

August 21, 2013

VIA FEDERAL EXPRESS

Hon. Tani Cantil-Sakauye, Chief Justice
and the Associate Justices
California Supreme Court
350 McAllister Street, Room 1295
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Re: **AVANDIA® DRUG CASES**
GlaxoSmithKline LLC v. Superior Court (Ahrens)
California Supreme Court No. S212493
Amicus Curiae Letter in Support of Petition for Review

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Under rule 8.500(g) of the California Rules of Court, the Civil Justice Association of California, the Los Angeles Area Chamber of Commerce, the Chambers of Commerce Alliance of Ventura & Santa Barbara Counties, the South Bay Association of Chambers of Commerce, the Orange County Business Council, the Valley Industry & Commerce Association, and the Chamber of Commerce of the United States of America (collectively, amici) respectfully submit this letter in support of GlaxoSmithKline LLC's Petition for Review.¹

The petition raises an issue of great statewide importance:

Is a nearly completed Judicial Council Coordinated Proceeding (JCCP) an inconvenient forum for resolving new, 11th hour complaints filed by hundreds of non-resident plaintiffs with no meaningful connection to California?

In this case concerning liability for GSK's drug Avandia®, the trial court allowed 632 non-California plaintiffs with no real link to California to hitch their lawsuits to a pending (but nearly completed) JCCP that had, over several years, resolved all but nine of more than 4,400 cases. (GSK's Petition for Review (PFR) 9-11; GSK's Petition for Writ of Mandate (PWM) 11-13, 16-17.) The trial court denied GSK's motion to dismiss these new claims on forum non conveniens grounds, ruling that the 632 non-residents could litigate their claims here because the JCCP was here, and because the coordination trial judge was obviously familiar with the issues. (PFR 11-12.) This is

¹ No party or counsel for any party, other than counsel for amici, has authored this letter in whole or in part or funded the preparation of this letter.

wrong. It runs counter to what a court is required to consider in ruling on a forum non conveniens motion and is thus an abuse of discretion. It signals to residents of states with less favorably perceived liability laws than California that all they need to do to insinuate themselves into California's courts and take advantage of our laws is to find a JCCP considering claims similar to their own and file their complaints there.

Not surprisingly, since the trial court's ruling, amici are informed that thousands more non-California plaintiffs have filed additional claims in California in an apparent rush to the JCCP's doors to take advantage of the decision. The Court of Appeal summarily denied GSK's writ petition, thus permitting a single superior court judge to establish California's JCCP as a permanent open forum—funded by California taxpayers—to decide all similar claims by non-resident plaintiffs with no real connection to California. This is an invitation to endless litigation and all its attendant costs for the defendants and the state.

Both the JCCP procedure and the doctrine of forum non conveniens are intended to promote the ends of justice by efficiently managing judicial resources. The trial court's ruling, however, turns the notion of efficiency on its head, announcing the willingness of a single California judge to devote unlimited amounts of California's scarce judicial resources to the resolution of many non-residents' claims with no end in sight. The trial court lacks discretion to commandeer the court's resources this way. The Legislature recognizes and approves of this Court's (and its Chief Justice's) active role in administering each JCCP as well as the JCCP system as a whole. This Court should therefore grant GSK's petition for review, "[i]n the exercise of [its] supervisory power over the courts of this state" (*People v. Pena* (2004) 32 Cal.4th 389, 403 (*Pena*)), to ensure that California's resources are used first and foremost to adjudicate disputes involving actual California litigants.

INTEREST OF AMICI

The Civil Justice Association of California (CJAC) is a more than 30-years old non-profit organization whose members are businesses, professional associations and local government groups. CJAC supports judicious use of the forum non conveniens doctrine because it furthers our principal purpose: to promote "fairness, efficiency, economy and certainty" in the resolution of disputes over who gets how much, from whom, and under what circumstances when wrongful civil conduct is alleged to occasion harm to others. Toward this end, we have previously and successfully argued for application of the inconvenient forum principle in appropriate cases. (E.g., *Guimei v. General Electric Co.* (2009) 172 Cal.App.4th 689.)

The Los Angeles Area Chamber of Commerce (“LA Chamber”) is the largest and most influential business association in Los Angeles County. As a trustee for the current and future welfare of the region, the LA Chamber champions economic prosperity and quality of life. The LA Chamber represents more than 1,600 members, with 650,000 employees in 35 industry sectors.

The Chambers of Commerce Alliance of Ventura & Santa Barbara Counties (“Chambers Alliance”) serves as a useful resource and effective advocacy partner for regional chambers that are interested in strengthening our business climate through better policy making. The Alliance consists of 11 proactive chambers with memberships representative of the diverse economy in this unique region such as agriculture, manufacturing, tourism and goods movement. Each of these industries is regularly subject to litigation, much of which is frivolous but, nonetheless, requires legal action through a court system that is already overwhelmed with legitimate lawsuits involving employers in our counties. The Chambers Alliance membership consists of the following chambers of commerce: the Camarillo Chamber, Carpinteria Valley Chamber, Greater Conejo Valley Chamber, Goleta Valley Chamber, Moorpark Chamber, Ojai Valley Chamber, Oxnard Chamber, Pt. Hueneme Chamber, Santa Barbara Chamber, Santa Paula Chamber, Simi Valley Chamber, and the Ventura Chamber.

The South Bay Association of Chambers of Commerce (SBACC) consists of 17 chambers located in the South Bay region of Los Angeles County and aims to provide coordination and to advance the common business interests of employers within the South Bay area. The region’s leading industries include manufacturing, tourism, aerospace, healthcare and goods movement as we are located between the nation’s largest seaport, the Port of Los Angeles, and the sixth busiest airport in the world, Los Angeles World Airport. SBACC members face the threat of litigation on a daily basis, and courts increasingly clogged with lawsuits involving out of state parties unreasonably draws out the process which, as a result, costs businesses a lot more than it should. SBACC membership consists of the following chambers of commerce: the Carson Chamber, El Segundo Chamber, Garden Valley Chamber, Harbor City/Harbor Gateway Chamber, Hawthorne Chamber, Hermosa Beach Chamber, Inglewood/Airport Area Chamber, Lawndale Chamber, LAX Coastal Area Chamber, Lomita Chamber, Manhattan Beach Chamber, Palos Verde Peninsula Chamber, Redondo Beach Chamber, San Pedro Chamber, Torrance Area Chamber, and the Wilmington Chamber.

The Orange County Business Council (OCBC), and through its predecessor organizations, has for more than 120 years, been a non-partisan association of business members, working with government and academia, to enhance economic prosperity

while maintaining a high quality of life for America's sixth largest county. OCBC's members employ over 250,000 people in the Southern California region, and over 2,000,000 people worldwide, and focuses on four core initiatives: enhancing the state's infrastructure, preparing a workforce for employment, assuring housing is available, and promoting economic development for California, including the attraction and retention of business and high-paying jobs for a high cost state. Members of the OCBC are concerned that the court system is now back logged and ranked as "not fair" in U.S. metropolitan areas from San Francisco to Los Angeles. Adding non-California plaintiffs to a California system guarantees that California businesses and residents will be denied justice.

The Valley Industry & Commerce Association's (VICA) mission is to enhance the economic vitality of the greater San Fernando Valley region by advocating for a better business climate and quality of life. With input and guidance from its members, VICA maintains a regular presence at all levels of government to effectively represent Valley businesses.

The Chamber of Commerce of the United States of America is the world's largest federation of business, trade, and professional organizations, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and corporations of every size, from every sector, and in every geographic region of the country. The Chamber routinely advocates the interests of the business community in courts across the nation by filing amicus curiae briefs in cases involving issues of vital concern. In fulfilling that role, the Chamber has appeared many times before this Court and the California Court of Appeal.

In particular, the Chamber has many members in California and many more who conduct substantial business in the state. For that reason, the Chamber and its members have a significant interest in the sound and equitable administration of venue and forum rules in California.

WHY THIS COURT SHOULD GRANT REVIEW

I. **The trial court abused its discretion in denying petitioner's motion for forum non conveniens by not flexibly balancing the public and private interests at stake.**

"Forum non conveniens is an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere." (*Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 751 (*Stangvik*); Code Civ. Proc., § 410.30.)

In California, the “basis of the inconvenient forum doctrine is the need to give preference to California residents and guard against the unchecked and unregulated importation of transitory causes of action for trial in this state.” (*National Football League v. Fireman’s Fund Insurance Company* (2013) 216 Cal.App.4th 902, 926, internal quotation marks omitted.) Nor should “California courts . . . throw their doors wide open to forum shopping.” (*Appalachian Ins. Company v. Superior Court* (1984) 162 Cal.App.3d 427, 438; see *Delfosse v. C.A.C.I., Inc.-Federal* (1990) 218 Cal.App.3d 683, 691.) Thus, while the decision of a California resident to file suit in California is given a strong presumption in favor of its choice of forum, the decision of a non-California resident to litigate here is given less deference. (*National Football League*, at pp. 929-930.)

Once the trial court considering a forum non conveniens motion determines, as it did here, that a suitable alternative forum exists for trial (PFR 11), the court must “consider the private interests of the litigants and the interests of the public in retaining the action for trial in California.” (*Stangvik, supra*, 54 Cal.3d at p. 751.) Private interest factors are those “that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive [for the parties], such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses.” (*Ibid.*) Public interest factors “include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation.” (*Ibid.*) “[P]reventing court congestion resulting from the trial of foreign causes of action is an important factor.” (*Id.* at p. 758.)

This Court has explained that “the private and public interest factors must be applied flexibly, without giving undue emphasis to any one element. A court should not decide that there are circumstances in which the doctrine will always apply or never apply.” (*Stangvik, supra*, 54 Cal. 3d at p. 753.) If courts do not follow this rule, “the flexibility of the doctrine [will] be threatened, and its application [will] be based on identification of a single factor rather than the balancing of several.” (*Ibid.*)

The trial court’s application of the *Stangvik* factors here flatly contravened this Court’s requirement. Rather than flexibly balancing the public and private interest factors—which, as GSK’s petition demonstrates, weighed strongly in favor of litigating the 632 non-California plaintiffs’ cases in their home states (PFR 21; PWM 21-22, 28-35)—the trial court kept the cases in California because of the mere *existence* of the JCCP and the alleged familiarity with the underlying issues. (PFR 12; PWM 16.) The

court gave short shrift to GSK's arguments that these cases were filed late and raise distinct statute of limitations issues requiring individualized discovery and each plaintiff's doctor's testimony at trial as to each plaintiff's medical history and discovery of injury. (PFR 23; PWM 15, 30-31, 33.) The trial court denied GSK's motion even though the JCCP had at that point resolved all but nine of the 4,400 actions pending since 2008. (PFR 9; PWM 11-12, 15-17.) Thus, the trial court found improperly that a single factor—that a JCCP was currently handling similar cases—created circumstances in which the *forum non conveniens* doctrine would never apply. This distorted analysis led the trial court to vitiate the doctrine's purpose of promoting the efficient administration of justice, and in turn, to endorse the very forum shopping that the doctrine was meant to prevent.

II. The trial court abused its discretion by converting the JCCP into an open forum for thousands of new non-California claims by non-California residents.

A. The JCCP's purpose is to efficiently utilize court resources.

The Legislature has authorized the coordination of civil cases pending in different courts that share common questions of fact or law in order to “promote the ends of justice.” (*Pesses v. Superior Court* (1980) 107 Cal.App.3d 117, 123 (*Pesses*); Code Civ. Proc., §§ 404, 404.1.) This purpose “includes the efficient use of judicial resources.” (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 877, fn. 6; accord, *Abelson v. National Union Fire Ins. Co.* (1994) 28 Cal.App.4th 776, 786 (*Abelson*)). The Judicial Council rules implementing the coordination statute provide courts with “whatever great breadth of discretion may be necessary and appropriate to ease the transition through the judicial system of the logjam of cases” and “expedite the just determination of the coordinated actions without delay.” (*Abelson*, at p. 786.)

Code of Civil Procedure section 404.1 requires the trial court considering whether to coordinate civil actions to consider whether consolidation “will promote the ends of justice” by “taking into account,” among other things, “the efficient utilization of judicial facilities and manpower; [and] the calendar of the courts.” The court must repeatedly monitor these same two factors at several more points in the proceedings, including when deciding (1) which appellate court will review the consolidated proceedings, (2) whether to consolidate an add-on proceeding, (3) where to locate the site for the coordinated proceedings, and (4) whether to remand or transfer a coordinated action back to the court from which it came (Code Civ. Proc., §§ 404.2; Cal. Rules of Court., rules 3.505(a), 3.530(b)(3) [“efficient use of court facilities and judicial

resources”], 3.542, 5.543; see *Pesses, supra*, 107 Cal.App.3d at p. 123; *Keenan v. Superior Court* (1980) 111 Cal.App.3d 336, 341-342 & fn. 2 (*Keenan*).

Here, the trial court’s decision to allow an additional 632 non-California plaintiffs to litigate non-California claims completely undermines the very purpose for which the Legislature created the JCCP. Far from promoting fast, efficient resolution of cases, the trial court has allowed plaintiffs’ counsel to turn the JCCP into a seemingly permanent forum that will take up a disproportionate share of the trial court’s time and resources. Rather than reduce the impact on California’s judicial resources, the trial court has given an open invitation to any plaintiff in the United States, or possibly the world, who has a personal injury claim arising from using Avandia® to bring his or her case to California. The trial court has now essentially made California the world’s forum for litigating all of these personal injury claims no matter what connection the cases may or may not have to California, an abuse of the JCCP procedure that the Legislature most certainly did not intend. The court’s ruling thus directly undermines the purposes of *both* the JCCP procedure *and* the forum non conveniens doctrine.

B. This case provides the Chief Justice of California and this Court an opportunity to correct misuse of this JCCP.

This petition affords the Chief Justice of California and this Court with the first occasion since this JCCP was established in 2009 to review and correct a particularly troubling abuse of scarce California court resources. In 2009, then Chief Justice Ronald M. George reviewed a coordination petition and assigned a coordination trial judge to coordinate the claims of only 295 individual plaintiffs. (PWM 10; Code Civ. Proc., §§ 404, 404.1, 404.3 [criteria for establishing the JCCP].) Opportunistic plaintiffs’ lawyers immediately took advantage of the newly-established JCCP, and as a result, its docket exploded to include over 4,400 plaintiffs. (PWM 11.) Over the last four years, significant California court resources have been dedicated to whittling away at that number, until a mere nine cases remained unresolved, as of August 9, 2012. (PWM 12.) Yet just as the JCCP should have been winding down, the lower court sanctioned a sudden and drastic expansion of *an additional 632 plaintiffs, with no California connections*. (PFR 9-11; PWM 10-12.) The jump from 9 to 632 plaintiffs—while itself alarming—was only the beginning; because of the open-ended nature of the trial court’s decision, the number of new plaintiffs appears to be swelling at an alarming rate. Virtually overnight, thousands of additional non-California claims became poised to be added to the JCCP. (PFR 1-5; PWM 2-3, 5, 17, fn. 3.) The trial court’s ruling has enabled an abuse of the JCCP that undermines the purpose of the

proceedings, and this Court has both the responsibility and the opportunity to cut off this abuse.

The Legislature has given the Judicial Counsel, of which the Chief Justice is the Chair, “broad authority over practice and procedure for coordinated actions,” which includes the power to create Rules of Court that take priority over “ ‘any other provision of law.’ ” (*Keenan, supra*, 111 Cal.App.3d at p. 341, quoting Code Civ. Proc., § 404.7.) This Court has also long recognized the necessity of clarifying or adapting the application of procedural rules in specific contexts “[i]n the exercise of [its] supervisory power over the courts of this state” to efficiently manage court resources and promote justice. (*Pena, supra*, 32 Cal.4th at p. 403 [ordering Court of Appeal to refrain from using specific oral argument waiver notice adopted to increase argument efficiency]; see *In re Roberts* (2005) 36 Cal.4th 575, 591-593 [ordering superior courts to hear certain habeas petitions in county of petitioner’s sentencing to remedy disproportionate expenditure of court resources in rural counties because “this court has inherent authority to establish ‘rules of judicial procedure to be followed by superior courts’”]; cf. *In re Reno* (2012) 55 Cal.4th 428, 514-516, 521-522 [creating limits for filing successive habeas petitions and rejecting claim that “this court is powerless to impose such remedial requirements in order to protect its docket and ensure the proper functioning of the court” where abusive writ petitions were depleting court resources and causing other petitioners with meritorious claims to wait longer for this Court’s review].) This petition presents to this Court, for the first time, the remarkable history of this litigation. Given the evidence now available to this Court regarding the manner in which California’s scarce court resources have been misused, this Court should exercise its supervisory authority to ensure the efficient administration of court resources.

C. The current California court funding crisis magnifies the harm caused by the trial court’s limitless expansion of the JCCP in this case.

As GSK shows in its petition, California currently faces a court funding crisis of historic proportions. (PFR 4, 12, 24-25; PWM 1, 34-35.) While our courts have done a tremendous job finding ways to continue providing justice under such difficult restraints, challenges remain and are exacerbated when trial courts take on hundreds of new cases that have no connection to California.

The court funding crisis threatens the availability of judicial relief for all Californians. As the Chief Justice explained earlier this year, “[t]o have your day in court, you need a courtroom,” but “what we once counted on—that courts would be open, and ready, and available to deliver prompt justice—is no longer true.” (Tani G.

Cantil-Sakauye, Chief Justice, Address to a Joint Session of the California Legislature, State of the Judiciary (Mar. 11, 2013) pp. 2-3).² Because the court's resources are finite, providing judicial relief for one non-resident now unfortunately comes at the expense of Californians who must now wait longer for their "day in court." (*Id.* at p. 3.) It has reached the point where "[w]e could never know how many people due to closures and delays, will not believe justice is for them." (*Id.* at p. 4.)

Yet despite the precarious access to justice currently confronting Californians, the trial court's ruling allows hundreds of new non-residents with no California connection to bring their cases here, and signals that it will welcome the thousands more that have streamed through the floodgates since its ruling. (PFR 1-5, 9-11; PWM 17, fn. 3.) For each case by one of these non-resident plaintiffs, California plaintiffs and defendants will now have to wait until that case is resolved before receiving the court's attention. This is exactly the type of mismanagement of court resources that the doctrine of *forum non conveniens* is meant to *prevent*, and certainly not what the rules on coordination proceedings are designed to *promote*. As this Court explained:

"There are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned.' . . . [T]he injustices and the burdens on local courts and taxpayers, as well as on those leaving their work and business to serve as jurors, which can follow from an unchecked and unregulated importation of transitory causes of action for trial in this state . . . require that our courts, acting upon the equitable principles . . . , exercise their discretionary power to decline to proceed in those causes of action which they conclude, on satisfactory evidence, may be more appropriately and justly tried elsewhere."

(*Stangvik, supra*, 54 Cal.3d at p. 751.)

Allowing cases to proceed in a forum state that has little connection to the plaintiffs distorts the civil justice system. At a minimum, it encourages forum shopping. Moreover, when such cases are allowed to proceed unchecked, the inevitable effect is the swelling of the dockets of courts that are perceived as favorable to certain types of plaintiffs. When courts become overburdened by such cases, their ability to

² (Available online at <http://www.courts.ca.gov/documents/SOJ_2013.pdf> [as of July 21, 2013].)

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deliver justice—including justice to other plaintiffs and defendants who may not have the ability to litigate elsewhere—is severely compromised. This delay in the resolution of litigation also causes particular harm to California businesses with cases in California courts, as it subjects these companies to prolonged uncertainty that poses difficult management challenges, which in turn negatively impacts the California economy. This Court should not permit this abuse of JCCP procedure to continue diverting our local resources for the benefit of non-resident, forum-shopping plaintiffs, leaving Californians to wait for their day in court.

CONCLUSION

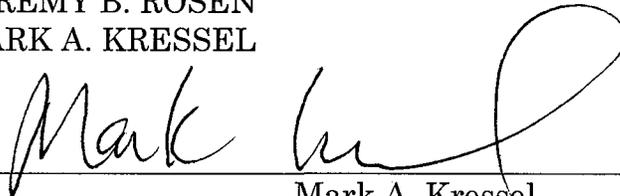
For the foregoing reasons and those expressed in GSK's petition for review, this court should grant review.

Respectfully submitted,

HORVITZ & LEVY LLP

JEREMY B. ROSEN

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A handwritten signature in black ink, appearing to read "Mark A. Kressel", is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

Mark A. Kressel

Attorneys for the Civil Justice Association of California, the Los Angeles Area Chamber of Commerce, the Chambers of Commerce Alliance of Ventura & Santa Barbara Counties, the South Bay Association of Chambers of Commerce, the Orange County Business Council, the Valley Industry & Commerce Association, and the Chamber of Commerce of the United States

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On August 21, 2013, I served true copies of the following document(s) described as **Letter in Support of GlaxoSmithKline LLC's Petition for Review** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on August 21, 2013, at Encino, California.



Robin Steiner

SERVICE LIST

AVANDIA® DRUG CASES

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