

IN THE SUPREME COURT OF THE STATE OF NEVADA

TEVA PARENTERAL MEDICINES,
INC., F/K/A SICOR, INC.; BAXTER
HEALTHCARE CORPORATION; AND
MCKESSON MEDICAL-SURGICAL,
INC.,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; THE HONORABLE TREVOR L.
ATKIN, DISTRICT JUDGE; THE
HONORABLE NANCY L. ALLF,
DISTRICT JUDGE; AND THE
HONORABLE JAMES CROCKETT,
DISTRICT JUDGE,

Respondents,

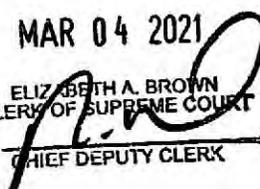
and

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; 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;
EMANUEL ANDREI; TERRIE ANTLES;

No. 81024

FILED

MAR 04 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  CHIEF DEPUTY CLERK

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; THERESA GEORGE; 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 HOVIETZ II; RUTH HOWARD; MICHELLE HOWFORD; EDWARD L. HUEBNER; LOVETTE M. HUGHES; VIRGINIA 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; SONDRRA 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; AGNES 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

MC GEE; 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
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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
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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.
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PEREZ; LUIS PEREZ; MARIA PEREZ;
MERCEDES PEREZ; AGUSTIN PEREZ-
ROQUE; ANDRE PERRET; JANET P.
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PITMAN; WAYNE PITTMAN; RON
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POURTEYMAUR; DONNA POWERS;
EVA POWERS; JENNIFER POWERS;
JOSE PRIETO; LUISA PRIETO;
FRANCISCO QUINTERO; ANTHONY
RAY QUIROZ; MARIBEL RABADAN;
ADRIANA RAMIREZ; JOHN RAMIREZ;
RAUL RAMIREZ; ROBERT RAPOSA;
CELIA REYES DE MEDINA; GABRIEL
REYES; MIGUEL REYES; BARBARA
ROBERTS; CONSTANCE ROBINSON;
LLOYD H. ROBINSON; CONNIE ROBY;
ANTOINETTE ROCHESTER; VICKI
RODGERS; TREVA RODGERS; MARIA
RODRIGUEZ; NENITA RODRIGUEZ;
RICARDO RODRIGUEZ; YOLANDA
RODRIGUEZ; JOSE RODRIGUEZ-
RAMIREZ; FREEMAN ROGERS;
CAROLE ROGGENSEE; SONIA ROJAS;
JOSEPH ROMANO; JEAN ROSE;
ROSETTA RUSSELL; DEMETRY
SADDLER; JANISANN SALAS; MARIA
SALCEDO; KERRI SANDERS; LOVIE
SANDERS; SHERRILYN SAUNDERS;
ISA SCHILLING; RAY SEAY; SANDRA
SENNESS; ANTHONY SERGIO, JR.;
SYLVIA SHANKLIN; DOUGLAS
SHEARER; SANDRA SIMKO; JAMES
SLATER; JACKLYN SLAUGHTER;
JOHN SLAUGHTER; CATHERINE
SMITH; WILBUR SMITH; LILA
SNYDER; DOLORES SOBIESKI;
WAYNE SOMMER; MARIA SOTO;
JULIE SPAINHOUR; JESSICA
SPANGLER; PATRICIA SPARKS;
WILLIAM STANKARD; GINGER
STANLEY; RODNEY STEWART;
LETICIA STROHECKER; HAROLD

STROMGREN; MAFALDA SUDO;
BARBARA SWAIN; NORMA TADEO;
RYSZARD TARNOWISKI; MIRKA
TARNOWISKI; ROXANNE E. TASH;
JILL TAYLOR; JEANNE THIBEAULT;
CATHERINE TITUS-PILATE;
RAYMOND TOPPLE; DOMINGA
TORIBIO; YADEL TORRES; RITA M.
TOWNSLEY; ROSELYN TRAFTON;
SALVATORE TROMELLO; PATRICIA
A. TROPP; DOROTHY TUCKOSH;
LUCY TURNER; TERRY TURNER;
ROBERT TUZINSKI; WILLIAM
UNRUH; JESUS VALLS; DIANNE
VALONE; HILLEGONDA
VANDERGAAG; HENRY VELEY;
STELLA VILLEGAS; LOUIS VIRGIL;
CECILIA VITAL-CEDENO; COLLEEN
VOLK; CHRIST VORGIAS; WILLIAM
WADLOW; BETTY WAGNER; JOHN
WALTERS; JASON WALTON; JANICE
WAMPOLE; BARBARA WARD; GLORIA
WARD; SANDRA WARIS; LESTER
WEDDINGTON; ARLENE WEISNER;
KATHRYN WHEELER; FRANK E.
WHITE; SERENE WHITE; SHARON
WHITE; BRIDGET WILKINS; ACE K.
WILLIAMS; ANTHONY WILLIAMS;
AUBREY WILLIAMS; CHARLES
WILLIAMS; CHERYL WILLIAMS;
MARY WILLIAMS; WILLIE WILLIAMS;
GARY WILSON; ROBERT WILSON;
STEVEN WILT; ANGELA WINSLOW;
BEVERLY WINTEROWD; BETTY
WINTERS; JAMES WOLF; DEREK
WORTHY; 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; SONDRÁ 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
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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; 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;
LORAIN TURRELL; GRAHAM TYE;
SCOTT VANDERMOLIN; LOUISE
VERDEL; J. HOLLAND WALLIS;
ANGELA HAMLER; 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; 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 SALSBUURY; 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; AND
VINCENZO ESPOSITO,
Real Parties in Interest.

Original petition for a writ of mandamus challenging district court orders denying petitioners' motions to dismiss the underlying consolidated tort cases on the basis of federal preemption.

Petition granted in part and denied in part.

Lewis Roca Rothgerber Christie LLP and Daniel F. Polsenberg, Joel D. Henriod, and Abraham G. Smith, Las Vegas; Greenberg Traurig LLP and Tami D. Cowden, Eric Swanis, and Jason K. Hicks, Las Vegas; Greenberg Traurig LLP and Brian Rubenstein, Philadelphia, Pennsylvania; Hymanson & Hymanson and Philip M. Hymanson and Henry J. Hymanson, Las Vegas,
for Petitioners.

Wetherall Group, Ltd., and Peter Wetherall, Las Vegas; Glen Lerner Injury Attorneys and Glen J. Lerner, Las Vegas,
for Real Parties in Interest.

BEFORE THE COURT EN BANC.¹

OPINION

By the Court, HARDESTY, C.J.:

This original petition for a writ of mandamus arises from lawsuits brought against generic drug manufacturers for selling single-patient-use 50 mL vials of propofol to ambulatory surgical centers despite an allegedly foreseeable risk that the centers would use them on multiple patients. The question presented to us is whether the plaintiffs' state-law tort claims are preempted by federal drug regulations. Because we conclude

¹The Honorable Abbi Silver, Justice, voluntarily recused herself from participation in the decision of this matter.

that some, but not all, of the claims are preempted, we grant the petition in part and deny it in part.

FACTS AND PROCEDURAL HISTORY

Petitioners Teva Parenteral Medicines, Inc., Baxter Healthcare Corporation, and McKesson Medical-Surgical, Inc., manufacture and sell the generic drug propofol, also known by its brand name Diprivan. Propofol was approved for sale by the United States Food and Drug Administration (FDA) in 1989 for use as an anesthetic in outpatient and inpatient procedures. In this, the FDA has granted petitioners permission to manufacture and distribute generic propofol in three vial sizes: 20, 50, and 100 mL. The label on each vial clearly prescribes that it is for single-patient use.

Petitioners sold propofol to nonparty and now deceased Dr. Depak Desai for use at his endoscopy centers in Las Vegas. Despite warning labels to the contrary, Dr. Desai used petitioners' 50 mL single-patient vials on more than one patient. Dr. Desai was criminally charged for reusing single-use injection syringes at his clinics and for using single-patient anesthesia vials on multiple patients.² *See Desai v. State*, 133 Nev. 339, 340-41, 398 P.3d 889, 891 (2017). Due to Dr. Desai's criminal behavior, his patients received warning letters from the Centers for Disease Control and Prevention and the Southern Nevada Health District notifying them of a risk of possible infection with Hepatitis B, Hepatitis C, and HIV.

The real parties in interest (collectively, plaintiffs) are approximately 800 individuals who received the warning letters after being treated by Dr. Desai at his endoscopy clinics between 2004 and 2008.

²The parties do not dispute the criminal allegations surrounding Dr. Desai's misuse of 50 mL vials of propofol.

Plaintiffs obtained testing, and all tests came back negative. Plaintiffs sued petitioners to obtain compensation for the testing costs as well as pain and suffering associated with being tested and waiting for test results. Their complaints alleged the following claims: (1) strict product liability, (2) breach of implied warranty of fitness for a particular purpose, (3) negligence, (4) violation of the Nevada Deceptive Trade Practices Act, and (5) punitive damages.³ Specifically, plaintiffs alleged that petitioners knew or should have known that selling 50 mL vials of propofol, as opposed to the smaller 20 mL vials, to Dr. Desai's ambulatory surgical centers with high patient turnover was unsafe because it would entice use of each vial on multiple patients, which increases the risk of contamination of the vial and infection of patients. Plaintiffs asserted that a 20 mL dose of propofol is commonly used to induce anesthesia in a patient, making the larger 50 mL vial more likely to be misused for multi-dosing at an ambulatory surgical center.

Petitioners filed a motion to dismiss in all three actions, alleging that under *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011), and *Mutual Pharmaceutical Co. v. Bartlett*, 570 U.S. 472 (2013), plaintiffs' claims must be dismissed because they conflict with federal law, specifically the Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (1984) (codified as amended at 21 U.S.C. § 355 (1984)), commonly known as the Hatch-Waxman Act. *See FTC v. Actavis, Inc.*, 570 U.S. 136, 142 (2013). After hearing arguments, the district courts summarily denied petitioners' motions to dismiss, finding that plaintiffs'

³Initially, three different lawsuits were filed in the Eighth Judicial District Court; those lawsuits have since been consolidated into one action in Department 8.

claims are not preempted by federal law. Petitioners filed this instant writ petition.

DISCUSSION

Entertaining the petition

A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *see also Humphries v. Eighth Judicial Dist. Court*, 129 Nev. 788, 791, 312 P.3d 484, 486 (2013). Writ relief is not available, however, when an adequate and speedy legal remedy exists. NRS 34.170; *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Although this court generally declines to consider writ petitions that challenge a district court's ruling on a motion to dismiss, this court will exercise its discretion to consider one when "an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *City of Mesquite v. Eighth Judicial Dist. Court*, 135 Nev. 240, 243, 445 P.3d 1244, 1248 (2019) (internal quotation marks omitted).

We conclude that whether the Hatch-Waxman Act preempts plaintiffs' state-law claims against a generic drug manufacturer is an important issue of law that needs clarification. Further, considerations of sound judicial economy and administration militate in favor of entertaining this petition because of the early stage of litigation and the vast number of plaintiffs involved in the consolidated action. Thus, we exercise our discretion to entertain the petition.

Preemption

Whether state-law claims are preempted by federal law is a question of law that this court reviews de novo, without deference to the

findings of the district court. *Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp.*, 123 Nev. 362, 370, 168 P.3d 73, 79 (2007). The Supremacy Clause of the United States Constitution provides that federal law supersedes, or preempts, conflicting state law. U.S. Const. art. VI, cl. 2; *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (“A fundamental principle of the Constitution is that Congress has the power to preempt state law.”).

There are two types of preemption—express and implied. *Rolf Jensen & Assocs., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 441, 445, 282 P.3d 743, 746 (2012). Express preemption occurs when Congress explicitly declares in the statute’s language its intent to preempt state law. *Id.* If the statutory language does not expressly preempt state law, preemption may be implied if the federal law dominates a particular legislative field (field preemption) or actually conflicts with state law (conflict preemption). *Id.* (citing *Nanopierce Techs.*, 123 Nev. at 371, 168 P.3d at 79-80).

Petitioners contend that conflict preemption applies here because the Hatch-Waxman Act imposes duties on them that conflict with the duties imposed under state tort law. Conflict preemption occurs where “it is impossible for a private party to comply with both state and federal requirements.” *Mensing*, 564 U.S. at 618 (internal quotation marks omitted). Petitioners argue that as generic drug manufacturers, they are unable to both comply with their duties under the federal drug regulations and avoid state-law tort liability. They rely on two decisions by the United States Supreme Court—*Mensing* and *Bartlett*—which they argue preclude plaintiffs’ claims.

Mensing and Bartlett

In *Mensing*, the plaintiffs sued generic drug manufacturers for failing to provide adequate warning labels on a generic drug that carried a

risk of a severe neurological disorder with long-term use. *Id.* at 610. The plaintiffs claimed that the manufacturers knew or should have known about the risk and that they had a duty under state law to adequately warn of it. *Id.* The Supreme Court found that the state-law claims were preempted because the manufacturers' duty under state law conflicted with their duty under federal drug regulations. *Id.* at 618. The Court explained that the Hatch-Waxman Act, which established an abbreviated process for FDA approval of generic versions of brand-name drugs, imposed a duty of "sameness" on the generic drug manufacturers. *Id.* at 612-13. This duty requires manufacturers to demonstrate that their generic drugs are identical to the brand-name drug in active ingredients, safety, efficacy, and warning label. *Id.* at 612-13 & n.2. By ensuring that their generic drug is equivalent to an FDA-approved brand-name drug, generic drug manufacturers can obtain FDA approval without undergoing the costly and lengthy clinical testing required for brand-name drugs, thereby expediting the introduction of low-cost generic drugs to the market. *See id.* at 612.

The *Mensing* Court compared this federal-law duty of sameness to the state-law duty, concluding that "it was impossible for the [m]anufacturers to comply with both their state-law duty to change the label and their federal-law duty to keep the label the same." *Id.* at 618. The Court reasoned that, because federal law requires generic drug labels to be the same as brand-name labels, any state-law duty that requires generic manufacturers to use safer labels conflicts with the federal "duty of sameness" and is preempted by federal law. *Id.* Further, the Court rejected the argument that the generic drug "[m]anufacturers [could have] asked the FDA for help" in strengthening the warnings and thereby defeating impossibility preemption. *Id.* at 620-21. The Court stated that the

“question for ‘impossibility’ is whether the private party could independently do under federal law what state law requires of it.” *Id.* at 620. “[W]hen a party cannot satisfy its state duties without the Federal Government’s special permission and assistance, which is dependent on the exercise of judgment by a federal agency, that party cannot independently satisfy those state duties for pre-emption purposes.” *Id.* at 623-24.

Similarly, in *Bartlett*, the Court considered whether a state-law design-defect claim against a generic drug manufacturer was preempted by the Hatch-Waxman Act. 570 U.S. at 475. The plaintiff succeeded on the claim at trial, and the First Circuit Court of Appeals affirmed the jury verdict, holding that the claim was not preempted because a generic manufacturer could simply stop selling the drug to avoid liability and thus comply with both federal and state law. *Id.* at 479. The Supreme Court reversed and specifically rejected this “stop-selling rationale” as a way to avoid impossibility preemption. *Id.* at 475-76. The Court determined that the state-law claim imposed a duty on the manufacturer to redesign the drug or strengthen the warning on its label, which was not possible under federal regulations. *Id.* at 486-87. The Court concluded that “it [wa]s impossible for [the generic drug manufacturer] to comply with both state and federal law.” *Id.* Thus, the state-law claim was preempted, and as explained by the Court, this preemption could not be avoided by the “stop-selling” theory: “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.” *Id.* at 488.

Read together, *Mensing* and *Bartlett* hold that the Hatch-Waxman Act imposes a duty of sameness on generic drug manufacturers that requires the labels and design of generic drugs to be the same as the

corresponding brand-name drugs and precludes manufacturers from unilaterally altering the label or design of the drug. A state-law claim that imposes a duty on a generic drug manufacturer to alter either the label or the design of a generic drug, thus making it impossible for the generic drug manufacturer to avoid liability under state law without also violating its federal duty of sameness, is preempted. And preemption cannot be avoided simply because the manufacturer could have stopped selling the drug to avoid liability under state law.

Analysis of state- and federal-law duty

Petitioners contend that plaintiffs' causes of actions are preempted under *Mensing* and *Bartlett* because each cause of action would impose a duty on petitioners to alter either the design or the formulation of the 50 mL vial, change its warning labels, or stop selling it altogether to avoid liability. In determining whether conflict preemption exists, we must first identify petitioners' duties under state law and then determine whether those duties conflict with petitioners' federal-law duties. See *Bartlett*, 570 U.S. at 480. Plaintiffs asserted four causes of action in their complaints: strict product liability, breach of implied warranty, deceptive trade practice, and negligence.⁴ Plaintiffs conceded at oral argument that their claims for strict product liability and breach of implied warranty are essentially failure-to-warn claims and are thus preempted under *Mensing* and *Bartlett*. However, they argue that their causes of action for negligence

⁴Plaintiffs also alleged a claim for punitive damages in their complaints, but punitive damages is a remedy and not a separate cause of action. See *Droge v. AAAA Two Star Towing, Inc.*, 136 Nev., Adv. Op. 33, 468 P.3d 862, 881 (Ct. App. 2020) (“[P]unitive damages is a remedy, not a cause of action.”).

and deceptive trade practice survive because they are not premised on the labeling or design of the drug.

As to the deceptive trade practice claim, plaintiffs alleged that petitioners made representations about the 50 mL vials that were false and omitted material facts. Plaintiffs did not identify in their complaints any representations made by petitioners other than those contained in the FDA-approved labeling. *See* NRS 598.0915(5), (7), (15) (providing, generally, that a person engages in a deceptive trade practice when he knowingly makes false representations); NRS 598.0923(2) (providing that a seller who “[f]ails to disclose a material fact” engages in a deceptive trade practice). As *Mensing* and *Bartlett* make clear, petitioners could not have rectified any alleged misrepresentation without violating federal law because they were required to adhere to the brand-name drug’s labeling. Thus, this cause of action is preempted under *Mensing* and *Bartlett*.

Turning to plaintiffs’ negligence claim, plaintiffs alleged that petitioners owed them a duty “to distribute, market, and package the propofol in safe single use vials that are not conducive to multi-dosing.” Plaintiffs further alleged that petitioners “knew, or in the exercise of reasonable care should have known, that packaging, marketing, and distributing propofol to high turnover ambulatory clinics . . . in 50 ml vials, was . . . likely to encourage or facilitate multi-dosing.” Under plaintiffs’ negligence theory, petitioners had a duty under state law not to package, market, or sell 50 mL vials of propofol to Dr. Desai’s ambulatory surgical clinics.

To the extent that plaintiffs’ negligence claim alleges that petitioners provided improper warnings or descriptions in the labeling and packaging of the 50 mL vials, such a claim is preempted, as it is clear under

Mensing and *Bartlett* that petitioners could not have unilaterally altered the labeling and packaging of the 50 mL vials under federal law. However, with respect to plaintiffs' claim that petitioners had a duty not to sell the 50 mL vials, we conclude that this cause of action is not preempted, as petitioners have not demonstrated that it would be impossible to comply with state law without violating federal law. The theory of this cause of action is that petitioners knew or should have known that Dr. Desai's ambulatory surgical centers were misusing the 50 mL vials of propofol labeled for single-patient use by anesthetizing multiple patients, and thus petitioners should have stopped selling 50 mL vials and sold only 20 mL single-dose vials to those centers. Petitioners contend that, to avoid liability under this theory, they would have had to either stop selling the 50 mL vials to Dr. Desai's ambulatory surgical centers or alter the size of the 50 mL vials. And, petitioners argue, the first option is precluded by *Mensing* and *Bartlett*, and the second option is preempted by conflict.

As to the first option, petitioners' duty to stop selling 50 mL vials of propofol to Dr. Desai's ambulatory surgical centers because petitioners allegedly knew that their vials were being misused, despite labels to the contrary, is not precluded by *Mensing* and *Bartlett*. Petitioners have not demonstrated that they have an absolute duty under federal law to continue selling 50 mL vials of propofol to clinics they allegedly know are misusing their product. Therefore, because petitioners' alleged state-law duty to stop selling the 50 mL to clinics it knows are misusing its product does not conflict with any federal-law duty, we conclude that plaintiffs' negligence cause of action is not preempted.

This conclusion is not affected by the Court's holding in *Bartlett* 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.” 570 U.S. at 488 (emphasis added). Though petitioners rely heavily on *Bartlett* in arguing that plaintiffs’ liability theory, which would require them to stop selling the 50 mL vials, cannot be used to avoid preemption, their reliance is misplaced. In *Bartlett*, the Court held that where there is a conflict between state and federal law, preemption cannot be avoided by requiring the generic drug manufacturer to stop selling the drug. *Id.* This analysis is not applicable here where there is no conflict between state and federal law in the first instance.

In the alternative, we agree that a conflict might arise if petitioners were required to unilaterally alter the size of their FDA-approved vials to avoid liability under state law.⁵ However, plaintiffs are not asking petitioners to alter their vial size, and even if they were, plaintiffs’ negligence cause of action would still not conflict with federal law. This is so because petitioners already obtained approval from the FDA to market a smaller, 20 mL vial size of propofol. Thus, unlike the generic drug manufacturers in *Mensing*, petitioners would not be required to make any unilateral changes to the drug’s design to comply with state law. Rather, petitioners could satisfy a state-law duty to sell only the smaller, 20 mL vials of propofol to Dr. Desai’s ambulatory surgical centers without violating their federal duty of sameness. Therefore, we hold that plaintiffs’

⁵The Hatch-Waxman Act does not permit generic drug manufacturers to independently change a drug’s strength, which includes a drug’s vial size. See 21 U.S.C. § 355(j)(2)(A)(iii) (2018) (requiring the generic drug’s “strength” to be equivalent to the brand-name drug); 21 C.F.R. § 314.3(b) (2020) (stating that a drug’s “[s]trength” refers to “the amount of drug substance contained in, delivered, or deliverable from a drug product which includes . . . [t]he total quantity of drug substance in mass or units of activity in a dosage unit or container closure”).

