UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
(at Covington)

IN RE: DARVOCET, DARVON AND PROPOXYPHENE PRODUCTS LIABILITY LITIGATION	Master File No. 2: 11-md-2226-DCR MDL Docket No. 2226
Gallagher v. Xanodyne Pharm., et al.,	Civil Action No. 2: 11-177-DCR
Corso, et al., v. Teva Pharm. USA, et al.,	Civil Action No. 2: 11-179-DCR
Babineaux v. Xanodyne Pharm., et al.,	Civil Action No. 2: 11-180-DCR
Alix, et al., v. Eli Lilly and Company, et al.,	Civil Action No. 2: 11-182-DCR
Gilbert, et al., v. Eli Lilly and Co., et al.,	Civil Action No. 2: 11-184-DCR
Hunsucker v. Xanodyne Pharm., et al.,	Civil Action No. 2: 11-185-DCR
West v. Qualitest Pharmaceuticals, et al.,	Civil Action No. 2: 11-186-DCR
Lambert, et al., v. Xanodyne Pharm., et al.,	Civil Action No. 2: 11-188-DCR
Eldredge v. Xanodyne Pharm., et al.,	Civil Action No. 2: 11-190-DCR
Kellehar v. Xanodyne Pharm., et al.,	Civil Action No. 2: 11-191-DCR
Lowe, et al., v. Xanodyne Pharm., et al.,	Civil Action No. 2: 11-196-DCR
Coney v. Xanodyne Pharmaceuticals, et al.,	Civil Action No. 2: 11-197-DCR
Cross v. Xanodyne Pharmaceuticals, et al.,	Civil Action No. 2: 11-198-DCR
Rogers v. Xanodyne Pharmaceuticals, et al.,	Civil Action No. 2: 11-200-DCR
Daugherty, et al. v. Xanodyne Pharm., et al.,	Civil Action No. 2: 11-204-DCR
Simpson v. Qualitest Pharmaceuticals, et al.,	Civil Action No. 2: 11-210-DCR
Lynch v. Xanodyne Pharmaceuticals, et al.,	Civil Action No. 2: 11-213-DCR
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Dickerson v. Eli Lilly and Company, et al.,	Civil Action No. 2: 11-295-DCR
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Balben v. Xanodyne Pharmaceuticals, et al.,	Civil Action No. 2: 11-297-DCR
Forrest v. Xanodyne Pharmaceuticals, et al.,	Civil Action No. 2: 11-298-DCR
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Green v. Xanodyne Pharmaceuticals, et al.,	Civil Action No. 2: 11-300-DCR
Wheeler v. Xanodyne Pharmaceuticals, et al.,	Civil Action No. 2: 11-301-DCR
J. Cook, et al., v. Xanodyne Pharm., et al.,	Civil Action No. 2: 11-304-DCR
Dahlgreen v. Xanodyne Pharm., et al.,	Civil Action No. 2: 11-322-DCR
Buch, et al., v. Xanodyne Pharm., et al.,	Civil Action No. 2: 11-324-DCR
Sandel v. Eli Lilly and Company, et al.,	Civil Action No. 2: 11-325-DCR
DeVine, et al., v. Eli Lilly and Co., et al.,	Civil Action No. 2: 11-327-DCR
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Felts v. Eli Lilly and Company, et al.,	)	Civil Action No. 2: 11-329-DCR
A. Smith v. Eli Lilly and Company, et al.,	)	Civil Action No. 2: 11-330-DCR
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M. Miller, et al., v. Eli Lilly and Co., et al.,	)	Civil Action No. 2: 11-352-DCR
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Aga, et al., v. Eli Lilly and Company, et al.,	)	Civil Action No. 2: 11-356-DCR
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Harper, et al., v. Eli Lilly and Co., et al.,	)	Civil Action No. 2: 12-040-DCR
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Ayling, et al., v. Eli Lilly and Company, et al.,	)	Civil Action No. 2: 12-043-DCR
Robles v. Eli Lilly and Company, et al.,	)	Civil Action No. 2: 12-045-DCR
Lopez, et al., v. Eli Lilly and Company, et al.,	)	Civil Action No. 2: 12-046-DCR
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Vance v. Eli Lilly and Company, et al.,	)	Civil Action No. 2: 12-048-DCR
Sinkler v. Eli Lilly and Company, et al.,	)	Civil Action No. 2: 12-049-DCR
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Coker v. Eli Lilly and Company, et al.,	)	Civil Action No. 2: 12-063-DCR
Fisher-Smith v. Eli Lilly and Co., et al.,	)	Civil Action No. 2: 12-064-DCR
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Morel v. Xanodyne Pharmaceuticals, et al.,	)	Civil Action No. 2: 12-074-DCR
Angell v. Xanodyne Pharmaceuticals, et al.,	)	Civil Action No. 2: 12-080-DCR
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	)	**ORDER**
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On April 10, 2012, the Court entered an order directing the plaintiffs in this multidistrict litigation to show cause why any and all remaining claims against manufacturers or distributors of generic propoxyphene ("Generic Defendants") should not be dismissed in light of the Court's previous ruling that such claims are preempted under *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011). [Record No. 1645] The deadline to respond to the show-cause order was April 24,

2012, and it passed without response from any plaintiff subject to the order.[1] [*See id.*, p. 2] However, on May 8, 2012, the plaintiffs in the above-captioned cases filed a notice of supplemental authority [Record No. 1799] advising the Court of a recent decision, *Bartlett v. Mutual Pharmaceutical Co.*, No. 10-2277, 2012 U.S. App. LEXIS 9050 (1st Cir. May 2, 2012), in which the First Circuit held that design-defect claims against generic drug manufacturers are not preempted. *See id.* at *14. Based on *Bartlett*, the plaintiffs argued that their design-defect claims should not be dismissed on preemption grounds. [Record No. 1799, pp. 4-5] The Generic Defendants responded, arguing that *Bartlett* did not affect the Court's earlier ruling. [Record No. 1865]

Having reviewed the *Bartlett* decision, the Court agrees with the Generic Defendants. In *Bartlett*, the First Circuit adopted the "failure-to-withdraw" argument previously rejected by this Court and others. *See* 2012 U.S. App. LEXIS 9050, at *12 ("[A]lthough Mutual cannot legally make sulindac in another composition . . . , it certainly can choose not to make the drug at all . . . ."); *id.* at *13 ("[W]hile the generic maker has no choice as to label[,] the decision to make the drug and market it in New Hampshire is wholly its own."). This argument — which failed to persuade either the Supreme Court or the Eighth Circuit on remand in *Mensing*, and the Sixth Circuit in *Smith v. Wyeth, Inc.*, 657 F.3d 420 (6th Cir. 2011) — is no more availing now.

[1]One plaintiff, Gregory Trimboli (Case No. 2: 11-cv-189-DCR), did submit a response. [Record No. 1727] However, Trimboli was not subject to the April 10 show-cause order because he no longer had any claims pending against the Generic Defendants. [*See* Record No. 1645, p. 2 (directing plaintiffs "with any remaining claims pending against any Generic Defendant" to show cause why the Court's previous order was not dispositive of those claims); Record No. 1305, pp. 15-16 (dismissing all Generic Defendants from Case No. 2: 11-cv-189-DCR)] The Court thus will not consider Trimboli's submission.

[*See* Record No. 1305, pp. 6-8] Moreover, the First Circuit offered little explanation for accepting it, noting simply that the *Mensing* opinion had not specifically addressed design-defect claims. *See Bartlett*, 2012 U.S. App. LEXIS 9050, at *14 ("On balance, we conclude that the [Supreme] Court adopted a general no-preemption rule in *Wyeth* [*v. Levine*, 555 U.S. 555 (2009)] and that it is up to the Supreme Court to decide whether [*Mensing*]'s exception is to be enlarged to include design defect claims.").

In summary, *Bartlett* does not alter the Court's previous ruling, and the plaintiffs have offered no other reason why that ruling should not apply equally to their claims against the Generic Defendants. Accordingly, and for the reasons set forth in the Court's Memorandum Opinion and Order Regarding Generic Defendants' Motions to Dismiss [Record No. 1305], it is hereby

ORDERED that all remaining claims against the Generic Defendants in the above-captioned matters are **DISMISSED**, with prejudice. For purposes of this Order, the term "Generic Defendants" includes Brenn Distribution, Inc.; Brenn Manufacturing, Inc.; Covidien Inc.; Covidien plc; Generics Bidco I, LLC; Generics Bidco II, LLC; Generics International (US Parent), Inc.; Generics International (US), Inc.; Endo Pharmaceuticals Inc.; Endo Pharmaceuticals Holdings Inc.; Vintage Pharmaceuticals, LLC; Mallinckrodt Holdings, LLC; Mallinckrodt Inc.; Mallinckrodt LLC; Mylan Pharmaceuticals, Inc.; Mylan, Inc.; Propst Distribution, Inc.; Qualitest Pharmaceuticals, Inc.; Teva Biopharmaceuticals USA, Inc.; Teva Pharmaceuticals USA, Inc.; Vintage Pharmaceuticals, Inc.; Watson Pharmaceuticals (New Jersey), Inc.; Watson Pharmaceuticals, Inc.; Ivax Pharmaceuticals, Inc.; Cornerstone BioPharma,

Inc.; Cornerstone BioPharma Holdings, Inc.; Aristos Pharmaceuticals, Inc.; Sun Pharmaceutical Industries, Inc., incorrectly named as Able Laboratories, Inc. n/k/a Sun Pharmaceuticals Industries, Inc.; and any other named defendant alleged to have produced or sold generic propoxyphene.

This 22nd day of June, 2012.

Signed By:
Danny C. Reeves DCR
United States District Judge