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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

JAMES R. CLAYWORTH, ET AL.,
Petitioners,

v.

PFIZER, INC., ET AL.,
Respondents.

*On Petition for Writ of Certiorari to the
State of California, First Appellate District*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is the right of trial by jury in suits at common law preserved by the Seventh Amendment a fundamental right that applies to the States through the Fourteenth Amendment, and that is, therefore, protected by the Fourteenth Amendment from infringement by the States?

Due process requires that a judge be fair and impartial, and this right is protected by the Fourteenth Amendment to the United States Constitution. *Tumey v. Ohio*, 273 U.S. 510 (1927). Is the requirement of a judge to be fair and impartial violated when the judge decides a dispositive motion which was authored and/or supported by the judge's sister-in-law, who is a partner in one of the law firms making the motion and submitting the papers in support thereof?

PARTIES TO THE PROCEEDINGS

PETITIONERS-PLAINTIFFS

James Clayworth, owner of Clayworth Pharmacy

Marin Apothecaries, Inc., owner of Ross Valley Pharmacy

Golden Gate Pharmacy Services, Inc., owner of Golden Gate Pharmacy

Pediatric Care Pharmacy, Inc., owner of Pediatric Care Pharmacy

Chimes Pharmacy, Inc., owner of Chimes Pharmacy

Mark Horne, owner of Burton's Pharmacy

Meyers Pharmacy, Inc., owner of Meyers Pharmacy

Benson Toy, owner of Marin Medical Pharmacy

Seventeen Fifty Medical Center Pharmacy, Inc., owner of Seventeen Fifty Medical Center Pharmacy

Jack's Drug Store and Medical Supplies, Inc., owner of Jack's Drug Store

Julian Potashnick, owner of Leo's Pharmacies

Jerry Shapiro, owner of Uptown Drug, Co.

Tilley Apothecaries, Inc., owner Zweber's Apothecary/Super Rx

RP Healthcare, Inc., owner of RP Healthcare

Rohnert Park Drugs, Inc., owner of Rohnert Park
Drugs

JGS Pharmacies, Inc., owner of Dollar Drugs

California Pharmacy Systems, Inc., owner of California
Pharmacy Systems

RESPONDENTS- DEFENDANTS

Pfizer, Inc.;

Johnson & Johnson Health Care Systems, Inc.;

Merck & Co., Inc.;

Bristol-Myers Squibb Company;

Abbott Laboratories;

Wyeth;

Eli Lilly & Company;

GlaxoSmithKline, PLC;

Allergan, Inc.;

Hoffman-LaRoche, Inc.;

Aventis Pharmaceuticals, Inc.;

Astrazeneca, LP;

Novartis Corporation;

Boehringer Ingelheim Pharmaceuticals, Inc.;

Pharmaceutical Research and Manufacturers of
America (PhRMA)

RULE 29.6 CORPORATE DISCLOSURE
STATEMENT

Pursuant to Supreme Court Rule 29.6, no petitioner has a parent company and no publicly held company owns 10% or more of any petitioner's stock.

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Petitioners respectfully pray that a writ of certiorari issue to review and reverse the decision by the Court of Appeal of the State of California, First Appellate District, which deprived petitioners of the constitutional right to trial by jury.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District is unreported. (Appendix to the Petition for Writ of Certiorari “App” 2-99.) The opinion of the Superior Court (App. 100-217.) is unreported.

JURISDICTIONAL STATEMENT

The California Court of Appeal, First Appellate District, rendered its decision on August 22, 2012 (App. 2-99.) On September 6, 2012, petitioners filed a petition for rehearing in the Court of Appeal to the State of California, First Appellate District. On September 12, 2012, the First Appellate District denied petitioners’ petition for rehearing (App. 218). On October 1, 2012, petitioners filed a petition for review to the Supreme Court of the State of California. On November 28, 2012, the Supreme Court of the State of California denied petitioners’ petition for review (App. 1.)

On February 14, 2013, petitioners filed in this Court an Application (12A818) to extend the time to file a petition for a writ of certiorari. On February 22, 2013, petitioners’ application (12A818) was granted by Justice Kennedy, extending the time to file a petition for writ of certiorari to on or before April 12, 2013.

This petition for certiorari was timely filed and this Court has jurisdiction under 28 U.S.C. § 1257(a).

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

The relevant constitutional and statutory provisions are the Seventh Amendment, and the Fourteenth Amendment to the U.S. Constitution and California Code Civ. Proc. § 170.1(a)(5), which are reproduced at App. 219-221. They provide:

Seventh Amendment:

“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved...”

Fourteenth Amendment, Section 1:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

California Code Civ. Proc. § 170.1(a)(5):

“A judge shall be disqualified if any one or more of the following are true...A lawyer or a spouse of

a lawyer in the proceeding is the spouse, former spouse, child, sibling, or parent of the judge or the judge's spouse or if such a person is associated in the private practice of law with a lawyer in the proceeding."

STATEMENT OF THE CASE

This petition for certiorari arises from a decision by Judge Steven A. Brick, judge of the Superior Court Alameda County, California, denying recusal and granting summary judgment against the plaintiffs.

A. Facts Before the Court Ruling on Summary Judgment

1. The Complaint

The complaint alleges that defendant manufacturers had agreed to set higher prices for their drugs sold in the United States and California than they charged for the same drugs manufactured from the same plants, sold in countries outside the United States. As a result, the Manufacturers were able to maintain prices for their drugs in California, as elsewhere in the United States, at levels 50 to 400 percent higher than for the same drugs sold outside the United States. Pharmacists alleged that they consequently have been forced to pay an overcharge, the difference between the conspiracy-inflated prices set by the Manufacturers and the price Pharmacies would have paid in a competitive market. *Clayworth v. Pfizer, Inc.*, (2010) 49 Cal. 4th 758, 765.

2. The Pharmaceutical Industry

Defendants sell their drugs to wholesalers at a price referred to as the wholesale acquisition cost ("WAC"). Plaintiff pharmacies, purchase prescription drugs primarily from wholesalers who purchase the drugs from the Defendants. Plaintiffs resell prescription drugs to patients who present prescriptions for them. Prescription drugs are medicines that require a medical professional's prescription before they can be dispensed to a patient. (App. 238.)

3. Defendants Never Reduce the List Price of Their Drugs

Defendants do not deny that "The prices for Defendants' drugs have continually increased over at least the past decade." The prices referred to are the list of WAC prices. Defendants publish their list price WAC for every drug they sell, including each price increase, to third party database companies such as First DataBank. Every defendant has immediate access to every other defendant's price increases through First DataBank or other databank sources. (App. 238-239.)

Defendants' customers, the wholesalers, resell the drugs to pharmacies at prices based on a percentage of the average wholesale price. Because the average wholesale price is a fixed percentage above the price charged by defendants to the wholesalers, any price increases by manufacturer defendants will increase the average wholesale price proportionally. As a result, when the manufacturer defendants increase their

prices, the cost of drugs to pharmacies increase by the same percentage amount. *Clayworth*, at 765.

In turn, pharmacies sell the drugs to two groups of consumers (1) those with third party insurance or a drug benefit plan offered either by a private entity or the government, which in turn pays consumers' claims on their behalf, and (2) uninsured (or cash paying) consumers. For the first group, those covered by third party payers, pharmacists are reimbursed at a contractually or statutorily fixed amount, predetermined as a percentage of the average wholesale price, plus a dispensing fee; this reimbursement is greater than pharmacies acquisition costs. For the second group, the cash-paying consumers, pharmacies establish the retail price unilaterally. Though not required to be, these prices traditionally have been based on a set percentage of the average wholesale price as well, plus in some instances an additional dispensing fee. *Clayworth*, at 765-766.

While the defendant manufacturers never reduce their list of WAC prices, they do pay secret rebates to large insurers, managed care providers, and government agencies. Third party payers, insurers, managed care providers, and government agencies, generally maintain "formularies" (which are lists of drugs) that substantially influence which prescription drugs are sold. The manufacturer defendants pay these secret rebates to third party payers to have their drugs placed on the payer's formularies, received preferred positions on the formularies, or otherwise gain market share. "By 'dirty little secret' I mean it is something that is not generally publicly well known." (App. 240.)

4. The CPI-Pledge—The Historical Origins of the Conspiracy

The prices of prescription drugs rose precipitously during the 1980's and as a result there arose considerable public and political backlash.

In a 1992 study by the General Accounting Office, there is the following summary:

“Prescription drug prices in the United States rose sharply in the 1980's. From 1980 to 1990, both consumer prices (measured by the Consumer Price Index – CPI) and prices charged by producers (Producer Price Index – PPI) for prescription drugs rose on average 9.6 percent per year. This was roughly double the average rate of growth for the economywide CPI (4.7 percent per year). The steep increase in drug prices in the 1980's is a marked change from the 1970s. In that decade, U.S. prescription drug prices rose about one-half as quickly as consumer prices in general (4.3 percent per year on average for prescription drugs, compared with 7.8 percent per year for general prices).”

(App. 240-241.)

The defendants, in order to quell the protests of the public to ever increasing drug prices, agreed not to increase their prices above the CPI plus one or two percent. In describing the agreement, Mr. O'Leary of Hoffman-LaRoche testified:

“Q. That reference there to that, quote, “the CPI pricing policy,” was that what you were referring to when you talked about the pledge made by the various pharmaceutical manufacturers?

A. The CPI pricing policy is referring to the pledge that manufacturers, certain manufacturers made to not increase their prices in excess of the CPI.”

(App. 241.)

Mr. O’Leary went on to explain the reason for taking the Pledge and limiting price increases as follows:

“A. Because there had been scrutiny and criticism of price increases taken by drug manufactures. And I believe the industry was concerned that if congress chose to, congress could have regulated prices in the market. So it was probably an issue of exercising restraint in the face of possible regulation of prices.”

(App. 241.)

In November 1992, the PhRMA Executive Committee assembled a Working Group in response to the threat against defendants’ high prices. The Working Group concluded its meeting by directing the PhARMA head to propose possible industry responses and to present his results at the December 10, 1992, Board of Directors meeting. (App. 242.)

As of September 16, 1993 – Burroughs-Wellcome (a predecessor of Defendant GSK) internally circulated a document entitled “Price Escalation Proposal.” In this document, it was confirmed that the industry-wide agreement had already been adopted.

“CPI has become the underlying guideline for pharmaceutical price increases. The industry has generally agreed to informally keep its prices in line with the CPI or the CPI plus 1 to two-and-a-half percent.”

(App. 245.)

The effectiveness of defendants’ agreement can be seen in the prices themselves. Between 1993 and 2000, defendants’ price increases almost perfectly paralleled increases in the CPI. (App. 246.)

The evidence shows that the defendants continued to use CPI for their prices. The following evidence supports this statement. Mr. White, CEO of Abbott testified:

“Q. As a general proposition, does Abbott raise its prices in the United States at least in accordance with the CPI.

A. I would say generally so, but it’s not always the case in every product.”

(App. 246.)

Mr. Brienzi, Vice President, Bristol-Meyers-Squibb testified:

Q. And the guidelines that they have issued was to price according to, increase price according to CPI?

* * *

A. It was to limit price to the CPI, price increases to CPI increases."

(App. 246.)

Mr. Brennan CEO of AstraZeneca testified:

"Q. ... Now, is it correct that as a general principle that you would increase your prices along with any CPI increase?

A. We use CPI as the benchmark –

Q. As the base?

A, - or starting point. Yeah. So if there was a reason to be significantly above it, *then we discussed why*. If there were a reason to be below it, *we discussed why*." [Emphasis added.]

(App. 246-247.)

Mr. Marsh, Executive Director of Boehringer-Ingelheim, testified:

"Q. So you have a 3 to 5 percent increase in price annually is that correct? You project that?

A, We project that. Yes we do.

Q. For WAC prices?

A. Yes, for our WAC. Yes.

Q. And does CPI, consumer price index, play any role in that determination?

A. Yes, we look at – we look at CPI and what its trending at, and that’s usually somewhat of the basis upon which we would put into our plans that we would be able to potentially take a pricing action within the – along the lines of CPI.”

(App. 247.)

A July 4, 2000, internal pricing memorandum from the director of pricing to the CEO of AstraZeneca proposed several price increases, approximating CPI, and stated in part: “Most major companies continue to raise prices at or above the CPI level.” (App. 247-248.)

A September 2004, price change strategy document by Amgen states in part as an issue to resolve: “2005 use CPI or CPI + 1%.” (App. 248.)

A February 28, 2000, email by Eli Lilly states in part: “In fact, over the past 5 years, our net price increases have approximated the CPI.” (App. 248.)

A Bristol-Myers-Squibb Executive Staff Memorandum states in part:

“CPC discussed and recommended a policy of no price increases in the pharmaceutical business

above CPI unless specifically approved by the EC. We will show the impact of implementing adherence to CPI in 2005, and look for a decision from the EC as to whether this should be adopted in the plans and budget for 2005”

(App. 248.)

In the 2002 Profit Plan, power point presentation, of USHH (Merck) there are the following points:

“* Proposed ave. price increase of 4.9% in 2002

* Consistent with stated policy

- Compliant with CPI pricing policy

- Consistent with “spirit” of price restraint pledge.”

(App. 248.)

In an October 2004, email Pfizer employees discuss the budgeted price increases and state in part: “Current Pfizer Price Increase Policy is weighted average increase = CPI+1% Net of Legislated Rebates = 3.4%” (App. 248.)

5. Defendants Agree Never to Cut List Prices to Pharmacists

As noted *infra* the defendants never reduce their list or WAC prices to the pharmacists. There is direct testimony from Dr. Rost (a former vice president of Wyeth) that when he cut prices he was confronted by

industry representatives and told not to cut prices. (App. 249.)

Dr. Rost spent his life in the pharmaceutical industry and has worked for several pharmaceutical manufacturers. While with Wyeth, he was assigned to the Nordic region and in that capacity had pricing authority. When he cut list prices for Wyeth in that region he was immediately confronted by representatives of the pharmaceutical manufacturers. As he testified, first he was contacted by email from the president of the local pharmaceutical manufacturers association, Horken Mondel, and told to "tone down his marketing efforts." He was then asked by Mr. Mondel to meet with him over lunch. In this meeting, at a private club, "he basically asked me to compete less aggressively." When this was ineffective, the General Manager for AstraZeneca, Steiner Hoeg, contacted Dr. Rost's superior, Rume Bremberg, and "asked to meet with us privately. Regarding our marketing and pricing of Lanzo." (App. 249-250.) Dr. Rost's superior told him that they would go to the meeting and that Dr. Rost did not have a choice. At this meeting:

"He [Mr. Hoeg] was very upset that we have started competing on price and that we were applying this strategy. And he told us that we are all going to lose out because of this.

Q. Did he say how you were going to lose out?

A. "Well, because it was going to hurt the industry in general and, I mean, basically I had broken ranks with the industry. It is like

swearing in church. You are lowing prices? You are a branded company? You don't do that."

(App. 250.)

Instead of supporting him, Dr. Rost's superior was quiet and later told Dr. Rost that his price cutting was not appreciated by Wyeth's higher-ups. (App. 250.)

Dr Rost also testified that it was against the self interest of the defendant manufacturers to adopt a uniform policy of not reducing list prices:

"This is something that people have a hard time to understand. It is something I had a lot of discussions internally because basically the principle is – if you go to Harvard Business School, the principle is you don't compete on price, anybody can match you, so you ruin the market.

That may be true when you have competitors with similar market shares. When you have competitors with very different market shares, a small one and a big one, it definitely makes sense to compete on price. And I am sometimes surprised that not more companies are doing this". (App. 250-251.)

Dr Rost backed up his belief that in many cases not reducing prices was against self interest. In 1999 and 2000 while he was managing director for Wyeth in Scandanavia (AA 6034) he cut prices of one product and doubled his sales revenue. He made it clear that the same could be done in the United States:

“Well, I think the same technique could be applied here selectively, depending on what kind of product you are looking at.”

(App. 251.)

Defendants’ testimony is that despite this clear evidence that it was against their self interest to not ever reduce list prices they consistently refused to cut prices. Mr. Dolan, CEO of Bristol-Myers-Squib, testified:

“Q. Have you in that market ever reduced, since you’ve been chief executive officer, have you in the United States reduced any of the prices of any of your major products?”

A. Possibly, but I don’t, I couldn’t give you an example of one if we have.”

(App. 251-252.)

Mr. Szabo, Senior Director of Pricing for BMS, testified:

“Q. Okay. Has it ever lowered a list price in order to be more competitive of brand name drugs?”

A. I can’t recall.

Q. Has Bristol-Myers ever lowered a list price to meet competition.

A. No.”

(App. 252.)

Mr Costa, CEO of Novartis testified:

“Q. Instead of paying the rebates why don’t you just lower your prices?

* * *

Q. Yeah, so that you don’t pay, you don’t have to pay any rebates, just lower the prices?

A. Because there is a significant component of our market which does not use the structure of managed care; and we would lose the income that’s related to that part of the business.

Q. Well, how significant is that?

A. Probably about 30, 40 percent, depending upon the product class.” [AA 2832-3].

“We did decrease the price all the time, the net prices, through concessions and rebates that caused the net price decrease.

Q. Yes, but those are price decreases, net price decreases to these PBMs and managed care folks?

A. Right.

Q. Not to pharmacists?

A. Right, not the list price.”

(App. 252-253.)

6. The Increasing US Prices and Lower Foreign Prices Leads to Collective Action

The conspiracy of steadily increasing prices and not reducing prices was leading to unsustainable imbalance.

With the passage of time and despite the “Pledge”, the disparity between prices in the United States and the rest of the world continued to increase. Dr. Rost, when he was assistant to the President of Wyeth Europe, observed this differential and testified:

“Q. At the time did you notice or have any knowledge as to whether or not the pricing in Europe was any different than the pricing for the same product in the United States?

* * *

Q. While you were assistant with the president?
[1998-1999]

A. I was aware that there was a very significant difference.

Q. When you say very significant, what do you mean in general?

A. In general, I believe Wyeth’s oral contraceptives were priced ten times as high in

the U.S. as they were in countries outside of the U.S.

Q. Any other products?

A. There was a similar difference, I believe, in the HRT products, the hormone replacement products.”

(App. 253-254.)

By 2002, the disparity was causing large problems for the drug manufacturers.

On July 9, 2002, PhRMA prepared a “Decision Memorandum for the Board of Directors on Canada Advocacy” which was circulated to the CEOs of the manufacturer defendants. In this Memorandum it is noted that:

“The increasing public perception of cross-border price differences – promoted by well-publicized drug-buying trips to Canada engineered for political purposes – helps drive unfavorable views of the industry and increase the political pressure for legislation in Washington and state capitals to fix the problem by controlling U.S. prices. What is at stake is not just the relatively small Canadian market, but continued support in the U.S. for our relatively more market-based health care system”

(App. 254.)

The Memorandum went on to recommend the formation of a Canada KIT by the Board of Directors. (App. 254.)

On July 18, 2002 the Board of Directors of PhRMA met and according to the highly redacted minutes created a Canada KIT (Key Issue Team) “to develop a mission statement and action plan.” (App. 254-255.)

While the minutes are redacted it is clear that prices were discussed. As Mr. Dolan, CEO of BMS testified:

“Q. There’s no question, is there, that at PhRMA there have been plenty of discussions about prices and differences in prices between prices in the United States and in other countries, that’s been a major point of discussion, isn’t that true?

* * *

Q. Isn’t that true?

A. As we discussed previously, there have been discussions about the differentials between Europe and the United States and Canada, etcetera,”

(App. 255.)

The then vice president for defendant Pfizer said: “We in the drug industry are fighting re-importation because we are worried about the bottom line.” (App. 255.)

A November 4, 2002, Memorandum from PhRMA entitled "Preventing Government Price Controls" the re-importation problem states: "Repeatedly we are told that cross-border price differentials resulting in part from price controls are politically unsustainable, as many Americans have come to believe they are paying unfairly high prices and that the industry is discriminating against Americans." (App. 255.)

Shortly thereafter, GSK set in motion a plan that required industry cooperation in order to avoid GSK being singled out for retaliation. According to the plan, notification letters were to be sent out to Canadian wholesalers and identified internet pharmacies regarding terms and conditions of sale. According to the Plan, between January 6 and 10, 2003, GSK was to "Advise key industry stakeholders (the identification of the "stakeholders" is redacted but another GSK document, makes it clear that Rx&D was a stakeholder) "and regulators of GSK position" and at the scheduled meeting of the Rx&D meeting scheduled for January 10, 2003, GSK's "Popp to attend Rx&D Reimportation & Internal Pharmacy Task Force Meeting @ Pfizer HQ." According to the redacted Minutes of the January 10, 2003, Rx&D Internet Pharmacy Committee Meeting, representatives from GSK, Pfizer, Abbott, Aventis, Eli Lilly, Merck, and BMS attended. (App. 256.)

While the lower court denied plaintiffs' request for production of the defendants re-importation letters to their Canadian wholesalers and internet pharmacies, plaintiffs know that on January 12, 2003, Pfizer wrote their Canadian pharmacies informing them of changes in the terms of sale and stating: We also reaffirm that

Pfizer products purchased by you may only be sold in Canada.” (App. 256.)

On January 13, 2003, the Wall Street Journal reported that: “GlaxoSmithKline PLC said it would stop providing pharmaceuticals to Canadian businesses that are shipping them to the U.S., revving up the debate over allowing U.S. consumers to fill their prescriptions in Canada, where many drugs are cheaper.” (App. 256-257.)

On January 21, 2003, GSK “reinforced” its position at a CAPDM Executive Conference. Every defendant is a member of CAPDM. CAPDM stands for “Canadian Association For Pharmacy Distribution Management.” (App. 257.)

Nor was PhRMA out of the loop. On January 31, 2003, at the Pfizer NY headquarters, there was a meeting of the Canada KIT Staff Work Group. On the agenda were presentations by the President of Rx&D, the Chair of the PhRMA Canada Committee, Crupi of Lilly, and a presentation on “Third Country Internet Challenge.” Defendants have refused to produce the presentations or the minutes. (App. 257.)

After the reports of GSK’s action against re-importation, Wyeth’s CEO Robert Ruffalo, on February 4, 2003, sent an email to GSK’s CEO J.P. Garnier, signaling that his company was on board, with the following note: “Way to Go! J.P. Nice job. I’m glad that somebody finally stood up and did it. Bob.” (App. 257.)

In a March 3, 2003, internal memorandum from Mr. Popp and others to GSK’s president, recommended that

GSK “clearly state our position, and the position of ... industry and others in order to broaden the scope of the issue beyond GSK.” (App. 257.)

On April 10, 2003, Mr. Popp internally circulated a draft AstraZeneca letter, addressed to Canadian wholesalers that announced AstraZeneca’s intention to monitor and allocate supply, with the obvious purpose of limiting re-importation. Although this letter was in GSK’s possession on April 10, the letter was not made public until 12 days later on April 22, 2003. This letter could not have come from an AstraZeneca customer as defendants have tried to argue, since its draft form is clearly indicated by the fact that instead of being dated it bears the notation “date” in its place. The clear inference is that the companies were in communication and concert. (App. 257.)

That industry cooperation was necessary in order to avoid retaliation for solo action is further indicated by the April 16, 2003, Edelman report. Edelman was an independent consulting company whose clients in 2003 included both GSK and AstraZeneca. In this memorandum Edelman makes it clear that it was important that GSK not appear to be alone in its intentions to eliminate internet sales. “[AZ saying it was not targeting INET’s] would not help GSK’s position and further reinforce the perception that the company is alone in its intentions.” (App. 258.)

In the meantime, with the industry lining up to stop the flow of Canadian drugs, PhRMA circulated, April 6, 2003, a Memorandum on “Progress In Opposition To Illegal Internet Imports of Medicines.” [AA 6154-65].

In this highly redacted Memorandum the following survives:

“Any true solution requires action to reduce U.S. demand as well as to eliminate illegal imports. While beyond the remit of the Canada KIT, PhRMA’s top priority continues to be enactment of Medicare drug coverage for seniors. While not a panacea, such an expansion in coverage for seniors and Americans with disabilities is the single most effective way to reduce U.S. demand for illegal imports. Other PhRMA actions to reduce U.S. demand are to (1) publicize companies’ patient assistance programs, and (2) educate opinion leaders that imports of medicines are illegal because they increase risks to American patients.”

(App. 258-259.)

While recommending this three pronged approach to curbing demand, the Memorandum noted that efforts to limit Canadian imports was not enough.

“Regarding the foreign supply challenge, we recognize that so long as U.S. demand continues, successes in limiting illegal internet imports from Canada would tend to shift internet sources to third countries. Illegal internet imports are ultimately a global challenge.”

(App. 259.)

One prong of the PhRMA action to eliminate demand for internet drugs was concerted action. As Mr. Costa, CEO of Novartis, testified:

“[W]e also had contacts with some other perspective manufacturers when we were putting together the Together Rx card, which was a program to provide access to drugs to low-income seniors. And at that point I believe I had contacts with Johnson & Johnson, I had contacts with Pharmacia, I had contacts with Pfizer; that’s about it that I recall.

Q. When you had the contacts with Johnson & Johnson, with whom did you have those contacts?

A. With the chairman of Johnson & Johnson, Bill Weldon, and it was, if I recall, one telephone conversation.

* * *

Q. That conversation, you said, lasted only about five minutes or so, is that what you said?

A. Yes.

Q. Did anything come of it?

A. They were supportive of the effort, and it was just, how do we reach out to other pharmaceutical companies and try to build a coalition. Maybe I can explain.

We had a discount card that we had put in place for low-income seniors, and when we did that we tried to do it in a way that would allow other companies to join us. Our rationale as that we did not think it would be feasible for seniors to carry four or five discount cards in their wallets, and that it would be simpler if there was a coalition that they would have with one discount card have access to a number of pharmaceutical companies. So we thought that that was in the interest of seniors and make it easier for them to have access to our discounts.

Q. Did you ever do that?

A. Yes.”

(App. 259-261.)

7. Other Evidence Demonstrating that the Plaintiffs’ Right to Trial by Jury in the Extraordinary Circumstances of this Case was Plainly Violated

Contacts, Meetings, Social Intercourse, and Opportunity to Conspire

Here the sheer number of meetings among supposedly competitive apex executives is staggering. The evidence shows not just dozens but thousands of meetings between defendants’ apex executives. Meetings were, not only, held under the auspices of PhRMA, Dolder (the international pharmaceutical trade association), regional trade associations such as Rx&d, the National Pharmaceutical Council, and

various business councils, but also phone calls, emails, and social meetings aboard private jets, yachts, private homes, French chateaus, luncheon and dinner parties and hunting, fishing and camping trips. The PhRMA meetings themselves were voluminous, monthly meetings of the Board of Directors for the CEO's, Executive Committee meetings, Key Issue Team meetings, and numerous committees. One CEO, Raymond Gilmartin of Merck, had over 800 communications with competitor executives over a five year period. Lilly's CEO Sidney Taurel said that he met with his competitors more often than he met with his own Board of Directors. (App. 262.)

Instant Communication of List Price Changes

There is no dispute that defendants publish their WAC price for every drug they sell, including each price increase to third party database companies such as First DataBank. There is also no dispute that every defendant has immediate access to every other defendant's price increases through First DataBank or other databank services. It is therefore clear that defendants can police their agreement, as they did with Dr. Rost, and take joint and corrective action to bring the competitor in line. (App. 263.)

High Prices and High Profits and Value Pricing.

The cost of production of defendants' drugs is estimated at only 6.6% of their U.S. price. That is, their gross margins are a phenomenal 95%. The cost of defendants' drugs has no relation to their price. Rather than base their product prices on cost as in competitive

industries, Defendants base their product prices on value. (App. 263.)

The pharmaceutical industry is also one of the most profitable in the world. Of the top 400 most profitable industries ranked by Fortune Magazine, the pharmaceutical industry ranked fifth with 2005 profit margins of 15.7%. Defendants Merck, GSK and Novartis have reported an average profit margin in excess of 20% for the past 5 years. In 2001, the drug industry was the most profitable industry in America and the 10 drug companies listed in the Fortune 500 were eight times more profitable (as a percentage of revenues) than the median for all Fortune 500 companies. (App. 263-264.)

Other Evidence of Cooperation and Protection of the WAC

Defendants have engaged in other activities to restrict competition in the United States and protect their artificially high WAC prices. Defendant PhRMA stated that its member companies have refused to negotiate with the government on the price of drugs. Defendants routinely enter into agreements to keep generic drug companies from eroding prices with less expensive generic drugs. Defendants routinely enter into co-promotion agreements to restrict the entry of competing drugs. (App. 264.)

B. The Lower Court Ruled on a Summary Judgment Motion Tainted by Conflict of Interest

This case was filed on August 26, 2004 when 16 retail pharmacists sued 15 drug manufacturers for stabilizing prices in violation of the California antitrust laws. Defendants filed motions for summary judgment on the pass-on defense and on the merits. On December 19, 2006, summary judgment on the pass-on defense was granted and the summary judgment on the merits was mooted. An appeal followed and the California Court of Appeal affirmed the pass-on defense. 165 Cal.App.4th 209 (2008). On July 12, 2010, in a landmark decision the California Supreme Court granted a petition for review and unanimously reversed and remanded for further proceedings. *Clayworth v. Pfizer, Inc.*, 49 Cal.4th 758 (2010). The case was then returned to the Superior Court six years after the complaint had been filed.

Within two days after the remand, an attorney for defendants contacted the trial court to determine to whom the case would be assigned, and they were informed that it would likely be California Superior Court Judge Steven A. Brick. At the time, Judge Brick's sister-in-law was a partner at the Covington & Burling law firm. Judge Brick admitted that under California Code of Civil Procedure, Sec. 170.1(a)(5) there would be a conflict of interest if the Covington firm remained in the case.

In this case, Covington's six-years of representation of defendant Boehringer Ingelheim had been both substantial and extensive. They participated in over 70

depositions, worked on every aspect of the case including the two motions for summary judgment on the pass-on defense and on the merits, and worked on the appeals from the pass-on summary judgment. In fact, Covington claimed over \$63,000 in taxable costs following the pass-on summary judgment.

Moreover, Covington & Burling not only represented defendant Boehringer Ingelheim in this case, but "Covington represents more pharmaceutical companies in more criminal and civil investigations by federal and state governmental agencies, including high profile congressional inquiries than any firm in the country." In addition to representing Boehringer in over 40 matters, Covington represented nine other defendants in over 190 matters.

Defendants considered it important to retain Judge Brick on the case. With Judge Brick's relationship to the Covington firm, it was likely that he would be recused under California Code of Civil Procedure, Sec. 170.1(a)(5). Accordingly, on August 5, 2010, Covington gave itself up and substituted out in favor of Jones Day. On September 2, 2010 when the case was formally assigned to Judge Brick, the defendants were able to argue that Covington was no longer an attorney in the proceedings and Judge Brick declined to recuse himself. Petitioners filed an unsuccessful motion to disqualify and sought writs in the Court of Appeals and Supreme Court of California which were denied without comment.

After the motion to disqualify was denied and after the Court of Appeal denied the Petition for Writ of Mandate, and after the Supreme Court denied the

Petition for Hearing, Judge Brick then set for hearing the motion for summary judgment on the merits that had been co-authored and signed by the Covington firm. He did so, over petitioners' objection, without the benefit of further discovery, evidentiary filings, or briefing.

After argument, Judge Brick granted defendants motion for summary judgment on the merits, issued an opinion and entered final judgment. The judgment was affirmed by the California Court of Appeals and the petitioners unsuccessfully sought a writ of review in the California Supreme Court.

PROCEEDINGS BELOW

Plaintiffs' initial complaint was filed and this action commenced on August 26, 2004. (App. 266.)

A third amended complaint was filed. On July 1, 2005, the court denied defendants' motions to dismiss, stated as follows:

"The Third Amended Complaint alleges that Defendants have conspired to inflate the prices of prescription drugs sold to plaintiffs. (3AC para 5) The Third Amended Complaint alleges the dates (3AC para 7 and 62), terms (3AC para 6, 8, 9, and 66(a)), means (3AC para 64), and effects (3AC para 11 and 13) of the alleged conspiracy. The Third Amended Complaint alleges overt acts in furtherance of the conspiracy, including the charging of higher prices in California and (otherwise legal) efforts to restrict the importation of drugs into the

United States. The Court finds that the Third Amended Complaint alleges sufficient parallel conduct by the Defendants to raise an inference of collusion and permit the claim to proceed under the heightened standards for pleading a claim under the Cartwright Act.” (App. 266-267.)

Defendants filed motions for summary judgment on the pass-on defense and on the merits. Plaintiffs’ motion under Code Civ. Proc., § 437(c)(h) was denied on November 22, 2006, and on December 19, 2006, summary judgment on the pass-on defense was granted. The summary judgment motion on the merits was mooted. (App. 269.)

An appeal followed and the Court of Appeal affirmed the summary judgment on the pass-on defense. 165 Cal.App.4th 209 (2008). The Supreme Court granted certiorari and on July 12, 2010, unanimously reversed the judgment of the Court of Appeals and remanded the matter for further proceedings. *Clayworth v. Pfizer, Inc.*, 49 Cal.4th 758. (App. 269.)

On remand to the Alameda Superior Court, the case was assigned to the Honorable Steven A. Brick. Upon hearing of the probable assignment to Judge Brick and realizing that Judge Brick’s sister-in-law was a partner in the law firm of Covington & Burling who represented one of the defendants, a substitution of attorneys was filed removing Covington & Burling from the case. However, the Covington firm continued to advertise that it represented more pharmaceutical companies in matters than any other firm and that

they continued to represent nine of the defendant in other matters. Initially, Judge Brick was inclined to recuse himself, but upon learning that the Covington firm had substituted out of this case, changed his mind. A motion to disqualify was filed but denied. (App. 269-270.)

Judge Brick then set for argument the motions for summary judgment, based on the papers and opposition previously filed in 2006 in part by his sister-in-law's law firm. (App. 270.)

After argument, the court granted defendants' motions for summary judgment, issued an opinion, and entered final judgment. A notice of appeal was filed to review the final judgment. (App. 270.)

On August 22, 2012, the Court of Appeal affirmed the decision of the lower court, granting defendants' motion for summary judgment. (App. 2-99)

The Court of Appeal held against plaintiffs on the disqualification issue, noting that the denial of writs of mandate precluded review of statutory disqualification claims, but referring to due process issues with references to *People v. Brown*, 6 Cal.4th 322 (1993). The decision, however, only reviewed *statutory* claims, and the decision neglected any review of due process issues. (App. 46-51.)

REASONS FOR GRANTING THE PETITION

A. Review Should be Granted Because The Seventh Amendment Right to a Jury Trial in Civil Cases is a Fundamental Right Protected by the Fourteenth Amendment from Infringement by the States

The Seventh Amendment preserves the right “that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative.” *See Walker v. N.M. & S. Pac. R.R. Co.*, 165 U.S. 593, 596 (1897); accord *Baltimore & C. Line v. Redman*, 295 U.S. 654, 657 (1935) (“substance of the common law right of trial by jury” is to have facts “determined by the jury under appropriate instructions from the court”).

This Court has said that to decide a motion for summary judgment courts should not adopt versions of facts “blatantly contradicted by the record.” *Scott v. Harris*, 550 U.S. 372, 380 (2007). Courts must review the entire record but believe the evidence of the non-moving party, and only such evidence of the moving party as a jury would be required to believe, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Reeves v. Sanderson Plumbing Prod. Inc.*, 530 U.S. 133, 151 (2000), and afford the non-moving party the benefit of every inference to which he or she is entitled based on the facts in the record. *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999). If “reasonable minds could differ as to the import of the evidence,” summary judgment would be improper. *See Anderson, supra*, at 250-251. However, the Court never expressly said that these

principles of review were constitutionally compelled by the Seventh Amendment.

The court below disregarded and disbelieved the direct evidence of a conspiracy. The court mischaracterized material testimony and affirmed summary judgment based on a version of facts “blatantly contradicted by the record.” *Scott*, supra at 380.

Petitioners contend that by reviewing the record in this way, the court below denied them the right to have a jury decide facts supported by competent evidence, which is preserved by the Seventh Amendment. Petitioners further contend that because the right preserved is fundamental, it is incorporated into the Fourteenth Amendment, and cannot be infringed by state courts applying their own procedures.

Since holding that the Seventh Amendment does not apply to the States directly, this Court has recognized that the due process clause of the Fourteenth Amendment “guarantees more than fair process”, *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997), and protects fundamental rights or “liberties” from infringement by the States. The threshold here is whether the right to a jury trial in civil cases is among those rights or liberties, and, therefore, applies to the States through the Fourteenth Amendment.

In *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010), the Court emphasized that if a right is fundamental, it is “incorporated” into the Due Process Clause of the Fourteenth Amendment, and that the Court would not single out some fundamental rights for

especially unfavorable treatment. *McDonald*, 130 S.Ct. at 3043. The Court reaffirmed that once a right is “incorporated” the same criteria must be applied to the States as to the federal government to determine if the right has been infringed. *Id.*

1. The right to civil jury trials is fundamental to America’s scheme of ordered liberty and deeply rooted in its history and traditions

Americans inherited the fundamental right “preserved” by the Seventh Amendment “that questions of fact in common law actions shall be settled by a jury”, *See Walker*, 165 U.S. at 596, through the English common law, which made “extensive use of the jury to provide the court with facts necessary for the decision of a case.” *See A. Hogue, Origins of the Common Law* 189 (1966). Although details of civil jury trials have changed over time, the specific right preserved by the Seventh Amendment has remained constant.

It is beyond doubt that civil jury trials have deep historical roots, and that Americans have always considered the right fundamental to the ordered scheme of liberty. This conclusion has been reinforced by better understanding of the events in which the Fourteenth Amendment originated.

Civil jury trials do not pose substantial risks to public safety. Placing a federal constitutional floor under a right already protected by state constitutions would not interfere with the ability of States to “experiment” with different ways to implement that right, and, therefore, with “federalism”.

2. The court below denied petitioners' right to a jury trial

The court below improperly denied petitioners' right to a jury trial by crediting respondents' evidence "over [evidence]...advanced and supported by" petitioners, *See Hunt*, 526 U.S. at 522; by disbelieving petitioners' evidence and failing to draw all justifiable inferences in their favor, *Anderson*, 477 U.S. at 255; by basing its holding on factual assertions "blatantly contradicted by the record", *Scott*, 550 U.S. at 380; by mischaracterizing material testimony; and by failing to consider whether a jury could reasonably find in petitioners' favor based on the evidence presented.

Even though the petitioners were denied discovery prior to the judge revisiting the six-year old motions for summary judgment, the evidence that the petitioners were able to gather even up to that point, was substantial and convincing, and certainly enough for a jury to find that these defendants had conspired to fix prices. Denying these petitioners the right to a trial by jury in such circumstances, was nothing less than depriving the petitioners of their fundamental rights as citizens of the United States, as well as citizens of California.

B. Review Should be Granted Because the Conflict of Interest and Due Process Issues Herein are of Nationwide Importance to Ensure Confidence in the Judiciary

The probability of actual bias on the part of the judge in this case was so high as to be constitutionally intolerable, violating petitioners' fundamental due

process rights. This Court's review is necessary because the admitted conflict of interest issues presented herein are of nationwide importance to ensure public confidence in the judiciary and to protect the right of litigants to a fair and impartial adjudicator, not to safeguard an asserted right, privilege or preference of Judge Brick to try or hear this case.

The Court of Appeal decision omitted reference to recent due process precedent, including *People v. Freeman* (2010) 47 Cal. 4th 993, 222 P.3d 177, *People v. Cowan* (2010) 50 Cal.4th 401, 236 P.3d 1074, and *Caperton v. A.T. Massey Coal Co., Inc.* (2009) 556 U.S. 868, 129 S.Ct. 2252. With neither facts nor law considered regarding due process issues, the Court of Appeal decision entirely avoided the issue.

In *Caperton*, this Court said:

Under our precedents there are objective standards that require recusal when “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). Applying those precedents, we find that, in all the circumstances of this case, due process requires recusal.

Caperton v. A.T. Massey Coal Co., Inc. (2009) 556 U.S. 868, 872, 129 S.Ct. 2252, 2256-57, 173 L. Ed. 2d 1208.

It is axiomatic that “[a] fair trial in a fair tribunal is a basic requirement of due process.” *Murchison*, supra, at 136, 75 S.Ct. 623. As the Court has recognized, however, “most matters

relating to judicial disqualification [do] not rise to a constitutional level.” *FTC v. Cement Institute*, 333 U.S. 683, 702, 68 S.Ct. 793, 92 L.Ed. 1010 (1948). The early and leading case on the subject is *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). There, the Court stated that “matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.” *Id.*, at 523, 47 S.Ct. 437. The *Tumey* Court concluded that the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has “a direct, personal, substantial, pecuniary interest” in a case. *Ibid.* This rule reflects the maxim that “[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.” *The Federalist* No. 10, p. 59 (J. Cooke ed. 1961) (J. Madison); see Frank, *Disqualification of Judges*, 56 *Yale L.J.* 605, 611-612 (1947) (same). Under this rule, “disqualification for bias or prejudice was not permitted”; those matters were left to statutes and judicial codes. *Lavoie*, *supra*, at 820, 106 S.Ct. 1580; see also Part IV, *infra* (discussing judicial codes). Personal bias or prejudice “alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause.” *Lavoie*, *supra*, at 820, 106 S.Ct. 1580. As new problems have emerged that were not discussed at common law, however, the Court has identified additional instances which, as an objective matter, require recusal. These are circumstances “in which experience teaches

that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” *Withrow*, 421 U.S., at 47, 95 S.Ct. 1456.

Caperton, 556 U.S. at 876-77, 129 S. Ct. at 2259.

In this case, the following points of fact demonstrate the constitutionally intolerable probability of actual bias on the part of the lower court judge:

- The decision by the trial judge for summary judgment dismissing this case and subsequently affirmed by the Court of Appeal was based upon a motion co-authored, authorized, and supported by the law firm of which the trial judge’s sister-in-law was a partner, in plain violation of California Rule of Civil Procedure § 170.1(a)(5).
- The trial judge admitted that it, “would have a conflict under section 170.1(a)(5)” if “the Covington firm had been involved in the case.” On September 21, 2010, the trial judge (Honorable Steven A. Brick), in his Verified Answer to the challenge for cause, stated as follows:

“Because my wife’s sister is a partner in the Covington firm I anticipated notifying the parties when they first appeared before me of the conflict under Code of Civil Procedure Section 170.1(a)(5) and advising them that

they could, if they wished, waive the conflict under section 170.3(b)(1).

...

I advised Judge Roesch that I had noticed that the Covington firm had been involved in the case and that I would have a conflict under section 170.1(a)(5)." Tab 95, Vol. XXIV, page 6803.

- The motion for summary judgment which Judge Brick granted and dismissed this case, and which decision was affirmed by the Court of Appeal, was pursuant to a motion co-authored, sponsored, and supported by the San Francisco and Washington D.C. offices of the Covington firm, of which Judge Brick's sister-in-law was a partner.
- After the motion to disqualify Judge Brick was denied, and after the Court of Appeal denied the Petition for Writ of Mandate, and after the Supreme Court denied the Petition for Hearing, Judge Brick set for hearing and heard the summary judgment, over Plaintiffs/Appellants' objections, which was filed and co-authored by the San Francisco and Washington D.C. offices of Covington & Burling, filed in 2006.

In the context of precedent cited above, the salient facts include how the judge decided a motion written by his sister-in-law's firm – a firm that had a deeply vested ongoing interest in the success of the client it represented in the case before withdrawal. The firm's

interests exceed simple concern for its client in this case and extend to many additional defendants in this case, as well as the pharmaceutical industry generally. Detailing those circumstances seems essential to portraying the basis for objective assessment and realistic appraisal of psychological tendencies and human weakness that reveal a probable actual bias (or interest tempting a judge to disregard neutrality) that is too high to be constitutionally tolerable. Only appropriate guidance from this Court can remedy this situation.

Even the partial recitation of some of the facts, which petitioners developed, even before the time of discovery had concluded and later denied by the trial judge, demonstrates that these petitioners did not receive a fair and impartial hearing. The trial judge should have recused himself. The right to a fair and impartial hearing must be constitutionally protected

CONCLUSION

The petitioners respectfully pray that the petition for writ of certiorari should be granted.

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