IN THE SUPREME COURT

OF THE STATE OF NEVADA

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

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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
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

YVETTE ADAMS, *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-18-778471-C

Dept. No.: 8

REPLY IN SUPPORT OF MOTION TO DISMISS

Date of Hearing: November 5, 2019

Time of Hearing: 8:30 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

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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 10:12-14. 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'

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representations to the contrary. Moreover, 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 2:21-23. 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 N** (*Chanin* Vacatur and Dismissal)**, O** (*Washington* Vacatur and Dismissal)**,** and **P** (*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, *Pontarelli Limousine, Inc. v. City of*

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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. 11, 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 (3d 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 page 12 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 9:17-19. 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 7:25-26. 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 pg. 13. 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 N** (*Chanin* Vacatur and Dismissal)**, O** (*Washington* Vacatur and Dismissal)**,** and **P** (*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.

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 N

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 O

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

☐ Voluntary Dis
☐ Involuntary (stat) Dis
☐ Jdgmt on Arb Award
☐ Mtn to Dis (by deft)
☒ Stip Dis
☐ Stip Jdgmt
☐ Default Jdgmt
☐ Transferred
☐ Sum Jdgmt
☐ Non-Jury Trial
☐ Jury Trial
FINAL DISPOSITIONS
☐ Time Limit Expired
☐ Dismissed (with or without prejudice)
☐ Judgment Satisfied/Paid in full

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(702) 240-0000

FEB 21 2012

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
Las Vegas, NV 89129
(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
Las Vegas, NV 89101
(702) 384-4000
Attorneys for Plaintiffs

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EDWARD M. BERNSTEIN & ASSOCIATES
ATTORNEYS AT LAW
500 SO. FOURTH ST.
LAS VEGAS,
NEVADA 89101
(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.
500 South Fourth Street
Las Vegas, NV 89101
(702) 384-4000
Attorneys for Plaintiffs

A558164

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

Exhibit P

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.
Nevada Bar No. 6551
ARTEMUS W. HAM, ESQ.
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Attorneys for Plaintiffs ANNE M. ARNOLD and JAMES L. ARNOLD

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Telephone: (702) 385-6000

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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EGLET WALL

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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: _____

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

YVETTE ADAMS, Plaintiff, vs. TEVA PARENTERAL MEDICINES, INC., Defendant.	CASE NO. A-18-778471-C DEPT. NO. VIII

BEFORE THE HONORABLE TREVOR L. ATKIN, DISTRICT COURT JUDGE

TUESDAY, NOVEMBER 5, 2019

RECORDER'S TRANSCRIPT OF HEARING:

DEFENDANT'S MOTION TO DISMISS

APPEARANCES:

For the Plaintiff: PETER C. WETHERALL, ESQ.,

For the Defendant: BRIAN RUBENSTEIN, ESQ.,
Pro Hac Vice
PHILIP M. HYMANSON, ESQ.

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

Case Number: A-18-778471-C

Las Vegas, Nevada Tuesday, November 5, 2019

[Hearing commenced at 9:01 a.m.]

MR. WETHERALL: Good morning, Your Honor, Peter Wetherall for the plaintiffs.

THE COURT: Good morning, Mr. Wetherall.

MR. RUBENSTEIN: Good morning, Brian Rubenstein for the defendants.

THE COURT: Good morning.

MR. HYMANSON: Good morning, Your Honor, Phil Hymanson on behalf of Teva.

THE COURT: Good morning, Mr. Hymanson.

This is the defendant's motion to dismiss.

MR. RUBENSTEIN: Correct.

THE COURT: Go ahead, yes.

MR. RUBENSTEIN: Good morning, Your Honor, this is a case where the plaintiffs are trying to hold the defendants here liable for the heinous criminal acts that were committed by healthcare providers completely unrelated to defendants over 10 years ago.

The defendants here are manufacturers and distributors of the generic pharmaceutical product propofol, which a perfectly safe widely used anesthesia product. It's probably the most widely used anesthesia product in the United States, if not the world. Doctors have described it as the gold standard for anesthesia products. It gets used safely tens of thousands of times every single day.

But the plaintiffs here are claiming that defendants should not have sold their perfectly safe FDA approved product to the real wrong doers who criminally misused the product for their own financial benefit. But all of plaintiff's claims here are preempted by federal law. The United States Supreme Court has found not once but twice that all of plaintiff's claims here are preempted.

First in the *Mensing* case back in 2011 the United States Supreme Court found that generic pharmaceutical manufacturers like the defendants here are not permitted to change the warnings on their labels and not permitted to send dear doctor letters. Then again in 2013 in the *Bartlett* case United States Supreme Court reaffirmed the *Mensing* decision and further held that generic pharmaceutical manufacturers cannot be held liable for design defect claims because those claims are preempted as well.

All the plaintiff's claims here basically boil down to one thing. They say the defendant should not have sold the 50 mL size vial of propofol to the clinics at issue. They claim throughout their complaint that the 50 mL vials are quote: multi-dose vials. But regardless of what the plaintiffs call them; that's simply not the case. Undisputed evidence shows that the warning label on the actual vial itself says single patient use. So the plaintiffs can call it whatever they want, but the fact of the matter is that they're not multi-dose vials. But regardless their claim is squarely preempted.

There's no claim by the plaintiffs that there's actually anything wrong with the 50 mL vials of propofol. The only thing wrong is the way

they were misused by the healthcare providers who have since been found guilty both in State and Federal Court proceedings for criminal neglect, healthcare fraud, insurance fraud, and other related claims. The only claim in this case basically is that the Defendant's should not have sold their FDA approved 50 mL sized bottles to the clinics. But this claim is squarely preempted by the United States Supreme Court decision in *Bartlett*.

Defendant's 50 mL vials were approved by the FDA. This approval came without restriction. The product was approved to be sold to licensed healthcare providers as it was here. The United States Supreme Court has found that any claim based on a theory that a defendant had simply had not sold its FDA approved product to avoid liability is preempted. What the language in the case says and I quote: we reject the stop selling rationale. It's incompatible with our preemption juris prudence.

Our preemption cases presume that an act or seeking to satisfy both has federal and state law obligations, is not required to seize acting all together in order to avoid liability. In deed if the option of seizing to act defeated a claim of impossibility, impossibility preemption would be all but meaningless.

Even if the plaintiffs were to claim that there was some sort of actual design defect with the 50 mL vial, which they don't, that claim would also be preempted. Because *Bartlett* said that a generic manufacturer, like the defendants here, cannot change the design of the drug. The only thing that a company can do if you can't change the

design of the drug is to enhance the warnings which runs head long into the *Mensing* decision, which specifically says that a generic pharmaceutical --

THE COURT: Not allowed to change it.

MR. RUBENSTEIN: -- cannot change the labels. So no matter how they define their claims they're all preempted.

Now to the extent the plaintiffs claim that the defendants could have done something more to warn the medical community about the dangers of multi-dosing 50 mL vials, that claim is preempted as well because a dear doctor letter, which the plaintiffs claim defendants should have sent, is considered labeling under the FDCA, through the drug and cosmetic act. Generic pharmaceutical manufacturers are not permitted to send a dear doctor letter where the branded company did not. The Court said that that would inaccurately imply therapeutic difference between the brand and generic drugs and thus would be impermissibly misleading.

Now to try to get around this plaintiffs say the first time in their opposition brief that the defendants could have selected the FDA approved alternative design. Now I'm not really sure what the means because the 50 mL vial was approved by the FDA. And the defendants didn't select this design. The branded product, Diprivan, which had been on the market for several years before the generic version came out in the market was already being sold in the 50 mL size vial. All defendants here what -- did was make a generic version, make it for sale at a cheaper price. So the defendants didn't select anything. The

only people that selected something were the healthcare providers who have since been convicted. They are the ones who selected the 50 mL size vials to use in their clinics.

Now plaintiffs also say that their claims aren't preempted. If there was some other updated warning or dear doctor letter that the defendants didn't adopt. Again they say this for the first time in their opposition brief. It's pled nowhere in their complaint. And there's a simple reason for that. The reason is there was no updated label that the defendants could have adopted. There was no dear doctor letter that the plaintiff could -- that the defendants could have adopted. Labels, dear doctor letters, are all a matter of public record. If there was one out there plaintiffs would have put it in their complaint. So this argument is nothing but a red herring.

So the bottom line, Your Honor, is that under whatever theory the plaintiffs want to pursue their claims are preempted by federal law.

THE COURT: All right. Thank you.

MR. RUBENSTEIN: Yeah.

MR. WETHERALL: Good morning, Your Honor.

THE COURT: Good morning, Mr. Wetherall.

MR. WETHERALL: And if all that were true two federal judges on --

THE COURT: Navarra, Mahan.

MR. WETHERALL: Navarro and Mahan would not have addressed the preemption issue when raised by the defense and found that preemption did not bar these claims in remanding it back to the

state court. And if all that were true Judge Crockett a few weeks ago would not have denied this identical motion in a companion case before his court. As Your Honor is aware there's three cases total, one which is pending in Department IV.

The preemption argument has been defeated multiple times in this jurisdiction. And I didn't provide Your Honor with evidence of past verdicts and decisions by other trial courts in order to say that there's nothing for you to assess or evaluate here. Quite the contrary, I provided it to you in response to them leading with their chin, by saying that the fact that criminal charges arose out of this scenario somehow immunizes them. We certainly know that's not true. There's nothing mutually incompatible or inconsistent with having civil liability along with criminal culpability. And we've seen that as recently as the October 1 shooting cases.

Preemption immunization comes when state court claims require a defendant to alter one of the following, the active ingredients, the root of administration, the dosage form, the strength, or the labeling on the product. At its core this case is about a company that knew that the sale of 50 mL propofol bottles at an ambulatory surgical center was subject to abuse. They had multiple incidents and events which told Teva that when they sell that larger bottle which may be single dose in a hospital environment where you need to put someone under for hours and hours. But it is obviously multi-dose in a scenario where an ambulatory surgical center is ambulatory, because you're only putting someone under for 20 minutes. In that scenario a 50 mL bottle is way

too much. They knew that.

And this case and complaint isn't requiring them to stop selling their drug. This case is about them making a conscious decision to sell and inordinately large bottle of propofol to an ambulatory surgical center under circumstances where Teva knew but not the patients that that 50 mL bottle was subject to abuse. And so there is nothing inconsistent or incompatible about the pursuit of that claim under various theories. That is preempted. That's what Judge Navarro found. That's what Judge Mahan found. That's what Judge Crockett found. That's what multiple judges that presided over half billion dollar verdicts in this community found years ago. But after the *Mensing* decision that they're referencing.

And for those reasons in a nutshell, Your Honor, these claims are not preempted and should go forward. Thank you.

THE COURT: Thank you.

MR. RUBENSTEIN: Thank you. Your Honor, Judges Navarro and --

MR. HYAMANSON: Mahan

MR. RUBENSTEIN: -- Mahan, sorry, did not find that these claims are not preempted. They simply found that there's not federal question jurisdiction.

THE COURT: And remanded it.

MR. RUBENSTEIN: It's a completely different analysis, because there conceivably could be claims against a generic pharmaceutical manufacturer that would not be preempted. But those

claims aren't present here.

You know, the verdicts and things of -- first all the verdicts were all vacated and occurred before the *Bartlett* decision which I think is probably more applicable here than *Mensing*. Because, you know, there might be some round about claim that the defendants could have altered their warnings or sent dear doctor letters. But the true claim is that they shouldn't have sold these 50 mL sized vials to the clinics at issue. And that claim has been squarely preempted by the United States Supreme Court and similar claims around the country have been dismissed on that ground. I --

THE COURT: I'm familiar with it. It was a 25 page brief and it was perfect. I wish all the briefing was that good.

MR. RUBENSTEIN: Thank you.

THE COURT: I'm going to deny the motion. It's a motion to dismiss. I think it's a drastic remedy and I find the case law presented by plaintiff's counsel persuasive and I want to err on the side of the caution if you think I've erred. So I'm going to deny the motion.

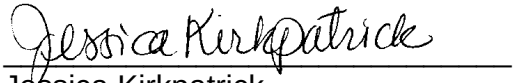
MR. WETHERALL: Thank you, Your Honor.

MR. RUBENSTEIN: Thank you, Your Honor.

[Hearing concluded at 9:13 a.m.]

****

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Jessica Kirkpatrick
Court Recorder/Transcriber

ORD
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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

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 FERNANDEZVENTURA; 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

CASE NO: A-18-782023-C

DEPT.: 24

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

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; JACQUELINE BEATTIE; PRENTICE BESORE; IRENE BILSKI; VIOLA BROTTLUND-WAGNER; PATRICK CHRISTOPHER; PAUL DENORIO; DAVID DONNER; TIMOTHY DYER; DEMECIO GIRON; CAROL HIEL; CAROLYN LAMYER; REBECCA LERMA; JULIE KALSNES f/k/a OLSON; FANNY POOR; FRANCO PROVINCIALI; JOELLEN SHELTON; FRANK STEIN; JANET STEIN; LOIS THOMPSON; FRANK TORRES; FRANK BEALL; PETER BILLITTERI; IRENE CAL; CINDY COOK; EVELYN EALY; KRISTEN FOSTER; PHILLIP GARCIA; JUNE JOHNSON; LARRY JOHNSON; WILLIAM KEPNER; PEGGY LEGG; JOSE LOZANO; JOSEPHINE LOZANO; DEBORAH MADISON; MICHAEL MALONE; ANN MARIE MORALES; GINA RUSSO; COLLEEN TRANQUILL; LORAINE TURRELL; GRAHAM TYE; SCOTT VANDERMOLIN; LOUISE VERDEL; J. HOLLAND WALLIS; ANGELA HAMLER f/k/a WASHINGTON; SHARON WILKINS; MARK WILLIAMSON; STEVE WILLIS; BENYAM YOHANNES; MICHAL ZOOKIN; LIDIA ALDANAY; MARIDEE ALEXANDER; ELSIE AYERS; JACK AYERS; CATHERINE BARBER; LEVELYN BARBER; MATTHEW BEAUCHAMP; SEDRA BECKMAN; THOMAS BEEM; EMMA RUTH

BELL; NATHANIA BELL; PAMELA BERTRAND; VICKI BEVERLY; FRED BLACKINGTON; BARBARA BLAIR; MICHELLE BOYCE; NORANNE BRUMAGEN; HOWARD BUGHER; ROBERT BUSTER; WINIFRED CARTER; CODELL CHAVIS; BONNIE CLARK; KIP COOPER; MICHEL COOPER; CHRISTA 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; SALVATORE J. SBERNA; JOSEPH LEWANDOWSKI; CAROLE LEE PERRELLI; JOSEPH PERRELLI; MURIEL CAROL HINMAN; KENNETH D. HINMAN; JANICE WELSH; LOIS THOMPSON; LOLA HALL; JAMES ("DICK") GUM; AUDREY GUM; PATRICK SNYDER; EDWARD SUTER; NANCY TITMUSS; MICHAEL TITMUSS; PHYLLIS J. BODELL; HELEN HACKETT; MARTHA TURNER; ROBERT RUGG; 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

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.

The foregoing case came on for hearing on September 17, 2019, as a result of Defendants' Motion to Dismiss. Peter C. Wetherall, Esq., of Wetherall Group, Ltd., appeared on behalf of Plaintiffs; Philip M. Hymanson, Esq., of Hymanson & Hymanson, and Jason Hicks, Esq., of Greenberg Traurig, LLP, appeared on behalf of Defendants.

The Court, having reviewed the briefing of the Parties, having entertained the oral arguments of counsel, being duly advised on the premises, and good cause appearing therefor:

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss is hereby DENIED.

IT IS FURTHER ORDERED, pursuant to the agreement of the Parties, that the claims of those Plaintiffs not identified in the Parties' Tolling Agreement are hereby dismissed.

DATED this 29 day of October, 2019.

DISTRICT JUDGE

Respectfully Submitted:

WETHERALL GROUP, LTD.

By: Peter C. Wetherall

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Attorneys for Plaintiffs

Approved as to Form and Content:

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&

HYMANSON & HYMANSON

By: [Refused to Sign]
Philip Hymanson, Esq.
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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

MAUREEN BRIDGES, et al,

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-18-782023-C

DEPT.: 24

AMENDED NOTICE OF ENTRY OF ORDER DENYING DEFENDANT'S MOTION TO DISMISS

PLEASE TAKE NOTICE that an **Order Denying Defendant's Motion to Dismiss** was filed with this Court in the above-entitled matter on the 12th day of November 2019, a copy of which is attached hereto.

/ / / /

/ / / /

/ / / /

The Certificate of Service for above-entitled document has been amended to reflect the true and correct information.

DATED this 19th day of November, 2019.

WETHERALL GROUP, LTD.

By: */s/ Peter C. Wetherall*
Peter C. Wetherall, Esq.
Nevada Bar No. 4414
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE
Case No.: A-18-782023-C

The undersigned does hereby declare that I am over the age of eighteen (18) years and not a party to the within entitled action. Pursuant to NRCP 5(b), I certify that I am an employee of Wetherall Group, Ltd., 9345 W. Sunset Road, Suite 100, Las Vegas, Nevada 89148. On this 19th day of November, 2019, I did cause a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER DENYING DEFENDANT'S MOTION TO DISMISS** to be served upon each of the parties listed below via electronic service through the Court's Odyssey File and Service System.

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Attorneys for Defendants

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

By */s/ Kristin Smith*
An employee of Wetherall Group, Ltd.

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DISTRICT COURT

CLARK COUNTY, NEVADA

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 FERNANDEZVENTURA; 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

CASE NO: A-18-782023-C

DEPT.: 24

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

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; JACQUELINE BEATTIE; PRENTICE BESORE; IRENE BILSKI; VIOLA BROTTLUND-WAGNER; PATRICK CHRISTOPHER; PAUL DENORIO; DAVID DONNER; TIMOTHY DYER; DEMECIO GIRON; CAROL HIEL; CAROLYN LAMYER; REBECCA LERMA; JULIE KALSNES f/k/a OLSON; FANNY POOR; FRANCO PROVINCIALI; JOELLEN SHELTON; FRANK STEIN; JANET STEIN; LOIS THOMPSON; FRANK TORRES; FRANK BEALL; PETER BILLITTERI; IRENE CAL; CINDY COOK; EVELYN EALY; KRISTEN FOSTER; PHILLIP GARCIA; JUNE JOHNSON; LARRY JOHNSON; WILLIAM KEPNER; PEGGY LEGG; JOSE LOZANO; JOSEPHINE LOZANO; DEBORAH MADISON; MICHAEL MALONE; ANN MARIE MORALES; GINA RUSSO; COLLEEN TRANQUILL; LORAINE TURRELL; GRAHAM TYE; SCOTT VANDERMOLIN; LOUISE VERDEL; J. HOLLAND WALLIS; ANGELA HAMLER f/k/a WASHINGTON; SHARON WILKINS; MARK WILLIAMSON; STEVE WILLIS; BENYAM YOHANNES; MICHAL ZOOKIN; LIDIA ALDANAY; MARIDEE ALEXANDER; ELSIE AYERS; JACK AYERS; CATHERINE BARBER; LEVELYN BARBER; MATTHEW BEAUCHAMP; SEDRA BECKMAN; THOMAS BEEM; EMMA RUTH

BELL; NATHANIA BELL; PAMELA BERTRAND; VICKI BEVERLY; FRED BLACKINGTON; BARBARA BLAIR; MICHELLE BOYCE; NORANNE BRUMAGEN; HOWARD BUGHER; ROBERT BUSTER; WINIFRED CARTER; CODELL CHAVIS; BONNIE CLARK; KIP COOPER; MICHEL COOPER; CHRISTA 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; SALVATORE J. SBERNA; JOSEPH LEWANDOWSKI; CAROLE LEE PERRELLI; JOSEPH PERRELLI; MURIEL CAROL HINMAN; KENNETH D. HINMAN; JANICE WELSH; LOIS THOMPSON; LOLA HALL; JAMES ("DICK") GUM; AUDREY GUM; PATRICK SNYDER; EDWARD SUTER; NANCY TITMUSS; MICHAEL TITMUSS; PHYLLIS J. BODELL; HELEN HACKETT; MARTHA TURNER; ROBERT RUGG; 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

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.

The foregoing case came on for hearing on September 17, 2019, as a result of Defendants' Motion to Dismiss. Peter C. Wetherall, Esq., of Wetherall Group, Ltd., appeared on behalf of Plaintiffs; Philip M. Hymanson, Esq., of Hymanson & Hymanson, and Jason Hicks, Esq., of Greenberg Traurig, LLP, appeared on behalf of Defendants.

The Court, having reviewed the briefing of the Parties, having entertained the oral arguments of counsel, being duly advised on the premises, and good cause appearing therefor:

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss is hereby DENIED.

IT IS FURTHER ORDERED, pursuant to the agreement of the Parties, that the claims of those Plaintiffs not identified in the Parties' Tolling Agreement are hereby dismissed.

DATED this 29 day of October, 2019.

DISTRICT JUDGE

Respectfully Submitted:

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

MAUREEN BRIDGES, *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-18-782023-C

Dept. No.: 24

MOTION FOR RECONSIDERATION OF ORDER DENYING DEFENDANTS' MOTION TO DISMISS

HEARING REQUESTED

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, respectfully submit this motion for reconsideration of the Court's order denying Defendants' motion to dismiss ("Motion"). This Motion is made and based upon the following memorandum of points and authorities, the exhibits attached hereto, the pleadings and papers on file herein, the oral argument heard by the Court on Defendants' motion to dismiss, and any argument to be entertained by the Court at the time of hearing on this Motion.

DATED this 25th day of November 2019.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs are a collection of prior patients of the Endoscopy Center of Southern Nevada (the "Clinic"), a non-party to this lawsuit. Compl. at ¶ 7. Each Plaintiff alleges that he or she received an injection of a generic form of propofol manufactured and distributed by Defendants while visiting the Clinic between March 2004 and January 2008. *Id*. at ¶ 8-10. Importantly, none of the Plaintiffs claim to have been infected with any type of blood borne pathogen as a result of being administered propofol at the Clinic. Nonetheless, Plaintiffs attack the packaging, labeling, and adequacy of the warnings, dosage, and strength of the propofol that was administered to them (*id*. at ¶ 8) and, in briefing, have modified their theory to attack the 50 mL vials of propofol in particular, arguing essentially that the vial size was "too large" (despite being authorized by the FDA) and that Defendants should have known the propofol would be misused. Defendants filed a motion to dismiss all of Plaintiffs' claims on several grounds, one of which was that they are federally preempted per the United States Supreme Court's decisions in *Mutual Pharmaceutical Company v. Bartlett*, 570 U.S. 472 (2013) and *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 620-21 (2011) given that the FDA specifically approved the 50 mL vials at issue.

Defendants' motion to dismiss came on for hearing before the Court on September 17, 2019.[1] While there is no transcript, at that hearing the Court expressed concern that finding Plaintiffs' claims to be federally preempted would be fundamentally unfair to Plaintiffs. The Court further posited the question: couldn't Defendants simply stop selling the 50 mL vials to avoid liability under Nevada law? But, these very concerns were addressed by the United States Supreme Court in both *Mensing* and *Bartlett* and were disposed of in favor of the generic-manufacturer defendants. Those decisions mandate the same result here.

By way of this motion for reconsideration, Defendants respectfully submit that the Court committed clear error in denying their motion to dismiss on federal preemption grounds. Defendants request that the Court set the matter for oral argument and reconsider its decision upon further examination of *Mensing*, *Bartlett*, and the more than one hundred decisions from around the country

[1] Defendants learned after the hearing that this Department does not record oral argument unless specifically requested to beforehand. For this reason it is important that this motion for reconsideration be set for hearing so that the record may be appropriately developed and preserved.

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in both state and federal courts correctly applying the same. To the extent Plaintiffs will again rely on the vacated Clark County judgments obtained in 2010-2011, those decisions were simply decided incorrectly and based upon an incomplete factual record that only played out in the years after those trials, and they have been wrongly used to create a domino effect in deciding dismissal of this case and, at present, one of the companion cases currently pending in Clark County. A plain reading of *Mensing*, *Bartlett*, et. al., reveal the same.

II. ARGUMENT

A. Standard on a Motion for Reconsideration

A court may reconsider a previously decided issue when the decision is "clearly erroneous" or would result in manifest injustice. *See Masonry & Tile Contractors v. Jolley, Urga & Wirth, Ltd.,* 113 Nev. 737, 941 P.2d 486, 489 (1997) ("A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous"); *Mustafa v. Clark County School District,* 157 F.3d 1169, 1178-79 (9th Cir. 1998) (generally, leave for reconsideration is granted upon showing of clear error or manifest injustice); *Harvey's Wagon Wheel, Inc. v. MacSween,* 96 Nev. 215, 606 P.2d 1095, 1097 (1980); *Trail v. Faretto,* 91 Nev. 401, 403, 536 P.2d 1026 (1975) (court may "for sufficient cause shown, amend, correct, resettle, modify, or vacate, as the case may be, an order previously made and entered on motion in the progress of the cause or proceeding"). The Nevada Supreme Court has explained that reconsideration of an order is also appropriate where "there is a reasonable probability that the Court may have arrived at an erroneous conclusion or overlooked some important question necessary to a full and proper understanding of the case." *State v. Fitch*, 68 Nev. 422, 426, 233 P.2d 1070, 1072 (1951); *Moore v. City of Las Vegas*, 92 Nev. 402, 551 P.2d 244, 246 (1976) (finding that rehearing will be granted when "new issues of fact or law are raised supporting a ruling contrary to the ruling already reached.").

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Pursuant to EDCR 2.24:

> A party seeking reconsideration of a ruling of the court, other than any order which may be addressed by motion pursuant to N.R.C.P. 50(b), 52(b), 59 or 60, must file a motion for such relief within 10 days after service of written notice of the order or judgment unless the time is shortened or enlarged by order.[2]

In short, a motion for reconsideration directs the court's "attention to some controlling matter which the court has overlooked or misapprehended." *In re Ross*, 99 Nev. 657, 659, 668 P.2d 1089, 1091 (1983).

Here, the Court's decision to deny Defendants' motion to dismiss on the basis of federal preemption is contrary to the binding decisions of the United States Supreme Court in *Mensing* and *Bartlett*, and, as such, appropriate for reconsideration.

B. Denying Defendants' Motion to Dismiss Based on Federal Preemption Grounds Was Clear Error

i. The United States Supreme Court Has Recognized But Rejected The "Unfairness" Argument.

First, at the hearing on Defendants' motion to dismiss, this Court seemed to expressed concern at the potentially inequitable outcome, as well as doubt about the FDA's intentions, should it find that Defendants could not be liable to Plaintiffs as a matter of law simply because the propofol at issue is a generic brand. But in *Mensing*, the United States Supreme Court explicitly recognized this perceived unfairness, stating that "we recognize that from the perspective of [plaintiffs], finding pre-emption here but not in *Wyeth* makes little sense" and that "[h]ad [plaintiff] taken Reglan, the brand-name drug prescribed by their doctors, *Wyeth* would control and their lawsuits would not be pre-empted." *Mensing*, 564 U.S. at 625. After acknowledging "the unfortunate hand that federal drug regulation has dealt [plaintiffs] and others similarly situated[,]" the Supreme Court nonetheless reiterated that "it is not this Court's task to decide whether the statutory scheme established by Congress is unusual or even bizarre" and that "[a]s always, Congress and the FDA retain the authority to change the law and regulations if they so desire." *Id*. at 625-26. The Court was nonetheless required

[2] Written notice of entry of the Order was served electronically on November 14, 2019 and an amended notice of entry was filed November 19, 2019. Accordingly, this Motion is timely under EDCR 2.24 and NRCP 6(a) and 6(d).

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to dismiss plaintiffs' claims against a generic manufacturer as preempted. The same holds true here. While Defendants understand the Court's concern, it has been explicitly addressed by controlling precedent. It is Congress or the FDA, alone, that can address this concern through revised legislation or agency regulations.

ii. Defendants Were Not Required to Stop Selling Propofol in 50 mL Vials.

Second, this Court indicated, and expressly asked at the hearing, whether Defendants could have stopped, or perhaps never started, selling propofol in 50 mL vials if Defendants wished to avoid liability under state tort law in relation to Plaintiffs' claims for the same. That is the exact argument Plaintiffs are charging forward on. But, this case is no different from the hundreds of others decided in the wake of the United States Supreme Court's decisions in *Mutual Pharmaceutical Company v. Bartlett*, 570 U.S. 472 (2013) and *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 620-21 (2011) in which the Supreme Court twice rejected this very same "stop-selling" theory:

> 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."

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

In the wake of those decisions, more than a hundred federal and state courts have followed suit, holding state-law claim targeting generic drugs are preempted and efforts to avoid preemption by insisting the manufacturer stop selling the product fail. *See, e.g.*, *Wagner v. Teva Pharms. USA, Inc.*, 840 F.3d 355, 358 (7th Cir. 2016) ("[F]ederal law preempts state tort laws when the generic drug manufacturer could not have abided by [its] duty [of sameness] without: (1) changing the drug's formula; (2) changing the drug's label; or (3) withdrawing the generic drug from the market altogether."); *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 (3d Cir. 2014) (noting that the plaintiffs "are trying to resurrect the 'stop-selling' theory, under which the Generic Defendants can only avoid state-law liability by halting their sales of alendronate sodium," "[b]ut *Bartlett*

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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).

It is undisputed that the manufacturer of the brand-name version of propofol (Diprivan) received approval from the FDA to sell its anesthesia product in 50 mL vials. It is undisputed that federal law requires that Defendants' generic product be at all times the "same as" the brand-name manufacturer's. It is undisputed that Defendants' generic product in fact was the same as the brand manufacturer's at all relevant times. Thus, it follows, that Defendants did exactly what federal law permitted and, in fact, mandated of them.[3] Plaintiffs' argument that Defendants should not have sold the 50 mL propofol vials specifically authorized by the federal government and, in fact, violated state law in doing so, which appears to have been adopted by this Court, is directly contrary to U.S. Supreme Court precedent. *Bartlett*, 570 U.S. at 488.[4]

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[3] Any theory that Defendants "knew" or should have known that 50 mL vials would be unsafe in an environment like the Clinics is also preempted because Plaintiffs have not alleged that Defendants had information available to them that the FDA did not when it authorized the 50 mL vials. This is, again, addressed by the U.S. Supreme Court in *Bartlett*. 570 U.S. 472 at fn. 4 ("The parties and the Government appear to agree that a drug is misbranded under federal law only when liability is based on new and scientifically significant information that was not before the FDA. Because the jury was not asked to find whether new evidence concerning sulindac that had not been made available to the FDA rendered sulindac so dangerous as to be misbranded under the federal misbranding statute, the misbranding provision is not applicable here.").

[4] The FDA expressly approved Defendants' generic propofol to be manufactured, marketed, and distributed in 50 mL single-patient vials in January 1999. *See* **Exhibit M** to Motion to Dismiss (FDA Review Packet). The FDA-approved package insert listed propofol as available in 20 mL, 50 mL, and 100 mL vials containing 10 mg/mL of propofol. *Id*. at 015 (emphasis added). The 50 mL vial labelling itself was stamped—literally—with the federal government's approval on January 4, 1999. *Id.* at Bates 024, 026. The Approval Summary clearly references approved labels and labeling for 50 mL containers and cartons (*id*. at 054) and discusses the amended application for the 50 mL vial size (*id*. at 059). The Review of Professional Labeling portion specifically notes that the Reference Listed Drug ("RLD"), Diprivan, is manufactured in 50 mL vials and 50 mL pre-filled syringes, and that the Abbreviated New Drug Application, *i.e.,* Defendants' generic propofol, is

iii. The Federal District Courts Did Not Already Rule on Defendants' Motion to Dismiss

Finally, this Court questioned at the hearing, albeit in passing, the Nevada federal court's recent decision in remanding this case to state court on preemption grounds, and seemed to indicate its agreement with Plaintiffs that Judge Mahan has already spoken on the issue of preemption as an affirmative defense. To the extent that was the case, not only is that untrue, but Judge Mahan has, in fact, dismissed similar claims against generic manufacturers on preemption grounds in cases in which the plaintiffs put forth the same or substantially similar arguments as Plaintiffs do here. *See, Moretti v. PLIVA, Inc.*, 2012 U.S. Dist. LEXIS 24113, 2012 WL 628502 (D. Nev. Feb. 27, 2012).

There is a distinct and important difference between preemption as an affirmative defense, which Defendants assert here, and preemption as an independent ground for the exercise of subject matter jurisdiction by a federal court. It was only the later that was decided on by Judge Mahan in this case. There are only a few areas of law that the courts have declared to be so totally preempted by federal law that the completely preemptive nature suffices as a basis for subject matter jurisdiction in and of itself. That concept is called "field preemption." *See, Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-153 (1982) (explaining field preemption). One example of field preemption is in the area of laws governing the registration of aliens within states. The United States Supreme Court has held that the "United States has broad, undoubted power over the subject of immigration and the status of aliens[,]" rooted in the U.S. Constitution, and, among other reasons, the national policy implications presented meant that the area of law is completely preempted. *Arizona v. United States*, 567 U.S. 387, 395-396 (2012); *see also id*. at 399 ("The intent to displace state law altogether can be inferred from a framework of regulation so pervasive that Congress left no room for the States to supplement it or where there is a federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.") (internal quotations, ellipses, and citation omitted).

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also manufactured in 50 mL vials. *Id*. at 076. It is beyond dispute, then, that the vials at issue in this case were specifically approved by the federal government. Plaintiffs do not contend otherwise.

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The entirety of the Federal Food, Drug, and Cosmetic Act ("FDCA") is not one of those limited areas. That is because, for example, state tort laws can conceivably coexist in harmony with federal regulations, at least with respect to brand-name manufacturers. Again, brand manufacturers hold an obligation to monitor safety information and, if necessary, submit information to the FDA. State laws imposing the same duty as their federal counterpart may not be in conflict and, therefore, may not be preempted. That is the only reason that the FDCA does not so completely preempt state law that it provides an independent ground for federal subject matter jurisdiction. That is why the federal district court determined that it did not have subject matter jurisdiction; it is not because the federal court entertained and rejected preemption as an affirmative defense, as Plaintiffs insist.

III. CONCLUSION

It is unclear, then, what grounds the Court relied upon in finding these claims are not preempted by federal law. Based upon the foregoing, in particular the binding decisions of the Supreme Court of the United States in *Mensing* and *Bartlett*, and in accord with the persuasive authority interpreting and applying the same, Defendants respectfully request that the Court reconsider its prior decision denying Defendants' motion to dismiss on federal preemption grounds. Defendants also respectfully request that the Court set this Motion for hearing so that it may be recorded and a proper record may be preserved.

DATED this 25th day of November 2019.

GREENBERG TRAURIG LLP

/s/ Jason K. Hicks
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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of November 2019, a true and correct copy of the foregoing **MOTION FOR RECONSIDERATION OF ORDER DENYING DEFENDANTS' 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/ Evelyn Escobar-Gaddi
an employee of Greenberg Traurig, LLP

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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

MAUREEN BRIDGES, et al,

Plaintiff,

vs.

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-18-782023-C

DEPT.: 24

Date: January 7, 2020

Time: [In Chambers]

OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION OF ORDER DENYING DEFENDANTS' MOTION TO DISMISS

Plaintiffs, by and through their attorneys of record, Peter C. Wetherall, Esq., of Wetherall Group, Ltd., hereby submit their *Opposition to Defendants' Motion for Reconsideration of Order Denying 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.

/ / / /

/ / / /

DATED this 5th day of December, 2019.

WETHERALL GROUP, LTD.

By: /s/ Peter C. Wetherall, Esq.
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

STATEMENT OF FACTS

Defendants' Motion for Reconsideration amounts to essentially a request for a "do-over", under circumstances where none is justified under Nevada law.

Following exhaustive briefing, including the inclusion of exhibits Defendants brought into play in their Motion to Dismiss – thereby necessitating Plaintiffs' inclusion of countervailing exhibits – the Parties argued their respective position at a hearing conducted on September 17, 2019. Thereafter, the Court entered its Order denying Defendants' Motion to Dismiss on October 29, 2019. An Amended Notice of Entry of the Court's Order was served on November 19, 2019, and the instant Motion for Reconsideration followed on November 25, 2019.

By way of update, following this Court's ruling from the bench, a hearing was conducted before Department 8 on Defendants' Motion to Dismiss in the "Adams" companion case on November 5, 2019, at which time Judge Atkin also denied Defendants' Motion to Dismiss (Order pending). In short, Defendants have now had five opportunities to persuade a court that their preemption argument has merit, including three opportunities before two federal judges, and has failed each time. Even as the Parties await one last hearing on Defendants' Motion to Dismiss in the "Abadjian" companion case before Dept. 4, Defendants seek reconsideration of this Court's Order, assuring two more bites of the apple, for a total of seven.

For the reasons previously identified in Plaintiffs' Opposition to Defendants' Motion to Dismiss (incorporated by reference as though fully set forth herein), Plaintiffs respectfully

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request the denial of Defendants' Motion for Reconsideration (and also the denial of oral argument thereon).

Defendants cite two grounds for reconsideration: 1) Defendants were unaware that this Department does not record oral argument unless specifically requested beforehand, therefore, the record needs to be "appropriately developed and preserved" by additional argument; and 2) "the Court's decision to deny Defendants' motion to dismiss on the basis of federal preemption is contrary to the binding decisions of the United States Supreme Court in Mensing and Bartlett, and, as such, appropriate for reconsideration". See, Motion, at 1:fn1; and 3:8-10.

LEGAL ARGUMENT

The standard for the granting of a Motion for Reconsideration set forth in Defendants' brief (at 2:9-24) is a correct statement of the law, and will not be recited here again. Under that "clearly erroneous" standard, there is no basis upon which to reconsider Defendants' Motion to Dismiss here.

First, Defendants have not and cannot cite any case law which supports their argument that their own failure to have the hearing reported OR recorded warrants the granting of their Motion for Reconsideration and for oral argument. It should be noted that the Court Reporter for Dept. 24 sits conspicuously in the courtroom, and asks prior to the start of the proceedings if anyone wants their matter reported. This occurred on the date this matter was argued, as it occurs every day that Dept. 24 is in session. So not only did Defendants fail to confirm that this matter would be recorded, they affirmatively declined to have the matter reported. Under these circumstances, there is no reason to grant Defendants the relief requested.

Next, within the ambit of their "clearly erroneous" argument, Defendants vaguely cite the Court's alleged reference to "unfairness" in support of their contention that the Court's ruling was premised upon improper grounds. Motion, 3:15-18. However, Defendants cannot cite to an exact quote or even the context in which the Court made such a comment. Notably, Defendants are careful NOT to contend that the Court specifically premised its ruling on some perceived "unfairness", but merely assert that, to the extent the Court *may have done so*,

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prevailing case law (arguably) militates against that.

This argument, that because the Court arguably made reference to "unfairness" at the hearing it *may have* decided Defendants' Motion correctly, is made from whole cloth, is altogether unsupported, and should be rejected as a basis for reconsideration of the Court's ruling.

Defendants' other two arguments under the "clearly erroneous" standard also fall short, but for different reasons.

First, Defendants' contend that Plaintiffs are "charging forward on" the contention that "Defendants could have stopped, or perhaps never started, selling propofol in 50 mL vials if Defendants wished to avoid liability under state tort law in relation to Plaintiffs' claims for the same". Motion, 4:6-9. This is NOT the argument Plaintiffs are making, so it stands to reason that the Court did not base its Order on that reasoning either.

Plaintiffs do not contend that Defendants needed to take their 50mL propofol off the market (i.e., "stop-selling) ***altogether***. See, *e.g.*, Wagner v. Teva Pharms. USA, Inc., 840 F.3d 355, 358 (7th Cir. 2016), cited in Defts. Motion, 4:17-23. Plaintiffs merely contend that Defendants could have and should have ceased selling 50mL vials of propofol *to ambulatory surgical clinics* (which require very small dosages) once Defendants became aware that misuse of the larger vials was occurring at ambulatory surgical clinics like the ones at issue. Thus, there is no conflict between state and federal law, and therefore no preemption. Plaintiffs' theory of liability under state law is compatible with federal prohibitions.

Lastly, Defendants contend that "the federal district courts did not already rule on Defendants Motion to Dismiss". Motion, 6:1-2. It should be noted that – any suggestions to the contrary - Plaintiffs have not misled or misstated the federal court Orders they cited in any way. Plaintiffs purposefully took pains to quote from those Orders and provide them for the Court's own independent review rather than summarizing or paraphrasing from them. Those federal court Orders are simply NOT amenable to the limited interpretation Defendants would have this Court ascribe to them. Regardless, Defendants have proffered their arguments in that regard, those arguments were entertained by the Court, and the Court made its ruling. The fact that

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Defendants believe that the federal court Orders in question have somehow been mischaracterized or misunderstood is not reason enough to grant reconsideration, whereas here, no evidence supports that contention.

CONCLUSION

For each of the foregoing reasons, Plaintiffs' respectfully request the Order of the Court denying Defendants' Motion for Reconsideration.

Dated this 5th day of December, 2019.

WETHERALL GROUP, LTD.

By:/s/ Peter C. Wetherall, Esq
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of WETHERALL GROUP LTD., and that on this 5th day of December, 2019 I caused the foregoing document entitled **OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION OF ORDER DENYING DEFENDANTS' MOTION TO DISMISS** to be served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

/s/ *Kristin L. Smith*
Employee of Wetherall Group, Ltd.

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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

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

The foregoing case came on for hearing on November 5, 2019, as a result of Defendants' Motion to Dismiss. Peter C. Wetherall, Esq., of Wetherall Group, Ltd., appeared on behalf of Plaintiffs; Philip M. Hymanson, Esq., of Hymanson & Hymanson, and Brian H. Rubenstein, Esq., of Greenberg Traurig, LLP, appeared on behalf of Defendants.

The Court, having reviewed the briefing of the Parties, having entertained the oral arguments of counsel, being duly advised on the premises, and good cause appearing therefor:

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss is hereby DENIED.

DATED this 17th day of DECEMBER, 2019.

DISTRICT JUDGE

Respectfully Submitted:

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By: Peter C. Wetherall
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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

NOTICE OF ENTRY OF ORDER DENYING DEFENDANT'S MOTION TO DISMISS

/ / /

PLEASE TAKE NOTICE that an ***Order Denying Defendant's Motion to Dismiss*** was filed with this Court in the above-entitled matter on the 23rd day of December 2019, a copy of which is attached hereto.

DATED this 23rd day of December, 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 23rd day of December, 2019, I served the foregoing *Order Denying Defendant's Motion to Dismiss PER NRCP 42; and EJDCR 2.50* 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/ Jasmyn Montano
An employee of Wetherall Group, Ltd.

ORIGINAL

ORD
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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

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

The foregoing case came on for hearing on November 5, 2019, as a result of Defendants' Motion to Dismiss. Peter C. Wetherall, Esq., of Wetherall Group, Ltd., appeared on behalf of Plaintiffs; Philip M. Hymanson, Esq., of Hymanson & Hymanson, and Brian H. Rubenstein, Esq., of Greenberg Traurig, LLP, appeared on behalf of Defendants.

The Court, having reviewed the briefing of the Parties, having entertained the oral arguments of counsel, being duly advised on the premises, and good cause appearing therefor:

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss is hereby DENIED.

DATED this 17th day of DECEMBER, 2019.

DISTRICT JUDGE

Respectfully Submitted:

WETHERALL GROUP, LTD.
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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

SOSSY ABADJIAN, Plaintiff(s), vs. TEVA PARENTERAL MEDICINES INC., Defendant(s).	CASE NO: A-18-781820-C DEPT. XXVII

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

THURSDAY, DECEMBER 26, 2019

RECORDER'S TRANSCRIPT OF PROCEEDINGS
RE: MOTIONS

APPEARANCES:

For the Plaintiff(s): PETER C. WETHERALL, ESQ.

For the Defendant(s): PHILIP M. HYMANSON, ESQ.

RECORDED BY: TRISHA GARCIA, COURT RECORDER

LAS VEGAS, NEVADA, THURSDAY, DECEMBER 26, 2019

[Proceeding commenced at 10:10 a.m.]

THE COURT: And then the last thing we have this morning is [indiscernible] versus tech closing argument.

MR. HYMANSON: Good morning, Your Honor.

THE COURT: Good morning.

MR. WETHERALL: Good morning, Your Honor. Peter Wetherall for plaintiffs.

MR. HYMANSON: Your Honor, Phil Hymanson, on behalf of Baxter, McKesson, and Teva.

THE COURT: Thank you.

All right. So this was the Defendant's Motion to Dismiss.

MR. HYMANSON: Thank you.

Your Honor, this case is becoming more of a history lesson than a legal question. It's a case that spans 10 years. And if you had told me I'd be going into the next decade with this case, I would not have believed you, and I wished it wasn't true. And I think I speak for both of us, we wish that wasn't true.

It's gone from civil litigation to criminal prosecution, back to civil litigation. There are things that have happened since the original litigation with the criminal prosecution, things that we couldn't talk about during the original propofol cases that are now public record.

And we also have the benefit of two U.S. Supreme Court

cases to give us guidance in this case, and those are the *Mensing* case in 2011, that was just breaking when we were doing the original propofol cases; and in 2013, the *Bartlett* case.

The plaintiffs in this case received a letter from Clark County saying that they should get tested as a result of treatment at several of the clinics here in Las Vegas. They had used a generic drug called propofol, which Teva manufactures, as an anesthesia for short medical procedures, and there was a potential risk of hepatitis C. In fact, there was a breakout of hepatitis C because of the procedures that were used by the clinic.

The defendants and the distributors went to trial. No one has ever said that the product or the delivery of the product was improper or inefficient or there was any issue with the product. In fact, propofol is probably the best-known and most-used short-term anesthesia of any drug in the United States. It's used thousands of times, every day, in all sorts of environments. And to this day, in these similar clinics, the 50-milliliter vials, which are the question here, are still being used. And the reason they're still being used is because of how the regulations are drafted.

In fact, after we finish the propofol litigation here, there were discussions with the Attorney General's Office. And we could have gotten out of the State of Nevada much easier had we made a concession and said, Well, we won't sell 50-milliliter single-use vials in these type of clinics because of what happened with these healthcare providers. That would have been the easiest out for Teva

and the distributors.

We could not, and we never did, because of the federal regulations. It wasn't our place to make that change or to make anything, other than producing a product that was similar -- not similar -- but exact to the branded manufacturing product. It's not a generic -- it doesn't have the opportunity to make changes in the labeling, to make changes in the product, or anything else. What they do is they have to mirror what the brand has put out. And the brand spends hundreds of millions of dollars to get this product to -- approved by the FDA. They do all this marketing; they work with the doctors.

And several years later, the generics come along, and they are allowed to produce the product identical, without the research and development, without the marketing, without the relationships with the physicians. And they produce a matching generic, which is less -- exactly the same, but not as expensive to the consumer. And they serve a great purpose.

And that is why the federal regulations are so controlling. And that's why, at some point, the State of Nevada is going to have to understand that these cases that are coming before the court are preempted by federal law.

So the claim that the plaintiffs have is that Teva should not have sold the 50-milliliter vials to these type of clinics because they were -- they're going to be used multidose. Well, the labeling, which is federally regulated, said it is a single-use vial. It's on the label. It

was on the label three years before it became a generic. It's only label today. And if the medical professionals use it appropriately, there is no problem.

The problem in this case is not only was it not used appropriately; it was never intended to be used appropriately. What the folks did in these centers is they cut every corner imaginable. And I know, living in the community, Your Honor, you're familiar with it. And the conduct was --

As a former prosecutor, it's hard to believe that people would even do such a thing -- but they did. They cut corners in every capacity. They reused the same needle. There were people -- there were companies that would have given these companies free needles, because there was so much profit to be made. But what these folks did is they reused the same needles. And they put it into the single-use vial, and they contaminated anyone else that used that vial.

And the reason they used the 50-milliliter vial, Your Honor, is because they were also committing fraud in the insurance and the Medicaid.

By using a 50-milliliter vial, they could sometimes use an 8-milliliter or a 10-milliliter and write it off as a 50-milliliter use. Then reuse it for two or three other procedures, billing again at 50 milliliters, and continue to make an outrageous amount of money, completely disregarding the risk of the human beings that are walking into that clinic. And did it catch up with them? Yes.

Not only, Your Honor, were they using -- reusing the needles, but they were cutting times on their procedures. What would take a 20-minute procedure, they were sometimes doing in three minutes, doing these endoscopies and putting what usually takes five minutes to put it into the system, they were putting it in and taking it out within several minutes with references of Zorro and flicking it out in the air and feces on the wall. It was just mind-boggling that human beings would do this. And why were they doing that? Because they were manipulating the books, Your Honor, and they were changing -- they were lying about the time of the procedure. They were lying about the amount of medicine that was used, and that they were using it in a contaminated fashion.

And through all of this, the manufacturer and the distributors had come into that environment 60,000 letters from the community. We couldn't even mention Dr. Desai's name during the trials. And we had to stand there, and we had to show that everything that we did was appropriate. But because it was misused, there was a responsibility to the manufacturers and the distributors.

Your Honor, we're now faced with -- fortunately, we have -- we had 640 cases. I think 167 are being stipulated that they were beyond the time. And so we have 400-plus people who were not infected. They have no physical problem. They have potentially an emotional and distress problem. But there isn't one claim that

they've brought forward that is not preempted by the federal guidelines.

And because of that, Your Honor, at some point, it has to stop. At some point, we have to draw a line in the sand. Because if it isn't drawn here, it'll be drawn with the Nevada Supreme Court or the U.S. Supreme Court, because if you step away from the emotional aspect of this case and you go beyond Clark County, there isn't anyone in the United States that can understand how we cannot fathom the preemption that has been clarified in *Bartlett* and in *Mensing*.

So Your Honor, we ask that you dismiss this claim.

You should know, and I'm sure you do, that judge Crockett has ruled against us. Judge Atkins has ruled against us. Judge Atkins was very complimentary to the brief, because I think it's a brief that stands on its own. I think it's something that'll go to the Nevada Supreme Court and the U.S. Supreme Court, if necessary. But it's very clear.

And what Judge Atkins said that -- is that a Motion to Dismiss is a drastic measure, and he wanted to err on caution.

Well, Your Honor, to err on caution is one thing, but to not follow the United States Supreme Court is another. And I would ask that the Court step up at this time and dismiss all of these claims, because it is clear, what we could not use before, we can use now.

And the issue isn't the design. It isn't the size of the vial. It is the felonious conduct of these people that committed fraud,

murder. I mean, we're talking about people that are put away for 20, 40, 60 years. And we have a drug that is still on the market, that is the most successful anesthesia short-term drug out there, and it is doing its job, thousands, if not hundreds of thousands of times a day.

And Your Honor, we would ask that the Court follow the U.S. Supreme Court and dismiss these claims.

THE COURT: Thank you.

MR. HYMANSON: Thank you.

THE COURT: Opposition, please.

MR. WETHERALL: Thank you, Your Honor.

This argument made by Mr. Hymanson has now been made six times -- three times before two federal judges who denied their preemption argument; once in Department 8; denied once in Department 24; denied and now here before you today. There is now a Motion for Reconsideration pending by the defense in Department 24, which is set to be heard in early January.

And Judge Atkin has delayed his consideration of plaintiff's Motion to Consolidate all of these cases until January 10, in order to give you an opportunity to weigh in and not take that away from you.

I'm not an expert on preemption, but federal court judges are. And they have all determined -- or at least two of them and three orders -- have determined that these claims are not preemptive.

What I do understand about preemption is that State law cannot step in and alter or regulate the active ingredients of a drug, the root of administration, the dosage form, the strength, or the labeling of the drug. And none of the claims being pursued in these companion actions involve any attempt to alter federal law in those regards.

The simple argument being made here is the same one that was being made back 10 years ago when those huge verdicts arose in the infected hepatitis claim context, and that is that these defendants had a knowledge, had an awareness that propofol was being abused or mishandled or misused in the context of ambulatory surgical centers, involving 50-milliliter bottles, and they did nothing to address that.

And by doing nothing to address that, they contributed to the outbreak that occurred here that resulted in the 60,000 letters that resulted in these individuals, who thankfully were not infected, to still have the shock and dismay and the need to go out and test for HIV and hepatitis.

There is nothing incompatible with wrongdoers in the criminal front with respect to the Endoscopy Center outbreak and civil liability on the part of some other parties.

So I recognize that Teva wants to say that the criminal conduct was an intervening or superseding cause that immunizes them from liability, but that isn't how our law works. We should be able to pursue the claims of civil -- on the civil liable -- liability front,

even as other individuals were accused of wrongdoing. And frankly, that's not a preemption argument. That is an apples-and-oranges type of circumstance.

So it's a very simple claim. Regrettably, Teva and its codefendants have never seen fit to acknowledge these claims in any way, shape, or form in the intervening 10 years, and so here we are. And for the reasons set forth in the briefing and for the reasons found by the federal court judges whose orders I've provided you, as well as the two prior district court judges, we would ask that Defendant's Motion be denied.

THE COURT: Thank you.

And the reply, please.

MR. HYMANSON: Briefly, Your Honor.

Your Honor, I'd like to be clear, Judge Navarro and Judge Mahan never weighed in on preemption. They simply remanded these cases to state court. Counsel said that we wanted to be immunized because of the -- we wanted to get blamed the criminal conduct. We don't need the criminal conduct. We don't have to blame the criminal conduct. It is simply facts that the jury will now hear to better understand that the propofol that we sold 10 years ago is the same propofol that we're selling today. And when it's used appropriately, and when it's used by medical professionals professionally, there's no problem.

And the 50-milliliter vial says on it single use. That is a labeling by the FDA. That is not something that Teva could change.

It's not something that they could alter. They couldn't alter -- they said that -- plaintiffs said we should send Dear Doctor letters.

If Dear Doctor letters were not sent by the branded company, it is inappropriate, and they'll lose the ability to sell the medication if they were to do that. So what the generic companies can do is very limited. And it doesn't change anything that --

What it comes down to, Your Honor, is *Mensing* and *Bartlett* were very clear. It is clear that we have not done a great job of being very clear on the cases of *Mensing* and *Bartlett*. We had some great lawyers come in when *Mensing* first broke, Harvard trained, that did the argument at the Supreme Court, and we couldn't convince our judges of what was going on. It took Professor Chemerinsky, who comes in every year and does the view -- the State -- the Supreme Court summary of all the cases. And he came, and he spoke to the State Bar and spoke about what *Mensing* meant.

And after that, each judge that was involved in the propofol litigations came up and had a discussion and says, Now I understand. I understand what preemption is. What preemption is is that the State doesn't have the ability to change what the federal government has dictated as it relates to pharmaceutical drugs.

And so we would -- for those reasons, Your Honor, we would ask that you dismiss. Thank you.

THE COURT: Thank you.

This is the Defendant's Motion to Dismiss under 12(b)(5).

It will be granted in part with regard to the 167 plaintiffs whose claims are time-barred. It will be denied in all other respects for the reason that the plaintiff has adequately pled causes of action under which relief can be granted. We looked at the strict products liability, the breach of implied warranty of fitness for a particular purpose, and the negligence, as well as the Deceptive Trade Practices Act, and as well as punitive damages.

So everything was adequately pled. It's a cause of action for which relief can be granted. So the motion is denied.

Mr. Wetherall to prepare the order.

Mr. Hymanson, I assume you would like to approve the form of that?

MR. WETHERALL: I would appreciate the courtesy, Your Honor.

THE COURT: Okay. So --

MR. WETHERALL: Your Honor, we have twice before prepared orders denying Defendant's Motion to Dismiss. And on one occasion, they decided that the order that I had prepared was not appropriate and sought an alternative order.

THE COURT: No competing orders. No competing orders.

If you can't agree as to the form, let me know, and I'll either sign or interlineate or convene a telephonic. But every time we get competing orders, it delays the entry.

MR. WETHERALL: Okay, Your Honor.

MR. HYMANSON: Understand, Your Honor.

THE COURT: So -- very good. Thank you both.

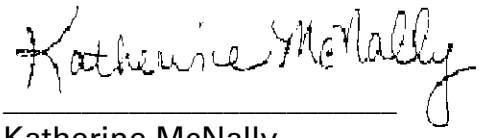
MR. WETHERALL: Thank you.

MR. HYMANSON: Thank you.

[Proceeding concluded at 10:52 a.m.]

* * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



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Attorneys for Defendants

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

MAUREEN BRIDGES, *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-18-782023-C
DEPARTMENT 24

REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER DENYING DEFENDANTS' MOTION TO DISMISS

DATE OF HEARING: JANUARY 7, 2020
TIME OF HEARING: CHAMBERS

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, respectfully submit this reply in support of their motion for reconsideration of the Court's order denying Defendants' motion to dismiss. 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, the oral argument heard by the Court on Defendants' motion to dismiss, and any argument to be entertained by the Court at the time of hearing on this Motion.

DATED this 2nd day of January 2020.

GREENBERG TRAURIG LLP

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs continue to rely on this Court's initial decision denying Defendants' motion to dismiss to create a domino effect in their favor in the companion cases. In doing so, Plaintiffs mischaracterize the grounds advanced by Defendants for reconsideration. Contrary to their assertion, Defendants are *not* seeking reconsideration on the basis that the hearing on Defendants' motion to dismiss was not recorded, or to simply get "another bite at the apple." Rather, reconsideration is being sought because the Court made comments at the hearing on the motion to dismiss that are, respectfully, incompatible with binding precedent from the United States Supreme Court. The Court did not specifically identify the basis for its decision at the hearing, and the written order signed by the Court (and provided by Plaintiffs) did not contain any explanation, either. As such, Defendants fairly assume that the Court's comments and questions at the hearing reflect the basis for its decision, which, respectfully, cannot be reconciled with the Supreme Court's decisions in *Mensing* and *Bartlett*.

II. ARGUMENT

First, at the hearing the Court expressed concern at the potentially inequitable outcome, as well as doubt about the FDA's intentions, should it find that Defendants could not be liable to Plaintiffs as a matter of law simply because the propofol at issue is a generic pharmaceutical product. In opposing reconsideration, Plaintiffs argue that Defendants are unable to "cite to an exact quote" or provide "the context in which the Court made such a comment." Opp. at 3:25-26. Of course, the hearing was not recorded so Defendants cannot "cite to an exact quote." But the undersigned counsel can and does, as an officer of the court bound to exercise candor to the Court, swear that the Court expressed that exact concern while Defendants were arguing the basis of their motion to dismiss. In particular, as it relates to the differing treatment received under the applicable FDA regulations by generic versus brand manufacturers, a key legal issue here that is, apparently, uncontested even by Plaintiffs.[1] The United States Supreme Court directly addressed this issue in *Mensing* and made clear

[1] *See, PLIVA, Inc. v. Mensing*, 564 U.S. 604, 626 (2011) ("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. Indeed, it is the special, and different, regulation of generic drugs that allowed the generic drug market to expand, bringing more drugs more quickly and cheaply to the public. But different federal statutes and regulations may, as here, lead to different pre-emption results.").

that notions of equity have no role in the preemption analysis; rather, "Congress and the FDA retain the authority to change the law and regulations if they so desire" in order to address the different – and according to the plaintiffs in *Mensing*, unfair – treatment received by generic manufacturers under the applicable FDA regulations. To the extent that equity or notions of fairness factored into the Court's decision denying Defendants' motion to dismiss, that would respectfully constitute "clear error."

Second, this Court expressly asked Defense counsel at the hearing whether Defendants could have stopped, or perhaps never started, selling propofol in 50 mL vials if Defendants wished to avoid liability under state tort law. Again, while there is no transcript, the undersigned counsel can and does, as an officer of the court bound to exercise candor to the Court, swear that the Court posited that exact question to Defendants, which Plaintiffs do not dispute in their Opposition. Instead, and for the first time in this case, Plaintiffs again shift their ever-evolving theory and now insist that they are not contending Defendants need to stop selling the 50 mL vials of propofol altogether, but instead that Defendants needed to stop selling the 50 mL vials "to ambulatory surgical clinics." Opp. at 4:16-17. But a spade is still a spade under any other name. By arguing that Defendants should have "ceased selling 50 mL vials" to ambulatory surgical clinics, Plaintiffs make a distinction without a difference. Tellingly, Plaintiffs do not cite to any case law whatsoever in support of their theory. The reason for this is clear – this qualified theory is still the same "stop-selling" theory explicitly rejected by the United States Supreme Court in *Mutual Pharmaceutical Company v. Bartlett*, 570 U.S. 472, 488 (2013) and by scores of other courts around the country. Defendants followed FDA regulations to the letter and were not required to stop selling the FDA-approved 50 mL vials, period, to ambulatory clinics or otherwise, to avoid liability under state law. That is the holding in *Bartlett*, and finding otherwise is, respectfully, "clear error." Defendants request the Court re-examine *Bartlett* and the scores of decisions in federal and state courts around the country appropriately rejecting this same stop-selling theory (or variants thereof), as collected in Defendants' motion to dismiss and motion for reconsideration.

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Third, this Court questioned at the hearing, albeit in passing, the Nevada federal court's recent decision in remanding this case to state court on preemption grounds, and seemed to indicate its agreement with Plaintiffs that Judge Mahan has already spoken on the issue of preemption as an affirmative defense. Again, Defendants' motion to dismiss was not even briefed in the federal court. Plaintiffs did not file an opposition to the motion to dismiss in federal court because, instead, Defendants agreed to stay Plaintiffs' response deadline while the parties briefed the jurisdiction issue. The federal court ultimately remanded this case to this Court based upon lack of subject matter jurisdiction. It did not issue an order on Defendants' motion to dismiss, and that is a fact that is a matter of public record. Moreover, not only is Plaintiffs' insistence to the contrary untrue, but Judge Mahan has, in fact, dismissed similar claims against generic manufacturers on preemption grounds in cases in which the plaintiffs put forth the same or substantially similar arguments as Plaintiffs do here. *See, Moretti v. PLIVA, Inc.*, 2012 U.S. Dist. LEXIS 24113, 2012 WL 628502 (D. Nev. Feb. 27, 2012). Plaintiffs' interpretation is flatly wrong and, to the extent the Court relied on the federal court's decision in remanding this case – a jurisdictional issue – to find the claims are not federally preempted – a legal defense – it would constitute "clear error."

III. CONCLUSION

Without a written order explaining the basis for the Court's denial of the motion to dismiss, Defendants are left to assume that the Court made its decision based upon the aforementioned comments the Court posited at the hearing, as the Court did not otherwise orally announce the basis

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for its decision. As such, this motion is respectfully made because the Court's decision is irreconcilable with the United States Supreme Court's decisions in *Bartlett* and *Mensing*, thus constituting "clear error" warranting reconsideration.

DATED this 2nd day of January 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of January 2020, a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER DENYING DEFENDANTS' 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/ Evelyn Escobar-Gaddi
an employee of Greenberg Traurig, LLP

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Attorneys for Plaintiffs

DISTRICT COURT
CLARK COUNTY NEVADA

ABADJIAN, SOSSY, et al., 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-18-781820-C Dept. No.: 27 **ORDER RE: DEFENDANTS' MOTION TO DISMISS**

The foregoing case came on for hearing on December 26, 2019, as a result of Defendants' Motion to Dismiss. Peter C. Wetherall, Esq., of Wetherall Group, Ltd., appeared on behalf of Plaintiffs; Philip M. Hymanson, Esq., of Hymanson & Hymanson, appeared on behalf of Defendants.

The Court, having reviewed the briefing of the Parties, having entertained the oral arguments of counsel, being duly advised on the premises, and good cause appearing therefor:

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss is hereby GRANTED as to those Plaintiffs not listed on the Parties' tolling agreement.

IT IS FURTHER ORDERED that Defendants' Motion is hereby DENIED in all other respects, as Plaintiffs' claims for relief are sufficiently pled and not preempted.

DATED this 7 day of Jan., 2020

Nancy L Allf
DISTRICT JUDGE
JD

Respectfully Submitted:

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Attorneys for Plaintiffs

DISTRICT COURT
CLARK COUNTY NEVADA

ABADJIAN, SOSSY, et al.,

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-18-781820-C

Dept No.: 27

NOTICE OF ENTRY OF ORDER RE: DEFENDANTS' MOTION TO DISMISS

///

///

PLEASE TAKE NOTICE that an **Order RE: Defendants' Motion to Dismiss** was filed with this Court in the above-entitled matter on the 14th day of January 2020, a copy of which is attached hereto.

DATED this 14th day of January, 2020.

WETHERALL GROUP, LTD.

By: */s/ Peter C. Wetherall*
Peter C. Wetherall, Esq.
Nevada Bar No. 4414
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE
Case No.: A-18-781820-C

The undersigned does hereby declare that I am over the age of eighteen (18) years and not a party to the within entitled action. Pursuant to NRCP 5(b), I certify that I am an employee of Wetherall Group, Ltd., 9345 W. Sunset Road, Suite 100, Las Vegas, Nevada 89148.

On this 14th day of January, 2020, I did cause a true and correct copy of the foregoing

NOTICE OF ENTRY OF ORDER RE: DEFENDANTS' MOTION TO DISMISS

to be served upon each of the parties listed below via electronic service through the Court's Odyssey File and Service System.

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Attorneys for Defendants

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

By */s/ Jasmyn Montano*
An employee of Wetherall Group, Ltd.

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY NEVADA

ABADJIAN, SOSSY, et al., 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-18-781820-C Dept. No.: 27 **ORDER RE: DEFENDANTS' MOTION TO DISMISS**

The foregoing case came on for hearing on December 26, 2019, as a result of Defendants' Motion to Dismiss. Peter C. Wetherall, Esq., of Wetherall Group, Ltd., appeared on behalf of Plaintiffs; Philip M. Hymanson, Esq., of Hymanson & Hymanson, appeared on behalf of Defendants.

The Court, having reviewed the briefing of the Parties, having entertained the oral arguments of counsel, being duly advised on the premises, and good cause appearing therefor:

Case Number: A-18-781820-C

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss is hereby GRANTED as to those Plaintiffs not listed on the Parties' tolling agreement.

IT IS FURTHER ORDERED that Defendants' Motion is hereby DENIED in all other respects, as Plaintiffs' claims for relief are sufficiently pled and not preempted.

DATED this 7 day of Jan., 2020

Nancy L Allf
DISTRICT JUDGE
SD

Respectfully Submitted:

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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

Consolidated with:
Case No. A-18-781820-C (*Abadjian*)
Case No. A-18-782023-C (*Bridges)*

PLAINTIFFS' MOTION FOR SETTING OF PRETRIAL CONFERENCE; FOR DESIGNATION OF CASE AS COMPLEX; AND FOR APPOINTMENT OF SPECIAL MASTER AND SETTLEMENT JUDGE

HEARING REQUESTED

COME NOW Plaintiffs, by and through their attorneys of record, Peter C. Wetherall, Esq., and Wetherall Group, Ltd., and hereby submit their Motion for Setting of Pretrial Conference; For Designation of Case as Complex; and For Appointment of Special Master and Settlement Judge. This Motion is made and based upon the following Memorandum of Points and Authorities, the pleadings and papers filed herein, and all other matters properly of record.

DATED this 12th day of February, 2020.

WETHERALL GROUP, LTD.

By: */s/ Peter Wetherall*
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Attorneys for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS:

Three multi-plaintiff Endoscopy "non-infection" cases involving hundreds of individual claimants have now been consolidated before this Court, and require management. The Nevada Rules of Civil Procedure provide guidance and instruction for the handling of litigations like this, which starts with the holding of a Pretrial Conference.

The attorneys for all Parties in these cases are experienced mass tort counsel, and are likely in agreement with the steps towards resolving these cases – by settlement or trial – that need to be taken here.

The undersigned counsel notes that this Court has already assumed responsibility for the pretrial management of the Rio Legionnaire's cases proceeding towards trial in October, 2020. These Endoscopy cases involve hundreds more Plaintiffs and millions more pages of relevant documents than the Rio litigation. In recognition of that fact, and with no offense to the Court intended,

Plaintiffs respectfully request the following: 1) the designation of these cases as complex; 2) the appointment of a Special Master; and 3) the appointment of a Settlement Judge, to aid the Court in the management of these cases without overwhelming it.

II. LEGAL ARGUMENT

NRCP 16 provides in pertinent part as follows (underline emphasis added):

Rule 16. Pretrial Conferences; Scheduling; Management

(a) **Pretrial Conferences; Objectives.** In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

(1) expediting disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation; and

(5) facilitating settlement.

. . .

(c) **Attendance and Subjects to Be Discussed at Pretrial Conferences.**

. . .

(2) **Matters for Consideration.** At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(B) amending the pleadings if necessary or desirable;

(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under NRS 47.060 and NRS 50.275;

(E) determining the appropriateness and timing of summary adjudication under Rule 56;

(F) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

(G) referring matters to a discovery commissioner or a master;

(H) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

(I) determining the form and content of the pretrial order;

(J) disposing of pending motions;

(K) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(L) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;

(M) establishing a reasonable limit on the time allowed to present evidence; and

(N) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

NRCP 16.1(f) enables the Court to designate a case as "complex":

> (f) **Complex Litigation.** In a potentially difficult or protracted action that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems, the court may, upon motion and for good cause shown, waive any or all of the requirements of this rule. If the court waives all the requirements of this rule, it must also order a conference under Rule 16 to be conducted by the court.

1. THE PARTIES SHOULD BE REQUIRED TO NEGOTIATE AND PROPOSE A SCHEDULING ORDER FOR THE COURT'S APPROVAL.

Plaintiffs request that these cases be designated as complex pursuant to NRCP 16.1(f). Plaintiffs further request that the Pretrial Conference result in the Parties being ordered to negotiate and propose a Scheduling Order to the Court, or in the absence of agreement, to propose competing Scheduling Orders to the Court for resolution (by either the Court or appointed Special Master).

2. THE COURT SHOULD APPOINT A SPECIAL MASTER/SETTLEMENT JUDGE IN THIS CASE TO ASSIST AT THE PARTIES' EXPENSE.

Plaintiffs further request the appointment of a Special Master/Settlement Judge to manage the pretrial progress of these cases on behalf of the Court going forward. To that end, the undersigned counsel has sought and received permission from the former Chief Judge of this District Court, The Hon. Jennifer Togliatti (Ret.), to nominate her for appointment as both Special Master/Settlement Judge.[1]

Judge Togliatti, now a respected Mediator and Private Judge for Advanced Resolution Management (ARM), is uniquely qualified to take on this role. In 2012, she was appointed by the Nevada Supreme Court to conduct a mandatory settlement conference in the Endoscopy "infection" cases arising out of the same facts and circumstances as these "non-infection" cases. Judge Togliatti was also involved in settling cases related to the Endoscopy scandal based on different theories of liability with different corporate defendants, all of which she settled. On the Supreme Court appointment case alone, her complex settlement conference lasted nine days, and by necessity required her to familiarize herself with the various claims and defenses these cases involve.

[1] Judge Togliatti's judicial career began in 1998 when she was elected Justice of the Peace for the Las Vegas Justice Court and, in 1999, served as Chief Judge. She also presided over specialty court dockets for the Eighth Judicial District Court and served as acting Federal Magistrate for U.S. District Court. In 2002, she was appointed by then Governor Kenny Guinn to the Eighth Judicial District Court and has served there for the last 16 years. As a trial judge in one of the busiest general jurisdiction trial courts in the country, she has managed the assignment of over ten thousand criminal and civil cases. She has presided over 300 jury and bench trials in her career. Judge Togliatti was elected Chief Judge of the Eighth Judicial District by acclamation of the 52 judges in her district in 2011 and re-elected in 2013. In 2019, Judge Togliatti retired from public service to focus on developing a private ADR practice with a focus on complex matters at ARM as a mediator, arbitrator and private judge.

Judge Togliatti's past experience with the Endoscopy litigation makes her an efficient, cost-effective choice in comparison to someone who might need to learn these cases from scratch. Moreover, Judge Togliatti has a track record of competence in case management and success in getting Endoscopy cases resolved.[2] The undersigned counsel is confident that Judge Togliatti can and will manage these cases and the Parties to the Court's satisfaction.

III. CONCLUSION

For each of the foregoing reasons, Plaintiffs respectfully request that the foregoing Motion be granted.

DATED this 12th day of February, 2020.

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

[2] In the interests of full disclosure, the undersigned counsel does not recall ever appearing before Judge Togliatti while she was on the bench, and none of the undersigned counsel's Endoscopy "infection" cases were part of the group settled by Judge Togliatti. The totality of interaction the undersigned counsel has had with Judge Togliatti is as a result of a personal injury case she successfully mediated in August, 2019.

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 12th day of February, 2020, I served the foregoing PLAINTIFFS' MOTION FOR SETTING OF PRETRIAL CONFERENCE; FOR DESIGNATION OF CASE AS COMPLEX; AND FOR APPOINTMENT OF SPECIAL MASTER AND SETTLEMENT JUDGE 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/ Jasmyn Montano
An employee of Wetherall Group, Ltd.

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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

ORDER GRANTING PLAINTIFFS' MOTION TO CONSOLIDATE FOR TRIAL PER NRCP 42; and EJDCR 2.50

[This document applies to Case No. A-18-781820-C, *Abadjian, et al. v. Teva, et al.*, Dept. 4]

This document applies to Case No. A-18-782023-C, *Bridges, et al. v. Teva, et al.*, Dept. 24]

The foregoing case came on for hearing on December 12, 2019, as a result of Plaintiffs' Motion to Consolidate For Trial Per NRCP 42; and EJDCR 2.50, seeking the consolidation of this case with A-18-781820-C, *Abadjian, et al. v. Teva, et al.*, in Dept. 4, and A-18-782023-C, *Bridges, et al. v. Teva, et al.*, in Dept. 24. Peter C. Wetherall, Esq., of Wetherall Group, Ltd., appeared on behalf of Plaintiffs; Philip M. Hymanson, Esq., of Hymanson & Hymanson, appeared on behalf of Defendants. Thereafter, this Court delayed its ruling to allow pending motions to be resolved in the *Abadjian* and *Bridges* cases.

The Court, having reviewed the briefing of the Parties, having entertained the oral arguments of counsel, being duly advised on the premises, and good cause appearing therefor:

IT IS HEREBY ORDERED that Plaintiffs' Motion to Consolidate is hereby GRANTED. There are issues of law and fact common to all of these cases, and judicial economy will be best served by the consolidation of these actions before one judge.

DATED this 12th day of February, 2020.

DISTRICT JUDGE
TREVOR L. ATKIN

Respectfully Submitted:

WETHERALL GROUP, LTD.

By: Pet C. Wetherall
Peter C. Wetherall, Esq.
Nevada Bar No.: 4414
9345 W. Sunset Rd., Ste. 100
Las Vegas, NV 89148
Attorneys for Plaintiffs

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Approved as to Form:

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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

Consolidated with:
Case No. A-18-781820-C (*Abadjian*)
Case No. A-18-782023-C (*Bridges*)

NOTICE OF ENTRY OF ORDER GRANTING PLAINTIFFS' MOTION TO CONSOLIDATE FOR TRIAL PER NRCP 42; and EJDCR 2.50

PLEASE TAKE NOTICE that an ***Order Granting Plaintiffs' Motion to Consolidate for Trial*** was filed with this Court in the above-entitled matter on the 24th day of February 2020, a copy of which is attached hereto.

DATED this 24th day of February, 2020.

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 24th day of February, 2020, I served the foregoing *Order Granting Plaintiffs' Motion to Consolidate PER NRCP 42; and EJDCR 2.50* 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/ Jasmyn Montano
An employee of Wetherall Group, Ltd.

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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

ORDER GRANTING PLAINTIFFS' MOTION TO CONSOLIDATE FOR TRIAL PER NRCP 42; and EJDCR 2.50

[This document applies to Case No. A-18-781820-C, *Abadjian, et al. v. Teva, et al.*, Dept. 4]

This document applies to Case No. A-18-782023-C, *Bridges, et al. v. Teva, et al.*, Dept. 24]

The foregoing case came on for hearing on December 12, 2019, as a result of Plaintiffs' Motion to Consolidate For Trial Per NRCP 42; and EJDCR 2.50, seeking the consolidation of this case with A-18-781820-C, *Abadjian, et al. v. Teva, et al.*, in Dept. 4, and A-18-782023-C, *Bridges, et al. v. Teva, et al.*, in Dept. 24. Peter C. Wetherall, Esq., of Wetherall Group, Ltd., appeared on behalf of Plaintiffs; Philip M. Hymanson, Esq., of Hymanson & Hymanson, appeared on behalf of Defendants. Thereafter, this Court delayed its ruling to allow pending motions to be resolved in the *Abadjian* and *Bridges* cases.

The Court, having reviewed the briefing of the Parties, having entertained the oral arguments of counsel, being duly advised on the premises, and good cause appearing therefor:

IT IS HEREBY ORDERED that Plaintiffs' Motion to Consolidate is hereby GRANTED. There are issues of law and fact common to all of these cases, and judicial economy will be best served by the consolidation of these actions before one judge.

DATED this 12th day of February, 2020.

DISTRICT JUDGE
TREVOR L. ATKIN

Respectfully Submitted:

WETHERALL GROUP, LTD.

By: Pet C. Wetherall
Peter C. Wetherall, Esq.
Nevada Bar No.: 4414
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Las Vegas, NV 89148
Attorneys for Plaintiffs

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Approved as to Form:

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HYMANSON & HYMANSON

By: _____
Philip Hymanson, Esq.
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Attorneys for Defendants

Approved as to Form:

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Attorneys for Defendants

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Attorneys for Defendants

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

YVETTE ADAMS, *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-18-778471-C

DEPARTMENT 8

NOTICE OF ENTRY

[STIPULATION AND ORDER TO (1) DEEM CASE COMPLEX; (2) APPOINT SPECIAL MASTER/SETTLEMENT JUDGE; AND (3) STAY ALL CASE DEADLINES]

/ / /

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the **STIPULATION AND ORDER TO (1) DEEM CASE COMPLEX; (2) APPOINT SPECIAL MASTER/SETTLEMENT JUDGE; AND (3) STAY ALL CASE DEADLINES** was entered in the above-captioned matter on the 3RD day of March 2020. A copy of said Order is attached hereto.

DATED this 3rd day of March 2020.

GREENBERG TRAURIG LLP

By: */s/ Jason K. Hicks*
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Attorneys for Defendants

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(702) 792-3773
(702) 792-9002 (fax)

CERTIFICATE OF SERVICE

I hereby certify that on this **3rd day of March 2020**, a true and correct copy of the foregoing **NOTICE OF ENTRY OF STIPULATION AND ORDER (1) DEEM CASE COMPLEX; (2) APPOINT SPECIAL MASTER/SETTLEMENT JUDGE; AND (3) STAY ALL CASE DEADLINES** 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/ Evelyn Escobar-Gaddi
An employee of GREENBERG TRAURIG, LLP

Greenberg Traurig, LLP
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EXHIBIT 1

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Hank@HymansonLawNV.com

Attorneys for Defendants

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

YVETTE ADAMS, *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-18-778471-C

Department No.: 8

Consolidated with:
Case No. A-18-781820-C (Abadjian)
Case No. A-18-782023-C (Bridges)

STIPULATION AND [PROPOSED] ORDER TO (1) DEEM CASE COMPLEX (2) APPOINT SPECIAL MASTER/SETTLEMENT JUDGE, and (3) STAY ALL CASE DEADLINES

Defendants Teva Parenteral Medicines, Inc., f/k/a Sicor Pharmaceuticals, Inc ("TPMI"), Sicor, Inc. ("Sicor"), Baxter Healthcare Corporation ("Baxter"), and McKesson Medical-Surgical, Inc. ("McKesson") (collectively, "Defendants"), by and through their counsel, the law firms of Greenberg Traurig, LLP, and Hymanson & Hymanson, and Plaintiffs ("Plaintiffs"), by and through their counsel, the law firm of Wetherall Group, Ltd., hereby stipulate as follows:

WHEREAS, Plaintiffs filed a motion on November 6, 2019, to designate this case as complex and to appoint the Hon. Jennifer Togliatti (Ret.) as a Settlement Judge and Special Master (the "Motion").

WHEREAS, the Court has denied Defendants' motions to dismiss and consolidated three similar cases into this matter, and Defendants are in the process of preparing a petition for writ of mandamus ("Petition") with the Supreme Court of the State of Nevada, challenging *inter alia* jurisdiction, to be filed forthwith.

WHEREAS, the parties have stipulated and agreed to stay all discovery and case-related deadlines pending the Nevada Supreme Court's decision on Defendants' Petition. Plaintiffs' stipulation to a stay is not intended to suggest that the Petition has merit or warrants an answer, both of which Plaintiffs deny.

WHEREAS, this request is made in good faith and not for the purposes of delay.

NOW, THEREFORE, the parties request that (1) the case be deemed complex; (2) the Hon. Jennifer Togliatti (Ret.) be appointed as a Special Master and Settlement Judge, and (3) discovery be stayed pending the decision on Defendants' forthcoming Petition by the Nevada Supreme Court.

IT IS SO STIPULATED.

DATED this 28 day of February 2020.

GREENBERG TRAURIG, LLP

By: _____
ERIC W. SWANIS
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Las Vegas, Nevada 89135

HYMANSON & HYMANSON
PHILIP M. HYMANSON
Nevada Bar No. 2253
HENRY J. HYMANSON
Nevada Bar No. 14381
8816 Spanish Ridge Avenue
Las Vegas, Nevada 89148

Attorneys for Defendant

DATED this _____ day of February, 2020.

WETHERALL GROUP, LTD.

By: _____
PETER C. WETHERALL
Nevada Bar No. 4414
9345 W. Sunset Rd., Ste. 100
Las Vegas, Nevada 89148

Attorneys for Plaintiff

Greenberg Traurig, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, Nevada 89135
(702) 792-3773
(702) 792-9002 (fax)

WHEREAS, Plaintiffs filed a motion on November 6, 2019, to designate this case as complex and to appoint the Hon. Jennifer Togliatti (Ret.) as a Settlement Judge and Special Master (the "Motion").

WHEREAS, the Court has denied Defendants' motions to dismiss and consolidated three similar cases into this matter, and Defendants are in the process of preparing a petition for writ of mandamus ("Petition") with the Supreme Court of the State of Nevada, challenging *inter alia* jurisdiction, to be filed forthwith.

WHEREAS, the parties have stipulated and agreed to stay all discovery and case-related deadlines pending the Nevada Supreme Court's decision on Defendants' Petition. Plaintiffs' stipulation to a stay is not intended to suggest that the Petition has merit or warrants an answer, both of which Plaintiffs deny.

WHEREAS, this request is made in good faith and not for the purposes of delay.

NOW, THEREFORE, the parties request that (1) the case be deemed complex; (2) the Hon. Jennifer Togliatti (Ret.) be appointed as a Special Master and Settlement Judge, and (3) discovery be stayed pending the decision on Defendants' forthcoming Petition by the Nevada Supreme Court.

IT IS SO STIPULATED.

DATED this ____ day of February 2020.

GREENBERG TRAURIG, LLP

By: _____

ERIC W. SWANIS
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Las Vegas, Nevada 89148

Attorneys for Defendant

DATED this 28th day of February, 2020.

WETHERALL GROUP, LTD.

By: Peter C. Wetherall

PETER C. WETHERALL
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Attorneys for Plaintiff

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ORDER

The Court having reviewed the foregoing Stipulation and [Proposed] Order to (1) Deem This Case Complex (2) Appoint a Special Master and Settlement Judge, and (3) Stay All Case Deadlines in the above-entitled matter, and good cause appearing,

IT IS HEREBY ORDERED that the case shall be deemed complex.

IT IS FURTHER ORDERED that, if she wishes to serve as one, the Hon. Jennifer Togliatti (Ret.) will be appointed as Special Master and as Settlement Judge in this matter.

IT IS FURTHER ORDERED that the case is stayed pending the decision by the Nevada Supreme Court on Defendants' forthcoming petition for writ of mandamus.

IT IS SO ORDERED.

Dated this 28th day of February, 2020.

DISTRICT COURT JUDGE

Respectfully submitted by:

GREENBERG TRAURIG, LLP

ERIC W. SWANIS
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JASON K. HICKS
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STMT
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Hank@HymansonLawNV.com

Attorneys for Defendants

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

MAUREEN BRIDGES, *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-18-782023-C

DEPT. NO.: 24

[PROPOSED] STATEMENT OF PROCEEDINGS IN LIEU OF TRANSCRIPT

Pursuant to NRAP 9, and in anticipation of Defendants filing a Petition for Writ of Mandamus, the following Statement of Proceedings of the hearing held September 17, 2019 is submitted for settlement and approval of the District Court. This Statement of Proceedings is submitted due to the fact that the hearing on Defendants' Motion to Dismiss held September 17, 2019 was not ~~recorded~~ REPORTED, AS NO Request WAS made by Counsel.

and therefore, no transcript is available. This statement of proceedings has been compiled based on review of the minute order and pursuant to the recollections of counsel for Defendants, who were present at that hearing.

Statement of Proceedings of September 17, 2019 Hearing.

On September 17, 2019 the hearing of Defendants' Motion to Dismiss was held. Peter C. Wetherall, Esq., of Wetherall Group, Ltd., appeared on behalf of Plaintiffs; Philip M. Hymanson, Esq., of Hymanson & Hymanson, and Jason K. Hicks, Esq., of Greenberg Traurig, LLP, appeared on behalf of Defendants. The hearing was called to order at approximately 9:00 am, and the following discussions were had:

The Court reviewed the procedural history of the case and gave a brief summary of the case.

Mr. Hymanson argued on behalf of the Defendants. He reiterated the points in the Defendants' briefing regarding federal case law preempting the state law claims at issue and the dispositive nature of the United States Supreme Court's decisions in *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 626 (2011) and *Mutual Pharmaceutical Company v. Bartlett*, 570 U.S. 472, 488 (2013). Mr. Hymanson stated that only the brand name manufacturer could send a "Dear Doctor letter," and that a generic manufacturer, such as some of the Defendants herein, are prohibited from unilaterally doing so under federal law. Mr. Hymanson further discussed the role of non-parties Dipak Desai and his co-workers insofar as they had previously been found criminally liable in relation to the multi-dosing of propofol in Nevada state and federal court, and Mr. Hymanson argued that Desai *et al*'s actions cut off any chain of causation linking Defendants to Plaintiffs' alleged injuries. The Court and Mr. Hymanson discussed how the size of the 50 mL propofol at issue could have affected the procedures occurring at the subject clinics.

Mr. Wetherall advised that this case and two companion cases have been remanded from the federal court and argued that the federal judges have already addressed Defendants' preemption argument. Mr. Wetherall also raised and relied on prior Clark County verdicts in in propfol cases occurring in 2010 and 2011, *Chanin*, *Sacks, et. al.*, and *Washington*, which had heen rendered in those plaintiffs' favor. Mr. Wetherall further stated that any issue regarding Mr. Desai is a question of fact

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inappropriate for resolution at the motion to dismiss stage. He stated Plaintiffs stood on the briefing.

Mr. Hymanson gave a brief rebuttal on the above points, and also stated that the *Chanin, Sacks, et. al., and Washington* verdicts had been vacated pursuant to stipulation and that they are therefore legal nullities not to be relied upon.

The Court stated that it agreed with the Plaintiffs that state law as it stands does not support dismissal of the claims. The Court indicated that it could be fundamentally unfair if Defendants, as generic manufacturers and distributors of pharmaceuticals, were not permitted to make changes to its labels or be able to be held liable for alleged injuries to users of their generic medicine under the theories of recovery set forth in Plaintiffs' Complaint. The Court also indicated that such a result presumably was not contemplated by the FDA. The Court also questioned Defendants why they could not have just ceased selling the 50 mL vials of generic propofol at issue in this case had they wished to avoid any liability under state tort laws. The Court acknowledged the federal courts' remand of this case and a companion case.

The Court found that, pursuant to the agreement of the Parties, only those Plaintiffs identified in the tolling agreement had their claims tolled; any Plaintiffs not identified in that agreement should be dismissed as the statute of limitations has run on their claims.

Other than the grant as to the nonparties to the Tolling Agreement, the Court denied the motion. Mr. Wetherall was asked to submit an order within 10 days. [End of Statement of Proceedings.]

The above Statement of Proceedings of September 17, 2019 hearing on Defendants' Motion to Dismiss, having been reviewed by the Court, is settled and approved.

Dated this 28 day of FEB 2020

JUDGE OF THE DISTRICT COURT

NS

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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

MAUREEN BRIDGES, et al.,

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-18-782023-C

DEPT.: 8

Consolidated with:
Case No. A-18-778471-C (*Adams*)
Case No. A-18-781820-C (*Abadjian*)

ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION

The foregoing Motion was set for in-chambers review and decision on January 7, 2020 in Dept. 24, as a result of Defendants' Motion for Reconsideration. Department 8 is entering this Order at Dept. 24's request because the Bridges case has now been consolidated in proceedings before this Court.

Dept. 24's Minutes from January 7, 2020, state: "Defendant's motion for reconsideration does not site any new facts, new law, or change in existing law that supports reconsideration…the Court is persuaded by the reasoning analysis set forth in the Plaintiff's opposition filed December 5, 2019 at page 3 line 11 through page 5 line 3."

The Court, being duly advised on the premises, and good cause appearing therefor, hereby adopts and defers to the decision reached by Dept. 24.

IT IS HEREBY ORDERED that Defendants' Motion for Reconsideration is DENIED."

DATED this __ day of _____, 2020.

_____
DISTRICT JUDGE

Respectfully Submitted:

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DATED this __ day of _____, 2020.

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IT IS HEREBY ORDERED that Defendants' Motion for Reconsideration is DENIED."

DATED this 28th day of February, 2020.

DISTRICT JUDGE

75

Respectfully Submitted:

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DISTRICT COURT

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MAUREEN BRIDGES, et al,

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CASE NO: A-18-782023-C

DEPT.: 8

Consolidated with:
Case No. A-18-778471-C (Adams)
Case No. A-18-781820-C (*Abadjian)*

NOTICE OF ENTRY OF ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION

PLEASE TAKE NOTICE that an **Order Denying Defendants' Motion for Reconsideration** was filed with this Court in the above-entitled matter on the 9th day of March 2020, a copy of which is attached hereto.

DATED this 9th day of March, 2020.

WETHERALL GROUP, LTD.

By: */s/ Peter C. Wetherall*
Peter C. Wetherall, Esq.
Nevada Bar No. 4414
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE
Case No.: A-18-782023-C

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 9th day of March, 2020, I served the foregoing ***Order Denying Defendants' Motion for Reconsideration*** *PER NRCP 42; and EJDCR 2.50* 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/ Jasmyn Montano
An employee of Wetherall Group, Ltd.

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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

MAUREEN BRIDGES, et al.,

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The Court, being duly advised on the premises, and good cause appearing therefor, hereby adopts and defers to the decision reached by Dept. 24.

IT IS HEREBY ORDERED that Defendants' Motion for Reconsideration is DENIED."

DATED this __ day of _____, 2020.

_____
DISTRICT JUDGE

Respectfully Submitted:

WETHERALL GROUP, LTD.
By: _____
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DISTRICT JUDGE

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The Court, being duly advised on the premises, and good cause appearing therefor, hereby adopts and defers to the decision reached by Dept. 24.

IT IS HEREBY ORDERED that Defendants' Motion for Reconsideration is DENIED."

DATED this 28th day of February, 2020.

DISTRICT JUDGE

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