IN THE SUPREME COURT OF THE STATE OF NEVADA

GLAXOSMITHKLINE LLC,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, et al.,

Respondents, and

SARA ELABBASSY, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF DECEDENT HUSROM, et al.,

Real Parties in Interest.

Case No.: 85501

ANSWER OF THE REAL PARTIES IN INTEREST TO GLAXOSMITHKLINE LLC'S PETITION FOR A WRIT OF MANDAMUS

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ORAL ARGUMENT REQUESTED

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I. INTRODUCTION.

GlaxoSmithKline LLC ("GSK") taught two generations of Nevadans to take Zantac with heartburn-inducing foods like tacos and pizza. For almost forty years, GSK's television ads made Zantac the household name in heartburn relief. If you want a "safe" drug doctors trust, take Zantac.[1] When that pastrami on rye catches up with you, take Zantac.[2] If you're missing out on taco night, take Zantac. (Pet. Ex. A. ("SAC"), at ¶ 102.)[3] But two years before the first commercial aired, GSK knew that Zantac causes cancer.

Although GSK developed Nevada's market for decades, it now claims that requiring it to face a lawsuit here—where Zantac gave the decedent cancer—violates the Constitution. But because GSK's marketing could have made any Nevadan a Zantac user, this lawsuit has the necessary "affiliation" with this State. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Court*, 141 S. Ct. 1017, 1029 (2021) (holding that personal jurisdiction exists over Ford in any state where its ads "might turn any resident . . . into a Ford owner").

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[1] *WSBT-22/CBS Commercial Breaks (12/22/1996) (Part 1)*, https://youtu.be/yoAwwKKOAEw?t=70 (last visited Nov. 21, 2022).
[2] *Brentford's Old TV Commercials and Stuff*, https://www.youtube.com/watch?v=VHfHH3n81hw (aired Dec. 24, 1998) (last visited Nov. 21, 2022).
[3] *See, e.g.*, *Zantac: Spicy*, https://www.ispot.tv/ad/dY7n/zantac-family-taco-night (last visited Nov. 21, 2022); https://youtu.be/jzS2kuB5_wg (last visited Nov. 21, 2022); *Zantac Heartburn Funny TV Commercial*, https://youtu.be/Z3QMwkSUlEg (last visited Nov. 21, 2022); *Zantac Heartburn Challenge*, https://youtu.be/qvh9gyWqQns (last visited Nov. 21, 2022).

This "market-creation" theory of jurisdiction applies with special force in the pharmaceutical context, where companies often develop the demand for a new product; spend millions convincing the public it is safe; and conceal side effects (like cancer) that take decades to be linked back to their drug. GSK did all that here. And Pfizer's predecessor (for brevity, "Pfizer"), which purchased the right to sell over-the-counter Zantac from GSK in 1998, paid GSK for the right to manufacture and sell Zantac to Ms. Husrom, the decedent in this case. Since Zantac is a carcinogen, it was worth zero dollars. But when GSK sold its rights to Pfizer, it made an (undisclosed) fortune.

GSK created the market for Zantac here and reaped the financial rewards, so subjecting it to suit in this State is fair. The alternative is worse: Allowing pharmaceutical companies to escape jurisdiction by selling off their interests would encourage them to play "hot potato," shuttling dangerous drugs back and forth to avoid being haled into Court where those they injure reside. And GSK's protestations ring hollow, since "significant moral blame attaches" to GSK's failure to warn the public of the risk of Zantac—and the fact that it sold its rights to Pfizer does not "alter that calculus." *T.H. v. Novartis Pharm. Corp.*, 407 P.3d 18, 46–47 (Cal. 2017).

What's more, although GSK claims that it washed its hands of over-the-counter Zantac in the 1990s (and "exited" the Nevada market), it continued to market and sell *prescription* Zantac in this State until October 2019, when it recalled the drug.[4] So for the decedent's whole life, she was subjected to GSK's barrage of public messaging that Zantac was safe. This is a far cry from the "severing" of all ties with Nevada necessary to cut off personal jurisdiction in this State. *Ford*, 141 S. Ct. at 1027. This Court should reject GSK's personal jurisdiction argument, just as two California federal Courts have already done.

Nor was GSK subject to perpetual liability, as it claims. At any time, GSK could have publicly disclosed the risk of cancer, putting consumers on notice and cutting off future liability. If it had filed a Citizen's Petition with the FDA—as others did in 2019—all Zantac would have been pulled from store shelves in months. Instead, GSK stayed silent.

Lastly, writ relief is not available to GSK on its motion for failure to state a claim. The trial Court followed the California Supreme Court, which adopted Plaintiffs' theory of "innovator liability" in 2017.

[4] Reuters, GSK recalls popular heartburn drug Zantac globally (Oct. 8, 2019), https://www.reuters.com/article/us-gsk-heartburn-zantac/gsk-recalls-popular-heartburn-drug-zantac-globally-after-cancer-scare-idUSKBN1WN1SL (last visited Nov. 21, 2022).

GSK's contrary Nevada authority comes from federal cases—not state courts. The trend is for state courts around the country, when not restrained by a contrary statute, to accept innovator liability. Because the trial Court followed well-established principles, writ review is limited to jurisdiction.

II. BACKGROUND.

A. Ms. Husrom Consumes Zantac Bearing GSK's Warning Label.

Plaintiffs are a Nevada family suing over the death of a young mother. (SAC ¶¶ 2–8.) Ms. Husrom, the decedent, contracted esophageal cancer and died after taking both branded and the generic Zantac from November 2016 to September 2019. (*Id.* at ¶¶ 11, 69.) Ms. Husrom lived in Nevada, took pills from bottles bearing GSK's warning label in Nevada, experienced GSK's marketing in Nevada, believed GSK's representation that Zantac was safe in Nevada, and died in Las Vegas. (*See generally id.*)

B. GSK Conceals the Risk of Zantac from the Public.

Although GSK marketed the drug in this State as a way to *treat* acid reflux, it knew that taking Zantac with foods high in nitrates—like tacos and pizza—is especially dangerous. (*Id.* at ¶¶ 103–04). When Zantac mixes with stomach acid, it reacts, causing N-nitrosodimethylamine ("NDMA") levels to soar to 3,100 times the FDA's allowable limit. (*Id.* at ¶¶ 103–104.)

To mask Zantac's cancer risk, GSK manipulated two studies in the 1980s. (*Id.* at ¶¶ 124–125.) In 1981, GSK omitted NDMA—a powerful carcinogen—from an otherwise comprehensive list of metabolites found in the urine of rats who had consumed ranitidine, the active ingredient in Zantac. (*Id.* at ¶ 124.) After a cadre of scientists sounded the alarm in the mid-1980s that ranitidine might contain NDMA, GSK doubled down in 1987 with a rigged study where it *removed* gastric samples containing the dangerous compound from its data set. (*Id.* at ¶ 125.) GSK could then falsely declare that Zantac was safe.

As a result of GSK's deception, Zantac became the world's best-selling drug in 1988. (*Id.* at ¶ 78.) By the next year, Zantac accounted for over *half* GSK's $3.8 billion in sales. (*Id.*)

GSK made Zantac available over the counter in 1996. (*Id.* at ¶ 79.) It later sold the right to manufacture over-the-counter Zantac to Pfizer in 1998, benefiting from an inflated sales price and realizing the value of future sales—including the sale of over-the-counter Zantac to the decedent here. Because GSK continued to sell prescription Zantac in Nevada, however, it continued to market and promote the drug in this State until October 2019, the month after regulators announced an investigation. (*Id.* at ¶ 80.)

III. ARGUMENT.

The trial Court's decision to follow the California Supreme Court and permit Plaintiffs' theory of "innovator liability" is the type of garden variety ruling not appropriate for writ review. If this Court does extend review to the merits of Plaintiffs' claims, this Court should join the growing trend of common-law products liability states that recognize innovator liability. By contrast, writ review is available on GSK's jurisdictional claims—but GSK does little more than offer the same arguments the United States Supreme Court recently rejected in *Ford*. So, this Court should dismiss GSK's petition.

A. GSK May Use This Writ to Review Jurisdictional Issues Only.

GSK moved for dismissal for both lack of personal jurisdiction *and* failure to state a claim. Writ review of jurisdiction is appropriate. But where the trial court followed well-established principles, writ review of failure to state a claim is not. *Compare Int'l Game Tech., Inc. v. Second Jud. Dist. Court*, 124 Nev. 193, 197–98 (2008). Failure to state a claim does not go to the trial Court's jurisdiction, so an appeal is an adequate remedy. *Id.* at 197. Premature review of motions to dismiss consumes an "enormous amount" of appellate resources. *Id.* And GSK seeks review of personal jurisdiction only. (Pet. Br. 2.) So this Court should assume that Plaintiffs state a claim.

That being said, the trial Court's decision to follow the California Supreme Court is hardly surprising. The Court held that Plaintiffs stated a claim against GSK because it *wrote* the warning label on the Zantac that Ms. Husrom took. This theory, which some Courts have called "innovator liability," is not a "new tort"—it is just a consequence of tort principles operating in the pharmaceutical context, an area of "unprecedented federal regulation." *Wyeth, Inc. v. Weeks*, 159 So. 3d 649, 677 (Ala. 2014), *superseded by statute*, Ala. Code § 6-5-530(a).

Under innovator liability, when a brand-name drug manufacturer writes a warning label, it assumes responsibility for the generic's label as well, since federal law *requires* the generic to copy whatever the brand-name manufacturer wrote. *Rafferty v. Merck & Co.*, 92 N.E.3d 1205, 1210 (Mass. 2018). Innovator liability is fair because it permits recovery from the party responsible for "the product design, formula, dosage, labeling and warning." *Franzman v. Wyeth, Inc.*, 451 S.W.3d 676, 691 (Mo. Ct. App. 2014).

Because a generic *must* copy, word for word, the brand-name's label, Plaintiffs' failure-to-warn claims against the generic manufacturer are preempted by federal law—which can leave plaintiffs in a "Catch 22." *Strayhorn v. Wyeth Pharm., Inc.*, 737 F.3d 378, 407 (6th Cir. 2013).

They can't sue the *generic* for failure to warn because that company didn't design the label. But they also (according to GSK) can't sue the *brand-name* manufacturer because it didn't make the pills the plaintiff took—even though that party is responsible for the "design, formula, dosage, labeling and warning" of the drug at issue. *Franzman,* 451 S.W.3d at 691.

In *Franzman* and *Strayhorn*, state statutes prevented the Courts from adopting innovator liability. *See Rafferty*, 92 N.E.3d at 1221 (distinguishing such cases). But where no statute requires otherwise, judges adopt innovator liability, allocating the risk of loss to the party in the best position to prevent the harm: the brand-name manufacturer. *See, e.g.*, *Wyeth, Inc.*, 159 So. 3d at 676; *T.H. v. Novartis Pharms. Corp.*, 407 P.3d 18 (Cal. 2017); *Rafferty*, 92 N.E.3d at 1221; *Dolin v. SmithKline Beecham Corp.*, 62 F. Supp. 3d 705, 713–14 (N.D. Ill. 2014), *reversed on other grounds*, 901 F.3d 803; *Doran v. Glaxosmithkline PLC*, No. 3:21-cv-1228 (JAM), 2022 U.S. Dist. LEXIS 103891, at *16 (D. Conn. June 10, 2022); *Lance v. Wyeth*, 85 A.3d 434, 458 (Pa. 2014) (holding that brand name manufacturer could be liable on design defect claim where plaintiff only took the generic); *Kellogg v. Wyeth*, 762 F. Supp. 2d 694, 708–09 (D. Vt. 2010) (permitting failure to warn claim against brand name manufacturer where physician prescribed generic).

Nevada law is no different. Under Nevada common law, Courts fix the responsibility for injuries caused by defective products "*wherever* it will most effectively reduce the hazards to life and health." *Allison v. Merck & Co.*, 878 P.2d 948, 952 (Nev. 1994) (emphasis added). When considering whether to permit a plaintiff's theory of liability, this Court follows the "guiding principle" that the public interest in human safety requires "the maximum possible protection for the user of the product." *Id.*; *see also Stackiewicz v. Nissan Motor Corp.*, 686 P.2d 925, 926–27 (Nev. 1984) (providing an overview of the evolution of products liability law in Nevada).

GSK's claim to the contrary is based on a pair of federal cases—*Moretti* and *Baymiller*—that predate the California Supreme Court's adoption of innovator liability in 2017. And Nevada has not shied away from following California decisions in products liability cases to protect consumers. *Shoshone Coca-Cola Bottling Co. v. Dolinski*, 420 P.2d 855, 857 (Nev. 1966).

GSK cites to *Moretti v. Wyeth, Inc.*, which ignored *Allison*'s broad holding that liability should be assigned wherever it will most effectively reduce hazards, and instead construed that case (which *expanded* liability) to *limit* liability to manufacturers. No. 2:08-cv-00396-JCM-(GWF), 2009 U.S. Dist. LEXIS 29550, at *9–10 (D. Nev. Mar. 20, 2009) (Mahan, J.).

Later, another federal Court relied on *Moretti* to reach the same conclusion—again without properly considering the theory of liability allocation set forth in *Allison*. *Baymiller v. Ranbaxy Pharm., Inc.*, 894 F. Supp. 2d 1302, 1311 (D. Nev. 2012) (Jones, J.).

Finally, the MDL Court, in a cursory analysis, reasoned that *Moretti* and *Baymiller* were appropriate "data" for predicting that this Court would reject innovator liability. *In re Zantac*, 510 F. Supp. at 1219. Given the 50-state task before it, no one can fault the MDL Court for doing this. But the opinion hardly constitutes persuasive authority.

The trial Court here, in declining to follow three wrongly decided federal cases, did not turn tort law "on its head," nor did it create a "new tort." *Wyeth*, 159 So. 3d at 677. Rather, it applied this State's established common law products liability principles in the context of the pharmaceutical industry, with its "unprecedented federal regulation." *Id.*

Given Nevada's common law, the trial Court correctly permitted Plaintiffs to proceed on an innovator liability theory. And a trial Court's reasoned decision to follow the growing trend of Courts (including California's Supreme Court) adopting innovator liability is not so extraordinary as to merit writ review.

B. The Trial Court Correctly Exercised Jurisdiction Under *Ford*.

Because GSK raised personal jurisdiction in a pretrial motion, Plaintiffs need only make a *prima facie* showing. *Levinson v. Second Jud. Dist. Court*, 103 Nev. 404, 407 (1987). At this stage, "when factual disputes arise," they "must be resolved in favor of the plaintiff." *Id.*

Plaintiffs only need to show that their claims "relate to" GSK's contacts with Nevada by demonstrating "an affiliation between the forum and the underlying controversy." *Ford*, 141 S. Ct. at 1024. When a party engages in such heavy marketing that it could turn "anyone" in the forum state into a customer, it has "reached out beyond" its home and exploited the forum's market—and is on "clear notice" that it is "subject to jurisdiction in the State's courts" when the product causes injury there. *Id.* at 1025, 1030.

This is doubly true for a company like GSK that single-handedly created the demand—and expectation of safety—for a new product. Not to mention that GSK profited by selling the right to manufacture the product and sell it into the forum. And on top of that, it continued throughout the decedent's lifetime to promote and market the product here. So, GSK cannot claim now that the trial Court denied it Due Process by allowing Plaintiffs to proceed with a suit for its misrepresentations in this State. *Id.*

1. *Personal Jurisdiction Exists Because Plaintiffs' Claims "Relate to" Nevada—Not Because of Any Causal Showing.*

Specific jurisdiction requires two things: (1) purposeful availment by the defendant and (2) that the cause of action arises from (or relates to) the defendant's contacts with the forum. *Trump v. Eighth Jud. Dist. Court*, 109 Nev. 687, 699–700 (1993). GSK disputes only the second prong. While this Court has traditionally used the phrase "arises from" when reciting the personal jurisdiction test, the United States Supreme Court has recently clarified that there are two *different* ways a plaintiff may satisfy the second prong: the "arises from" test and the "relates to" test. *Ford*, 141 S. Ct. at 1024.

The plaintiff may prevail on this prong by showing "arises from" jurisdiction—an inquiry that "asks about causation." *Id.* But if the plaintiff cannot make a "causal showing" (as is the case here), he can still prevail by showing that his claims "relate to" the defendant's contacts with the forum. *Id.* It is this second test, the "relate to" test, that Plaintiffs satisfy here.

2. *Because GSK's Marketing in Nevada Could Have Made Any Nevadan a Zantac User, This Case "Relates To" Nevada.*

Under the "relates to" test, but-for causation isn't required: just regularly marketing a product in the forum plus injury there. *Ford*, 141 S. Ct. at 1028. This allows for jurisdiction in "innovator liability" cases.

For instance, in *Quinn-White v. Novartis Pharm. Corp.*, although the plaintiff "did not ingest Defendant's drug," the case related enough to California because the plaintiff's California-based physician "reviewed and relied on Novartis's label and its warnings in California, where Novartis marketed its drugs." No. CV 16-4300 PSG (AGRx), 2016 U.S. Dist. LEXIS 201328, at *7 (C.D. Cal. Oct. 7, 2016). Because the defendant marketed its drugs in California, it had availed itself of California's laws and could reasonably expect to litigate claims related to its drugs there. *Id.*

Similarly, in *Whaley v. Merck*, the defendants' Singulair advertisements *were* the "jurisdictionally relevant" facts in the context of an innovator liability claim. No. 3:21-cv-01985-H-BLM, 2022 U.S. Dist. LEXIS 73391, at *27 (S.D. Cal. Apr. 11, 2022). So where a plaintiff is a California resident, is subject to the defendant's advertising there, took the drug there, and suffered harm there, the claims "relate to" that state. *Id.* at *26.

So too here. GSK's representation for decades that ranitidine (the active ingredient in Zantac) is safe occurred throughout Nevada, and GSK poured millions of dollars into marketing the drug here. Ms. Husrom, the decedent, relied on those misrepresentations and took ranitidine—both in its branded Zantac form and in its generic form—for years in this State.

When she developed cancer, as was reasonably foreseeable to GSK given what it knew about Zantac, she suffered in Nevada and was treated at a clinic in Las Vegas. And GSK profited from Ms. Husrom's purchase of the drug in Nevada—if not as the company that put the pills in the bottle, as the company that sold the right to manufacture the drug and sell it to her.

Under *Ford*, then, there is a sufficient "affiliation between the forum and the underlying controversy" for personal jurisdiction. By "conducting so much business in" Nevada, GSK has "enjoy[ed] the benefits and protection of" its laws, as well as its "effective markets." *Id.* at 1030.

Those benefits give rise to "reciprocal obligations for the Defendants under state law," notably the obligation not to make negligent or fraudulent misrepresentations. *Id.* For GSK's breach of those obligations, Nevada Courts may hold GSK accountable here consistent with the Due Process. *Id.*

3. GSK's Arguments Are the Same the Court Rejected in Ford.

Here, GSK did for Zantac what Ford did for its cars: It created a market for its products in the forum through advertising. Ford argued that it had "designed" and "manufactured" a defective product—a 1994 Crown Victoria—outside of Minnesota, where one of the plaintiffs was injured. *Ford*, 141 S.Ct. at 1023.

There (as here), Ford had not sold the Crown Victoria to that plaintiff in the forum. *Id.* And what's more, Ford had already "exited" the market for selling Crown Victoria models in Minnesota (or anywhere else) before that plaintiff purchased his car secondhand: Ford produced its last Crown Victoria on September 15, 2011, prior to the plaintiff's May 2013 purchase. (*See* Sup. Ct. Dkt. Nos. 19-368 & 19-369, J.A. at 132.) But when Ford argued there was no specific jurisdiction over it in Minnesota, the Court disagreed. *Id.* The Court considered Ford's contacts with the forum *as a whole*—not just Ford's cherry-picked facts, such as where it designed the car.

The Supreme Court did not—as GSK wants this Court to do—first winnow down the "relevant" jurisdictional facts to only those aspects of the defendant's conduct that were but-for causes of the plaintiffs' injuries. Rather, the Court asked whether there was "an affiliation between the forum and the underlying controversy," without "demanding that the inquiry focus on cause." *Id.* at 1026. And an "affiliation" may occur where the plaintiff is injured by a product in a state and the defendant has made "efforts" to "serve, directly or indirectly, the market" in that state. *Id.* at 1027. When a company conducts "activities within a state," enjoying the benefits of its laws, that State may hold it "to account for related misconduct." *Id.*

Just as Ford argued its manufacturing processes took place outside the forum, GSK argues here that Plaintiffs' innovator liability claims do not arise from its conduct in Nevada because GSK's labeling decisions allegedly took place in another state. But in *Ford*, the relevant type of "contact" was that the plaintiff "might never have bought [the products], and so these suits might never have arisen, except for Ford's contacts" with Minnesota. *Id.* at 1029. And Ford's development of Minnesota's markets "might turn any resident . . . into a Ford owner." *Id.*

GSK, by insisting that the only "legally relevant" fact is where it undertook its labeling decisions, applies the flawed analysis *Ford* set out to correct. This Court should reject GSK's sleight of hand, which misuses the phrase "legally relevant facts" as a stand-in for but-for causation.

GSK also claims that Ford "could have eliminated any exposure to products-liability claims" by "pulling its cars from those states." (Pet. Br. at 17.) But Ford had *already* stopped making the Crown Victoria in 2011—a fact not relevant to the Supreme Court's analysis, given that Ford continued to promote its other cars and its brand in the forum. Selling off the rights to one version of one product in the forum is hardly "severing" ties with the forum completely.

GSK continued to promote prescription Zantac here until October 2019. So GSK did not "sever" its connection with this State after all. On top of that, GSK's conduct—selling off the right to peddle its dangerous drug over the counter in Nevada, while continuing to pump the prescription version into the forum itself—could hardly have been what the Supreme Court meant by "severing" ties with the forum. *Ford*, 141 S. Ct. at 1027.

Finally, GSK claims that even if it were *still* selling and marketing over-the-counter Zantac in Nevada today, this Court couldn't exercise specific jurisdiction over it on any innovator liability claims. (Pet. Br. at 16.) That argument cannot be squared with *Ford*. GSK's efforts to develop and exploit the Nevada market, plus injury in the forum, satisfy the "relates to" test.

4. This Court Has Always Looked to Whether the Tort as a Whole Relates to Nevada.

Nevada Courts have never followed the approach argued by GSK here. GSK claims that only the location of its labeling decisions is relevant. In other words, if the tort of innovator liability is a claim with four elements—duty, breach, causation, and damages—GSK claims that the *only* relevant jurisdictional fact is the specific spot its officers and employees were standing when they played their part in committing the "breach" element.

But this Court has always considered the tort *as a whole* when considering the location of "contacts" with this State. For instance, in *Judas Priest v. Second Jud. Dist. Court*, the Court held that the British heavy metal band could be haled into Nevada on the theory that its music was responsible for teen suicides here. 104 Nev. 424, 426 (1988). The plaintiffs in that case did *not* allege that Judas Priest's satanic lyrics (the "cause" of the suicides) were written or approved by the band members in Nevada. *Id.* Rather, the Court focused on the cultivation of a Nevada market by Judas Priest for its music, such as by playing two concerts in the state. *Id.*

Similarly, in *Baker v. Eighth Jud. Dist. Court*, a Californian, Mr. Baker, had seen ads in California for a "suite" at the Rio hotel. 116 Nev. 527, 533 (2000). When he arrived, he was disappointed that his "suite" had only one room. *Id.* Once back in California, he threatened a class action of California plaintiffs based on California false advertising law—prompting the Rio to file a declaratory judgment action in Nevada. *Id.* Exercising jurisdiction over Mr. Baker, this Court reasoned that while in a narrow, technical sense, the dispute might "arise" from the false advertising in California, the real "injury" occurred here. *Id.* Indeed, it was Mr. Baker's trip to the Rio that had convinced him the California advertising was false. *Id.*

Likewise, in *Arbella Mut. Ins. Co. v. Eighth Jud. Dist. Court*, an insurance company, Arbella, could not escape specific jurisdiction on a bad-faith claim in Nevada when it refused to pay a Massachusetts plaintiff an uninsured motorist claim based on an accident in this state. 122 Nev. 509, 515–16 (2006). Arbella did not conduct any business in Nevada. *Id.* Instead, it merely had a territory clause in its insurance contract insuring against accidents in the United States and Canada. The only facts that would—according to GSK—give "rise" to the bad faith claim were those tied to Arbella's decision not to pay out on the policy, which happened at its out-of-state headquarters. *Id.* But this Court rejected that approach, since the claim, in the everyday sense of the term, related to Nevada.

Lastly, in *Trump v. Eighth Jud. Dist.*, Trump made the decision in Florida to hire away a Nevada company's employee. 109 Nev. 687, 692–93 (1993). Although Trump did set up a Nevada trust to guarantee the employee's compensation, the facts that (in a strict sense) gave "rise" to the claim all occurred in Florida: Trump's meetings with the employee, his decision to hire the employee away, and the signing of a new contract. But this Court focused instead on the whether the suit *as a whole* related to Nevada—and given *all* the facts, it did.

Under GSK's theory, specific jurisdiction would only be proper in Great Britain in *Judas Priest*, where the band's lyric-writing took place. It would only be proper in California in *Baker*, where the allegedly false ads aired. It would only be proper in Massachusetts in *Arbella*, where the insurance company drafted its policy and decided not to pay the uninsured motorist claim. And it would only be proper in Florida in *Trump*, where Trump's hiring decisions were made. Together, these cases show that this Court has never applied GSK's ridged approach to personal jurisdiction.

GSK's single Nevada case—*Tricarichi v. Coöperative Rabobank, U.A.*—holds that where the parties entered an illegal deal to flout federal tax law, the fact that one of them moved from Ohio to Nevada at some point during their negotiations does not mean that the other benefited from Nevada's laws. 440 P.3d 645, 648 (Nev. 2019). By contrast, Plaintiffs' cases illustrate that this Court has historically allowed a plaintiff whose claims "relate to" Nevada to bring suit here, anticipating *Ford*.

Ms. Husrom died in Las Vegas from a product bearing GSK's warning label, and she took the product in Nevada because of the market GSK cultivated here. Where GSK made its labeling decisions is just a small part of the overall context surrounding the tort.

5. As a California Federal Court and the Trial Court Recognized, the Florida MDL Court's Decision is Unpersuasive.

GSK argues that the trial Court should have followed the Florida Multi-District Litigation Court in holding that advertising and marketing are not relevant jurisdictional contacts. *In re Zantac (Ranitidine) Prods. Liab. Litig.*, 546 F. Supp. 3d 1192 (S.D. Fla. 2021). The MDL Court conflated the "relates to" and "arising from" tests, looking only at whether the defendants' conduct that "*gives rise* to Plaintiffs' claims." *Id.* at 1212–13 (emphasis added). This ignores the Supreme Court's directive in *Ford*—so this Court should avoid the analytical error made by the Florida MDL Court.

The MDL Court refused to consider whether the defendants had cultivated markets in other states, falling into the type of "but-for causation" thinking that *Ford* held was too narrow. Because the Florida MDL Court required the plaintiffs to show "but-for" causation, it reasoned that specific jurisdiction over innovator liability theory claims could *only* be proper where labeling decisions had taken place. *Id.* As one federal Court recently explained, the MDL court's holding stands in "tension" with *Ford*. *Whaley*, 2022 U.S. Dist. LEXIS 73391 at *27. And *Quinn-White* also rejected the reasoning used by the MDL Court. 2016 U.S. Dist. LEXIS 201328, at *7.

The trial court correctly declined to follow the MDL Court here. GSK's heavy marketing in this forum could have turned *any* Nevada resident into a Zantac user. And while the MDL Court worried that applying *Ford* to innovator liability claims would create a system of jurisdiction with no "real limits," Nevada has never had any problem setting limits where jurisdiction is unreasonable. *See, e.g.*, *Dogra v. Liles*, 129 Nev. 932, 938 (2013) (holding there was no jurisdiction in negligent entrustment case where the car's owner never encouraged the driver to travel here).

In this case, GSK created two generations of Zantac users in Nevada and made its drug a household name in this State. It made millions selling the right to sell a carcinogenic drug to Nevadans—knowing that the label it wrote, on the drug it developed, would be used by the manufacturer and passed on to Nevadans. It sold the right to manufacture over-the-counter Zantac to Pfizer for an undisclosed sum, benefitting from the anticipated value of future sales in Nevada. And it did not, as it claims, "sever" its connection with Nevada. Especially when combined with its continued promotion of prescription Zantac in Nevada until October 2019, GSK's exploitation of the Nevada market suffices for jurisdiction.

6. GSK Had Two Ways to Cut Off Liability: Severing Ties with Nevada or Disclosing the Cancer Risk to the Public.

GSK argues that the law must provide it with a way to "exit" the Nevada market and end its susceptibility to suit in Nevada. But to be clear, the law does provide a way, and GSK chose not to take it. GSK continued to sell prescription Zantac in Nevada until October 2019. And it continues to sell other drugs here to this day. GSK thus did not—as *Ford* instructs—weigh the costs and benefits of doing business in Nevada, decide that the risk of being sued in Nevada was too great, and stop cultivating the Nevada market altogether. *Ford*, 141 S.Ct. at 1027.

Alternatively, GSK could have disclosed to the public what it knew from the start, thereby cutting off its liability entirely. If competitors had continued to sell ranitidine, and if consumers had continued to purchase it, their informed decisions would be on them.

GSK knew full well that selling drugs, including prescription Zantac, in Nevada risked exposing it to future Zantac suits in Nevada. GSK continued to exploit the Nevada market anyway. It is far from unreasonable for Nevada courts to hold GSK "to account" for the risks it concealed from Nevadans. *Id.* at 1025.

7. GSK Concealed the Risk of Cancer During the Relevant Time Period: Ms. Husrom's 2016 to 2019 Zantac Use.

GSK complains that it should not be haled into Court today because it *started* concealing the risk of cancer long ago. In other words, it took too long for Zantac users to die and for the FDA to discover what GSK hid. But GSK *did* conceal the risk during Ms. Husrom's Zantac use, from 2016 to 2019. Its October 2019 recall came too late for Ms. Husrom and her family.

GSK should not be rewarded simply because it successfully concealed the risk of cancer—a disease that takes years to surface—for a long time. While GSK complains that it stopped selling over-the-counter Zantac eighteen years ago, GSK conveniently forgets that it took the FDA and the public thirty-six years to discover what GSK already knew. That GSK concealed the risk of cancer so adeptly makes it *more* blameworthy, not less.

As the California Supreme Court has reasoned, "significant moral blame attaches" to this type of coverup. *T.H.*, 407 P.3d at 46–47. That GSK has "since exited the market does not alter the calculus." *Id.* This is so because when a company conceals a health risk in its product, it is "inflating the sales price" of the right to manufacture the drug. *Id.* at 47. Which is exactly what GSK did here.

8. Contrary to GSK's Hypothetical, it Would Not Be Subject to Jurisdiction Here if it Had Never Marketed Zantac in Nevada.

Lastly, GSK argues that personal jurisdiction would still exist under the trial Court's theory even if GSK had never marketed or sold any Zantac in Nevada. (Pet. Br. at 9, 12.) Under GSK's hypothetical, a company might never sell the product here—but yet still be on the hook for personal jurisdiction. This is odd, as Plaintiffs have always argued that GSK's *marketing* in Nevada is what, under *Ford*, creates jurisdiction.

GSK misreads the trial Court's opinion. GSK claims the trial Court "acknowledged" that Plaintiffs "could have brought an innovator-liability claim even if GSK had *never* sold Zantac in Nevada." (Pet. Br. at 12) (emphasis in original). The Court did no such thing. First, the trial Court reasoned that because GSK had engaged in heavy marketing, "this hypothetical is not the case here." (P.A. 183:14–15.) Second, the trial Court reasoned that if GSK had never marketed the product, this would considerably weaken any claim that GSK's acts would sufficiently "relate to" this forum. (P.A. 183:16–18.)

Additionally, GSK forgets that there are other safeguards against the unreasonable exercise of personal jurisdiction. Personal jurisdiction requires

(1) purposeful availment and (2) that the cause of action arise from or relate to the defendant's contacts. *Trump*, 109 Nev. at 699–700. If GSK had never exploited the Nevada market, the first prong—purposeful availment—would not be satisfied. And even if the first two prongs *were* satisfied, GSK could still defeat personal jurisdiction by demonstrating unreasonableness. *See Arbella*, 122 Nev. at 516 (outlining additional reasonableness factors, such as the burden on the defendant).

Below, GSK did not even attempt to show a lack of purposeful availment here, nor did it argue that additional factors make the exercise of personal jurisdiction unreasonable. These arguments are waived now. But a company facing jurisdiction in GSK's no-marketing, no-sales hypothetical would win on *all* grounds: no purposeful availment, no marketing to satisfy the "relates to" test, and no balance of factors supporting reasonableness.

IV. CONCLUSION.

The "relates to" portion of the personal jurisdiction test means exactly what it says: the suit must relate to the forum, in the everyday sense—not in some counterintuitive, technical sense. If GSK had not developed the market in Nevada, or had sold no products here, there would be no jurisdiction over it. But that isn't this case. The petition for a writ should be denied.

Dated: November 22, 2022

THE702FIRM

/s/ Michael C. Kane

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**Motion for admission pro hac vice pending in the trial Court*

CERTIFICATE OF COMPLIANCE

I, Michael C. Kane, do hereby certify that this brief contains fewer than 7,000 words, as indicated by a word-processing program.

/s/ Michael C. Kane

CERTIFICATE OF SERVICE

I do hereby certify that on November 22, 2022, I submitted the foregoing Answer for filing via the Court's eFlex electronic filing system. Electronic notifications will be sent to the following:

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