

No. S221038
(Court of Appeal No. A140035)
(San Francisco County Super. Ct. J.C.C.P. No. 4748)

**IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA**

BRISTOL-MYERS SQUIBB COMPANY,
Petitioner,

v.

SUPERIOR COURT FOR THE COUNTY OF SAN FRANCISCO,
Respondent.

BRACY ANDERSON, *ET AL.*,
Real Parties in Interest.

SUPREME COURT
FILED

OCT - 3 2014

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REPLY IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

Whether for tactical reasons or because they have no substantive response to the Petition, the non-resident Plaintiffs¹ have filed a cursory Answer that begins with an erroneous procedural argument and finishes with conclusory assertions unsupported by authority or explanation. Contrary to their contentions, the Petition was timely filed, and presents an important question—arising from an Opinion that conflicts with prior decisions—that this Court should settle.

I.

THE PETITION IS TIMELY.

The non-resident Plaintiffs say that this Petition is untimely. *See* Answer 4. It is not. Under California Rule of Court 8.500(e)(1), “[a] petition for review must be served and filed within 10 days after the Court of Appeal decision is final in that court.” “[D]ecisions in a writ proceeding are final 30 days after the decision is filed” CAL. R. CT. 8.490(b)(2). Accordingly, the decision became final on August 29, 2014, and BMS had ten days after that—until September 8, 2014—to petition for review. BMS timely filed this Petition three days early on September 5, 2014.

II.

THE ANSWER DOES NOT REBUT BMS’S SHOWING THAT THE OPINION CONFLICTS WITH GOVERNING PRECEDENT AND RAISES AN IMPORTANT QUESTION OF LAW HAVING WIDESPREAD IMPLICATIONS.

The non-resident Plaintiffs assert in conclusory fashion that the Petition does not establish grounds for review because “there is no lack of uniformity of decision between

¹ Respondents refer to themselves in their Answer as Real Parties in Interest (“RPI”).

California Supreme Court precedent and the Opinion, nor an important question of law to settle.” Answer 4. But they do not address, much less rebut, any argument BMS raised in its Petition.

First, the Petition demonstrates that the Opinion conflicts with at least three prior California opinions: *Fisher Governor Co. v. Superior Court*, 53 Cal. 2d 222 (1959), *Spirits, Inc. v. Superior Court*, 104 Cal. App. 3d 918 (1980), and *Boaz v. Boyle & Co.*, 40 Cal. App. 4th 700 (1995). *See* Petition 8-10. It also conflicts with numerous federal cases and with an Illinois court’s decision in the Plavix® litigation. *See* Petition 10, 18-20. The Answer does not mention these cases, much less refute the Petition’s showing that the Opinion conflicts with them.

Second, the Answer portrays the Opinion as an “everyday application” of the “substantial connection” test to a “unique fact pattern.” Answer 4. But the facts here are not unique and the issues are not ordinary.

The nationwide Plavix® litigation involves a repeated pattern: several thousand plaintiffs, who reside all across the country, concentrated in only a handful of their lawyers’ chosen forum states. BMS’s writ petition cites numerous examples of similar cases pending in California courts and elsewhere. *See* Writ Petition 21 n.5. Case law provides yet more examples fitting this fact pattern. *See, e.g., Shiley Inc. v. Superior Court*, 4 Cal. App. 4th 126 (1992) (heart valve product liability litigation brought by four California plaintiffs and 35 non-residents); *Dunbar v. Medtronic, Inc.*, No. CV-14-01529, 2014 WL 3056081 (C.D. Cal. June 25, 2014) (INFUSE bone graft product liability action brought by one California plaintiff and 28 non-residents); *Aaron v. Merck & Co.*, No. CV 05-4073, 2005 WL 5792361 (C.D. Cal. July 26, 2005) (Vioxx product liability action brought by 38 California plaintiffs and 96 non-residents); *see also* Amicus Curiae

Letter of Generic Pharmaceutical Association at 4, No. S221038 (Cal. Sept. 24, 2014) (discussing other coordinated proceedings that involve a relatively few number of resident plaintiffs joined with non-resident plaintiffs).

Far from being “unique,” the issue raised here affects tens of thousands of product liability claims. Indeed, in the Plavix® litigation alone, it will affect more than 3,000 plaintiffs. In addition to the 575 out-of-state Plaintiffs previously before the trial court, the New Jersey judge overseeing the federal multidistrict litigation recently remanded to California Superior Court 57 cases involving more than 3,000 plaintiffs from 45 states, Puerto Rico and Canada. *See In re Plavix Prod. Liab. & Mktg. Litig.*, MDL No. 3:13-cv-2418, slip. op. at 4 (D.N.J. Oct. 1, 2014);² *see also* Writ Petition 3 n.1 (Cal. Ct. App. Oct. 22, 2013).

Nor are the issues ordinary. As one of the first appellate decisions in this State to address personal jurisdiction after *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014),³ the Opinion

² As of this filing, the opinion is only available on PACER. BMS will provide the Court with a Westlaw or Lexis citation when available. The MDL Court expressed some discomfort with the way these claims were joined in an attempt to keep them in California state court:

[T]he Removal Defendants’ position as to the manner in which Plaintiffs here have pled their Complaints, including the joining of numerous potentially non-related claims, raises substantial concerns. . . . In my view, in pharmaceutical cases like the ones here, courts should be steadfast in guarding against plaintiffs’ attempts at forum shopping by employing questionable procedural mechanisms, including misjoinder of claims. The question of misjoinder remains in these cases, but will be left to the sound judgment of the state court (*In re Plavix*, slip op. at 27-28).

³ The non-resident Plaintiffs claim that BMS “concedes that the Opinion does not conflict with the holding” in *Daimler*. Answer 5. That is not accurate. Although the Opinion “followed *Daimler*’s literal holding” (Petition 2), it
(... continued)

will have enormous importance statewide and nationwide. The Court of Appeal recognized that its ruling went beyond existing specific jurisdiction precedent (App. 32), and certified for publication its 40-page decision.⁴ The significance of this case is why it attracted substantial interest from *amici curiae* on both sides in the Court of Appeal and continues to do so here. *See, e.g.*, Amicus Curiae Brief of American Association for Justice in Support of Real Parties in Interest, No. A140035 (Cal. Ct. App. May 29, 2014); Amicus Curiae Brief of Consumer Attorneys of California Supporting Real Parties in Interest, No. A140035 (Cal. Ct. App. May 23, 2014); Amicus Curiae Brief of Chamber of Commerce in Support of Petitioner, No. A140035 (Cal. Ct. App. Apr. 14, 2014).

Petitioners have delineated at length the reasons warranting review and will not rehash those arguments here. Suffice it to say that the non-resident Plaintiffs do not deny that:

- No California court has previously held that the “substantial connection” necessary to establish specific jurisdiction “need not have *any* relevance to

(. . . continued)

nonetheless stands fundamentally at odds with *Daimler*. *Daimler* condemned the exercise of personal jurisdiction over out-of-state companies in the dozens of states where the defendant does business on the basis of general jurisdiction. 134 S. Ct. at 761-62. The Court of Appeal effectively resurrects the pre-*Daimler* regime in which plaintiffs can sue a national manufacturer in virtually any state in which that manufacturer does substantial business through the backdoor of specific jurisdiction. *See* Petition 4-5, 17-20.

⁴ To meet the standards for certification for publication, a Court of Appeal decision should: (1) establish a new rule of law, (2) apply an existing rule of law to a set of facts significantly different from those stated in published opinions, (3) modify, explain, or criticize an existing rule of law, (4) address or create an apparent conflict in the law, (5) involve a legal issue of continuing public interest, or (6) make a significant contribution to legal literature. *See* CAL. R. CT. 8.1105.

establishing the plaintiff's claim" (App. 28 (emphasis in original); Petition 13-16);

- The Opinion disregards territorial limits on state court jurisdiction, contrary to decisional law not only in the Due Process area but also Commerce Clause and Full Faith and Credit jurisprudence (Petition 11-13); and
- The Opinion is not limited to the pharmaceutical industry. It applies with equal force to any company that does business in California (Petition 1, 17, 20).

Finally, the non-resident Plaintiffs dismiss the burdens on California courts and jurors as "not a factor statutorily identified that the Supreme Court must consider when reviewing a petition." Answer 6. But they do not explain why such sweeping impacts on courts and jurors would not fit this Court's criteria for review.

CONCLUSION

For the foregoing reasons and those stated in the Petition for Review, this Court should grant review.

DATED: October 3, 2014

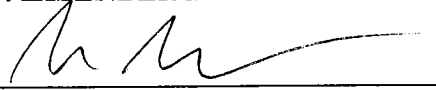
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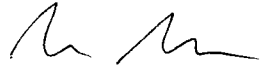
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**CERTIFICATE OF COMPLIANCE PURSUANT TO
CAL. R. CT. 8.504(d)(1)**

Pursuant to California Rule of Court 8.504(d)(1), and in reliance upon the word count feature of the software used, I certify that the attached **Reply in Support of Petition for Review** contains 1,348 words, exclusive of those materials not required to be counted under Rule 8.504(d)(3).

DATED: October 3, 2014



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PROOF OF SERVICE

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Three Embarcadero Center, 10th Floor, San Francisco, California 94111-4024. On October 3, 2014, I served the following document(s) described as **REPLY IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed to each as follows:

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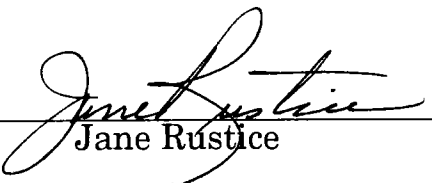
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I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on October 3, 2014.


Jane Rustice