

ORIGINAL

FEDERAL COURT OF AUSTRALIA
N.S.W. DISTRICT REGISTRY
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Order 73 rule 3
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IN THE FEDERAL COURT OF AUSTRALIA

NSW DISTRICT REGISTRY

No. 1991 / 2008

**AMENDED APPLICATION UNDER PART IVA OF THE FEDERAL
COURT OF AUSTRALIA ACT 1976**

1. This application is brought by the Applicant as a representative party.
2. The group members to whom the proceeding relates are persons who:
 - (a) are Injured Persons (as defined in para 26, together with paras 21, 24 and 25, of the Further Amended Statement of Claim);
 - (b) ~~had on 28 April 2003 an economic interest in Pan Pharmaceuticals Ltd continuing to manufacture and supply certain classes of goods, principally being vitamins, health supplements and complementary medicines;~~
 - (b) have suffered loss by reason of or as a consequence of some or all of the conduct of the respondents pleaded in paras 76-144, 146-174, 177-184, 185-191 of the Further Amended Statement of Claim~~the conduct of the Therapeutic Goods Administration pleaded in relation to regulatory action purportedly taken against Pan Pharmaceuticals Ltd on and from 28 April 2003; and~~

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- (c) have, as at the date of the commencement of this proceeding, entered into a litigation funding agreement with IMF (Australia) Ltd in relation to this proceeding;

(the **Group Members**).

3. The Applicant claims for itself and for the group:

- (a) Damages;
- (b) Exemplary Damages;
- (c) Interest pursuant to s 51A of the Federal Court of Australia Act 1976 (Cth);
- (d) Costs;
- (e) Such further or other relief as the Court determines is appropriate.

4. The questions of law or fact common between the claims of the Applicant and Group Members are:

- (a) whether the conduct or inactivity of the Respondents in their dealings with Pan Pharmaceuticals Ltd was proper and lawful;
- (b) whether as at 28 April 2003 all of the products manufactured by Pan Pharmaceuticals Ltd since 1 May 2002 created an imminent risk of death, serious illness or serious injury within the meaning and application of the Therapeutic Goods Act 1989 (Cth);

With respect to misfeasance in public office

- (c) whether the Respondents' conduct or inactivity together or separately amounted to an abuse of public office;

- (d) whether the Respondents' conduct or inactivity together or separately satisfy the legal requirements of the tort of misfeasance in public office;
- (e) whether the Respondents knew that they did not have lawful authority to engage in the conduct they did, or were reckless as to the fact;
- (f) whether the Respondents intended to cause harm or damage to Pan Pharmaceuticals Ltd, or were reckless as to the fact; and whether the Respondents by those facts also knew of or were reckless as to the fact of harm or damage to the Applicant and Group Members;
- (g) whether the Respondents intended to cause harm or damage directly to the Applicant and Group Members, or were reckless as to the fact;
- (h) in the event that the tort is established, the legal test for causation and the heads of damage recoverable by a person in the position of the Applicant and Group Members;

~~With respect to the cause of action in James v The Commonwealth~~

- ~~(i) whether the Respondents intended to cause loss to the Applicant and Group Members or were reckless as to the fact;~~
- ~~(j) whether the Respondents threatened illegal conduct in relation to the Applicant and Group Members, including by threatening to cancel products registered on the Australian Register of Therapeutic Goods and threatening to initiate a mandatory recall of goods from the market;~~
- ~~(k) in the event that the action is established, the legal test for causation and the heads of damage recoverable by a person in the position of the Applicant and Group Members;~~

With respect to the tort of Negligence

- (l) whether the Respondents conduct was *ultra vires*, and as such is to be treated as if the Respondents were private citizens and the claim was one as between private citizens;
- (m) alternatively, whether properly construed the Therapeutic Goods Act 1989 (Cth) excluded any common law duty of care in relation to the Applicant and Group Members;
- (n) whether a duty of care arose as between the Respondents and the Applicant and Group Members;
- (o) whether the Respondents breached a duty of care to the Applicant and Group Members;

~~with respect to the claim for knowing misrepresentation (fraud or deceit)~~

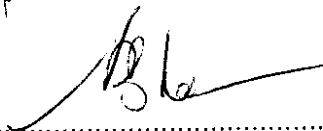
- ~~(p) whether the Respondents falsely represented to the Applicant and Group Members that none of the products manufactured by Pan after 1 May 2002 were safe to be consumed, knowing that the statements were false or with reckless indifference as to the truth of the representation~~
- ~~(q) in the event that the action is established, the legal test for causation and the heads of damage recoverable by a person in the position of the Applicant and Group Members.~~

5. And the Applicant claims by way of interlocutory relief:

N/A.

Dated:

23 April 2010



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Signature of applicant's solicitor

To the respondents:

C/- Corrs Chambers Westgarth
Lawyers
1 Farrer Place
SYDNEY NSW 2000

A directions hearing in this application will be heard by the Court at the time and place specified below.

If there is no attendance before the Court by you or a legal practitioner representing you, the application may be dealt with and judgment may be given or an order made in your absence.

Before any attendance at that time, you must file an appearance in the Registry.

Time:

Place:

Date:

.....
Registrar

The Applicants' address for service is c/- McLACHLAN THORPE PARTNERS, Lawyers,
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