The Miller Firm
TRIAL LAWYERS

Michael J. Miller – VA, MD, DC, PA
Nancy Guy Miller – MS
Bruce D. Burtoff, M.D., J.D. – VA, DC, FL, MS
Peter A. Miller – VA
David J. Dickens – VA, DC
Jeffrey Travers – VA
Tayjes Shah – PA, NJ
Nathan Cromley – DE, PA, NJ
Julie B. Isen – CA, IL
Timothy S. Peck – VA, MT
Timothy Litzenburg - VA

The Sherman Building
108 Railroad Avenue
Orange, Virginia 22960
Marcia DePalmo Swartz, R.N., MFS
Jennifer Miller, R.N.
Nancy Leftwich, R.N.
Website: Millerfirmllc.com
Telephone: (540) 672-4224
(866) 529-3323
Facsimile: (540) 672-3055

July 27, 2012

The Honorable Rebecca F. Doherty
United State District Court,
Western District of Louisiana
800 Lafayette Street
Lafayette, LA 70501

**Re: Paul De Domenico, et al v. Takeda Pharmaceuticals American, Inc., et al., First Judicial District Court, State of New Mexico, County of Santa Fe Cause No.: D-101-CV-2012-00258**

**In Re Actos (Pioglitazone-Products Liability Litigation) USDC – Western District of LA, MDL 2299, 6-11-md-2299**

Dear Judge Doherty:

This letter is respectfully submitted to inform the Court of some important issues raised by this Court's intervention in the above-referenced Actos tort case presently pending in New Mexico state court and other state court cases. Plaintiff's counsel requests leave to be heard further in this matter at the Court's next MDL hearing, which is presently set for August 23, 2012.

As this Court is aware, the plaintiff in the above-referenced case filed a state tort lawsuit against the manufacturer of Actos, the prescribing physician, and a sales representative in New Mexico state court. Undersigned counsel collectively represent over 280 Actos bladder cancer victims, more than 95% of whom will remain in state

court proceedings. On May 14, 2012, Plaintiffs filed a Motion to Consolidate and on May 22, 2012, plaintiffs filed a Motion for an Expedited Scheduling Order and Preferential Trial Setting. A hearing on that Motion was to be held with the state court on July 10, 2012 with counsel for the parties present. The day prior to the state court hearing, it is our understanding that your Honor called the Honorable Sarah Singleton, the state court judge assigned to plaintiff's case, and discussed *ex parte* with her the issues that were to be heard in plaintiff's motion, *i.e.*, length and timing for discovery, scheduling of motions, timing of *Daubert* motions, and timing of trial. Judge Singleton adopted the position that your Honor advocated and refused to grant the plaintiff's request for a shorter time period for discovery and trial. The plaintiff remains concerned that he will not live long enough to see his trial date and concerned the Federal Court has wrongfully interfered with his state court proceedings. Plaintiff's counsel remains concerned that federal court interference in state court proceedings will obstruct state court plaintiffs from rightfully proceeding with their cases. The undersigned counsel has gone to great lengths to work with the defendants towards a rational approach to discovery in our cases, a process we respectfully submit should not be hindered by the MDL Court.

Respectfully, it is submitted that the Court's actions do not give due regard to the important policy of comity. As the Court is undoubtedly aware, comity reflects "the mutuality of respect between state and federal courts[.]" *Demarest v. Price*, 130 F.3d 922, 942 (10th Cir. 1997). In the seminal case of *Younger v. Harris*, 401 U.S. 37, 91 S.

Ct. 746 (1971), the U.S. Supreme Court explicitly recognized the nature and importance of comity in the dual court system:

> The concept [of comity represents] a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

*Id.* at 44-45.

As a matter of comity, federal courts should generally refrain from intervening in state court proceedings, "whether civil or criminal, pending or threatened." *DeSpain v. Johnston*, 731 F.2d 1171, 1176 (5th Cir. 1984). "Inappropriate intervention breeds friction, but federal restraint facilitates the smooth and orderly operation of the dual judicial structure." *U.S. Steel Corp. Plan for Employee Ins. Benefits v. Musisko*, 885 F.2d 1170, 1175 (3d Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990); *see also Honey v. Goodman*, 432 F.2d 333, 342 (6th Cir. 1970). Thus, as a policy, "[p]roceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately [the U.S. Supreme] Court." *Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970); *accord J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d 176, 178 (5th Cir. 1996); *Total Plan Servs., Inc. v. Tex. Retailers Ass'n, Inc.*, 925 F.2d 142, 144 (5th Cir. 1991).

The mutual respect between sovereigns is severely undermined when either a federal or state court judge intervenes in a proceeding pending in the other's court.

Such intervention impinges on proceedings in the forum court and violates the important policy of comity. Moreover, it may be noted that the Anti-Injunction Act, 28 U.S.C. §2283, provides "an absolute bar to any federal court action that has the effect of staying a pending state court proceeding unless the action falls within a designated exception[.]" *Newby v. Enron Corp.*, 302 F.3d 295, 301 (5th Cir. 2002), *cert. denied*, *Fleming & Assocs. v. Fastow*, 537 U.S. 1191 (2003). In other words, "any injunction against state court proceedings . . . must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld." *Atl. Coast Line R.R.*, 398 U.S. at 287. Even if a particular federal court action does not violate the Anti-Injunction Act, federal judges are "constrained by the overarching principle that federal courts must be wary of infringing on legitimate exercises of state judicial power." *Newby*, 302 F.3d at 301.

Here, the well-established policy of comity called for this Court's exercise of restraint in regard to the New Mexico state court tort proceedings and other state court Actos cases. The state court's legitimate exercise of judicial authority was impeded by the Court's ex parte communications with the state court trial judge. In addition, no injunction staying the state court proceedings could have been properly obtained under § 2283. Thus, the Court's communications with the New Mexico state court judge did not reflect due regard for the concept of comity. It is, therefore, respectfully requested that the Court refrain from engaging in future communications of this type in the New Mexico state court proceedings or other state court Actos cases filed by the undersigned counsel.

In addition to considerations of comity, the *ex parte* nature of the communications at issue raises significant due process and objectivity concerns. As the Court is aware, ex parte communications by judges are prohibited by federal and state law. *In re Palmisano*, 70 F.3d 483, 487 (7th Cir. 1995), *cert. denied*, *Palmisano v. Executive Comm., U.S. Dist. Ct. for N. Dist. of Ill.*, 517 U.S. 1223 (1996); *see In re Dinova*, 212 B.R. 437, 445 (B.A.P. 2d Cir. 1997) (the American judicial system "forbids *ex parte* communications on substantive matters by statute, rule and code of ethics"). By their very nature, *ex parte* communications by judges may deprive litigants of their Fourteenth Amendment due process right to a fair trial. *Haller v. Robbins*, 409 F.2d 857, 859-60 (1st Cir. 1969); *Rinehart v. Brewer*, 421 F. Supp. 508, 518-19 (S.D. Iowa 1976), *aff'd*, 561 F.2d 126 (8th Cir. 1977); *see also Health Net, Inc. v. Wooley*, 534 F.3d 487, 494 (5th Cir. 2008).

Further, *ex parte* communications by a trial judge involve "'a breach of legal and judicial ethics. Regardless of the propriety of the court's motives in such a case . . . the practice should be discouraged since it undermines confidence in the impartiality of the court.'" *United States v. Early*, 746 F.2d 412, 416 (8th Cir. 1984), *cert. denied*, 472 U.S. 1010 (1985) (quoting 8B James W. Moore, *Moore's Federal Practice* § 43.03[2], at 43-23 (1983) (footnote omitted)). As explained in one case:

> "Administrative and judicial adjudications are viable only so long as the integrity of the decision making processes remain inviolate. There would be no way to protect the sanctity of adjudicatory processes if we were to condone direct attempts to influence decision makers through ex parte contacts.

*Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth.*, 685 F.2d 547, 570 (D.C. Cir. 1982).

Clearly, "*ex parte* communications shadow the impartiality, or at least the appearance of impartiality, of any judicial proceeding." *Grieco v. Meachum*, 533 F.2d 713, 719 (1st Cir.), *cert. denied*, *Cassesso v. Meachum*, 429 U.S. 858 (1976), *overruled on other grounds*, *Maine v. Moulton*, 474 U.S. 159 (1985); *accord Gomes v. Univ. of Maine Sys.*, 365 F. Supp. 2d 6, 34 (D. Me. 2005). This is particularly true where the *ex parte* contact may have influenced the

decision, and the opposing parties were unaware of the content of the communication and had no opportunity to respond. *Prof'l Air Traffic Controllers Org.*, 685 F.2d at 565; *Gomes*, 365 F. Supp. 2d at 34.

Recognizing these concerns, Canon 3A(4) of the Code of Judicial Conduct for United States Judges states that a judge "should . . . , except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding." Code of Conduct for United States Judges Canon 3A(4), 175 F.R.D. 363, 367 (1997). This Canon is part of the Code of Conduct for United States Judges, which "contains the ethical canons governing federal judges." *Ausherman v. Bank of Am. Corp.*, 216 F. Supp. 2d 530, 532 (D. Md. 2002); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 112 (the Code of Conduct "prescribes ethical norms for federal judges as a means to preserve the actual and apparent integrity of the judiciary"), *motion denied*, Nos. 00-5212, 00-5213 2001 WL 931170 (D.C. Cir. Aug. 17, 2001), *and cert. denied*, 534 U.S. 952 (2001). *Ex parte* communications by a trial judge may cause the judge to develop an unfair bias in favor of or against a particular party. *See Andrade v. Chojnacki*, 338 F.3d 448, 459 (5th Cir. 2003), *cert. denied*, *Thompson v. Chojnacki*, 541 U.S. 935, *and cert. denied*, *Brown v. United States*, 541 U.S. 935 (2004); *United States v. Bertoli*, 40 F.3d 1384, 1412 (3d Cir. 1994).

The *ex parte* communications at issue here created an appearance of bias and were barred by ethical Canon 3A(4). As a matter of equity, the Court is respectfully urged to refrain from engaging in any future *ex parte* communications with state court judges presiding over Actos tort cases.

The Manual for Complex Litigation Fourth Edition is in complete accord. "No single forum has jurisdiction over these groups of cases. Unless the defendants file for Bankruptcy, no legal basis exists for exercising exclusive federal control over state litigation." Manual for Complex Litigation, Fourth Ed., Sec. 20.31. "The federal court's power to interfere with parallel or related proceedings in state court is limited by the Anti-Injunction Act, which prohibits federal courts from enjoining or staying state court proceedings except as expressly authorized by an act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. The exceptions under the act are narrowly construed." Id.

At a minimum, plaintiff's counsel should be notified of the time and date that any future communications between this Court and a state court judge presiding over an Actos state case will occur so that counsel may be present and granted an opportunity to be heard. Toward this end, it is well-established that "[v]irtually every substantive motion in American jurisprudence must be on notice to affected parties." *Dinova*, 212 B.R. at 445. A fundamental precept of the American legal system is that a fair hearing "requires a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan v. United States*, 304 U.S. 1, 18 (1938).

In accordance with this precept, Canon 3A(4) provides that judges "should accord to every person who is legally interested in a proceeding, or his or her lawyer, full right to be heard according to the law[.]" Code of Conduct for United States Judges, Canon 3A(4), 175 F.R.D. at 367; *see also* ABA Model Code of Jud. Conduct R. 2.9(A)(1)(b). This Canon "requires judges to give parties an opportunity to respond to *ex parte* communications." *United States v. Courtland*,

642 F.3d 545, 552 (7th Cir. 2011). At a minimum, plaintiff's counsel should have been given such an opportunity here.

In summary, based on the foregoing concerns, it is respectfully requested that in the future, the Court refrain from intervening in state court proceedings by engaging in *ex parte* communications with state court judges presiding over Actos tort cases. In the event that such communications do occur, over objection of the undersigned, it is requested that the Court take steps to ensure that plaintiff's counsel is provided due notice of the time and date of such communications and that counsel be granted an opportunity to be heard at that time. Finally, it is requested that the Court grant counsel an opportunity to be heard further on these matters at the MDL hearing presently scheduled for August 23, 2012.

Respectfully Submitted,

Michael J. Miller, Esquire
The Miller Firm, LLC
108 Railroad Avenue
Orange, VA 22960
Telephone: (540) 672-4224
Facsimile: (540) 672-3055
Email: mmiller@millerfirmllc.com

Co-Counsel for Plaintiff

Turner Branch, Esquire
Branch Law Firm
2025 Rio Grande Boulevard NW
Albuquerque, New Mexico 87104
Telephone : (505) 243-3500
Facsimile : (505) 243-3534
Email : tbranch@branchlawfirm.com

Co-Counsel for Plaintiff

MJM:rmm
cc: Honorable Sarah M. Singleton
Sara J. Gourley, Esquire
Sherri A. Knutson, Esquire
Robert J. Curtis, Esquire
Kathleen M. Wilson, Esquire