16-1124, 16-3019

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

IN RE: FLONASE ANTITRUST LITIGATION,

SMITHKLINE BEECHAM CORPORATION, d/b/a GLAXOSMITHKLINE, n/k/a GLAXOSMITHKLINE LLC, including GLAXOSMITHKLINE PLC,

Defendant-Appellant,

—v.—

STATE OF LOUISIANA,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR RESPONDENT-APPELLEE STATE OF LOUISIANA

JOHN ALDEN MEADE
MEADE LAW LLC
909 Poydras Street, Suite 1600
New Orleans, Louisiana 70112
(504) 799-3102

Attorney for Respondent-Appellee State of Louisiana

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

As discussed more fully herein, the federal courts do not have jurisdiction over Respondent-Appellee, the State of Louisiana ("Louisiana"), in this proceeding. This is an appeal from two Orders entered by the United States District Court for the Eastern District of Pennsylvania (Brody, J.), which properly recognized that Louisiana's sovereign immunity barred efforts by Appellant Smithkline Beecham Corporation ("GSK") to enforce, against Louisiana, a class action settlement approved by the district court in 2013. Louisiana was not a named party to the class action and did not participate in the litigation or settlement in any way. However, the class definition sought to include the claims of states and state agencies "to the extent they purchased fluticasone propionate nasal spray (branded Flonase and/or its generic equivalents) for their employees or others covered by a government employee health plan." In approving the settlement, the district court asserted jurisdiction over all absent class members, one of which was purportedly the State of Louisiana. Because Louisiana never consented to federal jurisdiction with respect to these claims and never authorized private litigants to litigate and settle its claims, the district court's attempt to exercise jurisdiction over it was improper. Moreover, Louisiana never consented to have subsequent enforcement proceedings, such as this one, heard in federal court.

STATEMENT OF ISSUES ON APPEAL

1. Whether a federal court can exercise jurisdiction over a sovereign state to bind it to a class settlement and to enforce the settlement against it without the state's unequivocally expressed consent?
2. Whether a state can be deemed to have waived its sovereign immunity and consented to be bound to a class settlement where: (a) it took no action indicating affirmative consent to federal jurisdiction, but at most merely failed to opt out of the class; and (b) it did not receive actual notice of the class settlement in its capacity as an absent class member?
3. Whether the district court abused its discretion in denying a motion under Fed. R. Civ. P. 60(b)(2) for relief from a judgment based on newly discovered evidence where the evidence Appellant sought to submit: (a) was available to it prior to entry of the judgment; and (b) would not have altered the outcome.
4. Whether the federal courts should abstain from deciding a request for injunctive relief that would interfere with a pending litigation in state court?

STATEMENT OF RELATED CASES AND PROCEEDINGS

GSK seeks an order enjoining Louisiana from prosecuting certain claims in a lawsuit that is presently pending in the Nineteenth Judicial District Court for the Parish of East Baton Rouge, Louisiana, titled *State of Louisiana v. SmithKline Beecham Corp. d/b/a Glaxosmithkline PLC*, No. 636032. That action was remanded to state court by the United States District Court for the Middle District of Louisiana (Jackson, J.), in the action titled *State of Louisiana v. SmithKline Beecham Corp.*, No. 3:15-cv-00055-BAJ-EWD.

STATEMENT OF THE CASE

A. The Louisiana State Court Action

In December 2014, the State of Louisiana, in its proprietary and sovereign capacity, filed a lawsuit in Louisiana state court against GSK, alleging violations of state law. (JA331-54.) The State alleged that GSK engaged in an unlawful "brand maturation strategy," which involved a number of improper tactics aimed at delaying Food and Drug Administration ("FDA") approval, and thus market entry, of generic competitors to GSK's Flonase nasal spray, at the time a brand name prescription drug used primarily to treat nasal symptoms of allergies. (JA331-32.) The Petition alleged that, as a result of GSK's conduct, the State paid unlawfully inflated prices for brand name Flonase when, in the absence of GSK's misconduct, generic versions would (and should) have been available at lower prices. (JA332.)

The State alleged violations of several state laws, including state antitrust law, the Louisiana Unfair Trade Practices Act, and unjust enrichment. *Id*. It sought compensatory and treble damages. *Id*.

Apparently alarmed at the prospect of having to litigate in state court, GSK removed the case to federal court, claiming that the state law claims arose under federal law. (JA442-63). Louisiana moved to remand. (JA413-441.) In February 2016, the United States District Court for the Middle District of Louisiana remanded the case to state court, holding that the State's claims did not raise a substantial question of federal law. (JA647-56.) The lawsuit is currently pending in state court.

B. Proceedings in the Eastern District of Pennsylvania

While the parties were litigating over GSK's improper removal of the Petition, GSK launched another collateral attack on the state court's jurisdiction to hear the case. It did so by bringing a "Motion to Enforce Class Settlement Against Louisiana Attorney General" in the United States District Court for the Eastern District of Pennsylvania. (JA313-29.) GSK did not file a complaint in the district court, but rather sought relief by motion in an existing action, *In re Flonase Antitrust Litig.*, Civil Action No. 08-3301. *Id.* Though named as a defendant in the caption, GSK is in the position of plaintiff, seeking injunctive relief against non-party Louisiana.

1. The Class Action and Settlement

The *Flonase* action in the Eastern District of Pennsylvania was a class action filed by purchasers of Flonase, including indirect purchasers, in 2008. (JA355-91.) Like the Louisiana action, it alleged that purchasers had overpaid for brand name Flonase because GSK had improperly delayed the market entry of less expensive generic competitors. *Id*. The State was not a named plaintiff. *Id*. The indirect purchasers settled with GSK in December 2012. (JA523-36.)

In January 2013, the district court preliminarily certified a class for settlement purposes under Federal Rule of Civil Procedure 23(b)(3). (JA040-53.) The class was defined as:

> All persons throughout the United States and its territories who purchased and/or paid for, in whole or in part fluticasone propionate nasal spray, whether branded Flonase or its AB-rated generic equivalents, intended for the consumption of themselves, their family members and/or household members, and all Third Party Payor entities throughout the United States and its territories that purchased, paid for, administered and/or reimbursed for fluticasone propionate nasal spray, whether branded Flonase or its generic equivalents, intended for consumption by their members, employees, plan participants, beneficiaries or insureds.

(JA043.) The class expressly *excluded* "the United States and/or State governments and their agencies and departments, except to the extent they purchased fluticasone propionate nasal spray (branded Flonase and/or its generic equivalents) for their employees or others covered by a government employee health plan." *Id*.

The Court also approved a proposed notice plan, which required settlement notices (a short form postcard and, if requested, a long form notice) to be mailed to class members informing them of their potential membership in the settlement class, the terms of the settlement agreement, their right to object to or opt out of the settlement, and the consequences of failing to opt out, such as being precluded from asserting the settled claims in a subsequent action. (JA045-46; JA055-78.) The State was never identified as a potential class member and, therefore, did not receive a short or long form settlement notice addressed to it in its capacity as a potential class member. (JA513-14.) A claims administrator, Rust Consulting, was responsible for sending notices to class members and processing claims. (JA051.)

The Court also ordered GSK to prepare and send a separate set of notices under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715. (JA050.) That provision required GSK to "serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement." 28 U.S.C. § 1715(b). The Louisiana Attorney General received a CAFA notice on December 27, 2012. (JA499-512). The notice was a letter addressed to the United States Attorney General and copied to "The Attorney General of Each of the United States." *Id*. It expressly referenced the CAFA statute and enclosed various statutorily-required documents, including a chart

estimating the number of class members residing in each state, copies of the recommended short form, long form and publication notices that would be sent to potential class members, and a copy of the settlement agreement. *Id*.

The Court certified the Settlement Class and issued final approval of the Settlement Agreement on June 19, 2013. (JA024-37.) In its Final Order and Judgment, the Court asserted jurisdiction "over all members of the Settlement Class." (JA025 at ¶ 2.) It enjoined class members from commencing any proceeding in federal or state court asserting claims that were compromised by the settlement agreement. (JA034.) It also reserved "exclusive and continuing jurisdiction" over disputes arising out of or relating to the settlement. (JA031.)

GSK settled separately with a group of settling health plans ("SHPs") who were not part of the class settlement. (SA018-059.) Pursuant to the terms of that settlement, SHPs could seek compensation from the settlement fund for their own claims and on behalf of any customers to whom the SHPs provided administrative services but not coverage. (SA044-59.)

2. GSK's Motion to Enforce

The Louisiana Attorney General was not a party or absent class member in the *Flonase* class action. With its Motion to Enforce, GSK did not join the Attorney General as a party or serve him with process, but simply styled its request for relief as a motion "against the Louisiana Attorney General" and sent it to the

Attorney General and the State's counsel in the Louisiana lawsuit by first class mail. (JA313-17.) The State entered a special appearance and filed a Motion to Dismiss or Stay or, in the alternative, Opposition to GSK's Motion. (JA392-94.)

In support of its Motion, GSK argued that the claims asserted by Louisiana in the state action might "include" claims that were compromised by the class settlement. (JA314.) GSK conceded during oral argument that, because the settlement only covered States "to the extent they purchased fluticasone propionate nasal spray (branded Flonase and/or its generic equivalents) for their employees or others covered by a government employee health plan," Louisiana could continue to assert claims in the state action that did not fall within this definition. (JA561.) In other words, the state court action will proceed regardless of the outcome here.

On December 21, 2015, the district court (Brody, J.) dismissed GSK's motion, holding that GSK had failed to show that the State had waived its sovereign immunity and consented to the district court's jurisdiction. (JA005-17.) In so ruling, the district court did not hold that states can *never* be bound to a class settlement as absent class members. Rather, it held that under these circumstances, where Louisiana had not received notice of the settlement in its capacity as an absent class member and never took any other action indicating a voluntary and unequivocal waiver of its sovereign immunity, it could not be bound by the settlement. *Id.*

GSK filed a Notice of Appeal on June 29, 2016. (JA003.)

3. GSK's Motion for Relief Based on Newly Discovered Evidence

As GSK represented to the district court, before it filed its Motion to Enforce in April 2015, it "repeatedly" contacted class counsel and Rust Consulting to inquire whether Louisiana had received notice of the settlement or filed a claim. (SA013). It was informed that "any information it received would not include information relating to the SHP agreement because that information was confidential…" *Id*. And, of course, as a party to the SHP settlement, GSK was aware that SHPs could submit claims on behalf of their administrative services customers, and that, without that information, it would have an "incomplete list of those entities participating as class members." *Id.* GSK nevertheless chose not to pursue this investigation further, but instead filed its Motion to Enforce without it, arguing instead that the State was bound by the settlement to the same extent as other absent class members. (JA313-29.)

In May 2015, during briefing of the Motion to Enforce, Louisiana pointed out that the claims administrator had not identified Louisiana as a class member, and that therefore Louisiana would not have received the notices mailed to class members. (JA482.) GSK still took no steps to obtain claims information until early December 2015, after the court requested supplemental briefing on jurisdictional issues. At that time, in correspondence with Louisiana's counsel,

GSK's counsel stated that GSK wanted information, not just on whether Louisiana had been identified as a class member, but on any claims submitted "through Humana or any other PBM or third party payor." (JA621-22.) Louisiana's counsel responded, on December 5th, that the only information it had obtained was that "the State of Louisiana was not identified as a class member" and that the claims administrator had refused (or was unable) to provide additional information. (JA620.) Louisiana's counsel also stated that Louisiana "did not agree to the imposition of any additional burdens on the State of Louisiana" and, in any event, felt it "may have reached the end of the road" in its attempts to obtain information from the claims administrator. *Id.* GSK still did not serve discovery on the claims administrator or file a motion to compel.

Instead, in a supplemental brief in support of its Motion to Enforce filed four days after this exchange, on December 9th, GSK remarked in a footnote that it believed the State's inquiry was inadequate because it did "not preclude the possibility that [Louisiana] received settlement funds indirectly" through, for example, an SHP acting as an administrator for the state. (JA546 at n.6.) It did not, however, request an opportunity to conduct discovery or seek the district court's assistance in obtaining the supposedly missing information. Rather, it reiterated its argument that:

> GSK's entitlement to seek enforcement of the [settlement] does *not* require proof by it that the AG actually filed a claim to recover funds

> from the settlement, nor that it was included on the class list prepared by the claims administrator, Rust Consulting. Class members who do not opt-out are barred by a class settlement *regardless* of whether or not they filed the claim.

(JA546 (emphasis in original).) In the alternative, it argued that the CAFA notice was sufficient notice of the settlement. *Id.* The Court denied the Motion to Enforce later that month. (JA005-17.)

On March 9, 2016, more than two months after the court denied the Motion to Enforce – and 50 days after GSK filed its notice of appeal – GSK filed a "Motion for Relief Based on Newly Discovered Evidence" under Fed. R. Civ. P. 60(b)(2). (SA002-16.) The "evidence" GSK claimed to have "newly discovered" was a printout of transactional data it had obtained from the claims administrator, purportedly showing a subset of the claims submitted by Humana, one of the SHPs. (SA076-453.) GSK also submitted a declaration from the claims administrator stating that the data had been "pulled" from claims data provided to the claims administrator by Humana. (SA045-46.) The printout was not authenticated or explained by anyone from Humana – it was merely a list of dates and dollar amounts with the words "State of Louisiana" in a column labeled "CUST_NAME". *Id*. GSK did not submit any evidence concerning how Humana had generated that data; the relationship between Humana and the State; whether Humana had been authorized by the State to submit the claims; or the disposition

of the funds after they were disbursed to Humana. Louisiana moved to strike GSK's submission and opposed the motion for relief. (JA624-46.)

On May 31, 2016, the district court denied GSK's rule 60(b) Motion. (JA018-23.) The Court found that GSK was aware, at least since April 2015, that it did not have potentially relevant information concerning claims made by SHPs and that it had failed to exercise reasonable diligence in pursuing that information. *Id.*.

GSK filed its Notice of Appeal of the May 31st Order on January 19, 2016. (JA001.) This Court consolidated the appeals on June 30, 2016.

SUMMARY OF ARGUMENT

The question presented by this appeal is a simple one: can the federal courts exercise jurisdiction over a state to bind it to a class settlement without notice to, or consent by, the state? The State of Louisiana, in its sovereign and proprietary capacity, filed a lawsuit in Louisiana state court seeking damages from GSK under Louisiana law. In an effort to derail that lawsuit, GSK filed a motion in the United States District Court for the Eastern District of Pennsylvania, asking it to rule that the State had released some of its claims because it had been included as an absent class member in a previously-settled class action. The State never received notice of the class settlement in its capacity as an absent class member; never consented to the settlement; and never authorized or participated in the lawsuit. The district

court correctly concluded that, under these circumstances, it would violate the State's sovereign immunity to bind the State to the class settlement. Its decision should be affirmed.

The district court's ruling was premised on basic and well-settled principles. Federal courts cannot exercise jurisdiction over a sovereign state without its unequivocally expressed consent. The state as sovereign has the prerogative to decide "not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (emphasis in original). And the state's consent to federal jurisdiction must be "unequivocal," "altogether voluntary," and may not be implied. *See, e.g., Sossamon v. Texas*, 563 U.S. 277, 284 (2011); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 527 U.S. 666, 680 (1999). In approving the class settlement, the district court expressly asserted jurisdiction over all of the absent class members, including Louisiana, at the behest of private parties who sought to settle Louisiana's claims. Louisiana in no way expressed consent to that jurisdiction or to the settlement; nor did it authorize private litigants to litigate or compromise its claims. Louisiana cannot be haled into federal court for an adjudication of its interests against its will.

GSK and its *amici* ignore the district court's narrow, non-controversial and unassailable application of settled principles of sovereign immunity, and instead

launch an assault on broad rulings that the district court never made. The district court did *not* hold that a state can *never* be bound as an absent class member, and this Court also need not reach that issue. Rather, it held that a state cannot be bound by a class settlement in the absence of unequivocal evidence that the state received notice of the settlement and consented to be bound by it. The district court also did *not* hold that GSK cannot raise the settlement agreement as a *defense* to the State's claims. Just as GSK has conceded that Louisiana has asserted casues of action that fall outside the settlement agreement and accordingly must be heard in Louisiana state court, so too has Louisiana conceded that GSK can raise therein the defense of settlement or compromise. (JA397; JA561-63.)

GSK also strains to construct arguments based on purported lessons of history and policy and dire rhetoric about "extreme" decisions and "debilitating" results. But the premises underlying GSK's arguments are easily debunked. *First*, the fact that a state is capable of suing as a *voluntary* plaintiff in federal court does not mean that it can be bound as an *involuntary* plaintiff. If it offends the dignity of a sovereign state to be forced to defend itself in federal court without its consent, it also offends that dignity to permit strangers to litigate and compromise the sovereign's claims, purportedly on its behalf, in a federal forum without its authorization, and then hale that state into that federal court as a defendant in a motion for injunctive relief. As at least one circuit court has recognized, the

question is whether the state engaged in some "altogether voluntary" act (such as filing a lawsuit) indicating its consent to the federal forum, not whether it is technically aligned as a plaintiff, defendant or absent class member. *See Thomas v. FAG Bearings Corp.*, 50 F.3d 502, 505 (8th Cir. 1995). Louisiana did not take any action, voluntary or otherwise, indicating consent to federal jurisdiction.

Second, the fact that Fed. R. Civ. P. 23 provides protections to non-state plaintiffs sufficient to satisfy due process does not mean that those same protections are sufficient to satisfy the doctrine of sovereign immunity. As the U.S. Supreme Court has explained, in the sovereign immunity context, "[t]he constitutional role of the States sets them apart" such that "evenhandness between individuals and States is not to be expected." *Florida Prepaid*, 527 U.S. at 685, quoting *Welch v. Texas Dep't of Highways and Public Transportation*, 483 U.S. 468, 477 (1987). Sovereign immunity is an *additional* protection available to the states, and it requires something more than silence or inaction before a state can be bound by a federal proceeding. Nothing in Rule 23 purports to abrogate that immunity.

Third, the Louisiana state courts are fully capable of adjudicating this dispute, including any defenses GSK wishes to assert, notwithstanding the great lengths to which GSK has gone in an attempt to prevent them from doing so. The

state as sovereign has the choice of forum here, not GSK. Thus, GSK's feigned concerns about "windfalls" are baseless.

Fourth, as the Supreme Court has recognized, sovereign immunity is a fundamental aspect of the constitutional balance of power between the states and the federal government, and it does not bow to "administrative convenience." *See Federal Maritime Com'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 769 (2002). The fact that it may be simpler for defendants to bundle the states into class settlements rather than litigate their claims separately is no reason to disregard the states' rights as sovereigns. It also does not mean that settlements will suddenly become impossible or impracticable. Class defendants already litigate and settle separately with states and other parties that opt out of class settlements. (*See* JA523-529 (Settlement Agreement between GSK and Louisiana regarding drug Avandia); JA530-536 (Settlement Agreement between GSK and Louisiana regarding nine drugs). The district court's ruling simply means that states will not be presumed to have consented to a class settlement in the absence of notice and unequivocal consent. This approach is consistent with the states' sovereign status.

In sum, the district court correctly ruled that Louisiana has the right to decide where, and under what circumstances, it can be subjected to federal jurisdiction is paramount, and that it did not consent to have its interests

compromised in federal court in the class action. Moreover, the district court properly rejected GSK's belated attempt to seek relief from the judgment based on purported evidence that was neither "newly discovered" nor relevant. And finally, GSK never established that the relief it sought was warranted. Accordingly, the district court correctly denied both of GSK's motions, and its decisions should be affirmed.

STANDARD OF REVIEW

Dismissals on sovereign immunity grounds are subject to plenary review. *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 694 (3d Cir. 1996). A district court's decision denying a motion for relief from a judgment under Rule 60(b) is reviewed for abuse of discretion. *See Coltec Indus. v. Hobgood*, 280 F.3d 262, 269 (3d Cir. 2002).

ARGUMENT

I. The Relief GSK Seeks Would Violate Louisiana's Sovereign Immunity

"The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." *Federal Maritime Com'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 760 (2002). "Immunity from private suits has long been considered 'central to sovereign dignity.'" *Sossamon v. Texas*, 563 U.S. 277, 283 (2011). Thus, sovereign immunity is an "important constitutional limitation on the power of the federal courts." *Id.* at 284.

As shown below, the relief GSK seeks would violate Louisiana's sovereign immunity in two ways. *First*, GSK sought to enforce a class action settlement against the State, even though GSK failed to show that the State had consented to have its claims litigated and compromised in federal court. *Second*, GSK sought injunctive relief against the State in its Motion to Enforce, even though the State never consented to have this request heard in federal court. In other words, not only was the relief GSK sought not available, but the court also lacked jurisdiction to hear GSK's Motion. Accordingly, the district court's order should be affirmed.

A. Sovereign Immunity Applies to Class Action Settlements

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. The Supreme Court has "repeatedly held that the sovereign immunity enjoyed by the States extends beyond the literal text of the Eleventh Amendment." *Federal Maritime Com'n*, 535 U.S. at 754. Thus, although the Eleventh Amendment on its face only bars suits brought "against" a State in federal court, "the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity." *Id.* At its core, sovereign immunity protects against "the indignity of

subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Ex parte Ayers*, 123 U.S. 443, 505 (1887).

Here, private parties sought to bind Louisiana to a class settlement without its consent, in effect forcing it to litigate and compromise its claims in a court not of its choosing. In its final order and judgment certifying the class and approving the settlement, the district court expressly assumed jurisdiction over all of the absent class members. (JA025 at ¶ 2 ("This Court has jurisdiction over the subject matter of the Actions and over all parties to the actions and over all members of the Settlement Class.")) That process was just as coercive as any lawsuit brought directly against a state, and it violated Louisiana's sovereign immunity. *See Alden v. Maine*, 527 U.S. 706, 716 (1999) (historical understanding of sovereign immunity was founded on the concept that no court can have jurisdiction over the sovereign, because "all jurisdiction implies superiority of power").

Contrary to GSK's arguments, it does not matter that Louisiana was nominally aligned as an absent class member rather than a defendant. The Eighth Circuit Court of Appeals faced a similar question in *Thomas,* 50 F.3d at 504-07. There, the defendant in a lawsuit brought by citizens of Missouri seeking remediation of contaminated ground and drinking water attempted to join a state agency (MDNR) based on statements by MDNR that it intended to sue the defendant for remediation costs. *Id.* at 504. MDNR was originally joined as a

defendant, but the district court ruled that it could later be realigned as a plaintiff. *Id.* The Eighth Circuit held that this "coercive joinder" of a state agency violated the state's sovereign immunity because it would undermine "the state's autonomy and protection for its pocketbook" by "forcing it to prosecute [defendant] at a time and place dictated by the federal courts." *Id.* at 505. The Court further explained:

> Involuntary joinder diminishes state sovereignty by permitting [defendant] to unilaterally waive MDNR's Eleventh Amendment immunity. As a general matter, only unmistakable and explicit waiver by the state itself qualifies as a waiver of Eleventh Amendment immunity.

Id. at 506. Thus, "concern and respect for state sovereignty are implicated whenever a state is involuntarily subjected to an action, regardless of the role it is forced to play in the litigation." *Id*.

At least two district courts have raised similar concerns to those discussed in *Thomas* when presented with attempts by private plaintiffs to include states as absent class members. *See Walker v. Liggett Grp. Inc.*, 982 F. Supp. 1208, 1210-11 (S.D. W. Va. 1997) (attempts to include states as absent class members casts them in position of "unwilling Plaintiffs," which is "analogous to that of a defendant" and triggers the Eleventh Amendment); *In re McKesson Governmental Entities Avg. Wholesale Price Litig.*, 767 F. Supp. 2d 263, 271 (D. Mass. 2011) ("[A]s sovereigns, states have as strong interest in individually controlling the prosecution of their own cases. Indeed, significant sovereignty issues may

preclude defining a class to include state entities as absent class members…"). As in those cases and in *Thomas*, here, enforcement of the class settlement would undermine Louisiana's sovereignty by depriving it of the ability to litigate and settle its claims at the time and in the forum of its choosing.

GSK attempts to distinguish *Thomas* by arguing that, under Rule 23, the State was an absent class member, and thus was never formally a party to the class action. But as *Thomas* explains, the role the State is forced to play in the litigation – whether plaintiff, defendant, or absent class member – is beside the point. There is nothing in Rule 23 to suggest that, in adopting it, the U.S. Supreme Court ever intended – or, indeed, had the Constitutional authority – to confer on private litigants or the federal courts the power to strip the states of their decision-making autonomy. The critical question for sovereign immunity purposes remains whether the State has been involuntarily subjected to the jurisdiction of the federal courts for a determination of its interests. That is exactly what happened here: the district court assumed jurisdiction over the State at the behest of private litigants for the purpose of compromising the State's claims.

GSK's cited cases are not to the contrary. Those cases hold only that a state that *voluntarily* commences suit asserting an exclusively federal cause of action cannot assert its sovereign immunity as a bar to removal or appellate proceedings. *See, e.g., In re Methyl Tertiary Butyl Ether*, 488 F.3d 112, 119 (2d Cir. 2007)

(distinguishing *Thomas* on grounds that states' "voluntary act" in commencing suit "subjects them to the consequences that Congress may legitimately attach to such an action"); *Oklahoma ex rel. Edmondson v. Magnolia Marine Transport Co.*, 359 F.3d 1237 (10th Cir. 2004) (observing in *dicta* that a state cannot assert in state court an exclusively federal cause of action, *i.e.* admiralty, patent law, bankruptcy, natural gas act, and then rely on Eleventh Amendment immunity to prevent removal); *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831 (9th Cir. 2004) (holding the same); *Regents of the University of California v. Eli Lilly & Co.*, 119 F3d 1559 (Fed. Cir. 1997) (state university filed lawsuit in federal court); *Cohens v. Virginia*, 19 U.S. 264 (1821) (where state obtains judgment against a party, judgment can be reviewed by writ of error, even if state thereby nominally becomes a defendant).[1] Here, in contrast, Louisiana did nothing at all to invoke federal jurisdiction, and the question of remand has already been resolved in Louisiana's favor. Unquestionably, the sovereign has the *power* to sue, but *forcing* it to do so in federal court is an affront to its dignity.

It also does not matter, contrary to the arguments advanced by GSK and some of its *amici*, that Louisiana was not subjected to a suit for damages. As the

[1] *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447-48 (2004), on which GSK relies, held that the exercise of the bankruptcy courts' *in rem* jurisdiction over the debtor's property and estate does not offend state sovereignty. There was no *in rem* jurisdiction here, as the underlying class action was not premised on the court's jurisdiction over property. GSK also selectively quotes language from various cases that use phrases such as "redress against the sovereign" in discussing sovereign immunity. (GSK Br. at 26-28.) The fact that sovereign immunity is sometimes described as precluding suits against the states does not, of course, mean that it *only* applies if the state is named as a defendant. It simply means that situations such as the one presented here and in *Thomas*, in which private parties seek to force the state to litigate as a plaintiff or absent class member, are rare.

Supreme Court has explained, this argument "reflects a fundamental misunderstanding of the purposes of sovereign immunity." *Florida Maritime Com'n*, 535 U.S. at 765. Sovereign immunity "does not merely constitute a defense to monetary liability." *Id.* at 766. Rather, the central purpose of sovereign immunity is to respect the states' dignity as sovereigns. *Id*. at 765. That dignity is impacted whether or not the state treasury is at risk. *See id. See also Cory v. White*, 457 U.S. 85, 90-91 (1982) ("It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself merely because no money judgment is sought.").

Accordingly, Louisiana's sovereign immunity was violated by the class settlement, and – but for the district court's ruling – would have been violated again with GSK's motion for injunctive relief against Louisiana.

B. Louisiana Did Not Waive Its Sovereign Immunity With Respect to the Settlement

Since Louisiana's sovereign immunity was triggered by the settlement and the district court's order approving it, GSK cannot enforce the settlement against Louisiana unless it can show that Louisiana waived its immunity. GSK cannot do so for two reasons. *First*, a waiver of sovereign immunity cannot be found based on the state's mere failure to act, even if the state was notified that inaction might result in a waiver. *Second*, even assuming inaction in the face of notice could effect a waiver, Louisiana did not receive adequate notice here.

1. Inaction Cannot Effect a Waiver of Sovereign Immunity

The U.S. Supreme Court has established a "stringent" test for determining whether a State has waived its sovereign immunity and consented to suit in federal court. *See College Sav. Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 527 U.S. 666, 675 (1999). Waiver can only be found if the State has either: (a) "expressly consented" to federal jurisdiction; or (b) "affirmatively invoked" the federal court's jurisdiction. *Id*. at 676. The waiver must be "unequivocal" and "altogether voluntary." *Id.* at 681. Moreover, "[w]aiver may not be implied." *Sossamon v. Texas*, 563 U.S. 277, 284 (2011). "Only by requiring this 'clear declaration' by the State can we be 'certain that the State in fact consents to suit.'" *Id.*, quoting *College Savings Bank*, 527 U.S. at 680.

Applying these principles in *College Savings Bank*, the Supreme Court held that a State cannot be deemed to have constructively waived its sovereign immunity merely because Congress placed the State on notice that, by engaging in certain activity (in that case, advertising), the State would thereby constructively waive its immunity and subject itself to suit in federal court. *College Savings Bank*, 527 U.S. at 675-82. The Court explained:

> There is a fundamental difference between a State's expressing unequivocally that it waives its immunity and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity. In the latter situation, the most that can be said with certainty is that the State has been put on notice that Congress intends to subject it to suits brought by

> individuals. That is very far from concluding that *the State* made an "altogether voluntary" decision to waive its immunity.

Id. at 680-81(emphasis in original).

Here, Louisiana did not take any affirmative steps with respect to the class action litigation – it did not file the lawsuit or participate in the litigation in any way, and it did not negotiate, sign or otherwise approve the settlement. GSK urges only that Louisiana *failed to take action* to opt out of the settlement. If, under *College Savings Bank*, a waiver of sovereign immunity cannot be found based on a state's *action* after being placed on notice of a potential waiver, it certainly cannot be premised on the state's *inaction*. The most that can be said here is that the class plaintiffs and GSK intended to waive Louisiana's sovereign immunity for it, not that Louisiana made a voluntary decision to do so.

GSK attempts to obscure this point by arguing that, if the procedures governing class settlements under Rule 23 pass muster under due process jurisprudence with respect to non-state litigants, they must also be sufficient to protect the states' sovereign immunity. But as the Supreme Court explained in *College Savings Bank*, the states do not stand on equal footing with other litigants: "In the sovereign-immunity context… evenhand[ed]ness between individuals and States is not to be expected: The constitutional role of the States sets them apart from other [defendants]." *Id*. at 685-86. That is, sovereign immunity provides additional protections to the states beyond those afforded to other litigants. And,

again, nothing in Rule 23 confers on private litigants the power to waive that protection on the state's behalf. *See Thomas*, 50 F.3d at 506 (only the state itself, not private parties, can waive the state's sovereign immunity).

GSK also cites to cases holding that a state can waive its sovereign immunity by voluntarily invoking federal jurisdiction through "affirmative litigation conduct." *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002) (finding waiver resulted from state's removal of lawsuit to federal court). *See also Clark v. Barnard*, 108 U.S. 436, 447 (1883) (state voluntarily intervened in federal action); *City of Newark v. U.S.*, 254 F.2d 93, 98 (3d Cir. 1958) (sovereign immunity can be waived when state voluntarily becomes a party). But GSK does not identify a single *voluntary, affirmative* step taken by Louisiana that demonstrated its unequivocal consent to federal jurisdiction. All GSK claims is that Louisiana *failed to act*. Thus, the State did not give express consent or make a clear declaration of intent to waive its immunity.

2. Louisiana Was Not Notified It Might Be a Class Member

Even assuming a state can be held to have waived its sovereign immunity by failing to act after receiving notice that its claims might be compromised, Louisiana did not receive any such notice here. It is uncontroverted that Louisiana was not identified as a potential class member by the claims administrator and

therefore did not receive notice of the settlement in that capacity. (JA513-14.) It thus was not placed on notice that it might have claims that would be compromised if it failed to act.

GSK argues that a separate notice, sent to the Attorney Generals of each of the states in their *parens patriae* capacity under CAFA, should have alerted Louisiana to the fact that it might be a class member. This argument ignores the purpose of CAFA's notice provisions. The statute requires that notices of a proposed class settlement be sent to the "appropriate official of each State *in which a class member resides*." 28 U.S.C. § 1715(b) (emphasis added). Legislative history confirms that CAFA notices are intended to give the states an opportunity to review proposed class settlements and "voice concerns if they believe that the class action settlement is not in the best interest *of their citizens*." S. Rep. No. 109-14, at 5, 2005 WL 627977, at *6 (2005) (emphasis added). *See also id.* at 35 (purpose of CAFA notice is to permit states to "review the proposed settlement and decide what (if any) action to take to protect the interests of the plaintiff class"). CAFA notices are not intended to inform the states that they might have claims, or to take the place of the notices sent to class members. As the Ninth Circuit has explained:

> CAFA expressly provides that the defendant in a class action must provide notice to the appropriate state official of any proposed settlement, presumably so that the state may comment upon or object

> to the settlement's approval, *if the State believes the terms inadequately protect state citizens*.

California v. Intelligender, LLC, 771 F.3d 1169, 1172 (9th Cir. 2014) (emphasis added).

In accordance with this general understanding, the CAFA notice Louisiana received was designed to inform state attorneys general that the claims of some of their citizens were being compromised. It said nothing about Louisiana's own claims. The notice was not even directly addressed to Louisiana – rather, GSK sent a copy of a letter addressed to the United States Attorney General and "cc'd" to "The Attorney General of Each of the United States." (JA499-502.) The letter promised that a short form notice would be mailed to each absent class member identified by the claims administrator – notice that Louisiana never received. (JA500-01.) It enclosed a list estimating the number of class members residing in each State and their share in the settlement – information that would allow the state Attorneys General to assess the impact of the settlement on citizens of their states. (JA501-02; JA504-07.) Under these circumstances, as the district court correctly recognized, it is expected that Louisiana would have reviewed these materials with an eye toward protecting its citizens, not compromising its own claims or waiving its sovereign immunity. GSK presented no evidence to the contrary.

Accordingly, even assuming waiver could be implied from a state's failure to opt out after receiving notice of a class settlement, Louisiana did not receive adequate notice here.

C. Louisiana Did Not Waive Its Immunity with Respect to the Enforcement Proceeding

Moreover, even assuming Louisiana could be bound by the settlement as an absent class member, the parties to the settlement did not have the power to prospectively waive Louisiana's sovereign immunity on its behalf with respect to subsequent enforcement proceedings such as this one. Sovereign immunity bars claims for injunctive relief, including prospective injunctive relief, against the states in federal court without their consent. *See, e.g.*, *Cory*, 457 U.S. at 90-91.

GSK therefore must show that Louisiana agreed to submit to the district court's jurisdiction with respect to subsequent enforcement proceedings. It cannot. Nothing in the CAFA notice or the settlement agreement specifically addressed the State's sovereign immunity or clearly notified the State that it was at risk of waiving that immunity and being haled into court for subsequent enforcement proceedings. To the contrary, the settlement agreement expressly contemplated the possibility that the enforceability of the settlement might be litigated in other forums to the extent "this Court determines that it cannot bar" claims brought elsewhere. (JA119.) This language is, at best, equivocal, and a far cry from a "clear declaration" of intent to waive immunity. *Sossamon*, 563 U.S. at 284.

GSK argues that the state's sovereign immunity does not bar its Motion to Enforce because GSK nominally sought an injunction against the Attorney General under the *Ex Parte Young* doctrine. *Ex Parte Young* authorizes suits in federal court against state officials for prospective injunctive relief to remedy ongoing violations of federal law. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997), citing *Ex parte Young*, 209 U.S. 123 (1908). It does not authorize suits for injunctive relief against the state itself. *See Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (*Ex Parte Young* "has no application" in suits against States or state agencies, "which are barred regardless of the relief sought"). By attempting to differentiate between the State of Louisiana and its Attorney General, GSK merely introduces greater flaws. Here, GSK never joined the Attorney General as a party; never served him with a summons or other process; and never attempted to demonstrate that the district court had personal jurisdiction over the Attorney General.[2] Instead, it argued – erroneously – that the district court could exercise jurisdiction over *the State* as an absent class member. But the *Attorney General* was not an absent class member, nor has GSK ever contended to the contrary. Simply put, if GSK wanted to

[2] It appears that GSK attempted to effect service by mailing copies of the motion to the Louisiana Attorney General's Office and to the counsel who represented the State in the Louisiana state court action. (JA316.) This was not sufficient to make the Attorney General a party to the district court proceeding. *See* Fed. R. Civ. Proc. 4(j)(2); La. Code Civ. Proc. 1265.

circumvent the State's sovereign immunity by seeking relief against the Attorney General, it should have at a minimum properly made him a party.

Accordingly, the district court did not have jurisdiction to enforce the settlement against Louisiana.

II. Appellants' "Newly Discovered Evidence" Was Untimely and Irrelevant

Two months after the Court correctly ruled that Louisiana had not consented to federal jurisdiction, and 50 days after GSK filed its notice appealing that decision, GSK filed a Motion under Rule 60(b)(2), seeking relief from the judgment based on purportedly "newly discovered evidence."

Fed. R. Civ. P. 60(b)(2) provides, in pertinent part:

> On a motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> ***
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b).

To establish a right to relief under the Rule, GSK must show "that the new evidence (1) [was] material and not merely cumulative; (2) could not have been discovered before trial through the exercise of reasonable diligence; and (3) would

probably have changed the outcome of the trial." *Compass Technology, Inc. v. Tseng Laboratories, Inc.*, 71 F.3d 1125, 1130 (3d Cir. 1995).

As shown below, the evidence GSK submitted was not "newly discovered," and, in any event, was immaterial to the question of whether Louisiana waived its sovereign immunity. Accordingly, the district court properly exercised its discretion to deny GSK's motion.

A. GSK's Evidence Was Not Newly Discovered

A party seeking the "extraordinary relief" of Rule 60(b) "bears a heavy burden," and the motion "should be granted only where extraordinary justifying circumstances are present." *Bohus v. Beloff*, 950 F.2d 919, 930 (3rd Cir. 1991). The reasonable diligence requirement in the Rule "serves the salutary purpose of providing finality to judicial decisions and orders by preventing belated attempts to reopen judgment on the basis of facts that the moving party could have discovered" prior to the judgment. *Smith Int'l Inc. v. Hughes Tool Co.*, 759 F.2d 1572, 1579 (Fed. Cir. 1985). GSK thus was required to demonstrate that it was "excusably ignorant" of the new evidence it sought to submit. *Id.* Evidence is not "newly discovered" if a party could have obtained it earlier through discovery, by moving to compel or by other means but failed to do so. *See Floorgraphics Inc. v. News America Marketing In-Store Services, Inc.*, 434 Fed. Appx. 109, 113 (3d Cir. 2011) (district court did not abuse discretion in denying 60(b)(2) motion where party

seeking relief had failed to move to compel production of evidence during discovery); *Boldrini v. Wilson*, 609 Fed. Appx. 721, 724 (3d Cir. 2015) (relief not available where party failed to request information in timely manner).

GSK has admitted that it knew *before* it filed the Motion to Enforce (*i.e.*, before April 2, 2015) that information with respect to the notice and claims process was confidential, and that the claims administrator could not provide GSK with information concerning SHP claims. (SA071; SA013.) It took no further steps to obtain that information, but instead chose to file the Motion to Enforce without it. It slumbered on its rights for eight months, even after Louisiana asserted in May 2015 that the claims administrator had never identified the State as a class member. (JA482.) It waited until December 2015 to take the position that Louisiana's information was inadequate because it did not preclude the possibility that Louisiana's claims might have been submitted by an SHP. (JA 620-21.) It then attempted to place the burden on Louisiana to seek this additional information and was expressly informed by Louisiana's counsel that: (1) Louisiana would not take additional steps; and (2) in any event, the claims administrator had indicated that it would not provide more information than it already had. (JA620.) GSK still did not serve a subpoena, make a motion to compel or even inform the court in its subsequently-filed supplemental brief that it needed assistance to obtain potentially relevant information. Instead, it argued to the district court that the information

was irrelevant. (JA546.) In short, GSK made a tactical decision not to pursue information it knew was available. Its ignorance was not excusable; it was intentional.

GSK and its *amici* claim that GSK's tactical decisions were Louisiana's fault. But GSK has never contravened the information Louisiana obtained from the class administrator and conveyed to the district court: the claims administrator never identified Louisiana as a class member. GSK argues instead that it had no reason to believe that additional information existed prior to December 2015. This argument misses the mark for two reasons. *First*, GSK had all of the pertinent information in its possession as early as April 2015. It knew that the claims administrator would not provide information about SHP claims; and it knew, as a party to the SHP settlement, that it would not have complete information without this data. (SA013.) Louisiana did not conceal this information from GSK; to the contrary, the correspondence exchanged between counsel reflects that GSK – not surprisingly – knew far more about the SHP settlement and claims process than Louisiana did. (JA620-22.) GSK's failure to identify and raise this concern earlier is its own fault, not Louisiana's.

Second, even assuming GSK was unaware of the potential gap in Louisiana's information before December 2015, it was certainly aware of it no later than December 5, 2015 - *before* the Motion to Enforce was decided and

before GSK submitted its last brief to the district court on December 9th. (JA620-22.) The record is clear that by December 5th, GSK knew exactly what information Louisiana had received, and it was aware – and had expressly taken the position – that there could be additional information available. (*Id.*; JA546 at n.6.) It nevertheless chose not to seek discovery of that information, but instead argued to the district court in its December 9th brief that the information was not relevant. (JA 546.)[3]

Under these circumstances, the burden was on GSK to exhaust the means available to it, including formal discovery, to obtain information that it knew might exist and could potentially be relevant. It chose not to do so, and it is, therefore, not entitled to the extraordinary relief it seeks.

B. GSK's Purported "Evidence" Was Immaterial

Moreover, GSK's "new" evidence would not have altered the outcome. The question here is whether there is any evidence that Louisiana voluntarily and unequivocally waived its sovereign immunity. GSK submitted a single document that purported to list a subset of claims submitted by Humana, an SHP, to the claims administrator. (SA076-453; SA061-62.) The document listed "State of Louisiana" in the "CUST_NAME" column for each line item. (SA076-453.) GSK did not submit any evidence or testimony concerning the meaning of this column

[3] Nor was Louisiana under any obligation in March 2016, long after the Court denied the Motion to Enforce in December 2015, to assist GSK's efforts to reopen proceedings in the district court. As Louisiana explained to GSK at the time, GSK would have the opportunity to seek any relevant discovery in state court. (SA067.)

or how Humana generated this data. As such, it is not evidence in the first place. GSK also did not submit (or seek) any information concerning the relationship between Humana and the State; the scope of Humana's authority; whether Louisiana was aware these claims were being submitted; or what happened to the settlement funds after Humana received them.

GSK nevertheless argues that this document somehow proves that Louisiana voluntarily and unequivocally consented to federal jurisdiction. It does not. On the current record, and even taking this new submission at face value, there is no evidence that Humana was directed to submit these claims, nor that Louisiana was even aware of it, nor that Humana had the authority, as a provider of limited administrative services, to waive Louisiana's sovereign immunity. GSK simply leaps to the conclusion that Humana had that authority without any evidence to support it. (*See, e.g.*, GSK Br. at 20 (stating, based entirely on the claims document, that Humana "appears" to have had an administrative services contract with Louisiana).) In sum, this single document is wholly inadequate to establish that Louisiana took voluntary, affirmative steps indicating its consent to federal jurisdiction.

GSK will have every opportunity, in state court, to assert its defenses, including the defense that Louisiana has already been compensated for some of its claims, and to seek appropriate discovery concerning those defenses. What it

cannot do is reopen proceedings in federal court based on wholly inadequate evidence that it could, and should, have obtained before the district court denied GSK's Motion to Enforce. Accordingly, the district court properly exercised its discretion to deny GSK's Rule 60(b)(2) motion.

III. Application of Sovereign Immunity Will Not Prevent Class Action Defendants from Settling or Enforcing Settlements

In the absence of any precedent or evidence to support their positions, GSK and its *amici* strain to construct a policy argument, claiming that the sky will fall, settlements will become impracticable and states will reap windfall double recoveries if the Court does not reverse the district court's ruling. GSK's "parade of horribles" argument is unfounded for two reasons.

First, defendants in class action lawsuits will still be able to "buy peace" in the same way they do now: by negotiating separately with the states, either to ensure that they "opt in" to class settlements or to settle with them individually. GSK is well aware of this, having settled other claims separately with Louisiana, and no doubt with other states as well. (*See* JA523-529 (Settlement Agreement between GSK and Louisiana regarding drug Avandia); JA530-536 (Settlement Agreement between GSK and Louisiana regarding nine drugs).) It may well be more efficient, and perhaps less expensive, for GSK to lump the states into a class settlement rather than negotiate with them separately, but the states' sovereign

immunity cannot be disregarded simply because some parties find it expedient to do so. As the Supreme Court has explained: "While some might complain that our system of dual sovereignty is not a model of administrative convenience, that is not its purpose." *Federal Maritime Com'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 769 (2002). Rather, the courts should "guard[] against encroachments by the Federal Government on fundamental aspects of state sovereignty" and strive to "maintain the balance of power embodied in our Constitution." *Id.*

Second, settling defendants will still be able to assert their defenses, including the defense that a state has already been compensated for a particular claim, in the forum chosen by the states – here, Louisiana state court. While some defendants may prefer not to litigate in state court, principles of sovereign immunity grant the choice of forum to the state. *See Pennhurst*, 465 U.S. at 99. And there is no reason to believe that state courts are incapable of interpreting and applying a settlement agreement, or ascertaining whether a plaintiff has released, compromised or been compensated for some of its claims. This is particularly true here, given that GSK has conceded that the Louisiana state court action will proceed regardless of the outcome in federal court.

In sum, it is both unnecessary and inappropriate for the federal courts to interfere with the pending state court litigation. While GSK and other class

defendants might find the states' sovereign immunity irksome, that is no reason to carve out a new exception to a long-settled rule: the federal courts cannot assert jurisdiction over sovereign states without their consent. The district court's decisions should be affirmed.

IV. Appellants Failed to Demonstrate Entitlement to Injunctive Relief

In the alternative, assuming the district court had jurisdiction over the State, GSK failed to demonstrate its entitlement to injunctive relief. On motions to enforce a settlement agreement, courts apply the same standards applicable to summary judgment motions. *See Tiernan v. Devoe*, 923 F.2d 1024, 1031-32 (3d Cir. 1991). Enforcement is appropriate only if there are no genuine issues of material fact and the party seeking enforcement is entitled to relief as a matter of law. *Id.*[4] Moreover, a party seeking an injunction, as GSK does, must show "that there is some legal transgression that an injunction would remedy." *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation*, 369 F.3d 293, 307 (3d Cir. 2004).

Here, GSK failed to demonstrate entitlement to relief as a matter of law on a central issue: whether Louisiana has in fact brought claims that were released by the settlement. As GSK admits, at this stage, the precise nature and scope of

[4] *See also,* Louisiana's Supplemental Memorandum In Support of Rule 12(B)(2) at JA486, n. 1, regarding GSK's failure to brief even the threshold requirements for injunctive relief, and at JA488-489 regarding GSK's failure to join the Louisiana Attorney General as a party.

Louisiana's claims in the state litigation is not clear. (GSK Br. at 16 (explaining that it seeks relief "to the extent the damages claims had been released.") What *is* clear is that Louisiana has claims that were not encompassed by the settlement and that it is entitled to pursue those claims in state court. (JA561.) Any injunctive relief would be purely hypothetical, premised on the possibility that, when Louisiana's claims are better defined in the state litigation, some of them might be covered by the settlement. Under these circumstances, it is not clear what "transgression" the injunction would remedy, or, indeed, what an injunction would add to the order the district court issued when approving the settlement. (JA034 at ¶ 21.)

Indeed, parallel federal litigation over the scope of the settlement and whether it applies to any of Louisiana's claims is particularly inappropriate here. What GSK really seeks is an order instructing the state court on how to rule on GSK's defenses if and when the issue becomes ripe for resolution. GSK has admitted that Louisiana has asserted claims that fall outside the scope of the settlement agreement and that those claims will therefore need to proceed in Louisiana anyway, regardless of any action taken by the federal court. GSK is therefore openly advocating for a dual track litigation, with all the attendant inefficiencies and risks of contradictory rulings. This is precisely the scenario calling for federal abstention under the abstention doctrine recognized by the U.S.

Supreme Court in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

In *Colorado River*, the U.S. Supreme Court examined the principles which govern situations involving the contemporaneous exercise of concurrent jurisdictions by state and federal courts. *Id.* at 817. These principles rest on considerations of "(w)ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Id.* In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, the *Colorado River* court provided a number of factors, noting that "no one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required." *Id.* The factors that must be examined include: (1) which court first assumed jurisdiction over property involved, if any; (2) the relative convenience of the fora; (3) the desirability of avoiding piecemeal litigation; (4) the order in which jurisdiction was obtained; (5) whether federal or state law applies and (6) whether the state court will adequately protect the interests of the parties. *See BIL Mgmt. Corp. v. New Jersey Econ. Dev. Auth.*, 310 F. App'x 490, 492 (3d Cir. 2008).

Here, consideration of these factors weighs heavily against concurrent federal proceedings. First, assuming *arguendo* that the federal court could have

jurisdiction over the funds at issue (which the State does not concede), the federal court would only have jurisdiction over the State's limited claims involving purchases of Flonase for state employees or others covered by a government employee health plan. The federal court would not have jurisdiction over the State's remaining claims involving reimbursements owed for unrelated purchases made by other State agencies and programs. Second, it would be significantly inconvenient for the State to litigate its state law claims in a federal forum, rather than in the state forum where it chose to seek redress. Third, the desirability of avoiding piecemeal litigation in this case clearly weighs heavily against concurrent federal proceedings given that a number of the State's claims must go forward in Louisiana because they fall outside the scope of the settlement agreement. Fourth, state law clearly applies as the State has alleged violations of several state laws, including Louisiana's antitrust law and the Louisiana Unfair Trade Practices Act, all of which was recognized by the federal court in Louisiana in granting Louisiana's motion to remand. Finally, there is no reason why the state court cannot adequately protect the interests of the parties, particularly the interest of the plaintiff's choice of forum. The Louisiana state courts are fully capable of adjudicating this dispute, including any defenses GSK wishes to assert. Considering the foregoing factors, and even assuming *arguendo* that the federal

court could exercise jurisdiction in this case (which it cannot), the case should nevertheless be dismissed under the *Colorado River* abstention doctrine.

CONCLUSION

Accordingly, because Louisiana did not waive its sovereign immunity and consent to the settlement or to the district court's jurisdiction to enforce it, and because GSK has in any event failed to establish its right to relief, the district court's decisions should be affirmed.

Dated: December 12, 2017

Respectfully submitted,

/s/ John Alden Meade

John Alden Meade (*pro hac vice*, Dkt. #666)
MEADE LAW LLC
909 Poydras St., Suite 1600
New Orleans, LA 70112
Telephone: (504) 799-3102
Facsimile: (504) 717-2846
Email: jameade@meadelawllc.com

Counsel for Respondent-Appellee

CERTIFICATE OF BAR MEMBERSHIP

The undersigned, one of the attorneys whose name appears on the brief of Appellee-Respondent the State of Louisiana, hereby certifies pursuant to Local Appellate Rule 46.1 that I am a member in good standing of the bar of this court.

Dated: December 12, 2017

/s/ John Alden Meade
John Alden Meade

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,488 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman, 14 point font.
3. Pursuant to Local Appellate Rule 31.1(c), I certify that the text of the electronic brief is identical to the text of the paper copies.
4. The electronic brief has been scanned for viruses with a virus detection program, Norton Security, and no virus was detected.

Dated: December 12, 2017

/s/ John Alden Meade
John Alden Meade

CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2017, I served the foregoing document on all parties of record by electronically filing this document using the court's electronic docketing system (CM/ECF).

Dated: December 12, 2017

/s/ John Alden Meade
John Alden Meade