

1 Neal, Gerber & Eisenberg LLP
2 Karl R. Barnickol
3 Tonya G. Newman
4 Two North LaSalle Street
5 Suite 1700
6 Chicago, IL 60602-3801
7 Telephone: (312) 269-8000
8 Facsimile: (312) 269-1747

9 Attorneys for Defendants
10 Wolters Kluwer Health, Inc. and Wolters
11 Kluwer United States Inc.

12 UNITED STATES DISTRICT COURT
13 SOUTHERN DISTRICT OF CALIFORNIA

14 **IN RE: INCRETIN-BASED**
15 **THERAPIES PRODUCTS**
16 **LIABILITY LITIGATION**

MDL NO. 2452

Case No. 13-MD-2452

**DEFENDANT WOLTERS KLUWER
UNITED STATES INC.'S
MEMORANDUM IN SUPPORT OF
ITS MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED
COMPLAINT**

17 **THIS DOCUMENT RELATES
18 TO:**

19 Civil Action No.: 14-cv-00360-AJB-
20 MDD

Hon. Anthony J. Battaglia

Date: May 22, 2014

Time: 2:00 p.m.

Courtroom: 3B

21 *Danitta Rinder, Individually and as*
22 *Special Administrator for the Estate*
23 *of Gregg Rinder v. Merck Sharp &*
24 *Dohme Corp.; H.D. Smith Wholesale*
25 *Drug Co.; Smith Medical LLC;*
26 *Wolters Kluwer Health, Inc., and*
27 *Wolters Kluwer United States Inc.*

28 Defendant Wolters Kluwer United States Inc. ("WKUS") respectfully requests that the Court dismiss with prejudice Plaintiff's claims against it pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiff's claims against WKUS are misplaced because that entity is not involved in any way in publishing information

1 about Januvia or any other drug. Conclusory allegations that WKUS was somehow
2 involved in managing WKH in an unidentified way are not enough (and there is no
3 factual support for such allegations anyway) for the Court to conclude that WKUS
4 is a proper party. This Court, therefore, should dismiss with prejudice Plaintiff's
5 claims against WKUS.
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8 Moreover, even if Plaintiff had alleged sufficient facts to show either
9 WKUS's direct involvement in WKH's business of publishing patient drug
10 education information, or that WKUS is somehow the alter ego of WKH, dismissal
11 is warranted for each of the reasons set forth in WKH's Memorandum in Support of
12 its Motion to Dismiss, the arguments of which WKUS incorporates as if fully set
13 forth herein.
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15 **BACKGROUND**

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17 Plaintiff Danitta Rinder, and as Special Administrator for the Estate of Gregg
18 Rinder (the "Decedent"), alleges that the Decedent suffered pancreatic cancer as a
19 result of an adverse reaction to the prescription drug Januvia, which is generically
20 known as dipeptidyl peptidase-4 (DPP-IV) ("Januvia"). The First Amended
21 Complaint ("FAC") suggests that three groups of defendants are responsible for
22 Plaintiff's injuries – Merck Sharp & Dohme Corporation ("Merck"), the
23 manufacturer of Januvia; H.D. Smith Wholesale Drug Company and Smith Medical
24 Partners (together "H.D. Smith"), distributors of prescription drugs; and Wolters
25 Kluwer Health, Inc. ("WKH"), a publisher of drug information databases, including
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1 the patient education monograph (“PEM”) information allegedly provided to Mr.
2 Rinder by his pharmacy. Plaintiff also purports to bring claims against WKUS, a
3 separate entity from WKH that is not owned by or the owner of WKH and not
4 involved in publishing drug information, let alone PEM information.
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6 The background of Plaintiff’s allegations against WKH is set forth in its
7 Memorandum in Support of its Motion to Dismiss, filed contemporaneously
8 herewith. Plaintiff claims that the Decedent was prescribed and ingested Januvia to
9 treat diabetes and, as a result, developed pancreatic cancer. (FAC, attached hereto
10 as **Exhibit A**, ¶¶ 1, 5, 6.)¹ Plaintiff alleges that if the Decedent had been
11 “adequately” warned of the alleged risk of pancreatic cancer associated with
12 Januvia, he would not have taken the medication. (*Id.* at ¶ 59.)
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16 Plaintiff alleges that WKH is a publisher of generalized summary drug
17 information that allegedly contracted with Plaintiff’s pharmacy to provide patient
18 education monograph (“PEM”) information for prescription drugs, including
19 Januvia, which the pharmacy could provide to consumers when filling
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21 ¹ On November 27, 2013, WKUS and WKH filed in the Circuit Court of Cook
22 County, Illinois motions to dismiss the First Amended Complaint. Briefing on
23 those motions was stayed pending the court’s decision on a motion to sever and a
24 motion to dismiss based on forum *non conveniens* filed by Merck, Sharp & Dohme
25 Corp. On January 30, 2014, the Circuit Court of Cook County, Illinois issued an
26 order severing the claims of Plaintiff Diane M. Celeste, individually and as special
27 administrator for the estate of Frederick Celeste and Plaintiff Adelma Holzbaur
28 from Rinder’s claims, and dismissed Celeste’s and Holzbaur’s claims on the basis
of forum *non conveniens*. On January 31, 2014, Merck removed this action to the
United States District Court for the Northern District of Illinois. On February 13,
2014, this action was conditionally transferred to this Court as a tag-along action.

1 prescriptions. (*Id.* at ¶¶ 23, 26.) Plaintiff claims that the PEM information that
2 WKH provided Decedent’s pharmacy failed in some unidentified way to provide
3 the Decedent with “adequate” warnings about the potential side-effects caused by
4 Januvia. Based on these allegations, Plaintiff claims that WKH negligently caused
5 Plaintiff’s injuries. (*Id.* at ¶¶ 28, 220, 244.)
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8 Plaintiff **does not** and cannot in good faith allege that WKUS had any direct
9 involvement in the conduct allegedly giving rise to her claims because WKUS is
10 not engaged in the business of publishing drug information. Plaintiff acknowledges
11 that WKUS and WKH are separate corporate entities. (*Id.* at ¶ 22.) Plaintiff does
12 not and cannot allege that WKUS has any ownership interest in or is owned by
13 WKH. The only allegations that mention WKUS claim that Illinois is the “nerve
14 center of WKUS’s business as it is the site of the corporation’s headquarters and the
15 place where the corporation’s officers direct, control and coordinate the
16 corporation’s activities.” (*Id.*) Plaintiff further alleges that “WKUS participates in
17 the management of [WKH].” (*Id.*) Based on these sparse allegations, Plaintiff
18 claims that “the allegations against WK Health apply equally to WKUS.” (*Id.* at ¶
19 238.) Yet it is clear from Plaintiff’s own allegations that WKH is the only Wolters
20 Kluwer entity that publishes the patient education monographs purportedly at issue
21 in this matter. As such, the allegations against WKUS all describe conduct
22 allegedly done by WKH. (*See, e.g. id.* at ¶¶ 239-48.)
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1 **ARGUMENT**

2 **I. Legal Standard**

3 To avoid dismissal under Rule 12(b)(6), “a complaint must contain sufficient
4 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
5 face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.*
6 *Twombly*, 550 U.S. 544, 570 (2007)). A claim “has facial plausibility when the
7 plaintiff pleads factual content that allows the Court to draw the reasonable
8 inference” – based on the Court’s “judicial experience and common sense” – that
9 “the defendant is liable for the misconduct alleged.” *Id.* Legal conclusions are not
10 entitled to a presumption of truth, and the Court should disregard conclusory
11 allegations or legal characterizations cast in the form of factual allegations. *Id.*
12 “Threadbare recitals of the elements of a cause of action, supported by mere
13 conclusory statements do not suffice.” *Id.* Thus, a plaintiff must plead facts and
14 may not rely on mere conclusory statements in order to survive a motion to dismiss.
15 *See, e.g., Brooks v. Ross*, 578 F.3d 574, 581-82 (7th Cir. 2009) (rejecting as a
16 conclusory formulaic recitation of cause of action where complaint alleged
17 defendants “knowingly, intentionally and maliciously prosecuted” plaintiff in
18 retaliation for exercising constitutional rights); *McCauley v. City of Chicago*, 671
19 F.3d 611, 616-17 (7th Cir. 2011) (rejecting conclusory allegations, which “are not
20 entitled to assumptions of truth” pursuant to *Twombly* and *Iqbal*). Instead a court
21 must “draw on its judicial experience and common sense” in making a “context
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1 specific” determination as to whether a complaint states a plausible claim for relief.
2 *Iqbal*, at 679. Rule 8(a) of the Federal Rules of Civil Procedure “does not unlock
3 the doors of discovery for a plaintiff armed with nothing more than conclusions.”
4 *Id.* at 678-79.

6 **II. Plaintiff’s Claims Against WKUS Must be Dismissed Because Plaintiff**
7 **Has Not And Cannot Allege Facts Sufficient To Show That WKUS Is A**
8 **Proper Party.**

9 The entirety of Plaintiff’s allegations against WKUS are made in two
10 conclusory statements in the Complaint: “Illinois is the nerve center WKUS’s
11 business,” and “WKUS participates in the management of WK Health.” (Ex. A,
12 FAC at ¶¶ 22, 238.) From this second allegation flows Plaintiff’s insupportable
13 conclusion that “the allegations against [WKH] apply equally to WKUS.” (*Id.* at ¶
14 238.)
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17 Yet, the FAC acknowledges that that WKH and WKUS are separate
18 corporate entities. (*Id.* at ¶ 22.) Corporations are legal entities separate and distinct
19 from their affiliates. *Main Bank of Chicago v. Baker*, 86 Ill.2d 188, 205 (1981).
20 Thus, in order for Plaintiff to show that WKUS is a proper party, she must show
21 either its actual involvement in the conduct that purportedly gives rise to Plaintiff’s
22 claim or a basis for disregarding the separate corporate existence of WKH and
23 WKUS. Here, the allegations taken as a whole plainly do not show WKUS’s
24 involvement in publishing drug information. Moreover, the bare allegations in the
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1 FAC are insufficient to support derivative liability under a corporate veil piercing
2 theory or under the so-called “direct participant” doctrine.

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4 To pierce the corporate veil and hold one affiliated entity as the alter ego of
5 another, a plaintiff must show that “the affiliate is so controlled and its affairs so
6 conducted that it is a mere instrumentality of another, and it must further appear
7 that the observance of the fiction of separate existence would, under the
8 circumstances, sanction a fraud or promote injustice.” *Id. See also, e.g., State ex*
9 *rel. Higgins v. SourceGas, LLC*, No. N11C07-193 MMJ CCLD, 2012 Del. Super.
10 LEXIS 216, *15 (Del. Super. Mar. 12, 2012) (concluding that plaintiffs failed to
11 state valid claim against parent and sister entities where the only reference to those
12 entities was contained in an introduction to the complaint outlining the corporate
13 structure of the defendants); *Onyango v. Downtown Entm’t, LLC*, No. 11-cv-8445,
14 2012 U.S. Dist. LEXIS 106504, *5-6 (N.D. Ill. July 30, 2012) (granting motion to
15 dismiss where plaintiff merely restated elements in attempt to pierce corporate veil
16 rather than offering supporting factual allegations); *First Place Bank v. Skyline*
17 *Funding, Inc.*, No. 10 CV 2044, 2011 U.S. Dist. LEXIS 22349, at *14-17 (N.D. Ill.
18 Mar. 4, 2011) (dismissing complaint alleging principal was liable for acts of
19 dissolved corporation where plaintiff failed to allege a unity of interest and
20 ownership between defendants and failed to allege facts establishing that failure to
21 pierce the corporate veil would sanction a fraud or promote injustice);
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1 Plaintiff has alleged only that WKUS “participates in the management” of
2 WKH, stopping well short of alleging facts sufficient to show that WKH is the
3 instrumentality of WKUS, or that observing their corporate separateness would
4 promote injustice or sanction a fraud. Further, the basis for even the minimal
5 allegations about WKUS “participating in the management” of WKH is entirely
6 unclear.
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9 Similarly, Plaintiff has not alleged sufficient facts to state a claim against
10 WKUS under the “direct participant” doctrine. Under this “rarely-discussed
11 exception to the usual requirements for piercing the corporate veil,” “a parent
12 corporation may be held liable for acts of subsidiaries if the alleged wrong can be
13 ‘traced to the parent through the conduit of its own personnel and management’ and
14 the parent exerted control over the subsidiary ‘in a way that surpasses the control
15 exercised as an incident of ownership.” *U.S. v. All Meat & Poultry Prods. Stored at*
16 *LaGrou Cold Storage*, 470 F. Supp. 2d 823, 833 (N.D. Ill. 2007) (quoting *Forsythe*
17 *v. Clark USA, Inc.*, 361 Ill. App. 3d 642, 836 N.E.2d 850, 854 (1st Dist. 2005)); *see*
18 *also, e.g., Boston Fish Mkt., Inc. v. EMS-USA Insulated Doors, Inc.*, No. 12 C
19 6751, 2013 U.S. Dist. LEXIS 77429, *11-12 (N.D. Ill. June 3, 2013) (even
20 assuming direct participant doctrine applied to contract claims, complaint would
21 still be dismissed because it failed to make any allegations regarding the corporate
22 relationship between the entities or the level of control one exerted over the other’s
23 procedures at issue in the litigation); *Nathan v. Morgan Stanley Renewable Dev.*

1 *Fund, LLC*, No. 11 C 2231, 2012 U.S. Dist. LEXIS 71434, *30-31 (May 22, 2012)
2 (dismissing direct participant liability claim where complaint failed to allege
3 sufficient indicia of control relating to relevant activity); *Holmes v. United Airlines,*
4 *Inc.*, No. 10 C 8085, 2012 U.S. Dist. LEXIS 8732, *19-20 (N.D. Ill. Jan. 25, 2012)
5 (same); *Sefton v. Toyota Motor Sales U.S.A., Inc.*, No. 09 C 3787, 2010 U.S. Dist.
6 LEXIS 37036, *11-12 (N.D. Ill. Apr. 14, 2010) (same); *Santora v. Starwood Hotel*
7 *& Resorts Worldwide, Inc.*, No. 05 C 6391, 2007 U.S. Dist. LEXIS 77046, *18-19
8 (N.D. Ill. Oct. 16, 2007).

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12 Here, WKUS is not the parent of WKH, and Plaintiff does not allege
13 otherwise. Moreover, Plaintiff has not alleged that WKUS directly participated in
14 any of the alleged wrongful conduct they attribute to WKH. It is beyond dispute
15 that WKH is the “Wolters Kluwer” entity that publishes the PEM information
16 purportedly at issue. As such, the “direct participant” doctrine is inapplicable here.
17
18 Plaintiff’s baseless claims against WKUS must be dismissed with prejudice.
19

20 CONCLUSION

21 For all of the foregoing reasons, and for the reasons set forth in the
22 memorandum of Wolters Kluwer Health Inc. in support of its Motion to Dismiss
23 the FAC (which memorandum is incorporated herein by reference), Defendant
24 Wolters Kluwer United States Inc. respectfully requests that this Honorable Court
25 dismiss, with prejudice, the FAC as against Wolters Kluwer United States Inc.
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Dated: March 19, 2014

Neal, Gerber & Eisenberg LLP

By: /s/ Karl R. Barnickol
Karl R. Barnickol
Tonya G. Newman
Attorney for Defendant
Wolters Kluwer United States Inc.

1 **CERTIFICATE OF SERVICE**

2
3 Karl R. Barnickol, an attorney, hereby certifies that he caused a copy of the
4 foregoing **Defendant Wolters Kluwer United States Inc.’s Memorandum in**
5 **Support of its Motion to Dismiss** to be served on:

6
7 Jacob W. Plattenberger
jplattenberger@torhoermanlaw.com
8 Kenneth Brennan
kbrennan@torhoermanlaw.com
9 Magdalena Halbowicz
mhalbowicz@torhoermanlaw.com
10 TorHoerman Law LLC
11 234 South Wabash, 7th Floor
12 Chicago, Illinois 60604
13 Counsel for Plaintiffs

14 Timothy S. Tomasik
tim@tkklawfirm.com
15 Tomasik Kotin Kasserman, LLC
16 10 South LaSalle Street, Suite 2920
17 Chicago, Illinois 60603
18 Counsel for Plaintiffs

19
20 Richard J. Leamy, Jr.
rjleamy@wmlaw.com
21 Rachel Nevarez rsnevarez@wmlaw.com
22 J. Jason Coggins
jjcoggins@wmlaw.com
23 Wiedner & McAuliffe
24 1 North Franklin Street, Suite 1900
25 Chicago, Illinois 60602
26 Counsel for H.D. Smith Wholesale Drug
27 Co. and Smith Medical Partners LLC
28

Stephanie A. Scharf
Sscharf@scharfbanks.com
George D. Sax gsax@scharfbanks.com
Jean Casserly
jcasserly@scharfbanks.com
Scharf Banks Marmor LLC
333 West Wacker Drive, Suite 450
Chicago, Illinois 60606
Counsel for Merck Sharp & Dohme
Corp.

F. Lane Heard lheard@wc.com
Eva P. Esber eesber@wc.com
M. Elaine Horn ehorn@wc.com
Williams & Connolly LLP
725 12th St. N.W.
Washington, D.C. 20005
Counsel for Merck Sharp & Dohme
Corp.

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4 March, 2014.

7 /s/ Karl R. Barnickol
8 Karl R. Barnickol

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