the absence of legislation specifically providing for attorney's fees, such fees cannot be awarded." *Consumers League v. Southwest Gas*, 576 P.2d 737 (Nev. 1978). Notably, Nevada law does not expressly provide for attorney's fees in class action suits. "It is for the legislature . . . to make a special provision for class actions within NRS 18.010." *Schouweiler v. Yancey Co.*, 712 P.2d 786, 788 (Nev. 1985) (holding that the district court was correct in denying the award of attorney's fees pursuant to NRS 18.010).

Nevada law does allow courts to award attorney's fees when (1) the prevailing party has not recovered more than $20,000 or (2) when the opposing party's defense was "brought or maintained without reasonable grounds or to harass the prevailing party." Nev. Rev. Stat. 18.010(2). Because each plaintiff appears to seek less than $20,000 in damages, the court will consider attorney's fees in determining the amount in controversy.

Defendants' argue that attorney's fees will spike the cost of this action because this case involves hundreds of plaintiffs. (ECF No. 11). The complex nature of this lawsuit compels the court to conclude that plaintiffs will incur significant attorney's fees. However, defendants once again have not provided evidence showing the extent that attorney's fees increase the amount in controversy. Indeed, the court does not find that attorney's fees would quadruple or quintuple the ultimate award.

In sum, defendants have not shown by a preponderance of the evidence an amount in controversy in excess of $75,000. Accordingly, the court cannot exercise subject matter jurisdiction under § 1332(a).

. . .

b. Federal question jurisdiction

The "well-pleaded complaint rule" governs federal question jurisdiction. This rule provides that district courts can exercise jurisdiction under 28 U.S.C. § 1331 only when a federal question appears on the face of a well-pleaded complaint. *See, e.g., Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Thus, a plaintiff "may avoid federal jurisdiction by exclusive reliance on state law." *Id.* Moreover, "an anticipated or actual federal defense generally does not qualify a case for removal[.]" *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999).

The well-pleaded complaint rule does not require a plaintiff to assert a federal cause of action. District court also have jurisdiction over state law claims that raise "some substantial, disputed question of federal law[.]" *Indep. Living Ctr. of Southern California, Inc. v. Kent*, 909 F.3d 272, 279 (9th Cir. 2018). Indeed, federal question jurisdiction exists when a federal issue is "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disturbing the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013).

Defendants argue that plaintiffs' state tort claims, which allege that defendants improperly packaged medical products, raise a substantial issue of federal law because the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 301 *et seq.*, governs the packaging of medical products. (ECF No. 11). The court disagrees.

In *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, the Supreme Court held that state law claims which allege violations of the FDCA do not raise a substantial federal question because Congress did not intend to create a private right of action for violation of the FDCA. *Wander v. Kaus*, 304 F.3d 856, 859 (9th Cir. 2002) (citing *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 808 (1986)). As the circumstances of this case fall well within *Merrell Dow*, the court concludes that plaintiffs' complaint does not raise a substantial federal question.

The court notes that defendants' arguments are unclear, incoherent, and at times confused. Some paragraphs from defendants' brief appear to assert that the court has jurisdiction because the FDCA preempts plaintiffs' state law claims. To ensure complete adjudication of all pertinent issues that the parties raise, the court will consider this argument.

The "complete preemption doctrine" allows district courts to exercise federal question jurisdiction over state law claims when a federal statute completely preempts the relevant state law. *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1107 (9th Cir. 2000) (citation omitted). Courts consider the factual allegations in the complaint and the petition of removal to determine whether federal law completely preempts a state law claim. *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 191 (9th Cir. 1983).

It is well established that the FDCA does not completely preempt state law. *See Oregon ex rel. Kroger v. Johnson & Johnson*, 832 F. Supp. 2d 1250, 1259–60 (D. Or. 2011); *see also Perez v. Nidek Co. Ltd.*, 657 F. Supp. 2d 1156, 1161 (S.D. Cal. 2009); *see also Alaska v. Eli Lilly & Co.*, No. 3:06-cv-88 TMB, 2006 WL 2168831 at *3–4 (D. Ala July 28, 2006). Therefore, the court does not have federal question jurisdiction under the complete preemption doctrine.

IV. Conclusion

The court does not have subject matter jurisdiction because the amount in controversy is not in excess of $75,000, plaintiffs' complaint does not raise a substantial federal question, and the FDCA does not completely preempt plaintiffs' state law claims.

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that plaintiffs' motion to remand (ECF No. 21) be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that defendants' motion for leave to file a response (ECF No. 26) be, and the same hereby is, DENIED, consistent with the foregoing.

IT IS FURTHER ORDERED that defendants' motion to dismiss (ECF No. 8) be, and the same hereby is, DENIED without prejudice.

IT IS FURTHER ORDERED that the matter of *Abadjian et al. v. Teva Parental Medicines, Inc. et al.*, case number 2:18-cv-02321-JCM-VCF, be, and the same hereby is, REMANDED.

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. . .

. . .

James C. Mahan
U.S. District Judge

The clerk shall strike plaintiffs' addendum (ECF No. 25) and close the case accordingly.

DATED August 23, 2019.

James C. Mahan

UNITED STATES DISTRICT JUDGE

EXHIBIT 4

EXHIBIT 4

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

YVETTE ADAMS, *et al.*,

Plaintiffs,

vs.

TEVA PARENTERAL MEDICINES, INC., *et al.*,

Defendants.

Case No.: 2:18-cv-02305-GMN-BNW

ORDER

Pending before the Court is the Motion to Remand, (ECF No. 9),[1] filed by Plaintiffs Yvette Adams, Margaret Adymy, Thelma Anderson, John Andrews, Maria Artiga, Lupita Avila-Medel, Henry Ayoub, Joyce Bakkedahl, Donald Becker, James Bedino, Edward Benavente, Margarita Benavente, Susan Biegler, Kenneth Burt, Margaret Calavan, Marcelina Castaneda, Vickie Cole-Campbell, Sherrill Coleman, Nancy Cook, and James Duarte (collectively "Plaintiffs"). Defendants Teva Parenteral Medicines, Inc., Sicor, Inc., Baxter Healthcare Corporation, and McKesson Medical Surgical, Inc. (collectively "Defendants") filed a Response, (ECF No. 14), and Plaintiffs filed a Reply, (ECF No. 15).

For the reasons that follow, the Court **GRANTS** Plaintiffs' Motion to Remand.

I. BACKGROUND

Plaintiffs are adult individuals who underwent treatment at a medical center in Las Vegas, Nevada (the "Clinic") between 2004 and 2008 for endoscopy procedures. (*See* Compl. ¶¶ 7–8, Ex. A to Pet. for Removal, ECF No. 1-1). Under the care of the Clinic's health care

[1] Prior to Plaintiffs filing the instant Motion, Defendants filed a Motion to Dismiss, (ECF No. 4). Subsequently, the Court granted the parties' stipulation to stay the briefing schedule on the Motion to Dismiss until the instant Motion to Remand is resolved, (ECF Nos. 8, 13). Because the Court remands this action in this Order, the Motion to Dismiss is **DENIED as moot**.

providers, Plaintiffs were injected with propofol, an anesthetic drug manufactured, marketed, distributed, and sold by Defendants to the Clinic. (*Id.* ¶¶ 2–4, 7, 12).

On February 28, 2008, the Southern Nevada Health District sent a letter to 60,000 former Clinic patients, including Plaintiffs, stating they were at risk of exposure to bloodborne pathogens. (*Id.* ¶ 15). The letter recommended that all persons who received an injection at the [Clinic] between March of 2004 and January of 2008," as well as their spouses, be tested for Hepatitis B, Hepatitis C, and HIV. (*Id.* ¶ 11). Plaintiffs obtained the recommended testing and ultimately learned they were infection-free. (*Id.* ¶ 13). In doing so, Plaintiffs incurred medical bills and other out-of-pocket expenses, and endured emotional distress, anxiety, and fear during the pendency of their respective test results. (*Id.* ¶ 17). According to the Complaint, at all relevant times to this action, Defendants knew or should have known that the Clinic's practices "involved the re-use of injection syringes and anesthesia bottles," creating a "foreseeable risk of infection/cross-contamination between patients with whom said syringes and anesthesia bottles were shared." (*Id.* ¶ 9).

Plaintiffs filed this action in state court on July 26, 2018, bringing the following causes of action against Defendants: (1) strict product liability; (2) breach of the implied warranty of fitness for a particular purpose; (3) negligence; (4) violation of the Nevada Deceptive Trade Practices Act; and (5) punitive damages. (*Id.* ¶¶ 19–60). On December 10, 2018, Defendants removed the case here on the grounds of diversity and federal-question jurisdiction. (*See* Pet. for Removal, ECF No. 1). Shortly thereafter, Plaintiffs filed the instant Motion requesting that the Court remand this action back to state court. (*See* Mot. to Remand, ECF No. 9).

II. LEGAL STANDARD

Federal courts are courts of limited jurisdiction, possessing only those powers granted by the Constitution and by statute. *See United States v. Marks*, 530 F.3d 799, 810 (9th Cir. 2008) (citation omitted). For this reason, "[i]f at any time before final judgment it appears that the

district court lacks subject-matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). District courts have subject-matter jurisdiction in two instances. First, district courts have subject-matter jurisdiction over civil actions that arise under federal law. 28 U.S.C. § 1331. Second, district courts have subject-matter jurisdiction over civil actions where no plaintiff is a citizen of the same state as a defendant and the amount in controversy exceeds $75,000. 28 U.S.C. § 1332(a).

A defendant may remove an action to federal court only if the district court has original jurisdiction over the matter. 28 U.S.C. § 1441(a). "Removal statutes are to be 'strictly construed' against removal jurisdiction." *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 667 (9th Cir. 2012) (quoting *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002)). "The 'strong presumption against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper,' and that the court resolves all ambiguity in favor of remand to state court." *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1042 (9th Cir. 2009) (quoting *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir.1992) (per curiam)).

III. DISCUSSION

Plaintiffs move to remand this action on the basis that the Court is without subject-matter jurisdiction. (*See generally* Mot. to Remand, ECF No. 9). Defendants oppose Plaintiffs' Motion, contending this Court enjoys both diversity jurisdiction, as well as federal-question jurisdiction. (Defs.' Resp. to Mot. to Remand ("Resp.") 4:6–9:13, ECF No. 14).

The Court begins with diversity jurisdiction, followed by federal-question jurisdiction.

A. Diversity Jurisdiction

Federal courts have diversity jurisdiction over all civil actions in which the amount in controversy: (1) exceeds the sum or value of $75,000; and (2) is between citizens of different states. 28 U.S.C. § 1332(a). In the present case, it is undisputed that complete diversity of citizenship exists because no Plaintiff is a citizen of the same state as any Defendant. (*See* Pet.

for Removal ¶¶ 8–11, ECF No. 1); (Compl. ¶¶ 1–4, ECF No. 1-1). Therefore, the question is whether the amount in controversy exceeds $75,000.

1. Amount in Controversy

In determining the amount in controversy, the Court's "starting point is whether it is facially apparent from the complaint that the jurisdictional amount is in controversy." *Lowdermilk v. United States Bank Nat'l Ass'n*, 479 F.3d 994, 998 (9th Cir. 2007). "[W]hen a complaint filed in state court alleges on its face an amount in controversy sufficient to meet the federal jurisdictional threshold, such requirement is presumptively satisfied unless it appears to a 'legal certainty' that the plaintiff cannot actually recover that amount." *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 699 (9th Cir. 2007) (quoting *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 402 (9th Cir. 1996)). "Where it is not facially evident from the complaint that more than $75,000 is in controversy, the removing party must prove, by a preponderance of the evidence, that the amount in controversy meets the jurisdictional threshold." *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090–91 (9th Cir. 2003) (per curiam).

Here, the amount in controversy is not facially evident from the Complaint. Plaintiffs' prayer for relief includes a request for general damages "in excess of $15,000," and unspecified sums for punitive damages, attorneys' fees, and costs. (*See* Compl. 13:7–13). Though Plaintiffs request special damages "in excess of $15,000," within four of the Complaint's substantive claims, those requests employ identical language and expressly seek the same damages arising from the same injury. (*See id.* ¶ 41) ("Plaintiffs have incurred special damages in the form of medical expense as well as emotional distress, anxiety, and fear during the pendency of their test results and for some time after . . . ."); (*see also id.* ¶¶ 48, 53, 56) (same). Given the overlapping requested relief, the value of special damages on the face of the Complaint is uncertain. *See Singh v. Glenmark Phargenerics, Inc.*, No. 2:14-cv-154-GMN-CWH, 2014 WL 4231364, at *2 (D. Nev. Aug. 26, 2014) ("[T]hese causes of action seek recovery for the same

injuries. Therefore, it would be fallacious to mechanically add these values in determining the total amount in controversy, as Plaintiffs cannot recover multiple times for the same harm.") (citing *Elyousef v. O'Reilly & Ferrario, LLC*, 443, 245 P.3d 547, 549 (Nev. 2010) ("[A] plaintiff may not recover damages twice for the same injury simply because he or she has two legal theories.")).

Aside for the $15,000 Plaintiffs seek in general damages and the $15,000 requested in special damages, the remaining categories of relief do not assign dollar amounts. Thus, because the jurisdictional amount is not facially evident, Defendants must show, by a preponderance of the evidence, that it is more likely than not that $75,000 is at stake. *Matheson*, 319 F.3d at 1090–91. On this point, Defendants point to Plaintiffs' prayer for punitive damages and attorneys' fees to satisfy the jurisdictional threshold.

a. Punitive Damages

Where punitive damages are recoverable under state law, such damages may be considered in determining the amount in controversy. *Gibson v. Chrysler Corp.*, 261 F.3d 927, 945 (9th Cir. 2001). Because Nevada permits recovery of punitive damages, NRS 42.005, Plaintiffs' prayer for the same may be considered in calculating the amount in controversy. In situations where the value of punitive damages is unclear, "[t]he defendant bears the burden of actually proving the facts to support jurisdiction." *Gaus*, 980 F.2d at 567. To establish the probable amount of punitive damages, a defendant must come forward with evidence, which may include jury verdicts or settlements in substantially similar cases. *See, e.g., Flores v. Standard Ins. Co.*, No. 3:09-cv-00501-LRH-RAM, 2010 WL 185949, at *5 (D. Nev. Jan. 15, 2010); *Campbell v. Hartford Life Ins. Co.*, 825 F. Supp. 2d 1005, 1008 (E.D. Cal. 2011).

Here, Defendants' argument with respect to punitive damages is too speculative to be credited. Defendants contend that the Complaint's reference to NRS 42.005, which permits an award of up to $300,000 when a plaintiff's compensatory damages do not exceed $100,000,

establishes that more than $75,000 is in on controversy. (Resp. 6:9–17). Defendants, however, neglect to support its argument with facts from this case or any analogous case to demonstrate the likelihood of a punitive damages award. "Mere allusion, in the absence of supplementary evidence, is insufficient for the Court to determine a probable punitive damages amount." *Cayer v. Vons Cos.*, No. 2:16-cv-02387-GMN-NJK, 2017 WL 3115294, at *3 (D. Nev. July 21, 2017); *see also Hannon v. State Farm Mut. Auto. Ins. Co.*, No. 2:14-cv-1623-GMN-NJK, 2014 WL 7146659, at *3 (D. Nev. Dec. 12, 2014) (excluding punitive damages in the amount in controversy given the defendant's "fail[ure] to identify any particular facts or allegations which might warrant a large punitive damage award."). Because Defendants have not met their burden, the Court will not include punitive damages in determining the amount in controversy.

b. Attorneys' Fees

"[W]here an underlying statute authorizes an award of attorneys' fees, either with mandatory or discretionary language, such fees may be included in the amount in controversy." *Guglielmino*, 506 F.3d at 700 (quoting *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir. 1998)). "This Court considers attorneys' fees to be within the amount in controversy if the removing party: (1) identifies 'an applicable statute which could authorize an award of attorneys' fees and (2) provide[s] an estimate as to the time the case will require and opposing counsel's hourly billing rate.'" *Cayer*, 2017 WL 3115294, at *2 (quoting *Hannon*, 2014 WL 7146659, at *2).

Here, Defendants neither identify a statute nor provide an estimate of Plaintiffs' counsel's billing rate. Instead, Defendants limit their argument to hypothesizing that because the parties have been in settlement negotiations going back to April 2016, Plaintiffs' attorneys' fees "as a practical matter" have likely surged. (Resp. 6:5–8). Such speculation is not enough to warrant inclusion of attorneys' fees in the amount in controversy. *See, e.g., Surber v. Reliance Nat. Indent. Co.*, 110 F. Supp. 2d 1227, 1232 (N.D. Cal. 2000) (declining to add

attorneys' fees to the amount-in-controversy calculation where "Defendant has not estimated the amount of time that the case will require, nor has it revealed plaintiff's counsel's hourly billing rate."); *see also Wilson v. Union Sec. Life Ins. Co.*, 250 F. Supp. 2d 1260, 1264 (D. Idaho 2003) (stating a defendant "must do more than merely point to [a plaintiff's] request for attorney's fees; upon removal it must demonstrate the probable amount of attorney's fees").

To summarize, Defendants have not met their burden of showing, by a preponderance of the evidence, that more than $75,000 is at stake in this case. Accordingly, the Court cannot exercise diversity jurisdiction over this matter.

B. Federal-Question Jurisdiction

28 U.S.C. § 1331 vests federal district courts with original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." "To remove a case as one falling within federal-question jurisdiction, the federal question ordinarily must appear on the face of a properly pleaded complaint; an anticipated or actual federal defense generally does not qualify a case for removal." *Jefferson Cty. v. Acker*, 527 U.S. 423, 430–31 (1999); *see also Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) ("The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.").

Defendants do not contest that the Complaint, on its face, is solely comprised of state-law claims. Rather, Defendants appear to advance two distinct theories to support federal-question jurisdiction: (1) Plaintiffs' claims are preempted because they rely on state-law duties that conflict with those imposed by federal law; and (2) the Complaint necessarily raises a substantial federal question because resolution of the claims requires examination of federal issues that fall within the exclusive authority of the U.S. Food and Drug Administration ("FDA"). (Resp. 6:19–9:13). The Court addresses each argument in turn.

1. Federal Preemption

According to Defendants, the Complaint necessarily raises a federal issue because the Supremacy Clause preempts Plaintiffs' state law claims. (*Id.* 7:18–23). Defendants explain that the wrongful conduct alleged—Defendants' improper packaging and distribution of propofol—is governed exclusively by the FDA, which has promulgated regulations establishing baseline manufacturing requirements for the preparation of drug products. (*Id.* 4:26–5:18) (citing 21 C.F.R. § 211). And because Plaintiffs' claims rely upon state-law duties that go beyond what the FDA requires, the issue of federal preemption is necessarily raised. (*Id.* 7:15–23, 8:11–9:13).

To the extent Defendants invoke "defensive preemption," the Court is unconvinced. It is well settled that "a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption." *In re NOS Commc'ns*, 1357, 495 F.3d 1052, 1057 (9th Cir. 2007) (emphasis in original) (quoting *Caterpillar*, 482 U.S. at 392). This rule applies "even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar*, 482 U.S. at 392.

Insofar as Defendants advance a "complete preemption" argument, it necessarily fails. The U.S. Supreme Court has recognized that the "preemptive force of some statutes is so strong that they 'completely preempt' an area of state law." *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1107 (9th Cir. 2000) (citing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)). "Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar*, 482 U.S. at 393 (internal citation and quotation marks omitted). Complete preemption is "rare" and has only been endorsed by the U.S. Supreme Court with respect to three federal statutes: § 301 of the Labor Relations Act; §§ 85 and 86 of the National Bank Act; and § 502 of the Employee Retirement Income Security Act.

See Retail Prop. Tr. v. United Bhd. of Carpenters & Joiners of Am., 768 F.3d 938, 948 n.5 (9th Cir. 2014).

In the present case, Defendants have not made any showing as to why the Federal Food, Drug, and Cosmetic Act ("FDCA") should be counted as a completely preemptive statutory scheme. In any event, the Court is persuaded by the overwhelming weight of authority holding that Congress's endorsement of *some* state-law claims arising from FDCA regulations conclusively defeats arguments in favor of complete preemption. *See, e.g.*, *Bridges v. Teva Parenteral Medicines, Inc.*, No. 2:18-cv-02310-JCM-VCF, 2019 WL 1585109, at *4 (D. Nev. Apr. 12, 2019) (collecting Ninth Circuit district court cases holding that "the FDCA does not completely preempt state law"); *see also Mihok v. Medtronic, Inc.*, 119 F. Supp. 3d 22, 32 (D. Conn. 2015) ("Congress anticipated and approved of limited state court analysis and application of the FDA regulations when it decided not to completely preempt parallel state law claims.") (citing *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 330 (2008) (holding that 21 U.S.C. § 360 of the FDCA does not "prevent a State from providing a damages remedy for claims premised on a violation of FDA regulations; the state duties in such a case 'parallel' rather than add to, federal requirements.")).

Next, the Court turns to Defendants' contention that Plaintiffs' claims necessarily turn on a question of federal law.

2. Jurisdiction Under *Gunn-Grable*

The U.S. Supreme Court has identified a "special and small category" of cases that arise under federal-question jurisdiction notwithstanding a complaint's sole reliance on state-law claims. *Gunn v. Minton*, 568 U.S. 251, 258 (2013) (citation omitted). "Federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Id.* (citing *Grable & Sons Metal Prod., Inc. v. Darue Eng'g &*

Mfg., 545 U.S. 308, 313–14 (2005)). To support federal-question jurisdiction, all four *Gunn-Grable* requirements must be satisfied. *Id.*

Defendants contend that the Complaint requires examination of the FDCA's "duty of sameness," under 21 U.S.C. § 355 and 21 C.F.R. § 314, which requires that generic drug manufactures label their products identically to the respective brand manufacturer's label. (Resp. 5:23–6:1). According to Defendants, this duty "applies to every portion of Plaintiffs' complained-of conduct, including labeling, warnings, route of administration, dosage form, and strength." (*Id.* 6:1–3). Therefore, because the duty of sameness required that Defendants' labeling conform to that of the brand-name product, the Complaint necessarily touches upon Defendants' compliance with federal law. (*Id.* 6:3–17).

The problem for Defendants is that the Complaint does not allege that Defendants violated the FDCA's duty of sameness, or any federal duty for that matter.[2] Tellingly, Defendants do not cite to any portion of the Complaint for this proposition. Even if Plaintiffs raised the FDCA or the duty of sameness as an element of a claim, that would still not end the federal-question inquiry. For one thing, it is axiomatic that "the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 813 (1986). Furthermore, it is well established that "[w]hen a claim can be supported by alternative and independent theories—one of which is a state law theory and one of which is a federal law theory—federal question jurisdiction does not attach because federal law is not a necessary element of the claim." *Bank of Am. Corp.*, 672 F.3d at 675 (quoting *Rains v. Criterion Sys., Inc.*, 80 F.3d 339, 346 (9th Cir.

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[2] On this basis, Defendants' proffered supplemental authority is readily distinguishable. *See Bowdrie v. Sun Pharm. Indus. Ltd.*, 909 F. Supp. 2d 179, 183–84 (E.D.N.Y. 2012) (holding a federal issue was necessarily raised in the FDCA context where the complaint repeatedly and expressly alleged the "ongoing federal duty of sameness," as elements of the state-law claims). Additionally, *Bowdrie* concerned a generic manufacturer's failure to update its labeling to be consistent with the brand-name manufacturer's modified label. *Id.* at 181. In this case, by contrast, no such facts are alleged.

1996)). Indeed, each of Plaintiffs' claims refer only to common law duties under Nevada law and, consequently, do not appear to require federal analysis for their resolution. As Defendants have not articulated how any *specific* claim necessitates resort to federal law, Defendants have failed to meet their burden of showing otherwise. *See Cruz v. Preferred Homecare*, No. 2:14-cv-00173-MMD-CWH, 2014 WL 4699531, at *3 (D. Nev. Sept. 22, 2014) (rejecting the defendants' reliance on FDA regulation to establish the first *Gunn-Grable* element as "wholly insufficient, especially when contrasted with *Grable* and *Gunn*, in which the removing parties demonstrated that plaintiffs' *specific* claims hinged on a court's adjudication of a federal issue.") (emphasis in original).

Thus, Defendants have failed to establish the first element of the *Gunn-Grable* test. As the party asserting federal jurisdiction, Defendants bear the burden of showing removal is proper. *Gaus*, 980 F.2d 566. This burden is of enhanced significance in this context, where the weight of authority suggests no federal-question jurisdiction exists. *See, e.g.*, *Merrell Dow*, 478 U.S. at 817 (holding that a complaint's state-law claims against a drug manufacturer, premised upon FDCA misbranding violations, do not support federal-question jurisdiction); *Grable*, 545 U.S. at 316–20 (discussing *Merrell Dow*'s holding and reiterating "if the federal labeling standard without a federal cause of action could get a state claim into federal court, so could any other federal standard without a federal cause of action."); *Burrell v. Bayer Corp.*, 918 F.3d 372, 381 (4th Cir. 2019) (concluding a plaintiff's state-law claims regarding FDA-regulated medical devices do not satisfy the third and fourth prongs of *Gunn-Grable*, and expressing doubt as to whether such claims necessarily raise federal issues under the first prong); *see also Nunes v. Affinitylifestyles.com, Inc.*, No. 2:16-cv-02265-APG-NJK, 2017 WL 359178 (D. Nev. Jan. 23, 2017); *Brandle v. McKesson Corp.*, No. C 12-cv-05970 WHA, 2013 WL 1294630 (N.D. Cal. Mar. 28, 2013). Because Defendants have not put forth a thorough, meaningful case

for application of the *Gunn-Grable* exception, the strong presumption against removal jurisdiction remains undisturbed.

In short, Defendants have not satisfied the Court that it may exercise diversity jurisdiction or federal-question jurisdiction. Consequently, this action must be remanded back to state court for want of subject-matter jurisdiction. Plaintiffs' Motion to Remand is therefore granted.

IV. CONCLUSION

IT IS HEREBY ORDERED that Plaintiffs' Motion to Remand, (ECF No. 9), is **GRANTED**.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss, (ECF No. 4), is **DENIED as moot**.

IT IS FURTHER ORDERED that this matter is hereby **REMANDED** to the Eighth Judicial District Court for the State of Nevada, County of Clark.

The Clerk of Court is instructed to close this case.

DATED this 26 day of August, 2019.

Gloria M. Navarro, Chief Judge
United States District Judge

EXHIBIT 5

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TRIAL LAWYERS

DISTRICT COURT
CLARK COUNTY, NEVADA

HENRY CHANIN and LORRAINE CHANIN, husband and wife

Plaintiffs,

vs.

TEVA PARENTERAL MEDICINES, INC.,, formerly known as SICOR PHARMACEUTICALS, INC., a Delaware Corporation; SICOR, INC., a Delaware Corporation; BAXTER HEALTHCARE CORPORATION, a Delaware Corporation

Defendants.

CASE NO.: A571172
DEPT.NO.: X

JUDGMENT UPON THE JURY VERDICT

JUDGMENT UPON THE JURY VERDICT

This action came on for trial before the Court and the jury, the Honorable Jessie Walsh, District Judge, presiding, and the issues having been duly tried and the jury having

duly rendered their verdict[1] and also special verdict[2],

IT IS ORDERED AND ADJUDGED that Plaintiffs, HENRY CHANIN and LORRAINE CHANIN, have and recover of the Defendants, TEVA PARENTERAL MEDICINES, INC., formerly known as SICOR PHARMACEUTICALS, INC., a Delaware Corporation, SICOR, INC., a Delaware Corporation; and BAXTER HEALTHCARE CORPORATION, a Delaware Corporation, the following sums:

COMPENSATORY DAMAGES:

Henry Chanin against TEVA & BAXTER	$ 3,250,000.00
Lorraine Chanin against TEVA & BAXTER	$ 1,850,000.00
Total Compensatory Damages:	**$ 5,100,000.00**

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs' compensatory damages in the amount of Five Million One Hundred Thousand and 00/100 Dollars ($5,100,000.00), shall bear prejudgment interest in accordance with *Lee v. Ball, 116 P.3d 64*, (2005) at the rate of 5.25% per annum from the date of service of the Summons and Complaint, on October 6, 2008 through May 21, 2010 as follows:

PREJUDGMENT INTEREST:

10/06/08 through 05/28/10 =	$ 439,402.44
(599 days x $733.56 per day)	

PUNITIVE DAMAGES:

Henry and Lorraine Chanin against TEVA	$ 356,000,000.00
Henry and Lorraine Chanin against BAXTER	$ 144,000,000.00
Total Punitive Damages:	**$ 500,000,000.00**

1 Exhibit 1, Verdict
2 Exhibit 2, Special Verdict

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs' punitive damages in the amount of Five Hundred Million and 00/100 Dollars ($500,000,000.00), shall bear postjudgment interest in accordance with *Lee v. Ball, 116 P.3d 64*, (2005) at the rate of 5.25% per annum from the time of entry of judgment until satisfied as follows:

POSTJUDGMENT INTEREST:

$71,917.80 per day

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs shall be awarded their costs of the action, the amount of which to be determined by the Court.

NOW, THEREFORE, Judgment Upon the Verdict in favor of Plaintiffs, HENRY AND LORRAINE CHANIN, is hereby given for Five Hundred Five Million, Five Hundred Thirty-Nine Thousand Four Hundred Two and 44/100 Dollars (**$505,539,402.44**) against Defendants which shall bear postjudgment interest at the current rate of 5.25% or $72,651.36 per day, until satisfied.

DATED this 1st day of June, 2010.

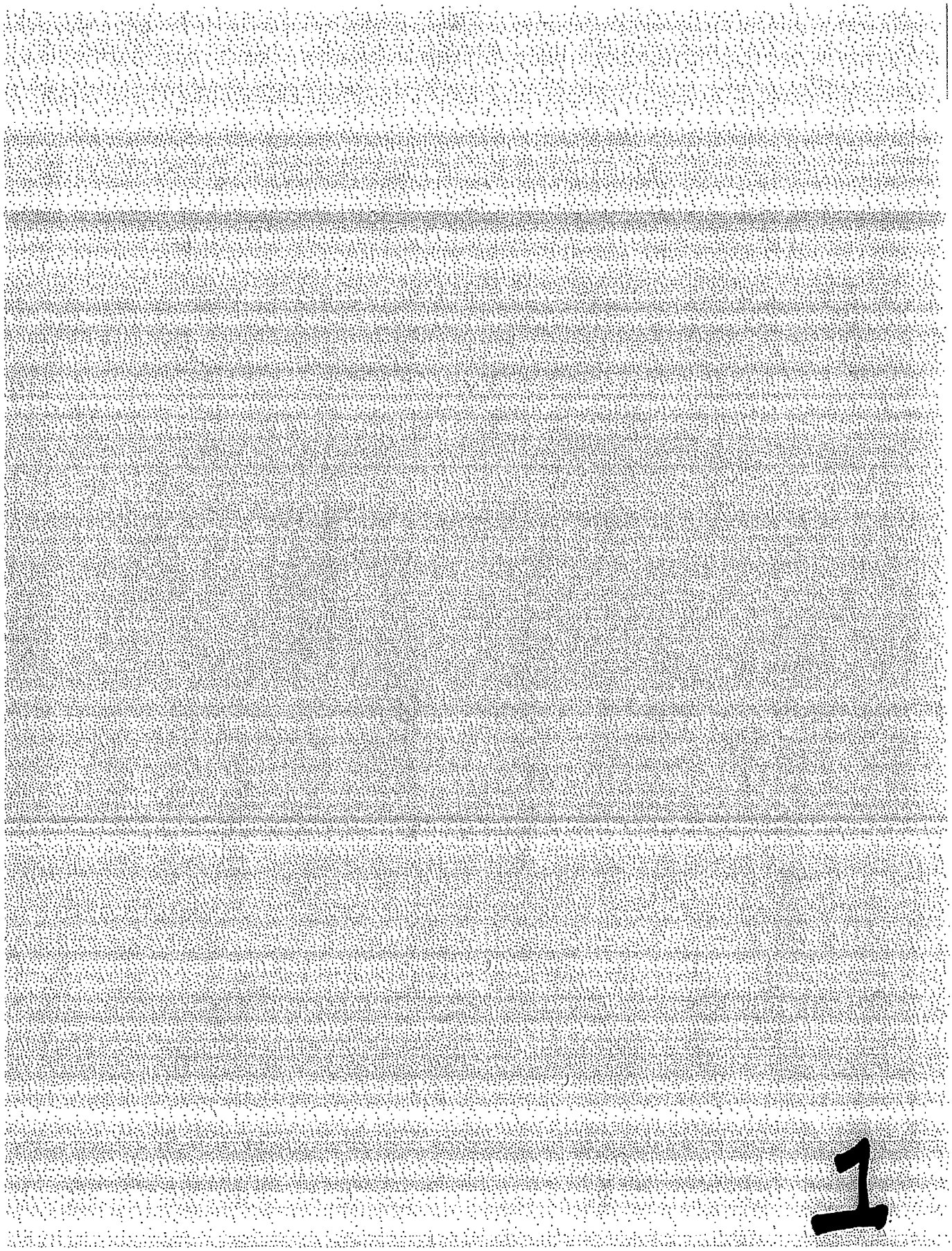
Jessie Walsh
DISTRICT COURT JUDGE

Respectfully Submitted by:

MAINOR EGLET COTTLE

ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
ROBERT W. COTTLE, ESQ.
Nevada Bar No. 4576
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
400 South Fourth Street, Suite 600
Las Vegas, NV 89101

MAINOR EGLET COTTLE
TRIAL LAWYERS



STEVEN D. GRIERSON
CLERK OF THE COURT

MAY 05 2010

BY TERI BRAEGELMANN, DEPUTY

DISTRICT COURT

CLARK COUNTY, NEVADA

HENRY CHANIN and LORRAINE CHANIN, husband and wife Plaintiffs. vs. TEVA PARENTERAL MEDICINES, INC., formerly known as SICOR PHARMACEUTICALS, INC., a Delaware Corporation; SICOR, INC., a Delaware Corporation; BAXTER HEALTHCARE CORPORATION, a Delaware Corporation Defendants.	CASE NO.: A571172 DEPT.NO.: X A571172 Henry Chanin, et al. v. Teva Parenteral Medicines, Inc., et al.

VERDICT FORM

If you find that the Defendant(s) are liable to the Plaintiff(s) set forth below under any one of the different liability claims for compensatory damages against such Defendants, check YES in the appropriate box and fill in the amount of compensation that you deem appropriate for each Plaintiff(s) for compensatory damages.

If you find that the Defendant(s) are not liable to the Plaintiff(s) set forth below under any of the different liability claims for compensatory damages, check NO in the appropriate box.

1. TEVA is liable to Henry Chanin for the following claims, if any:

   a. Strict liability for defective design.

   YES ___ NO X

   b. Failure to warn.

   YES X NO ___

   c. Breach of the implied warranty of fitness for a particular purpose.

   YES X NO ___

2. BAXTER is liable to Henry Chanin the following claims, if any:

a. Strict liability for defective design.

YES ___ NO X

b. Failure to warn.

YES X NO ___

c. Breach of the implied warranty of fitness for a particular purpose.

YES X NO ___

3. If you find TEVA is liable to HENRY CHANIN, you must also determine if TEVA is liable to LORRAINE CHANIN for loss of consortium.

YES X NO ___

4. If you find BAXTER is liable to HENRY CHANIN, you must also determine if BAXTER is liable to LORRAINE CHANIN for loss of consortium.

YES X NO ___

5. If you found TEVA is liable to HENRY CHANIN or to LORRAINE CHANIN for compensatory damages, you must also determine if TEVA is liable for punitive damages.

YES X NO ___

6. If you found BAXTER is liable to HENRY CHANIN or to LORRAINE CHANIN for compensatory damages, you must also determine if BAXTER is liable for punitive damages.

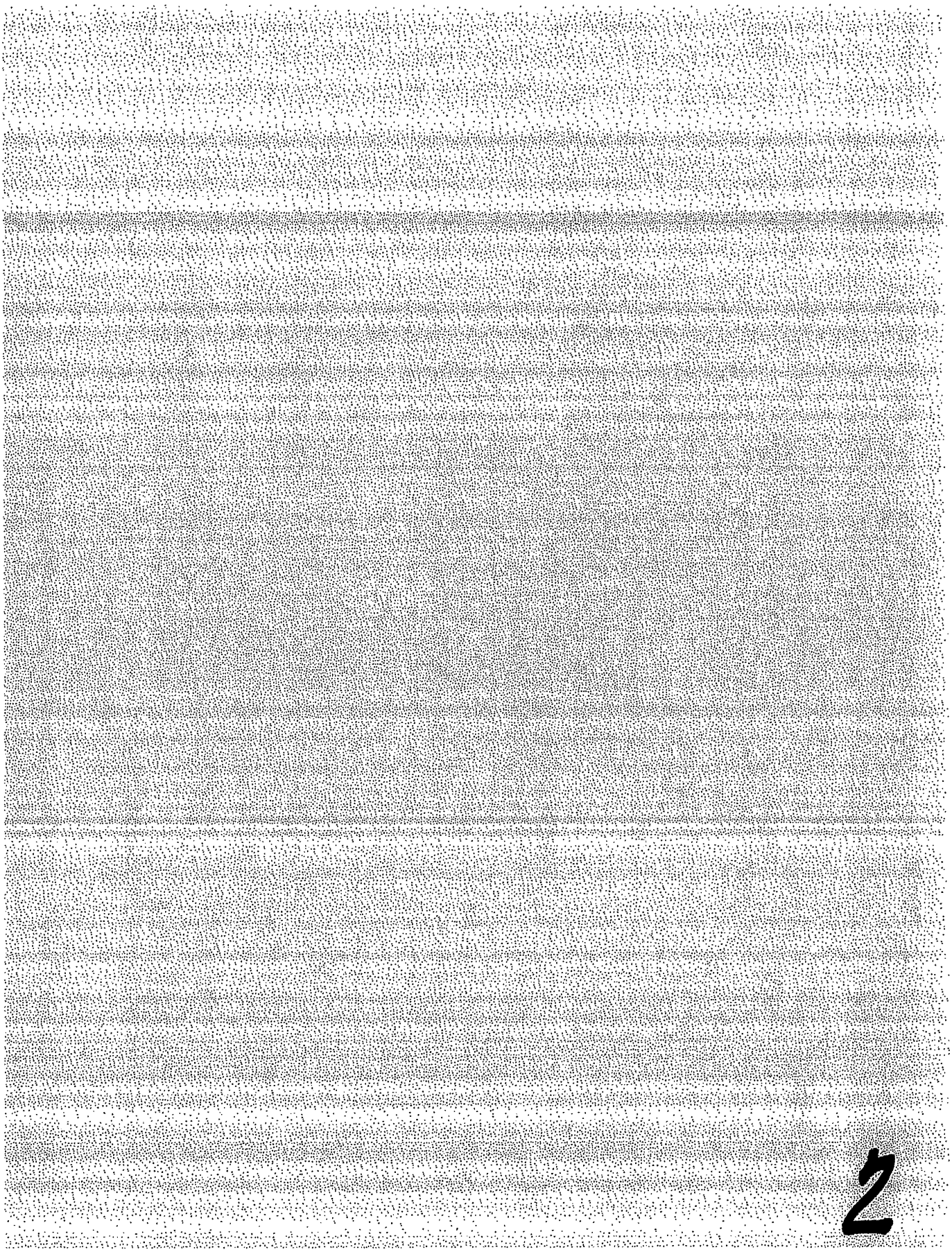
YES X NO ___

HENRY CHANIN COMPENSATORY DAMAGES $ 3.25 million

LORRAINE CHANIN COMPENSATORY DAMAGES $ 1.85 million

DATED this 5th day of May, 2010.

(FOREPERSON)



FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

MAY 07 2010

BY, _____ TERI BRADELMANN DEPUTY

DISTRICT COURT

CLARK COUNTY, NEVADA

HENRY CHANIN and LORRAINE CHANIN, husband and wife

Plaintiffs,

vs.

TEVA PARENTERAL MEDICINES, INC., formerly known as SICOR PHARMACEUTICALS, INC., a Delaware Corporation; SICOR, INC., a Delaware Corporation; BAXTER HEALTHCARE CORPORATION, a Delaware Corporation

Defendants.

CASE NO.: A571172
DEPT.NO.: X

SPECIAL VERDICT

We, the jury in the above entitled action, assess the amount of punitive damages as follows:

Punitive Damages Against TEVA $ 356,000,000

Punitive Damages Against BAXTER $ 144,000,000

DATED this 1st day of May, 2010.

FOREPERSON

EXHIBIT 6

CLERK OF THE COURT

JGJV
ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
ARTEMUS H. HAM, ESQ.
Nevada Bar No. 7001
MAINOR EGLET
400 South Fourth Street, Suite 600
Las Vegas, NV 89101
(702) 450-5400
Attorneys for Plaintiff Anne Arnold

WILLIAM S. KEMP, ESQ.
Nevada Bar No. 1205
KEMP JONES & COULTHARD LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, NV 89169
(702) 385-6000
Attorney for Plaintiffs, Sacks and Devito

MAINOR EGLET

DISTRICT COURT
CLARK COUNTY, NEVADA

RICHARD C. SACKS, individually Plaintiff, vs. SICOR, INC., a Delaware Corporation; TEVA PARENTERAL MEDICINES, INC., formerly known as SICOR PHARMACEUTICALS, INC., A Delaware Corporation, BAXTER HEALTHCARE CORPORATION, a Delaware Corporation. Defendants.	CASE NO.: A572315 DEPT. NO.: XXVIII **JUDGMENT UPON THE JURY VERDICT**
ANNE ARNOLD and JAMES ARNOLD, individually and as husband and wife Plaintiffs, vs. SICOR, INC., a Delaware Corporation; TEVA PARENTERAL MEDICINES. INC., formerly known as SICOR PHARMACEUTICALS, INC., A Delaware Corporation, BAXTER HEALTHCARE CORPORATION, a Delaware Corporation; Defendants.	CASE NO.: A576071 DEPT. NO.: XXVIII

☐ Voluntary Dis	☐ Stip Dis	☐ Sum Jdgmt	FINAL D
☐ Involuntary (stat) Dis	☐ Stip Jdgmt	☐ Non-Jury Trial	☐ Time
☐ Jdgmt on Arb Award	☐ Default Jdgmt	☒ Jury Trial	☐ Disn
☐ Mtn to Dis (by deft)	☐ Transferred		☐ Judg

11/17/11 (28)

ANTHONY V. DEVITO and DONNA JEAN DEVITO, individually and as husband and wife, Plaintiffs, vs. SICOR, INC., a Delaware Corporation; TEVA PARENTERAL MEDICINES, INC., formerly known as SICOR PHARMACEUTICALS, INC., A Delaware Corporation, MCKESSON CORPORATION, a Delaware Corporation. Defendants.	CASE NO.: A583058 DEPT. NO.: XXVIII

JUDGMENT UPON THE JURY VERDICT

This action came on for trial before the Court and the jury, the Honorable Ronald J. Israel, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered their verdict[1] and also special verdict[2],

IT IS ORDERED AND ADJUDGED that Plaintiffs, RICHARD SACKS, ANNE ARNOLD and JAMES ARNOLD, ANTHONY V. DEVITO and DONNA JEAN DEVITO, have and recover of the Defendants, TEVA PARENTERAL MEDICINES, INC., formerly known as SICOR PHARMACEUTICALS, INC., a Delaware Corporation, SICOR, INC., a Delaware Corporation, BAXTER HEALTHCARE CORPORATION, a Delaware Corporation, and MCKESSON CORPORATION, a Delaware Corporation, the following sums:

COMPENSATORY DAMAGES FOR RICHARD SACKS:

Richard Sacks against TEVA & BAXTER	$ 5,000,000.00
Total Compensatory Damages for Richard Sacks:	**$ 5,000,000.00**

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's compensatory damages in the amount of Five Million 00/100 Dollars ($5,000,000.00), shall bear prejudgment interest in accordance with *Lee v. Ball, 116 P.3d 64*, (2005) at the rate of 5.25% per annum from the date of

[1] Exhibit 1, Verdict
[2] Exhibit 2, Special Verdict

MAINOR EGLET

service of the Summons and Complaint on Baxter Healthcare Corporation on September 29, 2008, and Sicor Pharmaceuticals, Inc. on January 20, 2009 and through November 9, 2011 as follows:

PREJUDGMENT INTEREST FOR RICHARD SACKS:

09/29/08 through 11/09/11 = $ 816,986.30
(1136 days x $719.17 per day)

COMPENSATORY DAMAGES FOR ANNE ARNOLD AND JAMES ARNOLD:

Anne Arnold against TEVA & BAXTER	$ 8,500,000.00
James Arnold against TEVA & BAXTER	$ 900,000.00
Total Compensatory Damages for Anne and James Arnold:	**$ 9,400,000.00**

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs' compensatory damages in the amount of Nine Million Four Hundred Thousand and 00/100 Dollars ($9,400,000.00), shall bear prejudgment interest in accordance with *Lee v. Ball, 116 P.3d 64*, (2005) at the rate of 5.25% per annum from the date of service of the Summons and Complaint on Baxter Healthcare Corporation on December 23, 2008, and Sicor Pharmaceuticals, Inc. on January 16, 2009 and through November 9, 2011 as follows:

PREJUDGMENT INTEREST FOR ANNE ARNOLD AND JAMES ARNOLD:

12/23/08 through 11/09/11 = $ 1,421,009.58
(1051 days x $1,352.05 per day)

MAINOR EGLET

COMPENSATORY DAMAGES FOR ANTHONY DEVITO AND DONNA JEAN DEVITO:

Anthony Devito against TEVA & MCKESSON	$ 5,000,000.00
Donna Jean Devito against TEVA & MCKESSON	$ 700,000.00
Total Compensatory Damages for Anne and James Arnold:	**$ 5,700,000.00**

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs' compensatory damages in the amount of Five Million Seven Hundred Thousand and 00/100 Dollars ($5,700,000.00), shall bear prejudgment interest in accordance with *Lee v. Ball, 116 P.3d 64*, (2005) at the rate of 5.25% per annum from the date of service of the Summons and Complaint on McKesson Corporation on March 5, 2009, and Sicor Pharmaceuticals, Inc. on March 7, 2009 and through November 9, 2011 as follows :

PREJUDGMENT INTEREST FOR ANTHONY DEVITO AND DONNA JEAN DEVITO:

03/05/09 through 11/09/11 =	$ 802,645.89
(979 days x $819.86 per day)	

PUNITIVE DAMAGES:

Richard Sacks, Anne Arnold, James Arnold, Anthony Devito and Donna Jean Devito against TEVA:	$ 89,375,000.00
Richard Sacks, Anne Arnold and James Arnold Against BAXTER:	$ 55,250,000.00
Anthony Devito and Donna Jean Devito against McKESSON	$ 17,875,000.00
Total Punitive Damages:	**$ 162,500,000.00**

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs' punitive damages in the amount of One Hundred Sixty Two Million, Five Hundred Thousand and 00/100 Dollars ($162,500,000.00), shall bear postjudgment interest in accordance with *Lee v. Ball, 116 P.3d 64*,

(2005) at the rate of 5.25% per annum from the time of entry of judgment until satisfied as follows:

POSTJUDGMENT INTEREST:

$23,373.28 per day

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs may be awarded their costs of the action, the amount of which to be determined by the Court.

NOW, THEREFORE, Judgment Upon the Verdict in favor of Plaintiffs, RICHARD SACKS, ANNE ARNOLD and JAMES ARNOLD, ANTHONY V. DEVITO and DONNA JEAN DEVITO, is hereby given for One Hundred Eighty Five Million, Six Hundred Forty Thousand Six Hundred Forty One and 77/100 Dollars (**$185,640,641.77**) against Defendants which shall bear post judgment interest at the current rate of 5.25% or $26,701.73 per day, until satisfied.

DATED this 16 day of November, 2011.

DISTRICT COURT JUDGE

JV

Respectfully Submitted by:

Dated this 9th day of November, 2011.

ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
ARTEMUS W. HAM, ESQ.
Nevada Bar No. 7001
400 South Fourth Street, Suite 600
Las Vegas, NV 89101
Attorneys for Plaintiffs

WILLIAM S. KEMP, ESQ.
Nevada Bar No. 1205
KEMP JONES & COULTHARD LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, NV 89169
Attorney for Plaintiffs

MAINOR EGLET

EXHIBIT "1"

ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
OCT 0 6 2011
643pm
BY, KATHY KLEIN, DEPUTY

DISTRICT COURT

CLARK COUNTY, NEVADA

RICHARD C. SACKS, individually Plaintiff, vs. SICOR, INC., a Delaware Corporation; TEVA PARENTERAL MEDICINES, INC., formerly known as SICOR PHARMACEUTICALS, INC., A Delaware Corporation, BAXTER HEALTHCARE CORPORATION, a Delaware Corporation. Defendants.	CASE NO.: A572315 DEPT. NO.: XXVIII
ANNE ARNOLD and JAMES ARNOLD, individually and as husband and wife Plaintiffs, vs. SICOR, INC., a Delaware Corporation; TEVA PARENTERAL MEDICINES, INC., formerly known as SICOR PHARMACEUTICALS, INC., A Delaware Corporation, BAXTER HEALTHCARE CORPORATION, a Delaware Corporation; Defendants.	CASE NO.: A576071 DEPT. NO.: XXVIII
ANTHONY V. DEVITO and DONNA JEAN DEVITO, individually and as husband and wife, Plaintiffs, vs. SICOR, INC., a Delaware Corporation; TEVA PARENTERAL MEDICINES, INC., formerly known as SICOR PHARMACEUTICALS, INC., A Delaware Corporation, MCKESSON CORPORATION, a Delaware Corporation. Defendants.	CASE NO.: A583058 DEPT. NO.: XXVIII

VERDICT

We, the jury in the above-entitled action, return the following verdict:

Question No. 1: Is TEVA liable to ANNE ARNOLD for any of the following claims?

a. Duty to monitor

YES X NO _____

b. Defective product design

YES _____ NO X

c. Failure to send Dear Doctor letter

YES X NO _____

d. Breach of the implied warranty of fitness for particular purpose

YES X NO _____

Question No. 2: Is BAXTER liable to ANNE ARNOLD for any of the following claims?

a. Defective product design

YES _____ NO X

b. Failure to send Dear Doctor letter

YES X NO _____

c. Breach of the implied warranty of fitness for particular purpose

YES X NO _____

Question No. 3: If you find TEVA is liable to ANNE ARNOLD, is TEVA also liable to JAMES ARNOLD for loss of consortium?

YES X NO _____

Question No. 4: If you find BAXTER is liable to ANNE ARNOLD, is BAXTER also liable to JAMES ARNOLD for loss of consortium?

YES X NO _____

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Question No. 5: Is TEVA liable to ANTHONY DEVITO for any of the following claims?

a. Duty to monitor

YES X NO _____

b. Defective product design

YES _____ NO X

c. Failure to send Dear Doctor letter

YES X NO _____

d. Breach of the implied warranty of fitness for particular purpose

YES X NO _____

Question No. 6: Is MCKESSON liable to ANTHONY DEVITO for any of the following claims?

a. Defective product design

YES _____ NO X

b. Failure to send Dear Doctor letter

YES X NO _____

c. Breach of the implied warranty of fitness for particular purpose

YES X NO _____

Question No. 7: If you find TEVA is liable to ANTHONY DEVITO, is TEVA also liable to DONNA DEVITO for loss of consortium?

YES X NO _____

Question No. 8: If you find MCKESSON is liable to ANTHONY DEVITO, is MCKESSON also liable to DONNA DEVITO for loss of consortium?

YES X NO _____

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Question No. 9: Is TEVA liable to RICHARD SACKS for any of the following claims?

a. Duty to monitor

YES X NO ____

b. Defective product design

YES ____ NO X

c. Failure to send Dear Doctor letter

YES X NO ____

d. Breach of the implied warranty of fitness for particular purpose

YES X NO ____

Question No. 10: Is BAXTER liable to RICHARD SACKS for any of the following claims?

a. Defective product design

YES ____ NO X

b. Failure to send Dear Doctor letter

YES X NO ____

c. Breach of the implied warranty of fitness for particular purpose

YES X NO ____

Question No. 11: Do you find that any of the Plaintiffs have suffered damages as a result of any Defendants' conduct? If so, please state the damages, if any:

ANNE ARNOLD COMPENSATORY DAMAGES $ 8,500,000

JAMES ARNOLD COMPENSATORY DAMAGES $ 900,000

ANTHONY DEVITO COMPENSATORY DAMAGES $ 5,000,000

DONNA DEVITO COMPENSATORY DAMAGES $ 700,000

RICHARD SACKS COMPENSATORY DAMAGES $ 5,000,000

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Question No. 12: If you found that TEVA is liable to RICHARD SACKS, ANNE ARNOLD and/or ANTHONY DEVITO for compensatory damages, is TEVA also liable for punitive damages?

YES X NO _____

Question No. 13: If you found that BAXTER is liable to ANNE ARNOLD and/or RICHARD SACKS for compensatory damages, is BAXTER also liable for punitive damages?

YES X NO _____

Question No. 14: If you found that MCKESSON is liable to ANTHONY DEVITO for compensatory damages, is MCKESSON also liable for punitive damages?

YES X NO _____

DATED this 10th day of October, 2011.

Jerry L. Foster
FOREPERSON

EXHIBIT "2"

ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

RICHARD C. SACKS, individually Plaintiff, vs. SICOR, INC., a Delaware Corporation; TEVA PARENTERAL MEDICINES, INC., formerly known as SICOR PHARMACEUTICALS, INC., A Delaware Corporation, BAXTER HEALTHCARE CORPORATION, a Delaware Corporation. Defendants.	CASE NO.: A572315 DEPT. NO.: XXVIII
ANNE ARNOLD and JAMES ARNOLD, individually and as husband and wife Plaintiffs, vs. SICOR, INC., a Delaware Corporation; TEVA PARENTERAL MEDICINES, INC., formerly known as SICOR PHARMACEUTICALS, INC., A Delaware Corporation. BAXTER HEALTHCARE CORPORATION, a Delaware Corporation; Defendants.	CASE NO.: A576071 DEPT. NO.: XXVIII
ANTHONY V. DEVITO and DONNA JEAN DEVITO, individually and as husband and wife, Plaintiffs. vs. SICOR, INC., a Delaware Corporation; TEVA PARENTERAL MEDICINES, INC., formerly known as SICOR PHARMACEUTICALS, INC., A Delaware Corporation, MCKESSON CORPORATION, a Delaware Corporation. Defendants.	CASE NO.: A583058 DEPT. NO.: XXVIII

SPECIAL VERDICT

We, the jury in the above-entitled action, assess the amount of punitive damages as follows:

Punitive Damages TEVA $89,375,000

Punitive Damages BAXTER $55,250,000

Punitive Damages MCKESSON $17,875,000

DATED this 10th day of October, 2011.

FOREPERSON

EXHIBIT 7

JUJV

EDWARD M. BERNSTEIN, ESQ.
Nevada Bar #1642
PATTI S. WISE, ESQ.
Nevada Bar #5624
EDWARD M. BERNSTEIN & ASSOCIATES
500 South Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 384-4000
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RICHARD H. FRIEDMAN, ESQ.
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LINCOLN D. SIELER, ESQ.
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Admitted Pro Hac Vice
FRIEDMAN | RUBIN
1126 Highland Avenue
Bremerton, WA 98337
Telephone: (360) 782-4300

Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY NEVADA

MICHAEL WASHINGTON and JOSEPHINE WASHINGTON, Plaintiffs, vs. TEVA PARENTERAL MEDICINES, INC.; SICOR, INC.; BAXTER HEALTHCARE CORPORATION, Defendants.	CASE NO. A558164 DEPT NO. XV

JUDGMENT UPON THE JURY VERDICT

This action came on for trial before the Court and the jury, the Honorable Abbi Silver, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered their verdict[1].

IT IS ORDERED AND ADJUDGED that Plaintiffs, MICHAEL WASHINGTON and JOSEPHINE WASHINGTON, have and recover of the Defendants, TEVA PARENTERAL MEDICINES, INC. (hereinafter "TEVA"), SICOR, INC. (hereinafter "SICOR"), and BAXTER HEALTHCARE CORPORATION (hereinafter "BAXTER"), jointly and severally the following sums:

COMPENSATORY DAMAGES:

Michael Washington against TEVA, SICOR and BAXTER $ 7,000,000.00

Josephine Washington against TEVA, SICOR and BAXTER $ 7,000,000.00

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff MICHAEL WASHINGTON have and recover of Defendants TEVA and SICOR, jointly and severally, the following sum as Punitive Damages:

PUNITIVE DAMAGES:

Michael Washington against TEVA and SICOR $ 60,000,000.00

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff MICHAEL WASHINGTON have and recover of Defendant BAXTER the following sum as Punitive Damages:

PUNITIVE DAMAGES:

Michael Washington against BAXTER $ 30,000,000.00

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[1] *See* Special Verdict Forms attached as Exhibit "1".

EDWARD M. BERNSTEIN & ASSOCIATES
ATTORNEYS AT LAW
500 SO. FOURTH ST.
LAS VEGAS,
NEVADA 89101
(702) 240-0000

IT IS FURTHER ORDERED AND ADJUDGED that this Judgment Upon the Verdict shall bear postjudgment interest as provided by NRS 17.130 from the date of entry of judgment until satisfied.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs shall be awarded their costs of the action jointly and severally against the Defendants, the amount of which is to be determined by the Court upon Plaintiffs' Memorandum of Costs, to be filed within five (5) days of entry of this Judgment Upon the Verdict. Plaintiffs may also bring any motion for prejudgment interest and attorneys' fees pursuant to NRCP 68 and NRS 17.115 within ten (10) days of notice of entry of this Judgment.

NOW, THEREFORE, Judgment Upon the Verdict in favor of Plaintiff MICHAEL WASHINGTON, jointly and severally against TEVA, SICOR and BAXTER is hereby given for **Seven Million and 00/100 Dollars ($7,000,000.00)**, plus costs.

In addition, Judgment Upon the Verdict in favor of Plaintiff JOSEPHINE WASHINGTON, jointly and severally against TEVA, SICOR and BAXTER is hereby given for **Seven Million and 00/100 Dollars ($7,000,000.00)**, plus costs.

In addition, Judgment Upon the Verdict in favor of Plaintiff MICHAEL WASHINGTON, jointly and severally against TEVA and SICOR is hereby given for **Sixty Million and 00/100 Dollars ($60,000,000.00).**

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EDWARD M. BERNSTEIN & ASSOCIATES
ATTORNEYS AT LAW
500 SO. FOURTH ST.
LAS VEGAS,
NEVADA 89101
(702) 240-0000

In addition, Judgment Upon the Verdict in favor of Plaintiff MICHAEL WASHINGTON against BAXTER is hereby given for **Thirty Million and 00/100 Dollars ($30,000,000.00).**

DATED this 19th day of October, 2011.

DISTRICT COURT JUDGE

Respectfully Submitted by:

EDWARD M. BERNSTEIN & ASSOCIATES

BY: _____

PATTI S. WISE, ESQ.
Nevada Bar #5624
500 South Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 384-4000
Facsimile: (702) 385-4640
Attorneys for Plaintiffs WASHINGTON

A558164

EDWARD M. BERNSTEIN & ASSOCIATES
ATTORNEYS AT LAW
500 SO. FOURTH ST.
LAS VEGAS,
NEVADA 89101
(702) 240-0000

EXHIBIT 1

EXHIBIT 1

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
3:50 PM
OCT 10 2011
BY: JENNIFER KIMMEL, DEPUTY

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL WASHINGTON and JOSEPHINE WASHINGTON, Plaintiffs, v. SICOR PHARMACEUTICALS, INC., et al., Defendants.	CASE NO. A558164 DEPT. NO. XV **SPECIAL VERDICT FORM**

08A558164
SJV
Special Jury Verdict
1546432

3

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL WASHINGTON and JOSEPHINE WASHINGTON, Plaintiffs, v. SICOR PHARMACEUTICALS, INC., et al., Defendants.	CASE NO. A558164 DEPT. NO. XV

Special Verdict

We the Jury in the above-entitled action find the following Special Verdict on the questions submitted to us:

1. Is Teva Parenteral Medicines, Inc. liable to Michael Washington for the following claims, if any:

   a. Negligence

   Yes ✓ No ___

   b. Strict Liability for Defective Design of 50ml Propofol vial

   Yes ✓ No ___

2. Is Baxter Healthcare Corporation liable to Michael Washington for the following claims, if any:

   a. Negligence

   Yes ✓ No ___

   b. Strict Liability for Defective Design of 50ml Propofol vial

   Yes ✓ No ___

3. If you find Teva Parenteral Medicines, Inc. is liable to Michael Washington, you must also determine if Teva Parenteral Medicines, Inc. is liable to Josephine Washington for loss of consortium.

   Yes ✓ No ___

4. If you find Baxter Healthcare Corporation is liable to Michael Washington, you must also determine if Baxter Healthcare Corporation is liable to Josephine Washington for loss of consortium.

Yes ✓ No ___

5. What amount of damages, if any, do you find was sustained by:

Michael Washington compensatory damages $ 7million

Josephine Washington compensatory damages $ 7million

6. If you found that Teva Parenteral Medicines, Inc. is liable to Michael Washington, you must also determine if Teva Parenteral Medicines Inc. is liable for punitive damages:

Yes ✓ No ___

7. If you found that Baxter Healthcare Corporation is liable to Michael Washington for compensatory damages you must also determine if Baxter Healthcare Corporation is liable for punitive damages:

Yes ✓ No ___

Dated this 10th day of October, 2011.

FOREPERSON

DISTRICT COURT

CLARK COUNTY, NEVADA

*****

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
2:18 P.M.
OCT 12 2011
BY Jennifer Kimmel
JENNIFER KIMMEL, DEPUTY

MICHAEL WASHINGTON and JOSEPHINE WASHINGTON,

Plaintiffs,

vs.

TEVA PARENTERAL MEDICINES, INC.; SICOR, INC.; BAXTER HEALTHCARE CORPORATION,

Defendants.

CASE NO. A558164
DEPT NO. XV

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SVF
Special Verdict Form
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SPECIAL VERDICT

We, the jury in the above entitled action, award punitive damages to plaintiff Michael Washington as follows:

Punitive Damages Against Teva Parenteral Medicines, Inc.: $ 60 million

Punitive Damages Against Baxter Healthcare Corporation: $ 30 million

DATED this 12 day of October, 2011.

FOREPERSON

EXHIBIT 8

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CLERK OF THE COURT

ORDR
Judge Ronald J. Israel
Eighth Judicial District Court
Department XXVIII
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155
(702)671-3631
(702)366-1407 Facsimile

DISTRICT COURT

CLARK COUNTY, NEVADA

RICHARD C. SACKS, individually, et al, Plaintiff(s), vs. ENDOSCOPY CENTER OF SOUTHERN NEVADA, LLC, et al. Defendant(s), And All Related/Consolidated Matters.	Case No. 08A572315 (LEAD) CONSOLIDATED with 08A576071 and 09A583058 DEPT. NO. XXVIII ***ELECTRONIC FILING CASE***

DECISION AND ORDER: PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PREEMPTION DEFENSE FOR DEAR DOCTOR LETTER LIABILITY ... PRODUCT DEFENDANTS' PRE-TRIAL MOTION #4, MOTION FOR SUMMARY JUDGMENT ON GROUNDS OF FEDERAL PREEMPTION ON ORDER SHORTENING TIME

This case arises out of the transmission of Hepatitis C from patient to patient at various endoscopy clinics in Las Vegas. Causation of the transmission is highly contested by the parties; however, the main theories are either the transmission by means of "double dipping" regarding the use of Propofol as an anesthetic in the procedures or improper cleaning and sterilization of the medical equipment at the time of the procedures. This motion is regarding summary judgment based on *Pliva, Inc. v. Mensing*, 131 S. Ct. 2567 (2011).

The *Mensing* Decision was announced by the United States Supreme Court (herein after "Supreme Court") approximately two (2) weeks ago. The parties agree that the Supreme Court has precluded claims against a generic drug manufacturer for failure to warn as long as the generic warning is equivalent to the brand name warning. The Supreme Court based their Decision on the fact that federal law preempts state law. Plaintiffs have agreed that a failure to warn claim is no longer at issue; however, they argue that the *Mensing* Decision does not preclude a "Dear Doctor letter" that is consistent with the federal warning label.

In the *Mensing* Decision the parties did not dispute that state law required the manufacturers to use a different and safer label. In the *Sacks* case, Plaintiffs claim the state law does not require a stronger warning and, therefore, preemption does not apply. If state law is not preempted, then the generic manufacturers should have issued a "Dear Doctor letter" reiterating the single-use warning on the Propofol bottle. The *Mensing* Court states, "What is in dispute is whether, and to what extent, generic manufacturers may change their labels after initial FDA approval." The Plaintiffs in *Mensing* clearly seek a stronger warning than was previously approved and, therefore, the Supreme Court ruled that the federal law prevented them from changing the label and the claims were dismissed.

The facts in the *Sacks* case differ, in that, first of all, we are not talking about the medicine contained in the bottle but, in fact, the means of accessing the medicine in the bottle; i.e., the single- or multi-use container. In the *Mensing* case at Page 8, Part 2, the Court states, "The FDA argues that "Dear Doctor letters" qualify as "labeling" ... Thus any such letters must be "consistent with and not contrary to [the drugs] approved labeling." Once again, the United States Supreme Court draws a distinction between additional and/or stronger warnings that were the subject of the *Mensing* case and not the subject of the *Sacks* case.

The Supreme Court in *Mensing* for a third time states at Page 12, "...State law imposed on

the Manufacturers a duty to attach a safer label (emphasis added) to their generic metoclopramide." This, once again, is not the same as we have in the *Sacks* case at issue. The Supreme Court states at Page 13, "The question for "impossibility" is whether the private party could independently do under federal law what state law requires of it." In the *Sacks* case it is clear the allegations are that the generic manufacturer could have done a "Dear Doctor letter" that does not violate federal law. The issue as to whether or not the "Dear Doctor letter" would have made a difference is a question of fact to be determined by the Jury and, therefore, Defendants' Motion For Summary Judgment is DENIED.

Defendants also seek to lump the Second and Third Causes of Action regarding design defect and breach of implied warranty of fitness for a particular purpose together and base their argument on the *Mensing* case. If the Supreme Court had intended to preclude all tort claims against generic manufacturers then they would have said so. This is certainly not the interpretation by this Court, and, therefore their arguments regarding the other Causes of Action are DENIED.

Plaintiffs' Motion For Summary Judgment is also DENIED as there are questions of fact to be determined by the Jury at the time of trial.

DATED AND DONE this 28 day of July, 2011.

DISTRICT JUDGE RONALD J. ISRAEL

EXHIBIT 9

EXHIBIT 9

ODM
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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

*****

MICHAEL WASHINGTON and JOSEPHINE WASHINGTON, Plaintiffs, vs. TEVA PARENTERAL MEDICINES, INC.; SICOR, INC.; BAXTER HEALTHCARE CORPORATION, Defendants.	CASE NO. A558164 DEPT NO. XV

ORDER DENYING PRODUCT DEFENDANTS' MOTION IN LIMINE NO. 9 TO EXCLUDE TESTIMONY, REFERENCES OR ARGUMENTS THAT CHALLENGE THE SUFFICIENCY OR ADEQUACY OF THE PROPOFOL WARNINGS FEDERAL LAW COMPELLED PRODUCT DEFENDANTS TO USE

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AUG 29 2011

Product Defendants' Motion in Limine No. 9 to Exclude Testimony, References or Arguments that Challenge the Sufficiency or Adequacy of the Propofol Warnings Federal Law Compelled Product Defendants to Use, having come before this Hon. Court on August 17, 2011, Plaintiffs Michael and Josephine Washington, appearing by and through their attorneys of record, Richard Friedman, Esq., Lincoln Sieler, Esq., of the law firm Friedman | Rubin, and Patti S. Wise, Esq., of the law firm of Edward M. Bernstein and Associates, and Defendants Teva Parenteral Medicines, Inc., formerly known as Sicor Pharmaceuticals, Inc., Sicor, Inc., and Baxter Healthcare Corporation, appearing by and through their attorneys of record, Glenn Kerner, Esq. of the law firm Goodwin Procter, Michael Stoberski, Esq., of the law firm Olson, Cannon, Gormley & Desruisseaux, and Michael Shumsky, Esq., of the law firm Kirkland & Ellis LLP, the Court having considered argument of counsel and the papers and pleadings on file, the Court finds:

Pliva, Inc. v. Mensing, 79 USLW 4606, 564 U.S. --, 2011 WL 247290 (June 23, 2011), held that plaintiffs are foreclosed from bringing claims against a generic pharmaceutical manufacturer based on failure to use a better warning due to preemption. The United States Supreme Court did not rule that a generic warning the FDA previously approved is "sufficient" or "adequate" as a matter of law. Thus, evidence relating to alleged flaws or defects in the existing labels is relevant to Plaintiffs' claims for design defect, negligence claims and the Defendants' intervening superseding cause defense.

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Accordingly, **IT IS HEREBY ORDERED** that, Product Defendants' Motion in Limine No. 9 to Exclude Testimony, References or Argument that Challenges the Sufficiency of Adequacy of the Propofol Warnings Federal Law Compelled Product Defendants to Use **IS DENIED** as that is a question for the Jury to determine.

DATED this 8 day of September, 2011.

DISTRICT COURT JUDGE Abbi Silver

Submitted by:

EDWARD M. BERNSTEIN & ASSOCIATES

BY: _____

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EXHIBIT 10

EXHIBIT 10

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DISTRICT COURT

CLARK COUNTY, NEVADA

*****

MICHAEL WASHINGTON and JOSEPHINE WASHINGTON, Plaintiffs, vs. TEVA PARENTERAL MEDICINES, INC.; SICOR, INC.; BAXTER HEALTHCARE CORPORATION, Defendants.	CASE NO. A558164 DEPT NO. XV

ORDER GRANTING IN PART AND DENYING IN PART PRODUCT DEFENDANTS' PRE-TRIAL MOTION #7 TO ADMIT EVIDENCE AND EXPERT TESTIMONY OF THE HATCH-WAXMAN ACT, FDA REGULATIONS, PHARMACEUTICAL INDUSTRY PRACTICE, AND PRODUCT DEFENDANTS' COMPLIANCE THEREWITH FOR PROPOFOL

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THIS COURT, having entertained Product Defendants' Pretrial Motion #7 to Admit Evidence and Expert Testimony of the Hatch-Waxman Act, FDA Regulations, Pharmaceutical Industry Practice, and Product Defendants' Compliance Therewith for Propofol on August 17, 2011, with Plaintiffs Michael and Josephine Washington, appearing by and through their attorneys of record, Richard Friedman, Esq., Lincoln Sieler, Esq., of the law firm Friedman | Rubin, and Patti S. Wise, Esq., of the law firm of Edward M. Bernstein and Associates, and Defendants Teva Parenteral Medicines, Inc., formerly known as Sicor Pharmaceuticals, Inc., Sicor, Inc., and Baxter Healthcare Corporation, appearing by and through their attorneys of record, Glenn Kerner, Esq. of the law firm Goodwin Procter, Michael Shumsky, Esq. of the law firm of Kirkland & Ellis, LLP, and Michael Stoberski, Esq., of the law firm Olson, Cannon, Gormley & Desruisseaux, the Court having considered argument of counsel and the papers and pleadings on file, the Court finds:

Subject to the Product Defendants' specific offers of proof and the proper laying of a foundation, the Product Defendants shall be generally entitled to offer evidence regarding the following: (1) Propofol is a generic version of the brand pharmaceutical product Diprivan; (2) Propofol and its label are FDA approved; (3) Propofol and Diprivan have the same language for their labels and warnings; (4) by law Propofol cannot unilaterally change its warnings and labels; (5) Propofol was in compliance with FDA requirements at the time of Michael Washington's treatment; (6) the FDA did not prohibit the sale of 50 mL vials to ambulatory surgical centers and, in fact, approved the Product Defendants' labeling and products as suitable for use during outpatient surgical procedures; and (7) other manufacturers used the same warnings.

However, the Court also finds the following: (1) Federal law does not place the responsibility solely upon brand name pharmaceuticals to monitor medical literature and to disseminate warnings to health care providers; (149:22-24) (2) *Mensing* does not prohibit generic

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manufacturers from sending "Dear Doctor" letters so long as they do not alter or change the existing warnings; and (3) the parties may not present evidence as to industry customs regarding what a medical professional would expect a marketing representative to do or not to do regarding the use of the product.

The court declined to rule that any specific evidence was admissible and said it would wait to rule on that until more specifics were provided. See. p. 167:19-25, 169:25-170:1, 171:5-11, 172:1-15, 190:15-193:22.

DATED this 20 day of Sept., 2011.

DISTRICT COURT JUDGE Abbi Silver

Submitted by:

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

SOSSY ABADJIAN, *et al.*,

Plaintiffs,

vs.

TEVA PARENTERAL MEDICINES, INC., fka SICOR PHARMACEUTICALS, INC.; SICOR, Inc., a Delaware Corporation; BAXTER HEALTHCARE CORPORATION, a Delaware Corporation; McKESSON MEDICAL-SURGICAL INC., a Delaware Corporation,

Defendants.

Case No.: A-18-781820-C

Dept. No.: 4

REPLY IN SUPPORT OF MOTION TO DISMISS

Date of Hearing: November 7, 2019

Time of Hearing: 9:00 a.m.

Defendants, Teva Parenteral Medicines, Inc. f/k/a Sicor Pharmaceuticals, Inc. ("TPM"); Sicor, Inc. ("Sicor"); Baxter Healthcare Corporation ("Baxter"); and McKesson Medical-Surgical,

Inc. ("McKesson") (collectively "Defendants"), by and through their counsel of record, Greenberg Traurig, LLP and Hymanson & Hymanson, submit this Reply in support of their motion to dismiss this matter for failure to state a claim pursuant to Nevada Rule of Civil Procedure 12(b)(5).

This Reply is made and based upon the following Memorandum of Points and Authorities, the exhibits attached hereto, the pleadings and papers on file herein, and any argument to be entertained by the Court at the time of hearing.

DATED this 29th day of October, 2019.

GREENBERG TRAURIG LLP

/s/ Jason K. Hicks

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs first assert that Defendants' Motion to Dismiss "contains no acknowledgment whatsoever of Defendants' well-documented wrongdoing" and "no acknowledgement of the multiple Clark County 'Endoscopy' verdicts (and settlements) obtained against these Defendants which confirm their wrongdoing[.]" Opp. at 2:14-16. The verdicts to which Plaintiffs refer have all been vacated, making them legal nullities which should not be cited for any purpose. *Franklin Sav. Corp. v. United States*, 56 Fed. Cl. 720, 734 n. 18 (2003) ("It does not take a prophet, however, to divine that a court would not, and could not, consider the contents of a vacated opinion."). In fact, it is wholly improper for Plaintiffs to do so. *In re Miller*, 482 P.2d 326, 329 n. 1 (Nev. 1971) ("[A lawyer] should not cite authorities he knows have been vacated . . . without making a full disclosure to the court and counsel.").

Most importantly, the Clark County cases referenced by Plaintiffs were tried in the years *before* the United States Supreme Court's preemption decision in *Mutual Pharmaceutical Co. v. Bartlett*, 570 U.S. 472 (2013), which is dispositive of the instant matter in Defendants' favor. Specifically, Plaintiffs have clarified in their Opposition that they believe Defendants should be liable under Nevada law because they manufactured and sold generic propofol in 50 mL vials. Plaintiffs' entire case, however, is based on a falsity. Throughout their Opposition, Plaintiffs repeatedly, and misleadingly, refer to Defendants' 50 mL propofol vials as "multi-dose" vials, and say "had Defendants simply used the FDA-approved design that was available to it and branded manufacturers, *i.e.*, single-dose vials, Plaintiffs would not have suffered the injuries they claim." *See* Opp. at 9:16-18. While Plaintiffs' well-plead allegations must be taken as true at this stage, they need not be taken as true where they are patently and demonstrably false. Defendants have asked the Court to take judicial notice of the FDA-approved labeling in this case, which Plaintiffs do not oppose. The FDA-approved label on Defendants' 50 mL propofol vials clearly states, sometimes in multiple places, that the propofol is for "**single patient use**" only. *See* **Exhibit M** at Bates 024 (container label for 20 mL, 50 mL, and 100 mL vials); *id.* at Bates 026 (packaging for 50 mL vial approved January 4, 1999) (emphasis added). Defendants' 50 mL propofol vials were, in fact, single-dose despite Plaintiffs' representations to the contrary. Moreover,

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Defendants' 50 mL vials were approved by the federal government as single-dose vials, and *Bartlett* very clearly states that generic manufacturers are not required to "stop selling" an FDA-approved drug simply to avoid liability under state law. Rather, any such law, including the claims Plaintiffs bring herein, is completely preempted. Plaintiffs' insistence that Defendants should have utilized an "alternative design," which incorrectly insinuates that Defendants' product was not FDA-approved, is simply another way of arguing Defendants should have "stopped selling" one already approved by the FDA, a theory foreclosed by the U.S. Supreme Court.

Plaintiffs next complain that Defendants' Motion "contains no acknowledgement that Judges Mahan and Navarro of the Federal District Court *rejected* Defendants' preemption arguments only weeks ago when remanding this and two companion cases back to state court." Opp. at 2:20-22 (emphasis in original). Plaintiffs again mislead the Court. Judges Mahan and Navarro merely found that federal jurisdiction did not exist and, accordingly, ordered the cases remanded to this Court. Neither judge ruled on the merits or the viability of Defendants' motion to dismiss on either preemption or substantive grounds, which were instead denied without prejudice as moot given the remand orders. Indeed, Plaintiffs did not even file oppositions to the motions to dismiss; they were never briefed nor heard by either court. In advancing this falsity, Plaintiffs further ignore that preemption as an affirmative defense (as is asserted here) and preemption as an independent ground for the exercise of federal subject matter jurisdiction (a different issue, and the one that was before the Nevada federal courts) is not one in the same analysis. Plaintiffs are conflating the two to urge the Court to look anywhere other than the U.S. Supreme Court's decision in *Bartlett*.

Indeed, Plaintiffs' reliance on Judge Mahan is ironic. Judge Mahan was presented with, and dismissed, identical claims to those asserted by Plaintiffs here in *Moretti v. PLIVA, Inc.*, 2012 U.S. Dist. LEXIS 24113, 2012 WL 628502 (D. Nev. Feb. 27, 2012) on preemption grounds, in which he followed similar correctly-decided cases from scores of courts around the United States. *See id*. at *14-15 (collecting cases dismissing claims against generic manufacturers on preemption grounds). Plaintiffs' representations to the contrary are simply false, and Defendants urge the Court to review Judge Mahan's decision in *Moretti* to see for itself.

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Lastly, Plaintiffs rely on Judge Crockett's recent decision denying Defendants' motion to dismiss in a companion case, *Bridges, et. al. v. Teva Parenteral Medicines, Inc. et. al.*, case no. A-18-782023-C. *See* Opp. at 2:22-24. It is true that Judge Crockett denied Defendants' similar motion to dismiss in *Bridges*. There, as here, Plaintiffs asserted the same incorrect, and at times outright false, arguments before Judge Crockett and were, unfortunately, successful in convincing him to retain the matter.[1] But this Court is not bound by Judge Crockett's analysis or decision, and Defendants respectfully request that this Court review the United States Supreme Court's decisions in *Mensing* and *Bartlett* for itself, without regard to the *Bridges* result. Should this Court desire additional instructive authority for how *Mensing* and *Bartlett* apply to this case, there are dozens—if not hundreds—of state and federal courts around the country that have correctly applied those binding decisions in identical cases as this one. Indeed, for instructive authority, this Court need go no further than Judge Mahan's decision in *Moretti*, which was based on indistinguishable facts. *Mensing* and *Bartlett* are controlling and dispositive of this case on preemption grounds. Plaintiffs have been fortunate enough to escape their binding effect of those decisions to date, but when this Court reviews *Mensing*, *Bartlett*, and the scores of instructive decisions for itself, it will discover that Plaintiffs have no way around them other than to rely on misinformation, prey on sympathy, and rest on outdated, overruled, and vacated decisions from years past.

Moreover, Plaintiffs ignore entirely Defendants' arguments as to the substantive deficiencies in each of their claims, whether it be the absence of a "defect" in the chemical composition of the propofol such that their product defect claim fails, the lack of privity between Plaintiffs and these Defendants, which defeats their breach of implied warranty claim, the failure to plead (much less with specificity) their fraud-based claim under the Nevada Deceptive Practices Act, and the absence of causation traceable to Defendants for any of their claims. Instead, Plaintiffs again rest on past laurels, but prior results can no longer carry the day.

Plaintiffs' claims should be dismissed as preempted by federal law or, alternatively, as deficient under Rule 12(b)(5) for the reasons discussed herein and in Defendants' Motion.

[1] Judge Crockett has not signed an order yet in *Bridges*, but Defendants will be challenging it when that order is issued.

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II. ARGUMENT

A. Plaintiffs Improperly Rely on Vacated Verdicts Obtained in Clark County Years Before the U.S. Supreme Court Clarified the Law on Preemption as Applied to Generic Manufacturers, Like Defendants

Plaintiffs insist that Defendants are "confirmed wrongdoers" and therefore liability is presumed. There are two major problems with this argument.

First, the three Clark County verdicts that Plaintiffs point to, *Chanin, Sacks, et. al.*, and *Washington*, have all been vacated. *See* **Exhibits O** (*Chanin* Vacatur and Dismissal)**, P** (*Washington* Vacatur and Dismissal)**,** and **Q** (*Sacks* Vacatur and Dismissal), attached hereto. These vacated decisions are thus of no precedential value and it is wholly improper for Plaintiffs to cite to them for any purpose, much less as proof positive of Defendants' alleged wrongdoing. *N.W. Resource Info. Ctr., Inc. v. N.W. Power Planning Council*, 35 F.3d 1371, 1385-86 (9th Cir. 1994) (asserting that a court's reliance on a vacated judicial decision "if allowed, would undermine the validity and authoritativeness of final decisions."); *Franklin Sav. Corp. v. United States*, 56 Fed. Cl. 720, 734 n. 18 (2003) ("It does not take a prophet, however, to divine that a court would not, and could not, consider the contents of a vacated opinion."); *Lawrence v. U.S.*, 488 A.2d 923, 924 n. 3 (D.C. 1985) (stating that a vacated opinion "cannot be cited as authority."); *Faus Group, Inc. v. U.S.*, 358 F. Supp. 2d 1244, 1254 n. 17 (Ct. Intl. Trade 2004) ("Because the [relevant] portion of the decision was vacated, reliance [on] or citation thereto is precluded."); *Gilmore Steel Corp. v. U.S.*, 585 F. Supp. 670, 674 n. 3 (Ct. Intl. Trade 1984) (characterizing the plaintiff's reliance on a vacated opinion as "ill-founded since, having been vacated, it is no longer binding precedent"); *Cash in Advance of Fla., Inc. v. Jolley*, 612 S.E.2d 101, 102 (Ga. App. 2005) ("[T]he trial court's reliance upon the vacated opinion . . . is not well founded, as the opinion has no precedential value."); *United States v. Walgren*, 885 F.2d 1417, 1423 (9th Cir. 1989) (vacated decisions are of no precedential value). Nor can Plaintiffs rely on the vacated judgments for their preclusion argument, which is not even applicable, and which Plaintiffs seem to only halfway assert. *Schlang v. Key Airlines*, 158 F.R.D. 666, 671 (D. Nev. 1994) ("The most significant cost associated with vacatur is the elimination of the judgment's preclusive effect."); *Engel v. Buchan*, 981 F. Supp. 2d 781, 794 (E.D. Ill. 2013) ("[A] vacated judgment does not trigger collateral estoppel[.]") (citing,

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Pontarelli Limousine, Inc. v. City of Chicago, 929 F.2d 334, 340 (7th Cir. 1991)). These verdicts are no longer worth the paper they are printed on.

Second, at the time those Clark County verdicts were issued, the United States Supreme Court had not completely clarified the preemptive effect of the FDA's exclusive regulation over manufacturers of generic drugs. *Chanin* went to trial in Clark County in 2010. The United States Supreme Court did not issue its first major preemption decision as to generic manufacturers, *Mensing*, until 2011. While *Sacks, et. al.*, and *Washington* went to trial in Clark County *immediately* after *Mensing* was issued, and thus well before the decision was refined or properly applied by courts around the country, those trials nonetheless took place two years *before* the United States Supreme Court issued its follow-up decision on preemption as to generic manufacturers in *Bartlett*. *Bartlett* is entirely dispositive of this matter.[2]

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B. Plaintiffs Shift Positions and Argue Defendants Should Not Have Sold Generic Propofol in the FDA-Approved 50 mL Vials

Plaintiffs next set forth their new-found "alternative design" theory, in which they argue Defendants could have avoided liability under Nevada law if they would have simply refrained from selling the generic drug in 50 mL vials. However, there is no dispute that the FDA stamped – literally – Defendants' 50 mL vials with federal approval. Thus, Defendants were not required to stop selling the 50 mL vials.

Indeed, a few years after the Clark County verdicts were reached, the United States Supreme Court in *Bartlett* flatly rejected the argument that a generic manufacture must stop selling its FDA-approved product if it wishes to avoid liability under state tort laws:

> **We reject this "stop-selling" rationale as incompatible with our pre-emption jurisprudence.** Our pre-emption cases presume that an actor seeking to satisfy both his federal- and state-law obligations is not required to cease acting altogether in order to avoid liability. **Indeed, if the option of ceasing to act defeated a claim of impossibility, impossibility pre-emption would be "all but meaningless.**"

[2] Plaintiffs state that the verdicts were obtained after the United States Supreme Court's decision in *Wyeth v. Levin*, 555 U.S. 555 (2009), and incorrectly claim "a case on which Defendants here rely." Opp. at 7:3-5. However, *Wyeth* addresses whether failure to warn claims against branded pharmaceutical manufacturers are preempted by federal law and is completely irrelevant to the issues in this case concerning **generic** pharmaceutical manufacturers, to which a different set of rules and regulations apply.

Bartlett, 570 U.S. at 488 (quoting *Mensing*, 564 U.S. at 621) (emphasis added).

This "stop-selling" theory is *exactly* what Plaintiff allege Defendants should have done here when they attack Defendants' decision to sell propofol in FDA-approved 50 mL vials. In a footnote buried in their brief, Plaintiffs concede that *Bartlett* rejected the "stop-selling" theory, but nevertheless attempt to distinguish their theory of liability by stating, "Defendants in the case at bar would not have had to stop selling their product to avoid liability, they simply could have selected the FDA-approved alternative design." *See* Opp. at p. 10, fn. 3. But it is undisputed that the FDA stamped—literally—its approval on Defendants' 50 mL propofol. *See* **Exhibit M** to Motion to Dismiss (FDA Review Packet) at Bates 024, 026. And, it is undisputed that Defendants' generic labeling was the same as the brand-names, as was required by the law. Thus, by arguing that Defendants should have sold the propofol in a different volume (*i.e.*, what Plaintiffs call an "alternative design"), Plaintiffs are simply, and still, arguing that Defendants should have "stopped-selling" the FDA-approved 50 mL vials. That argument is nothing more than the "stop-selling" theory rejected by the Supreme Court, recast in different language. It is completely and without question barred by the United States Supreme Court's decision in *Bartlett*. And, other courts around the country have rightly rejected this argument, too. *Guidry v. Janssen Pharms., Inc.*, 206 F. Supp. 3d 1187 (E.D. La. 2016)("Any state requirement that a brand name drug manufacturer should have adopted an alternative design to a prescription drug after it was approved by the FDA is preempted."); *Yates v. Ortho-Mcneil-Janssen Pharms., Inc.*, 808 F.3d 281, 300 (6th Cir. 2015)("In contending that defendants' pre-approval duty would have resulted in a birth control patch with a different formulation, Yates essentially argues that defendants should never have sold the FDA-approved formulation of ORTHO EVRA® in the first place. We reject this never-start selling rationale for the same reasons the Supreme Court in *Bartlett* rejected the stop-selling rationale of the First Circuit."); *In re Darvocet*, 756 F.3d at 928 (noting *Bartlett* and *Mensing* had provided "clear pronouncements" that state-law tort claims are preempted and the stop-selling theory lacks merit); *Johnson v. Teva Pharms. USA, Inc.*, 758 F.3d 605, 613 (5th Cir. 2014) (same); *In re Fosamax (Alendronate Sodium) Prods. Liab. Litig. (No. II)*, 751 F.3d 150, 163 (3rd Cir. 2014) (noting that the plaintiffs "are trying to resurrect the 'stop-selling' theory, under which the Generic Defendants

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can only avoid state-law liability by halting their sales of alendronate sodium," "[b]ut *Bartlett* categorically rejected that theory, and that ends the argument."); *Drager v. PLIVA, Inc.*, 741 F.3d 470, 476 (4th Cir. 2014) ("[C]ourts may not avoid preempting a state law by imposing liability on a generic manufacturer for choosing to continue selling its product."); *Strayhorn v. Wyeth Pharms., Inc.*, 737 F.3d 378, 398 (6th Cir. 2013) (same); *Schrock v. Wyeth, Inc.*, 727 F.3d 1273, 1290 (10th Cir. 2013) (same); *Trejo v. Johnson & Johnson*, 13 Cal. App. 5th 110, 155 (2017) (holding defendants "could [not] be required to stop selling Motrin in order to avoid state liability," and that the "[p]laintiff's design defect claim accordingly is preempted"); *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 365-66 (Iowa 2014) ("In *Bartlett*, the Supreme Court rejected the 'stop selling' argument because 'if the option of ceasing to act defeated a claim of impossibility, impossibility pre-emption … would be all but meaningless.") (some quotation marks omitted). Defendants' 50 mL vials were approved by the FDA, and Defendants had the absolute right to continue selling them, Plaintiffs' claims notwithstanding.[3]

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C. The Nevada Federal District Court Did Not Rule on Defendants' Preemption Defense

Plaintiffs next insist that "Judges Mahan and Navarro of the Federal District Court similarly *rejected* Defendants' preemption arguments only weeks ago[.]" *See* Opp. at 2:20-22 (emphasis in original). That statement is false. Judge Mahan and Judge Navarro did not "reject Defendants' preemption arguments" in this case; they merely found that federal jurisdiction did not exist and, accordingly, ordered the cases remanded to this Court. Neither ruled on the merits or the viability

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[3] Plaintiffs make a passing reference on pages 10-11 of their Opposition that their claims are not preempted "if in fact there was another, updated FDA-approved warning or Dear Doctor letter that Defendants failed to adopt or send, which could only be determined through discovery." However, there is no such allegation of an "updated" label or warning during the relevant time in their Complaint, and Plaintiffs cannot make this assertion now, for the first time, in their Opposition solely to avoid dismissal. Moreover, all labels and Dear Doctor letters are a matter of public record, so discovery is not needed to confirm that there were no "updated" labels or warnings during the relevant time.

of Defendants' motions to dismiss on either preemption or substantive grounds, which were instead denied without prejudice as moot given his order on remand.[4]

In fact, and contrary to Plaintiffs' statements, Judge Mahan has addressed virtually identical claims against a generic manufacturer as those asserted by Plaintiffs here and dismissed them on preemption grounds. *See Moretti v. PLIVA, Inc.*, 2012 U.S. Dist. LEXIS 24113, 2012 WL 628502 (D. Nev. Feb. 27, 2012). Like here, the plaintiff in *Moretti* argued that *Mensing*'s preemption bar was "narrow" and could be avoided if she alleged that the generic manufacturer-defendant "had a duty under federal law to keep abreast of information and perform post-marketing surveillance regarding its drug product and to take action (notifying the FDA and/or brand-name manufacturer) where there is evidence that its drug may be harming people." *Id*. at *4-5 (internal quotations omitted). Plaintiff further alleged that the generic manufacturer "had a duty to communicate existing warnings to the medical community, [] that [defendant] had a variety of tools available by which it could have disseminated information to her and the medical community" and specifically that the defendant "could have sent dear healthcare professional letters, conducted training programs, or utilized other communication methods to provide information regarding metoclopramide's alleged risks to her, her physician, and the medical community." *Id*. at *5 (citations omitted). Finally, the plaintiff in *Moretti* unsuccessfully asserted, as Plaintiffs do here, that *Mensing* does not preempt "any claim where the manufacturer could have satisfied its duty under state law by approaching [the] FDA with information supporting a label change for [the drug], or by suspending sales of its drug." *Id*. at *6.

In dismissing plaintiff's claims based upon preemption, Judge Mahan noted that "[t]he Supreme Court made clear in *Mensing* that state-law tort claims based on a generic drug

[4] Plaintiffs further contend that Judge Mahan and Judge Navarro "recognized . . . that the FDCA does not completely preempt all of a plaintiffs' state law claims, nor does it provide immunity." Opp. at 8:25-26. That state is a misleading half-truth. There are very limited areas of law that so completely preempt all state laws that their preemptive effect provides an independent basis for federal subject matter jurisdiction. Parallel state-law claims can coexist with the Federal Food, Drug, and Cosmetic Act, as it is applied to brand-name manufacturers. That is so because a brand-name manufacturer has an affirmative duty to monitor safety information and utilize processes available to update its labeling, which is otherwise unavailable to generic manufacturers. It is possible, then, that this affirmative duty under federal law can coexist with similar duties under state law. The distinction between the treatment of brand-name and generic manufacturers under federal law cannot be overemphasized. *Mensing*, 131 S. Ct. at 2577-78 ("It is beyond dispute that the federal statutes and regulations that apply to brand-name drug manufacturers are meaningfully different than those that apply to generic drug manufacturers," and such "different federal statutes and regulations may . . . lead to different pre-emption results.").

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manufacturer's labeling conflict with, and thereby are preempted by, federal law." *Id*. at *14. Judge Mahan rejected plaintiff's assertion that *Mensing*'s holding was a narrow one, instead noting that both the majority *and* the dissent in *Mensing* "acknowledged the broad scope of the decision requiring the dismissal of such lawsuits against generic drug manufacturers" *Id*. (citations omitted). Judge Mahan specifically rejected "plaintiff's arguments that she has claims that survived *Mensing* based on (1) [defendant's] alleged manufacture and continued distribution of a 'misbranded' drug in violation of federal law, (2) [defendant's] alleged failure to conduct post-marketing surveillance or report adverse events, or (3) [defendant's] 'failure to communicate' warnings about metoclopramide by 'tools' other than the labeling for [the drug]." *Id*. at *14-15.

In determining that *Mensing* barred plaintiff's state-law based claims against the generic manufacturer, Judge Mahan took notice that "[n]umerous other courts have rejected those same arguments and dismissed lawsuits against generic drug manufacturers." *Id*. (citing *Smith v. Wyeth, Inc*., 657 F.3d 420 (6th Cir. 2011), *petition for reh'g en banc denied* (6th Cir. Nov. 22, 2011) (rejecting similar post-*Mensing* arguments by plaintiffs and affirming dismissal of claims against generic drug manufacturers); *Mensing v. Wyeth, Inc*., 658 F.3d 867, 2011 WL 4636653 (8th Cir. 2011) (denying motion to file supplemental briefing raising similar post-*Mensing* arguments and affirming dismissal of claims against generic drug manufacturers); *Gross v. Pfizer Inc*., No. 10-cv-110-AW, 825 F. Supp. 2d 654, 2011 U.S. Dist. LEXIS 134895 (D. Md. Nov. 22, 2011) (rejecting similar post-*Mensing* arguments by plaintiff and dismissing all claims against generic drug manufacturer as preempted by *Mensing*); *In re: Fosamax (Alendronate Sodium) Prods. Liab. Litig.* ("Fosomax"), MDL No. 2243, Civ. No. 08-008, 2011 U.S. Dist. LEXIS 135006 (D.N.J. Nov. 21, 2011) (MDL decision dismissing all plaintiffs' claims against all generic drug manufacturers for defective manufacture; defective design; failure to warn; negligence; fraud, misrepresentation, and failure to conform to representation, negligent misrepresentation; breach of express warranty; breach of implied warranty; violation of consumer protection laws; restitution, and loss of consortium as preempted under *Mensing*); *Morris v. Wyeth, Inc*., 2011 U.S. Dist. LEXIS 121052, 2011 WL 4973839 (W.D. La. Oct. 19, 2011) (dismissing claims against generic drug manufacturers after assertion of similar post-*Mensing* arguments by plaintiffs). Judge Mahan's decision in *Moretti* was issued in February 2012 –

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approximately 8 months after *Mensing* – and similar decisions dismissing state law tort claims against generic manufacturers have been issued by scores of state and federal courts around the country in the seven-and-a-half years since.

D. The Criminal Cases Were Unresolved at the Time Plaintiffs Obtained Prior Verdicts Which Constitute Superseding, Intervening Causes

Even if the Court were to look past the preemptive mandate of *Mensing* and *Bartlett*, Plaintiffs' claims cannot attach liability to these Defendants as these Defendants are the not the wrongdoers that caused Plaintiffs' alleged injuries. The verdicts in the criminal cases demonstrate as much.

In order to proceed on their claims, which are all based on a theory of strict products liability, regardless of how captioned, Plaintiffs bear the burden of proving legal causation. *Shoshone Coca-Cola Bottling Co. v. Dolinski*, 82 Nev. 439, 443, 420 P.2d 855, 857-858 (1966). A plaintiff "must still establish that his injury was caused by a **defect in the product**, and that such defect existed when the product left the hands of the defendant." *Id*. (emphasis added). "The concept of strict liability does not prove causation, nor does it trace cause to the defendant." *Id*. Yet with the benefit of the criminal convictions, it is now impossible for Plaintiffs to prove that any purported defect in the propofol itself, for example the chemical makeup, caused their alleged injuries, as opposed to the purposeful and criminal misuse of the product by third-parties. In resting on their laurels and the result of the prior hepatitis-C cases, Plaintiffs completely ignore the change in landscape between those prior verdicts and today. In fact, Plaintiffs have the audacity to state in the Opposition, "[a] threshold question for this Court becomes, has anything changed between the date of Defendants' last foray into Clark County District Court and now? The answer is 'no.'" Opp. at 7:12-14. Plaintiffs want this Court to completely ignore the fact that multiple medical practitioners either pleaded guilty to, or were convicted of, criminal misuse of the propofol in the years after the vacated verdicts against Defendants, **and further that the U.S. Supreme Court issued its preemption decision in *Bridges* in 2013, a case that is dispositive here**.

Particularly, the *Chanin* verdict was reached in May 2010. **Exhibit 3** to Plaintiffs' Opposition. The *Sacks, et. al.,* and *Washington* verdicts were reached in October 2011. **Exhibits 4** and **5** to

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Plaintiffs' Opposition. Mathahs then plead guilty in state court over two years later in November 2013. *See* **Exhibit F** to Motion to Dismiss. Desai and Lakeman were found guilty in their state court case by a jury of their peers in July 2013. *See* **Exhibits H** and **I** to Motion to Dismiss. Desai plead guilty in the federal case in July 2015. *See* **Exhibit B** to Motion to Dismiss (Amended Judgment in a Criminal Case). Thus the (vacated) verdicts Plaintiffs rest on were entered years before the criminal cases concluded.

Having the benefit of the criminal convictions, obtained beyond all reasonable doubt, it is now a certainty the actors at the Clinic criminally misused the propofol in furtherance of a larger insurance fraud scheme, and in doing so caused the injuries complained of. Plaintiffs cannot simply brush past these convictions as the law requires them to prove that Defendants', and not an intervening third-party's, conduct "be established as a proximate cause of the plaintiff's injury." *Drummond v. Mid-West Growers Coop. Corp.*, 91 Nev. 698, 704-705, 542 P.2d 198, 203 (1975). The Nevada Supreme Court defines "proximate cause" as "any cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury complained of and without which the result would not have occurred." *Id*. (quoting, *Mahan v. Hafen*, 76 Nev. 220, 225, 351 P.2d 617, 620 (1960)). An "efficient intervening cause" is "not a concurrent and contributing cause but a superseding cause which is itself the natural and logical cause of the harm." *Id.* (quoting, *Thomas v. Bokelman*, 86 Nev. 10, 13, 462 P.2d 1020, 1022 (1970)). "No liability attaches unless there is a causal connection between the negligence and the injury." *Mahan*, 76 Nev. at 224, 351 P.2d at 620 (citations omitted).

In the intervening period between the entry and vacatur of the *Chanin*, *Sacks*, *et. al.*, and *Washington* verdicts relied upon by Plaintiffs, a state and federal court in Nevada have found, beyond all reasonable doubt, that Desai and his cohorts actually caused the injuries complained of by patients of the Clinics through intentionally and criminally multi-dosing patients from single patient use vials as part of a larger insurance fraud scheme. The confirmed, criminal actions of Desai and his fellow wrongdoers are the "natural and logical cause" of Plaintiffs' complained-of harm. It is now undisputed that, had Desai and others not blatantly ignored the clear, express, FDA-approved warnings on the propofol, and had they instead used the drug for single patient use, as intended and

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instructed, "the result would not have occurred." *Drummond*, 91 Nev. at 704-705, 542 P.2d at 203. As such, the actions of Desai and others at the Clinic, now proven beyond any reasonable doubt, are the legal, proximate, and intervening cause of Plaintiffs' alleged injuries.[5]

E. Plaintiffs Fail to Address the Deficiencies in the Claims Themselves

Defendants alternatively moved to dismiss each of Plaintiffs' causes of action due to the numerous deficiencies within them, separate and apart from the preemption issue. *See* Motion at Section II(B), pgs. 15-24. Though Defendants dissected each individual claim, Plaintiffs have not responded to the substance of any of these arguments. Rather, instead of responding with any *legal* arguments, points or authority, apart from addressing the learned intermediary doctrine, Plaintiffs again simply point to the prior verdicts in *Chanin*, *Washington*, and *Sacks, et. al.* *See* Opposition at pgs. 13-14. And in doing so, Plaintiffs summarily argue that issue preclusion applies because verdicts were obtained in those three cases. *Id*.

Yet again, Plaintiffs ignore that the verdicts in *Chanin*, *Washington*, and *Sacks et. al.*, were all vacated. *See* **Exhibits O** (*Chanin* Vacatur and Dismissal)**, P** (*Washington* Vacatur and Dismissal)**,** and **Q** (*Sacks* Vacatur and Dismissal), attached hereto. These vacated decisions are thus of no precedential value, and it is wholly improper for Plaintiffs to cite to them for any purpose, much less as proof positive of Defendants' alleged wrongdoing. *N.W. Resource Info. Ctr., Inc. v. N.W. Power Planning Council*, 35 F.3d 1371, 1385-86 (9th Cir. 1994) (asserting that a court's reliance on a vacated judicial decision "if allowed, would undermine the validity and authoritativeness of final decisions."); *Franklin Sav. Corp. v. United States*, 56 Fed. Cl. 720, 734 n. 18 (2003) ("It does not take a prophet, however, to divine that a court would not, and could not, consider the contents of a vacated opinion."); *Lawrence v. U.S.*, 488 A.2d 923, 924 n. 3 (D.C. 1985) (stating that a vacated opinion "cannot be cited as authority."); *Faus Group, Inc. v. U.S.*, 358 F. Supp. 2d 1244, 1254 n. 17 (Ct. Intl. Trade 2004) ("Because the [relevant] portion of the decision was vacated, reliance [on] or citation thereto is precluded."); *Gilmore Steel Corp. v. U.S.*, 585 F. Supp. 670, 674 n. 3 (Ct. Intl. Trade 1984)

[5] The inclusion of the criminal verdicts is not a "plea for sympathy" as stated by Plaintiffs. Rather, these verdicts illustrate how baseless Plaintiffs' theory really is. Plaintiffs would seek to attach liability to Defendants **for following the mandates of federal law** rather than the convicted criminals who purposefully misused the product in intentional disregard of the federally approved and mandated warnings.

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(characterizing the plaintiff's reliance on a vacated opinion as "ill-founded since, having been vacated, it is no longer binding precedent"); *Cash in Advance of Fla., Inc. v. Jolley*, 612 S.E.2d 101, 102 (Ga. App. 2005) ("[T]he trial court's reliance upon the vacated opinion . . . is not well founded, as the opinion has no precedential value."); *United States v. Walgren*, 885 F.2d 1417, 1423 (9th Cir. 1989) (vacated decisions are of no precedential value). Nor can Plaintiffs rely on the vacated judgments for their preclusion argument, which is not even applicable, and which Plaintiffs seem to only halfway assert. *Schlang v. Key Airlines*, 158 F.R.D. 666, 671 (D. Nev. 1994) ("The most significant cost associated with vacatur is the elimination of the judgment's preclusive effect."); *Engel v. Buchan*, 981 F. Supp. 2d 781, 794 (E.D. Ill. 2013) ("[A] vacated judgment does not trigger collateral estoppel[.]") (citing, *Pontarelli Limousine, Inc. v. City of Chicago*, 929 F.2d 334, 340 (7th Cir. 1991)).

Briefly, and as more fully detailed in Defendants' Motion, Plaintiffs cannot prevail on any of their claims, including their negligence claim, because they cannot prove causation.

With respect to their product defect claim, they have wholly failed in their Complaint (or even in their Opposition) to identify any "defect" with the propofol itself. *Shoshone Coca-Cola Bottling Co.*, 82 Nev. at 443, 420 P.2d at 857-58 (a plaintiff "must still establish that his injury was caused by a defect in the product, and that such defect existed when the product left the hands of the defendant.").[6]

As to their implied warranty claim, Plaintiffs contracted with the physicians at the Clinic, not Defendants, and thus have no privity with Defendants, an essential element to support this claim. *Shoshone Coca-Cola Bottling Co.*, 82 Nev. at 441, 420 P.2d at 857 (noting Court has rejected implied warranties in the absence of privity of contract) (citations omitted).

With respect to their fraud-based claim under the Nevada Deceptive Practices Act, Plaintiffs have not identified the "fraud," attributed any misrepresentations to any particular Defendant, or otherwise plead the claim with particularity as required.

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[6] Plaintiffs' case is, in truth, a failure to warn case, which is preempted by *Mensing*, and not a true product defect case.

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Lastly, punitive damages are not a standalone cause of action, and Plaintiffs do not dispute this.

Plaintiffs have not substantively responded to any of these points, and instead impermissibly rest on previous results that, from a legal standpoint, no longer even exist. Even if the Court were to somehow find that Plaintiffs' claims are not preempted, they nonetheless fail for all of the other reasons discussed herein, and in more detail in Defendants' Motion.

F. Plaintiffs Consent to the Dismissal of Those Individuals Not Part of the Tolling Agreement

The claims brought by 167 of the 651 Plaintiffs are undisputedly time-barred. Those individuals are listed in **Exhibit N** to Defendants' Motion. Plaintiffs have consented to the dismissal of those individuals' claims. *See* Opp. at 6:4-6. Accordingly, Defendants request that the Court dismiss the claims brought by those 167 individual plaintiffs as falling outside of the statute of limitations.

III. CONCLUSION

Plaintiffs' claims are squarely preempted by the United States Supreme Court's decision in *Mensing* and *Bartlett*. State and federal courts around the country have resoundingly correctly applied these cases to dismiss identical claims alleged against generic manufacturers. That other plaintiffs obtained favorable results pre-*Mensing* and pre-*Bartlett* is irrelevant, and that other courts incorrectly applied *Mensing* in the weeks immediately following its release in 2011 and before *Bartlett* in 2013 is immaterial. This Court should take a fresh look at these binding decisions against the backdrop of the scores of cases applying them in the last eight years, the overwhelming weight of which agree dismissal is mandated.

Even if the Court were to be unconvinced that *Mensing* and *Bartlett* mandate dismissal, the criminal convictions obtained by the state and federal courts in the years since are indisputable proof that those criminals' actions broke any causal chain linking Defendants' actions or inactions to Plaintiffs' alleged injuries.

Lastly, Plaintiffs' claims each fail for the individual reasons discussed at length in Defendants' Motion and highlighted herein, which Plaintiffs do not substantively respond to.

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Based upon the foregoing, and as detailed in their moving papers, Defendants respectfully requests that the Court dismiss Plaintiffs' claims in their entirety, with prejudice, under Rule 12(b)(5).

DATED this 29th day of October, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2019, a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS** was served electronically using the Odyssey eFileNV Electronic Filing system and serving all parties with an email address on record, pursuant to Administrative Order 14-2 and Rule 9 of the N.E.F.C.R.

/s/ Andrea Flintz
an employee of Greenberg Traurig, LLP

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Exhibit O

Stipulation and Order to Vacate Judgment and Dismiss all Claims with Prejudice in

Henry Chanin, et al. v. Teva Parenteral Medicines, Inc., et al.

Eighth Judicial District Court Case No. A571172

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DISTRICT COURT

CLARK COUNTY, NEVADA

HENRY CHANIN and LORRAINE CHANIN, husband and wife, Plaintiffs, *vs.* TEVA PARENTERAL MEDICINES, INC., a Delaware corporation; SICOR, INC., a Delaware corporation; and BAXTER HEALTHCARE CORPORATION, a Delaware corporation, Defendants.	Case No. A571172 Dept. No. X

STIPULATION AND ORDER TO VACATE JUDGMENT AND DISMISS ALL CLAIMS WITH PREJUDICE

The parties, having reached a settlement, STIPULATE to vacate the following orders in this case:

1. "Judgment Upon the Jury Verdict," entered June 1, 2010;

2. "Order Granting Plaintiffs' Motion for Costs," entered September 27, 2010;

3. "Order Granting Plaintiffs' Motion for Attorneys Fees and Interest," entered September 28, 2010; and

4. "Final Judgment," entered on September 28, 2010.

The parties FURTHER STIPULATE that:

5. Each party shall bear its own cost and fees; and

6. All claims shall be dismissed with prejudice.

Dated: March 21, 2012.

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Dated: March 2nd, 2012.

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IT IS SO ORDERED.

Dated this 5th day of March, 2012.

By _____
DISTRICT JUDGE

Exhibit P

Stipulation and Order to Vacate Judgment and Dismiss all Claims with Prejudice in

Michael Washington, et al. v. Teva Parenteral Medicines, Inc., et al.

Eighth Judicial District Court Case No. A558164

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DISTRICT COURT

CLARK COUNTY NEVADA

MICHAEL WASHINGTON and JOSEPHINE WASHINGTON, Plaintiffs, vs. TEVA PARENTERAL MEDICINES, INC.; SICOR, INC.; BAXTER HEALTHCARE CORPORATION, Defendants.	CASE NO.: A558164 DEPT NO.: XV **STIPULATION AND ORDER TO VACATE JUDGMENT AND DISMISS ALL CLAIMS WITH PREJUDICE**

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IT IS STIPULATED AND AGREED, by and between Plaintiffs MICHAEL and JOSEPHINE WASHINGTON, by and through their counsel of record, PATTI S. WISE, ESQ., of the Law Office of Edward M. Bernstein & Associates, and Defendants SICOR, INC., TEVA PARENTERAL MEDICINES, INC., and BAXTER HEALTHCARE CORPORATION, through their counsel of record, MICHAEL STOBERSKI, ESQ., of the law firm Olson, Cannon, Gormley & Desruisseaux, that the Judgment entered on October 19, 2011 shall be vacated and the above-referenced action shall be dismissed with prejudice. Each party agrees to bear its own costs and fees.

Dated this 27 day of ~~January~~ February, 2012.

OLSON CANNON GORMLEY & DESRUISSEAUX

By: _____
James R. Olson, Esq.
Michael E. Stoberski, Esq.
9950 W. Cheyenne Avenue
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(702) 384-4012
Attorneys for Defendants Sicor Inc., Teva Parental Medicines, Inc. and Baxter Healthcare Corporation

Dated this 25th day of January, 2012.

EDWARD M. BERNSTEIN & ASSOCIATES

By: _____
Patti S. Wise, Esq.
500 South Fourth Street
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(702) 384-4000
Attorneys for Plaintiffs

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EDWARD M. BERNSTEIN & ASSOCIATES
ATTORNEYS AT LAW
500 SO. FOURTH ST.
LAS VEGAS,
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(702) 240-0000

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Judgment entered on October 19, 2011 in Case No. A558164 shall be vacated and all claims be dismissed with prejudice with each party to bear its own fees and costs.

DATED this 22 day of February, 2012.

DISTRICT COURT JUDGE
Abbi Silver

Respectfully submitted,

EDWARD M. BERNSTEIN & ASSOCIATES

By: _____
Patti S. Wise, Esq.
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(702) 384-4000
Attorneys for Plaintiffs

A558164

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(702) 240-0000

Exhibit Q

Stipulation and Order to Vacate Judgment and Dismiss all Claims with Prejudice in

Richard C. Sacks v. Sicor, Inc., et al.

Eighth Judicial District Court Case No. A572315

SAO
ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
ROBERT M. ADAMS, ESQ.
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Attorneys for Plaintiffs RICHARD C. SACKS, ANTHONY V. DEVITO, and DONNA JEAN DEVITO,

DISTRICT COURT
CLARK COUNTY, NEVADA

RICHARD C. SACKS, individually, Plaintiff, v. SICOR, INC., et. al., Defendants.	CASE NO. A572315 DEPT. NO. XXVIII
ANTHONY V. DEVITO and DONNA JEAN DEVITO, individually, and as husband and wife, Plaintiffs, v. SICOR, INC., et al., Defendants.	CASE NO. A583058 DEPT. NO. XXVIII **STIPULATION AND ORDER TO VACATE JUDGMENT AND DISMISS ALL CLAIMS WITH PREJUDICE**
ANNE M. ARNOLD and JAMES L.	CASE NO. A576071

ARNOLD, husband and wife, Plaintiffs, v. SICOR, INC., et al., Defendants.	DEPT. NO. XXVIII

IT IS STIPULATED AND AGREED, by and between Plaintiffs RICHARD C. SACKS, ANTHONY V. DEVITO, DONNA JEAN DEVITO, ANNE M. ARNOLD, and JAMES L. ARNOLD, and Defendants SICOR, INC., TEVA PARENTERAL MEDICINES, INC., BAXTER HEALTHCARE CORPORATION, and McKESSON MEDICAL-SURGICAL INC. by and through their respective counsel of record, that the Judgment entered on November 16, 2011 shall be vacated and the above-referenced consolidated actions shall be dismissed with prejudice. Each party agrees to bear its own costs and attorneys' fees. Claims against health maintenance organizations in parallel actions are not included in this dismissal and such claims are not dismissed by this Order.

Dated this 6 day of March, 2012.

OLSON, CANNON, GORMLEY & DESRUISSEAUX

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Counsel for Plaintiffs ANTHONY DEVITO, DONNA DEVITO AND RICHARD SACKS

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Judgment entered on November 16, 2011 in Case Nos. A572315, A583058, and A576071 shall be vacated and all claims be dismissed with prejudice with each party to bear its own attorneys' fees and costs.

JENNIFER P. TOGLIATTI
~~Hon. Ronald J. Israel~~
DISTRICT COURT JUDGE

SUBMITTED BY:

MAR - 9 2012

EGLET WALL

By: _____

KEMP JONES & COULTHARD

By: _____