16-2524

United States Court of Appeals
for the
Eighth Circuit

ELAINE ROBINSON; HELEN PSARAS; REBECCA COUTURE; VANESA FORD; GEORGIA LEE HARLAN; CLAIRE A. HOLMES; TINA LOOMIS; JUANA MILES; DELORIS MITCHELL; HIMILCE NEGRON; CAROL L. QUALLS; RHONDA ROBINSON; HARRIET L. SCOTT; CHARLOTTE L. SHAW; SUSAN M. SIMCOX; LINDA C. TANGUAY; VIOLET E. WYERS; KIM DILING; REBEKAH MCDONALD; SOCORRO PEREZ; CYNTHIA WEDDLE; MARY HIGDON; YOLANDA BAKER; PRISCILLA BILLINGSLEA; YIONA BRYANT; DIANE EZELL; JANET GALLO; LADESSA LEWIS; QUYNH NGUYEN; ISABEL POWER; DENISE PROULX; SHARON WHEELEHAN; PATRICIA HERRERA; CAROL HENRIQUES; LINDA CHRISTNER; RITA PROBST; PATRICIA JOHNSON; LOIS MORTON; SHARON BOWERS; HENRIETTA EATMAN; SHARON MURDOCK; MILDRED WATLEY; DELAYNE WHARTON; PATRICIA TROTMAN; GLADYS BATES; HELEN COURTNEY; MYRTLE WHITE-ROYES; CAROL PETERSON; ELENA BARNOVICS; VICTORIA ELLEMAN; ELEFTHERIA KARAMIHALIS; LINDA L. JACKSON; GLADYS F. BRENT; MARY ROBINSON; MARTHA FARR; ELIZA TAYLOR; ROSE RUSH-GASWIRTH; ARDELL R. MARTINEZ; CAROL A. MORAN; LOU ANNE BOX; BARBARA L. KUIKAHI; ELIZABETH A. PARKS-MCDONALD; WILLIE WILLIAMS; CLARA YARBOROUGH,

Plaintiffs-Appellees,

– v. –

PFIZER, INC.,

Defendant-Appellant.

(For Continuation of Caption See Reverse Side of Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI (ST. LOUIS)

BRIEF FOR PLAINTIFFS-APPELLEES

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Amici on Behalf of Appellant(s).

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This is an appeal from an award of attorneys' fees following an improper removal to federal court. Despite the absence of complete diversity or a federal question, Defendant-Appellant Pfizer, Inc. removed Plaintiffs' personal injury action and then moved to dismiss the claims of the non-diverse plaintiffs on the theory that it could not be subject to personal jurisdiction with respect to those claims. The district court declined to address Pfizer's Rule 12(b)(2) motion prior to deciding Plaintiffs' motion for remand. The court found that the grounds for removal offered by Pfizer – fraudulent joinder and fraudulent misjoinder – were inapplicable and provided no basis for federal jurisdiction. Accordingly, the district court remanded the action and awarded attorneys' fees under 28 U.S.C. § 1447. Plaintiffs subsequently disclaimed the fee award and filed a Satisfaction of Judgment, extinguishing their right to collect the fee award. The remand order not being appealable, Pfizer appealed from the fee award.

This Court should affirm because the possibility that the district court might have chosen to hear Pfizer's motion to dismiss for lack of personal jurisdiction before hearing Plaintiffs' remand motion did not make the case removable. The Court need not reach Pfizer's personal jurisdiction argument, but even if it does, that argument should be rejected. Like Pfizer, Plaintiffs request 20 minutes for argument.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellees certify that they are all natural persons.

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INTRODUCTION

This appeal is not about the due process limitations of personal jurisdiction. It is, rather, about the limits of federal subject-matter jurisdiction and the proper balance between federal and state courts. Defendant-Appellant Pfizer, Inc. ("Pfizer") asks this Court to create, from the bench, a new basis for removal outside the removal statute written by Congress, or, in the alternative, to overlook the absence of any such basis. It also asks this Court to tackle a novel and complex question of personal jurisdiction without first ascertaining whether this case was ever properly in federal court in the first place. This Court should decline Pfizer's invitation to rewrite the removal statute and to expand the jurisdiction of the federal courts. Pfizer's personal jurisdiction argument can, and should, be heard, in the first instance, in the Missouri state court where this action was commenced.

Plaintiffs are women who are citizens of various states, including Missouri, all of whom were prescribed Lipitor, a prescription drug manufactured by Pfizer and all of whom developed diabetes, which they allege was caused by the Lipitor. (R26-35 ¶¶1, 4-66).[1] They assert state-law

[1] Plaintiffs adopt Pfizer's format for citations to Pfizer's Appendix (R.__) and Addendum (A.__). Citations to Plaintiffs' Appendix are in the form "Pltf. App.__."

personal injury claims arising from Pfizer's failure to warn that Lipitor increases the risk of diabetes in women. (R36-51). As discussed below, Pfizer sells Lipitor in Missouri and engages in extensive sales and marketing in Missouri with respect to that drug as well as in connection with its many other products

Despite the absence of complete diversity (some Plaintiffs are from the same state as Pfizer) or a federal question, Pfizer nonetheless removed. (R54-84). It then moved, pursuant to Fed. R. Civ. P. 12(b)(2), to dismiss the claims of the non-diverse plaintiffs arguing that Pfizer could not be subject to personal jurisdiction with respect to those claims. (R85-104). For reasons that remain unknown, Pfizer did not present its personal jurisdiction theory to the Missouri state court, which was fully competent and empowered to hear it.

Nor indeed did Pfizer contend, in the district court, that the existence of the Rule 12(b)(2) motion created a proper basis for removal. Instead, it argued that the court should decide the Rule 12 motion before deciding Plaintiffs' remand motion; if (but only if) the Rule 12 motion were granted, the parties would be completely diverse and the case could remain in federal court. (R57-59, 89). The improper removal would, in effect, be "cured" by the subsequent dismissal of the non-diverse parties. Pfizer thus proposed an "end-run" around this Court's jurisprudence of "fraudulent joinder," which

forbids removal of non-diverse state-law actions unless the claims against the non-diverse parties are frivolous. The non-diverse Plaintiffs' assertion of personal jurisdiction over Pfizer was not frivolous (Pfizer has never contended otherwise), but Pfizer argued that it could avoid remand despite the absence of complete diversity or fraudulent joinder, so long as it ultimately prevailed on its Rule 12(b)(2) motion. *Id*.

The district court declined to address Pfizer's Rule 12(b)(2) motion prior to deciding Plaintiffs' motion for remand. (R204). The court found that the grounds for removal that were offered by Pfizer – fraudulent joinder and fraudulent misjoinder – were inapplicable and provided no basis for federal jurisdiction and remanded the action. (R204-205). Noting more than thirty recent decisions, several involving Pfizer itself, rejecting precisely the same arguments raised by Pfizer, and finding no objectively reasonable basis for removal, the district court awarded attorneys' fees under 28 U.S.C. § 1447. (A3-9). Pfizer appeals only the fee award, as the remand order is not appealable. § 1447(d).

On this appeal, Pfizer offers a more radical argument than the one presented to the district court. Here, it claims not only that a successful Rule 12 motion would have cured any removal defect, but also that the intention to present the Rule 12 motion *actually created a proper basis for removal at the outset*. This Court need not decide the merits of this latter argument in order

to reject it. Because Pfizer never made this argument to the district court, it formed no part of the district court's decision that Pfizer's removal lacked an objectively reasonable basis. While the propriety of the fee award properly encompasses the validity of the district court's determination that there was no objectively reasonable basis for removal, Pfizer cannot use this appeal to obtain review of a removal theory never presented to the district court. Even if the Court were to reach the argument, however, it should still reject it because the Supreme Court's decision in *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), permitting a district court to decide a motion to dismiss for lack of personal jurisdiction prior to a remand motion, does not create an independent basis for removal.

Moreover, even if there had been a colorable basis for removal, *Ruhrgas* did not authorize, much less require, the district court to consider Pfizer's personal jurisdiction argument first, because that argument was complex and uncertain, while the remand motion was simple and straightforward. For these reasons, the fee award was proper and should be affirmed. The Court need not reach Pfizer's personal jurisdiction argument, but even if it does, that argument should be rejected because neither *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011) nor *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), nor *Walden v. Fiore*, 134 S. Ct. 1115 (2014), alters this Court's, or the Supreme Court's, previous specific jurisdiction jurisprudence,

pusuant to which Pfizer is subject to personal jurisdiction with respect to all the claims in this action.

JURISDICTIONAL STATEMENT

As discussed below, this Court lacks jurisdiction over this appeal, because the appeal is moot. *See* Point I.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Is Pfizer's appeal from an award of attorneys' fees moot because Plaintiffs have disclaimed the fee award, so that there is no effective relief for this Court to grant and a judgment from this Court could have no practical effect upon the parties?

Answer: This Court should hold that this appeal is moot because there is no relief this Court can grant to Pfizer.

Authorities: Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016); *Tesco Corp. v. National Oilwell Varco, L.P.*, 804 F.3d 1367 (Fed. Cir. 2015); *Clark Equipment Co. v. Lift Parts Mfg. Co. Inc.*, 972 F.2d 817 (7th Cir. 1992); U.S. Constitution, article III.

2. Was the court below permitted to address its own subject-matter jurisdiction first, remand to state court, and award attorneys' fees for an improper removal, when (a) the case was not removable under the statute because there was no basis for federal subject-matter jurisdiction; (b) there

was neither fraudulent joinder nor fraudulent misjoinder – the only removal theories presented to the district court -- that would create jurisdiction by removing a non-diverse party; and (c) Pfizer's removal was based on a novel challenge to personal jurisdiction that it could raise in the state court proceeding, that did not itself create removal jurisdiction, and that may have required jurisdictional discovery?

Answer: This Court should hold that the district court properly addressed its own subject-matter jurisdiction before addressing Pfizer's novel theory of personal jurisdiction, and properly awarded attorneys' fees for Pfizer's improper removal.

Authorities: *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999); *In re Prempro Prod. Liab. Litig.*, 591 F.3d 613 (8th Cir. 2010); 28 U.S.C. § 1332; U.S. Constitution, article III; 28 U.S.C. § 1441; 28 U.S.C. § 1447.

If the Court nonetheless finds that the answer to Question 2 is negative, then a third issue would be presented, which the Court need not reach if it answers Question 2 in the affirmative:

3. May courts in Missouri exercise personal jurisdiction over the Lipitor-injury claims of non-resident plaintiffs either (a) because Pfizer consented to such jurisdiction when it appointed an agent for service of

process in Missouri; or (b) under this Court's five-part test for the exercise of personal jurisdiction; or (c) through the exercise of pendent personal jurisdiction?

Answer: Assuming it reaches the issue, this Court should hold that courts in Missouri may properly exercise personal jurisdiction over Pfizer with respect to the claims of all the Plaintiffs.

Authorities: *Burnham v. Superior Court of Cal., County of Marin*, 495 U.S. 604 (1990); *Downing v. Goldman Phipps, PLLC*, 764 F.3d 906 (8th Cir. 2014), *cert. denied*, 135 S. Ct. 1464 (2015); *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199 (8th Cir. 1990).

SUMMARY OF THE ARGUMENT

This Appeal Is Moot

This appeal is moot because no party has a monetary interest in the outcome. Plaintiffs have no legal right to collect attorneys' fees, so that a decision of this Court can have no possible effect on Pfizer's obligations (or anyone else's). Reputational injury arising from a fee award is not sufficient, standing alone, to maintain a live controversy. Even if it were, Pfizer has suffered no reputational injury here, because (a) the fee award neither required nor implied any finding of misconduct; (b) the district court made

no such finding; and (c) only Pfizer, not its attorneys, was required to pay the award.

The District Court Properly Assessed Attorneys' Fees

The district court properly assessed attorneys' fees for Pfizer's improper removal to federal court. (A11-14; R222-25). On its face, the case was not removable, because complete diversity was lacking. Moreover, statutory and case law narrowly restrict exceptions to the general rule that federal jurisdiction must exist on the face of the complaint and at the time of removal in order for the case to be removable. The possibility that a federal court may choose to address personal jurisdiction before subject-matter jurisdiction does not mean that a challenge to personal jurisdiction creates an independent basis for removal. The Supreme Court cautioned against just such improper removals in *Ruhrgas*. *See* 526 U.S. at 587

Although fraudulent joinder is recognized as an exception to the strict construction of the removal statute, it is inapplicable here. Fraudulent joinder requires that the claim involving the non-diverse party be frivolous. Courts have stated that the claim must lack any reasonable basis in fact or law and be so insubstantial, implausible, foreclosed by prior decisions of the Supreme Court, or otherwise completely devoid of merit as not to involve a federal controversy. Pfizer's personal jurisdiction argument was novel and

complex, and the contrary position was not frivolous or devoid of merit. In this circumstance, there could be no fraudulent joinder.

Some courts have recognized a second exception to the removal rules, in the form of fraudulent misjoinder. Fraudulent misjoinder requires that the claims of the allegedly misjoined parties bear no relation to the claims of the remaining parties. Only when the misjoinder is egregious, moreover, will it support removal based on fraudulent misjoinder. Pfizer's argument that the non-diverse Plaintiffs were fraudulently misjoined was foreclosed by this Court's decision in *Prempro*, where the Court held that plaintiffs who used different hormone-replacement therapy drugs manufactured by different defendants could join their claims and sue the separate defendants in a single action. 591 F. 3d at 623-24. Here, the plaintiffs all used the same drug manufactured by the same defendant and all suffered the same injury. If the claims in *Prempro* were not fraudulently misjoined, the claims here could not be.

Even if there had been a colorable basis for removal, the district was neither empowered nor required to address Pfizer's Rule 12(b)(2) motion before considering the motion to remand. Under *Ruhrgas*, a district court may consider a rule 12(b)(2) motion ahead of assessing federal subject-matter jurisdiction only when the former question is "straightforward" and the "alleged defect in subject-matter jurisdiction raises a difficult and novel

question." 526 U.S. at 576. Neither of these things was true here: the personal jurisdiction question was novel and difficult – and may have required jurisdictional discovery to resolve – whereas the subject-matter question was straightforward because existing precedents of this Court controlled and resolved the issue. And even if the district court was permitted to consider Pfizer's personal jurisdiction argument first, it was not *required* to do so. In order to reverse the fee award here, this Court would have to find that it was an abuse of discretion for the district court to address its own subject-matter jurisdiction before tackling personal jurisdiction. The Supreme Court holdings in *Steel Co.*, 523 U.S. at 89-92, and *Ruhrgas*, 526 U.S. at 576, foreclose that result. Nor was the question of personal jurisdiction was intertwined with the subject-matter jurisdiction question, so that the court had to consider one in order to resolve the other. This is so because, as noted above, the fraudulent joinder inquiry looks only at whether the assertion of personal jurisdiction is frivolous and completely devoid of merit. The district court could easily conclude – as it did – that the assertion of personal jurisdiction was not frivolous, without going on to resolve whether it was also correct.

Pfizer Is Subject to Personal Jurisdiction on the Claims of All Plaintiffs

Were the Court to reach the issue of personal jurisdiction, it should find that jurisdiction is proper. First, as was the case in *Knowlton*, 900 F.2d

1196, jurisdiction is proper here because Pfizer consented to personal jurisdiction in Missouri with respect to all claims. Nothing in recent Supreme Court jurisprudence can be read to undermine the holding of *Knowlton* and the traditional analysis of jurisdiction by consent. This is particularly true because, in *Burnham*, 495 U.S. 604, the Supreme Court held that its "minimum contacts" jurisprudence was not intended to, and did not, undermine traditional bases of jurisdiction that existed prior to the evolution of that jurisprudence.

Second, jurisdiction is proper here under this Court's traditional five-factor test, which analyzes the quantity and quality of the defendant's contacts and the degree of relatedness between the claims and those contacts. Even if the claims of the out-of-state plaintiffs did not arise directly from Pfizer's contacts with Missouri, they were sufficiently related to those contacts so that assertion of jurisdiction with respect to those claims is not unfair. Neither *Goodyear*, nor *Daimler*, nor *Walden* addresses specific jurisdiction and none can be read to have undermined or altered this Court's specific jurisdiction jurisprudence. Finally, the Court may exercise pendent personal jurisdiction with respect to the additional claims.

STANDARD OF REVIEW

This Court reviews a determination whether to award attorneys' fees under 28 U.S.C. § 1447(c) for an abuse of discretion. *Convent Corp. v. City of*

N. Little Rock, Ark., 784 F.3d 479, 483 (8th Cir. 2015). In assessing the district court's exercise of discretion, the court "the court must consider the objective merits of removal at the time of removal . . . ." *Id.* A fee award under § 1447(c) is overturned "only if it is based on clearly erroneous findings of fact or erroneous determinations of law." *Dahl v. Rosenfeld*, 316 F.3d 1074, 1077 (9th Cir. 2003).

ARGUMENT

I. THIS APPEAL SHOULD BE DISMISSED AS MOOT

This Court should dismiss this appeal as moot.[2] This Court has repeatedly recognized that, under article III of the Constitution, federal courts lack power to decide moot cases. *See, e.g., Americans United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 421 (8th Cir. 2007)

The test for mootness is a practical one: a case becomes moot "when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016).

[2] Plaintiffs have moved separately to dismiss this appeal as moot. On July 19, 2016, this Court ordered that "the motion [to dismiss as moot] will be taken with the case for consideration by the panel to which the case is submitted for disposition on the merits." *See* Dkt. No. 4427700. The motion is fully briefed. Plaintiffs respectfully refer this Court to the arguments set forth in that briefing, and provide here only a summary.

Here, Pfizer's appeal is moot because neither this Court nor any other can grant Pfizer any effective relief and the appeal can have no practical effect. If Pfizer were to prevail on its appeal, it would obtain nothing: it does not owe Plaintiffs anything now and so cannot be relieved of an obligation it does not have.

Pfizer concedes that there is no monetary injury at stake, but argues that, because a fee award under § 1447(c) has sometimes been referred to as a "sanction," Pfizer has suffered a reputational injury that is still capable of being redressed. As described below, this argument should be rejected.

A. Reputational Injury Is Insufficient to Prevent Mootness

This Court has not recognized reputational injury, standing alone, as a basis for appeal, and the majority of circuits that have considered the question have rejected the argument that such injury is sufficient to prevent a case from becoming moot. The First, Sixth, Seventh, Ninth, and Federal Circuits have all found the reputational injury of an attorney, standing alone, insufficient to support jurisdiction. *See Tesco Corp. v. National Oilwell Varco, L.P.*, 804 F.3d 1367 (Fed. Cir. 2015); *In re Metropolitan Government of Nashville and Davidson Co. TN*, 606 F.3d 855 (6th Cir. 2010); *In re Williams*, 156 F.3d 86, 87 (1st Cir. 1998); *Clark Equipment Co. v. Lift Parts Mfg. Co. Inc.*, 972 F.2d 817 (7th Cir. 1992); *Riverhead Savings Bank v. National Mortgage Equity Corp.*, 893 F.2d 1109, 1112 (9th Cir. 1990). The Eleventh Circuit similarly has found that

an underlying settlement moots an appeal from a sanctions award. *See Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1199–1200 (11th Cir. 1985).

Pfizer relies on two cases for its claim that reputational injury, standing alone, is sufficient injury to meet the "case or controversy" requirement, but, as set forth in Plaintiffs' motion to dismiss this appeal, neither case supports its position.

B. No Reputational Injury Exists Here Because the District Court Made No Finding of Attorney Misconduct

While a minority of Circuits have held that reputational injury to a lawyer from a sanctions order is sufficient to support appellate jurisdiction, those cases all involve findings of attorney misconduct. *See Walker v. City of Mesquite, Tex.*, 129 F.3d 831 (5th Cir. 1997); *Grider v. Keystone Health Plan Central, Inc.*, 580 F.3d 119 (3d Cir. 2009); *Butler v. Biocore Medical Technologies, Inc.*, 348 F.3d 1163 (10th Cir. 2003); *Agee v. Paramount Communications, Inc.*, 114 F.3d 395 (2d Cir. 1997). Indeed, in *Butler*, the Tenth Circuit expressly limited its holding, explaining, "We also wish to make clear that only orders finding misconduct are appealable and not every negative comment or observation from a judge's pen about an attorney's conduct or performance. . . ." 348 F.3d at 1168.

Pfizer goes to great lengths to show that courts have used the word "sanction" when referring to § 1447(c), but the issue is not whether a fee

award has ever in any context been described as a sanction, but rather, even assuming this Court were to adopt the minority, and not the majority, rule with respect to reputational injury, whether this particular fee award injured the reputation of anyone such that vindication of a reputational interest is still at issue on this appeal. It did not. The district court did not admonish or reprimand Pfizer or its lawyers, or suggest that they had behaved improperly. And while the district court did find that Pfizer's removal lacked an "objectively reasonable basis," the court also found, in determining the amount of Plaintiffs' fee award, that "not all of the hours expended [by plaintiff's counsel] were reasonable." (A9, 11, 13). Although both statements might fairly be read as criticisms, neither rises to the level of casting aspersions on anyone's professionalism or reputation. These statements are precisely the kind of "negative comment[s] or observation[s] from a judge's pen" that the Tenth Circuit found did not support appellate jurisdiction. *See Butler*, 348 F.3d at 1168.

Moreover, even if the court's fee award could be read to cast negative light, it does not give rise to an appealable reputational injury because the award was imposed on Pfizer, not on its attorneys. Pfizer simply cannot explain how a ruling that it removed a case to federal court without an

"objectively reasonable basis" could possibly impair its reputation as a pharmaceutical company.[3]

II. THE DISTRICT COURT PROPERLY ASSESSED ATTORNEYS' FEES BECAUSE THERE WAS NO OBJECTIVELY REASONABLE BASIS FOR REMOVAL FROM THE MISSOURI STATE COURT

The remand statute provides: "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C.A. § 1447(c). "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). Here, Pfizer lacked an objectively reasonable basis for its removal, and the district court properly exercised its discretion to assess fees.

A. There Was No Basis for Removal Because Complete Diversity Was Lacking

The district court did not abuse its discretion when it assessed attorneys' fees from Pfizer because it correctly found that the case was not

[3] Plaintiffs' motion to dismiss was timely because, as this Court has recognized, changed circumstances may render a case moot when it was not moot at the outset. *See, e.g., Ali v. Cangemi*, 419 F.3d 722, 723 (8th Cir. 2005); *Lebanon Chem. Corp. v. United Farmers Plant Food, Inc.*, 179 F.3d 1095, 1099 (8th Cir. 1999); *see also Already*, 133 S. Ct. at 727. Plaintiffs moved to dismiss the appeal six days after it became moot.

removable under 28 U.S.C. § 1441. There was no basis for federal jurisdiction: Plaintiffs' claims all arise under state law, and complete diversity among the parties was lacking because at least one of the Plaintiffs was from the same state as Pfizer. *See* 28 U.S.C. § 1332 (requiring complete diversity). "As federal courts are courts of limited jurisdiction, it is to be presumed that a cause lies outside this limited jurisdiction, and *the burden of establishing the contrary rests upon the party asserting jurisdiction*." *Dakota, Minnesota & Eastern R.R. Corp. v. Schieffer*, 715 F.3d 712, 712 (8th Cir. 2013) (emphasis added).

Pfizer's removal, in the teeth of more than 30 decisions from the very same district remanding cases with the same factual and procedural posture, lacked any reasonable basis.[4] Under these circumstances, the district court did not abuse its discretion when it assessed attorneys' fees.

Pfizer makes three arguments why its removal was proper, but none is correct.

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[4] The judge who remanded this case and assessed the fee award had herself remanded three of the other cases removed by Pfizer in the three years preceding the removal here. *See* (A8-9), *citing Davood v. Pfizer Inc.*, No. 4:14-CV-970 (CEJ), 2014 WL 2589198 (E.D. Mo. June 10, 2014); *Lovett v. Pfizer Inc.*, No. 4:14-CV-458 (CEJ), 2014 WL 1255956 (E.D. Mo. Mar. 26, 2014); *S.L. v. Pfizer, Inc.*, No. 4:12-CV-420 (CEJ), *slip op.*, (E.D. Mo. Apr. 29, 2013) (unreported). (Unreported decisions are provided in Plaintiffs' Addendum.)

1. Ruhrgas *Provides No Basis for Removal*

Pfizer contends that this case was properly removed under *Ruhrgas*, but that cannot be so, because *Ruhrgas* creates no removal jurisdiction. Even if it did, it would provide no ground for reversal here because, although Pfizer argues in this Court that *Ruhrgas* authorized its removal to federal court, it never made that argument below. *See* (R54-84, 140-55). In the district court, Pfizer argued only that removal was proper because of fraudulent joinder and misjoinder. (R60-81) (identifying as grounds for removal only fraudulent joinder and misjoinder); (R140-55) (same). Although it did contend that, under *Ruhrgas*, the court could and should decide its Rule 12(b)(2) motion before Plaintiffs' motion to remand, it did not claim that *Ruhrgas* created a separate ground for removal. The distinction is significant: Pfizer argued in the district court only that, under *Ruhrgas*, its improper removal could be cured by a dismissal, under Rule 12(b)(2), of non-diverse parties, whereas in this Court, Pfizer argues that the removal was proper to begin with because of the potential for dismissal of the non-diverse parties under Rule 12(b)(2).

It is true that, as Pfizer contends, review of an award of attorneys' fees on remand brings up for review the underlying question whether the district court was correct in holding that the removal lacked an objectively reasonable basis. But review of the propriety of the fee award can only

include review of the grounds for removal *that were presented to the district court.* *See* 28 U.S.C. § 1446(a) (requiring defendant to state grounds for removal).

Even if the "*Ruhrgas* removal" theory had been presented, Pfizer's argument should still be rejected. "For a party to remove a case to federal court based on diversity jurisdiction, the parties must be diverse both *when the plaintiff initiates the action in state court and when the defendant files the notice of removal in federal court*." *Reece v. Bank of N.Y. Mellon*, 760 F.3d 771, 777 (8th Cir. 2014) (emphasis added).[5] Here, of course, the parties were not diverse at the time of commencement or removal; Pfizer argues, instead, that they would have become diverse at a later date. But other than in the very narrow circumstance discussed below, *see* Point II-A-2, where dismissal of a non-diverse party is inevitable because the non-diverse claim is frivolous, *see Knudson v. Sys. Painters, Inc.*, 634 F.3d 968, 976 (8th Cir. 2011), that is insufficient. The law does not permit a defendant to decide its own Rule 12(b)(2) motion and remove on the basis of the presumed outcome. As this Court has held, "the nature of federal removal jurisdiction—restricting as it

[5] As discussed below, 28 U.S.C. § 1446 provides an exception to the requirement of diversity at the time of commencement, although, of course, where that section is invoked, the parties will be diverse at the time of removal.

does the power of the states to resolve controversies in their own courts—requires strict construction of the legislation permitting removal." *Nichols v. Harbor Venture, Inc.*, 284 F.3d 857, 861 (8th Cir. 2002); *accord Int'l Ass'n of Entrepreneurs of Am. v. Angoff*, 58 F.3d 1266, 1270 (8th Cir. 1995).

The Supreme Court decision in *Ruhrgas* itself also precludes Pfizer's theory of "*Ruhrgas* removal." In *Ruhrgas*, the Supreme Court held that, under certain circumstances, a federal court may consider a challenge to personal jurisdiction before assessing its own subject-matter jurisdiction. 526 U.S. at 576. In so holding, however, the Supreme Court made clear that this was so only in cases where there is a legitimate independent basis for federal subject-matter jurisdiction separate and apart from the personal jurisdiction question. *Id.* at 587.[6]

The Fifth Circuit had foreseen the possibility of "opportunistic" removal in its own *Ruhrgas* opinion, concerned that a forum-shopping defendant might "manufacture a convoluted theory of federal subject-matter jurisdiction, remove to federal court, and then take advantage of a

[6] In *Ruhrgas*, the removing defendant offered three bases for removal. Each presented complex issues, including questions of foreign law, foreign sovereignty, and the proper construction of an international gas-sales agreement. *Id.* at 581 n.5. All three grounds were recognized bases for removal, and the fact that each presented such complex issues ensured that the removal was at least colorable.

stricter interpretation of personal-jurisdiction requirements in federal court, to have the case dismissed rather than remanded." *Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211, 219 (5th Cir. 1998), *rev'd sub nom. Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999). In reversing the Fifth Circuit, the Supreme Court did not minimize this concern, but explained that the remedy for this problem already existed:

> Th[e] specter of unwarranted removal, we have recently observed, rests on an assumption we do not indulge —that district courts generally will not comprehend, or will balk at applying, the rules on removal Congress has prescribed. The well-advised defendant will foresee the likely outcome of an unwarranted removal—a swift and nonreviewable remand order . . . attended by the displeasure of a district court whose authority has been improperly invoked.

526 U.S. at 587.

Thus, *Ruhrgas's* holding that a district court may sometimes consider a Rule (b)(2) motion before deciding a remand motion does not create removal jurisdiction; it merely provides flexibility in the order in which the court may take up the issues of personal and subject-matter jurisdiction, when both questions are legitimately presented. Had there been a colorable basis for removable here, *Ruhrgas* might have empowered the court to consider Pfizer's Rule 12(b)(2) motion before a challenge to that removal (although as discussed below, that is not the case), but *Ruhrgas* cannot authorize a removal that has no independent basis in the removal statute.

This is especially true because the statutory removal scheme provides a means for defendants to raise issues like Pfizer's personal jurisdiction defense without trampling on the proper balance of federal and state jurisdiction. As already noted, Pfizer could have raised its personal jurisdiction defense in the state court where the action was filed. That court was empowered and indeed required to consider Pfizer's due process arguments; indeed, state courts are "entitled to have their own interpretation of state and federal law, which would be reviewable only by the state courts and ultimately by the Supreme Court," *see Ruhrgas*, 145 F.3d at 219 (a point not disputed by the Supreme Court when it reversed the Fifth Circuit's holding.) Moreover, and significantly, had Pfizer been successful in state court in its motion to dismiss the non-diverse Plaintiffs, the case would *then* have become removable under 28 U.S.C. § 1446, which provides:

> [I]f the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or *has become* removable.

(emphasis added.) Thus, Congress specifically provided for the situation here, where a case is not removable as originally filed, but through developments in the state court subsequently becomes removable; it

provided for removal jurisdiction only *after* the case becomes removable, not in anticipation of the possibility that might occur.

2. The Non-Resident Plaintiffs Are Not Fraudulently Joined

Pfizer also claims its removal was proper because the out-of-state Plaintiffs were fraudulently joined. But this is clearly not so.

"Fraudulent joinder occurs when a plaintiff files a frivolous or illegitimate claim against a non-diverse defendant solely to prevent removal." *Prempro*, 591 F.3d at 620. Pfizer asks this Court to extend the fraudulent joinder analysis in two ways. First, it argues that fraudulent joinder should be applied to a non-diverse plaintiff as well as a non-diverse defendant; second, it argues that fraudulent joinder should be extended to include claims that fail for a lack of personal jurisdiction. *See* Pfizer Br. at 40-41. Given the precedents cited above regarding strict construction of the removal statute, expansion of any exception to the requirement of federal jurisdiction on the face of the complaint should be viewed with suspicion. This Court need not, however, address either of Pfizer's proposed extensions of the fraudulent joinder exception to the restrictions on removal. For *even if* fraudulent joinder applies to a non-diverse plaintiff, and *even if* fraudulent

joinder may be premised on a lack of personal jurisdiction, there was no fraudulent joinder in this case.[7]

This is so because fraudulent joinder does not occur whenever a plaintiff's claim against a non-diverse defendant ultimately fails. *See Steel Co.*, 523 U.S. at 89. Fraudulent joinder requires that the claim be *frivolous*. Indeed, in an analogous context, the Supreme Court has explained that

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[7] This Court should not extend the fraudulent joinder exception to consider issues of personal jurisdiction in any event. As discussed below, *Steel Co.* and *Ruhrgas* set forth the circumstances under which a district court may consider the question of personal jurisdiction before establishing its own subject-matter jurisdiction; that is the framework this Court should apply. Pfizer relies on four district court cases for its contention that fraudulent joinder can be premised on a purported lack of personal jurisdiction, and so result in a consideration of personal jurisdiction before subject-matter jurisdiction, but three of the four were decided prior to both *Steel Co.* and *Ruhrgas*. *See Villar v. Crowley Mar. Corp.*, 780 F. Supp. 1467 (S.D. Tex. 1992), *aff'd*, 990 F.2d 1489 (5th Cir. 1993); *Martino v. Viacao Aerea Riograndense, S.A.*, 1991 WL 13886, at *2 (E.D. La. Jan. 25, 1991) (unpublished); *Nolan v. Boeing Co.*, 736 F. Supp. 120, 122 (E.D. La. 1990), *cited by* Pfizer Br. at 41 n.13. To the extent that these cases provide a different framework for considering personal jurisdiction before subject-matter jurisdiction from that set forth in *Steel Co.* and *Ruhrgas*, they are no longer good law. The remaining case, a district court opinion, disposes of the question of which issue to consider first in a single sentence, without consideration of whether the factors set out in *Ruhrgas* are satisfied. *See Thomas v. Mitsubishi Motor N. Am., Inc.*, 436 F. Supp. 2d 1250, 1251 (M.D. Ala. 2006). Moreover, it does not appear that the *Thomas* court focused on the difference between the standard applicable to the question of fraudulent joinder – whether the assertion of jurisdiction is frivolous – and that applicable on a Rule 12 motion. *Thomas* is neither authoritative nor well-reasoned, and it conflicts with precedents from the Supreme Court.

"[d]ismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Steel Co.*, 523 U.S. at 89, *citing Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666 (1974).

Thus, this Court has held, "[w]hen determining if a party has been fraudulently joined, a court considers whether there is *any reasonable basis in fact or law* to support a claim against a nondiverse defendant." *Prempro*, 591 F.3d at 620 (emphasis added), *citing Wilkinson*, 478 F.3d at 964; *see also Knudson v. Sys. Painters, Inc.*, 634 F.3d 968, 980 (8th Cir. 2011), *quoting Filla v. Norfolk S. Ry. Co.*, 336 F.3d 806, 810 (8th Cir. 2003)). Only "if it is *clear* under governing state law that the complaint does not state a cause of action against the non-diverse defendant, the joinder is fraudulent." *Knudson*, 634 F.3d at 980 (emphasis in original). Conversely, "joinder is not fraudulent where there is arguably a reasonable basis for predicting that the state law might impose liability based upon the facts involved.'" *Id.*, *quoting Filla*, 336 F.3d at 811. Thus, in opposing remand on the basis of fraudulent joinder, "we require the defendant to *do more than merely prove that the plaintiff's claim should be dismissed pursuant to a Rule 12(b)(6) motion*." *Knudson*, 634 F.3d at 979-980 (emphasis added).

Moreover, on a motion to remand, "[t]he defendant bears the burden of establishing federal jurisdiction by a preponderance of the evidence." *Prempro*, 591 F.3d at 620, *citing Altimore v. Mount Mercy College*, 420 F.3d 763, 768 (8th Cir. 2005). A district court is "required to resolve all doubts about federal jurisdiction in favor of remand." *Wilkinson v. Shackelford*, 478 F.3d 957, 963 (8th Cir. 2007), *citing Transit Cas. Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619, 625 (8th Cir. 1997). Thus, in order to prevail on its theory of fraudulent joinder, Pfizer had to show not only that it would ultimately prevail on its argument that it is not subject to personal jurisdiction in Missouri with respect to the non-diverse claims, but also that the argument to the contrary is frivolous and that there is no reasonable basis to predict that any Missouri court would assert such jurisdiction. And any doubt in this showing is resolved in favor of remand. *Wilkinson*, 478 F.3d at 963.

As discussed below, the Missouri courts have personal jurisdiction here *either* because Pfizer consented to such jurisdiction *or* because its activities in Missouri are sufficient to confer jurisdiction over the entire action *or* because courts may assert pendent personal jurisdiction with respect to additional claims. *See below* Point III. Regardless of the outcome on any of these issues, Pfizer cannot show that any of these arguments is frivolous or that none provides a reasonable basis to predict that state courts

might impose liability on Pfizer on the facts of these cases, as required by *Prempro* and *Wilkinson*. Indeed, the federal district court presiding over the Lipitor multi-district litigation – the court that would have decided Pfizer's remand motion had the case been transferred before the district court remanded it – recently found, on precisely the same facts presented here, that the state of the law on the issue of consent jurisdiction precluded a finding that there was "no possibility" that personal jurisdiction would exist in Missouri state court. *See In re Lipitor (Atorvastatin Calcium) Marketing, Sales Practices, and Products Liability Litigation*, 14-mn-02502, *slip op.* at 8 (D.S.C. October 26, 2016) (unpublished decision). It thus remanded multi-plaintiff claims just like this one, which will now proceed in state courts in Missouri and Illinois.

3. The Theory of Fraudulent Misjoinder Is Inapplicable Here

Pfizer also contends that diversity jurisdiction exists in this case based on the theory of fraudulent misjoinder. This Court has not determined whether to adopt the theory of fraudulent misjoinder, but need not reach the issue in this case because, as was true in *Prempro*, there is no fraudulent misjoinder here. Indeed, *Prempro* is dispositive of the question of fraudulent misjoinder in this case.

As this Court has explained, fraudulent misjoinder

> occurs when a plaintiff sues a diverse defendant in state court and joins a viable claim involving a nondiverse party, or a resident defendant, even though the plaintiff has no reasonable procedural basis to join them in one action because the claims bear no relation to each other.

Prempro, 591 F.3d at 620. In applying the doctrine of fraudulent misjoinder, the party seeking to establish federal jurisdiction has the burden of proof and must show that the nondiverse party has been "egregiously misjoined." *Id.* at 623 & n.7. Indeed, this Court specifically held in *Prempro* that mere misjoinder of a non-diverse party was insufficient to create federal jurisdiction upon removal; the misjoinder, if there is one, must be egregious and "grossly improper." *Id.* at 623-24.

Rule 20 of the Federal Rules of Civil Procedure governs the proper joinder of parties. It allows multiple plaintiffs to join in a single action if (1) they assert claims "with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (2) any question of law or fact common to all plaintiffs will arise in the action." Fed. R. Civ. P. 20. As this Court has held:

> [A]ll "logically related" events entitling a person to institute a legal action against another generally are regarded as comprising a transaction or occurrence. The analogous interpretation of the terms as used in Rule 20 would permit all reasonably related claims for relief by or against different parties to be tried in a single proceeding. *Absolute identity of all events is unnecessary*.

Prempro, 591 F.3d at 622 (emphasis added).

Here, there is no question that joinder of diverse and non-diverse plaintiffs in this action does not constitute "egregious misjoinder" under this test. Each of the plaintiffs in this action alleges that she took Pfizer's branded drug, Lipitor. Each plaintiff alleges that, as a result of taking that drug, she developed diabetes. Each plaintiff alleges that Pfizer failed properly to warn of the dangers of Lipitor and specifically of the danger of an increased risk of diabetes in women who take Lipitor. Each plaintiff alleges that Pfizer also mispresented the benefits of Lipitor specifically in women. (R45-47 ¶¶117-126). Issues of fact common to all plaintiffs include: (1) whether Lipitor increases the risk of diabetes in women and, if so, by how much; (2) whether Pfizer knew that Lipitor increases the risk of diabetes in women when it marketed the drug; (3) whether Pfizer failed adequately to warn of the increased risk of diabetes in the Lipitor label and in its nationwide marketing campaign; (4) whether Lipitor has been shown to be effective in preventing heart attacks and strokes in women; and (5) whether, in its nationwide marketing campaign, Pfizer mispresented the benefits of Lipitor for women. (R36-51).

Given these common allegations and common factual questions, it is clear that the claims of all of the Plaintiffs are "logically related" even though Plaintiffs filled their Lipitor prescriptions in different states. Indeed, and

significantly, in transferring cases filed in federal courts around the country asserting precisely the same claims as those asserted here, the Judicial Panel on Multi-District Litigation stated, "*we find that these actions involve common questions of fact,* and that centralization will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation." *In re: Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prod. Liab. Litig. (No. II)*, 997 F. Supp. 2d 1354, 1356 (U.S. Jud. Pan. Mult. Lit. 2014). The Panel further elaborated that "[t]hese actions share factual issues arising from common allegations that taking Lipitor can cause women to develop type 2 diabetes." *Id.* at 1357.

Nor is there any doubt that the claims of the plaintiffs in this case arise from the same series of transactions or occurrences; indeed, this Court's decision in *Prempro* forecloses any other conclusion. In *Prempro*, plaintiffs who used different hormone replacement therapy ("HRT") products manufactured by different defendants joined their claims against the various defendants in a single action. All of the products were HRT drugs and all were alleged to have caused breast cancer in plaintiffs or plaintiffs' deceased next-of-kin. 591 F.3d at 616-17. Given the combination of plaintiffs and defendants, complete diversity was lacking. Defendants removed and the district court denied plaintiffs' remand motions. This Court reversed, finding no subject-matter jurisdiction, given the lack of complete diversity.

This Court considered defendants' argument that the non-diverse parties were procedurally misjoined, but found it unnecessary to decide whether to recognize that doctrine. *Prempro*, 591 F.3d at 622. This was so because, the Court found, even if it were to adopt the doctrine of fraudulent misjoinder, the parties were not so egregiously misjoined as to constitute fraudulent misjoinder, given the relationship among the claims. *Id.* at 623. If claims against *different* manufacturers involving *different* products but the same injury arise from the same "series of transactions," as was the case in *Prempro*, then *a fortiori*, claims against the *same* manufacturer involving the *same* product, and the same injury also arise from the same series of transactions.[8] With both requirements of Rule 20 satisfied, Plaintiffs' claims

[8] That Rule 20 permits the joinder of claims of different plaintiffs against the same manufacturer involving the same product can also be seen by examination of the Class Action Fairness Act ("CAFA"), codified at 28 U.S.C. § 1332. In CAFA, Congress vested federal courts with jurisdiction over "mass actions," even in the absence of complete diversity. *Id.* "Mass actions" are defined as actions "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact . . . " *Id.* If the claims could not procedurally be joined together, the question of jurisdiction over an action so joining them could never arise. Thus, to find that Plaintiffs' claims here could not procedurally be joined under Rule 20, this Court would have to assume that the "mass action" section of CAFA has no possible purpose or effect. Plaintiffs further note that, had Congress wanted to vest federal jurisdiction in multi-plaintiff cases involving fewer than 100 persons, it could have done so. Pfizer seeks to accomplish here what Congress declined to do

are not procedurally misjoined. Moreover, even if the joinder is questionable, any misjoinder is not sufficiently egregious so as to constitute fraudulent misjoinder.[9]

Nor does the injection of Pfizer's challenge to personal jurisdiction into the equation convert this into a case of fraudulent misjoinder. Fraudulent misjoinder is a specific doctrine focused on a specific issue: whether claims have been joined together "even though the plaintiff has no reasonable procedural basis to join them in one action *because the claims bear no relation to each other*." *Prempro*, 591 F.3d at 620 (emphasis added). The question of personal jurisdiction has nothing to do with whether plaintiffs had a "reasonable *procedural* basis" or to join their claims, much less whether the claims bear any relation to each other. If plaintiffs' claims are not fraudulently joined because of Pfizer's argument about personal jurisdiction, they certainly are not procedurally *misjoined* on that basis, since

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in CAFA – to bring all multi-state, multi-plaintiff personal injury cases into the federal court system.

[9] The Missouri Court of Appeals recently held, under similar facts, that claims of in-state and out-of-state plaintiffs against a single defendant alleging injuries arising from the same drug were properly joined under Missouri's joinder rule, which is essentially the same as Rule 20. *See Barron v. Abbott Laboratories, Inc.*, No. ED103508, *slip op.* at 4-8 (Mo. Ct. App. Nov. 8, 2016) (unreported), Add. 26-30.

the personal jurisdiction argument has nothing whatsoever to do with any of the elements of fraudulent misjoinder.[10]

B. The District Court Was Not Required to Consider Pfizer's Personal Jurisdiction Argument Before Addressing Its Own Subject-Matter Jurisdiction

As discussed above, *Ruhrgas* does not provide an independent basis for removal. Even assuming there was a proper basis for removal, moreover, *Ruhrgas* did not permit the district court to address Pfizer's personal jurisdiction argument before assessing the court's subject matter jurisdiction and, even if the court were permitted to do so, nothing in *Ruhrgas* can be read to *require* it. Because the court was permitted to address subject-matter jurisdiction first, indeed in this case required to do so, and because it properly found that the case should be remanded, it was empowered, under § 1447, to award attorneys' fees.

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[10] Pfizer mingles into its fraudulent misjoinder argument a quite different point altogether: that the existence of its personal jurisdiction argument provided an objectively reasonable basis for its removal. *See* Pfizer Br. at 46. Plaintiffs' note, however, that because Pfizer's personal jurisdiction argument has nothing whatsoever to do with the doctrine of fraudulent misjoinder, it cannot have given Pfizer a good faith basis to remove on that ground.

1. *Under* Steel Co. *and* Ruhrgas, *the District Court Was Required to Determine Its Own Subject-Matter Jurisdiction Before Addressing Any Other Issue*

As discussed above, the subject-matter jurisdiction of the federal court is limited by the Constitution. *See* U.S. Constitution, article III. Moreover, in *Steel Co.*, the Supreme Court held, "[t]he requirement that jurisdiction be established *as a threshold matter* springs from the nature and limits of the judicial power of the United States and is *inflexible and without exception*." 523 U.S. at 94-95 (Scalia, J) (emphasis added). Thus, the Court explained, "Article III jurisdiction is always an antecedent question." *Id.* at 101.

Although *Ruhrgas* created a narrow exception to this principle, it also reaffirmed the basic holding of *Steel Co*, reiterating that "[c]ustomarily, a federal court first resolves doubts about its jurisdiction over the subject matter. . . ." *Ruhrgas*, 526 U.S. at 578. Indeed, the *Ruhrgas* Court further held that where "subject-matter jurisdiction will involve no arduous inquiry . . . . both expedition and sensitivity to state courts' coequal stature should impel the federal court to dispose of that issue first." *Id.* at 587-88. Nonetheless, the Court held:

> Where, as here, however, a district court has before it a straightforward personal jurisdiction issue presenting no complex question of state law, and the alleged defect in subject-matter jurisdiction raises a difficult and novel question, the court does not abuse its discretion by turning directly to personal jurisdiction

Ruhrgas, 526 U.S. at 588.

While *Ruhrgas* permits a federal court to decide the personal jurisdiction question before the subject-matter jurisdiction question when both questions are properly presented and the latter is the simpler inquiry, that exception to the rule of *Steel Co.* is not applicable here. This is so because, in this case, the subject-matter jurisdiction question was by far the simpler inquiry. As the district court noted below, the issue had been decided against Pfizer itself in at least eight other recent cases. (R14). Moreover, the court noted, "[i]n at least *twenty-five other cases*, this Court has remanded for lack of subject matter jurisdiction when other defendants have attempted to remove matters to federal court asserting substantially similar arguments." (R14-15) (emphasis added). The district court noted no authority pointing the other way. Indeed, as the district court noted, Rule 20 of the Federal Rules of Civil Procedure and this Court's decision in *Prempro*, 591 F.3d at 619, essentially preclude a contrary result.

Pfizer's personal jurisdiction argument, by contrast, is complex and, according to Pfizer, presents a novel theory of specific jurisdiction. *See* below Point III. The issue is further complicated because one of the grounds that Plaintiffs assert for personal jurisdiction in this case is consent, based on Pfizer's appointment of a registered agent for service of process in Missouri. As the MDL court presiding over the Lipitor cases in the federal system

recently noted, federal courts in Missouri are split on the question of the continuing vitality of this theory; *see In re Lipitor*, slip op. at 7-8; Plaintiffs are aware of at least seven decisions in the Eastern District of Missouri, split four-to-three on the resolution of this question.[11] This split of authority contrasts with the unanimity of opinion on the subject matter jurisdiction question presented to the district court.[12] The same is even more true with

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[11] *Compare Mitchell v. Eli Lilly & Co.*, 159 F. Supp. 3d 967, 979 (E.D. Mo. 2016) (finding consent jurisdiction); *Chalkey v. Smithkline Beecham Corp.*, No. 4:15 CV 1838 DDN, 2016 WL 705134, at *2 (E.D. Mo. Feb. 23, 2016) (same); *Regal Beloit Am., Inc. v. Broad Ocean Motor LLC*, No. 4:16-CV-00111-JCH, 2016 WL 3549624, at *5 (E.D. Mo. June 30, 2016) (same); *Trout v. SmithKline Beecham Corp.*, No. 4:15 CV 1842 CDP, 2016 WL 427960, at *1 (E.D. Mo. Feb. 4, 2016) (same) *with Addelson v. Sanofi*, No. 4:16-CV-01277-ERW, 2016 WL 6216124, at *1 (E.D. Mo. Oct. 25, 2016); *Beard v. SmithKline Beecham Corp.*, No. 4:15-CV-1833 RLW, 2016 WL 1746113, at *2 (E.D. Mo. May 3, 2016) (finding no consent jurisdiction); *Keeley v. Pfizer Inc.*, No. 4:15CV00583 ERW, 2015 WL 3999488, at *4 (E.D. Mo. July 1, 2015) (same). (In an eighth case, *Neeley v. Wyeth LLC*, No. 4:11-CV-00325-JAR, 2015 WL 1456984 (E.D. Mo. Mar. 30, 2015), the court found the issue of consent jurisdiction was not timely raised and therefore did not address it). As discussed below, *see* Point III, Plaintiffs submit that *Mitchell* and the cases that have followed it are the better reasoned decisions.

[12] Several months after the district court's decision in this case, one judge in the Eastern District of Missouri accepted a defendant's invitation to consider personal jurisdiction before subject-matter jurisdiction and dismissed the claims of non-diverse plaintiffs before addressing the question of remand. *Addelson*, 2016 WL 6216124. *Addelson* does not make Pfizer's removal any more objectively reasonable, not only because the case had not yet been decided when Pfizer removed this case, *see Convent Corp.*, 784 F.3d at 483 (reviewing court "must consider the objective merits of removal at the time of removal"), but also because the court in *Addelson* never considered whether the removal was proper, but rather allowed the defendant there to

respect to Plaintiffs' assertion of contacts-based, specific jurisdiction, as Pfizer's discussion of this question, as well as Plaintiffs', *see* below, Point III, show. On this issue, Pfizer contends that recent precedents from the Supreme Court have changed decades of existing jurisprudence, which according to Pfizer, must now be revisited. Moreover, because Pfizer's argument depends on the extent of its contacts with Missouri overall, and its Lipitor-related contacts in particular, jurisdictional discovery, which Plaintiffs requested below, may be necessary to resolve the issue. *See* below at Point III. The personal jurisdiction question thus raises issues that are complex and uncertain, while the subject-matter presents a simple question with a wealth of precedent. In this circumstance, *Ruhrgas* does not warrant the consideration of personal jurisdiction before subject-matter jurisdiction.

2. Even if the District Court Was Permitted to Address Personal Jurisdiction First, It Was Not Required to Do So

Even if the district court was permitted to address personal jurisdiction first, it was not required to do so. Nothing in *Ruhrgas* can be read to *require* a district court to address any issue, including personal jurisdiction, before ascertaining its own subject-matter jurisdiction. Rather, *Ruhrgas* holds only that, under certain circumstances (not present here, as

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"cure" the improper removal with its Rule 12(b)(2) motion. For the reasons discussed above, this was contrary to *Ruhrgas* and erroneous.

already explained), a district court "does not abuse its discretion by turning directly to personal jurisdiction." 526 U.S. at 588. In order to reach Pfizer's jurisdictional question, this Court would have to find that the district court abused its discretion in addressing subject-matter jurisdiction first. *Steel Co.* and *Ruhrgas* foreclose that conclusion.[13]

III. PFIZER IS SUBJECT TO PERSONAL JURISDICTION IN MISSOURI WITH RESPECT TO THE CLAIMS ASSERTED IN THE COMPLAINT

Pfizer offers a novel constitutional argument concerning personal jurisdiction, based on recent decisions of the Supreme Court in *Goodyear, Daimler*, and *Walden*. As discussed below, none of these cases compels the conclusion that the claims of any of the plaintiffs to this litigation should be dismissed for lack of personal jurisdiction, but this Court need not reach Pfizer's theory in order to find that Pfizer is subject to jurisdiction here. Rather, assuming the Court reaches the issue of personal jurisdiction at all (which, for the reasons described above, it should not), the Court should hold that the Missouri courts have jurisdiction over Pfizer with respect to the claims of all Plaintiffs because: (a) Pfizer consented to that jurisdiction when it appointed a registered agent for service of process; (b) Pfizer has sufficient

[13] Nor, as discussed above, did resolution of the Pfizer's fraudulent joinder and fraudulent misjoinder arguments require the court to address the merits of its personal jurisdiction argument. *See* above, Point II-A-2, II-A-3.

contacts with Missouri, and the claims of all Plaintiffs are sufficiently related to those contacts, to support the assertion of jurisdiction under this Court's five-part test; and (c) Pfizer is subject to pendent personal jurisdiction.

A. Pfizer Consented to Personal Jurisdiction

A party may consent to jurisdiction, thus waiving any due process objection it might otherwise have. *See, e.g., J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011), *citing Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982); *Burnham*, 495 U.S. 604. Here, Pfizer consented to jurisdiction in Missouri by registering an agent for service of process in the state.

The Supreme Court has long recognized that a defendant's designation of an agent to accept service in a state and registration to do business therein establishes personal jurisdiction by consent in the courts of that state. *Neirbo Co. v. Bethlehem Shipbuilding*, 308 U.S. 165, 170, 174, 175 (1939) (a corporation consents to be sued in the courts of a state by complying with the state law for designating an agent to accept service); *accord Ex parte Schollenberger*, 96 U.S. 369 (1877); *see also Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co.*, 243 U.S. 93 (1917). Thus, "[o]ne of the most solidly established ways of giving such consent is to designate an agent for service of process within the State." *Knowlton*, 900 F.2d at 1199. Indeed, in *Pennoyer v. Neff*, 95 U.S. 714, 735 (1877), the Supreme Court, while otherwise limiting

the scope of extraterritorial jurisdiction, specifically stated that its holding was not intended to undermine such jurisdiction.

This consent is effective whether or not the cause of action arises out of activities within the State. *Ytuarte v. Gruner + Jahr Printing & Pub. Co.*, 935 F.2d 971, 973 (8th Cir. 1991) ("appointment of an agent for service of process under [chapter 303] gives consent to the jurisdiction of Minnesota courts for any cause of action, whether or not arising out of activities within the state"), *quoting Knowlton*, 900 F.2d at 1200; *citing Neirbo*, 308 U.S. at 170, 174; *Schollenberger*, 96 U.S. at 376-77; *see also Sondergard v. Miles, Inc.*, 985 F.2d 1389, 1397 (8th Cir. 1993) ("appointment of an agent for service of process in South Dakota subjects the corporation to general jurisdiction, we conclude that there is no due process objection to South Dakota's exercise of jurisdiction in this case"); *Ocepeck v. Corp. Transpt., Inc.*, 950 F.2d 556 (8th Cir. 1991) (designation under Motor Carrier Act constituted consent to jurisdiction in Missouri in a case arising from out-of-state accident). The statute at issue here is similar to that found to confer general jurisdiction in *Knowlton*. *See Mitchell*, 159 F.Supp.3d at 978.

Pfizer may argue in its reply brief that consent to general jurisdiction does not survive *Goodyear* and *Daimler*, but this argument should be

rejected.[14] *Goodyear* addresses only the question when a defendant's contacts with a forum will be deemed to subject it to general jurisdiction; it simply does not address the question of *consent* to general jurisdiction. In this respect, the decision of the Supreme Court in *Burnham* is instructive if not indeed controlling.

In *Burnham*, the Supreme Court held that a state may exercise personal jurisdiction for any cause of action over a defendant who is physically present in the state at the time of service. 495 U.S. 604. In so holding, the Supreme Court rejected the argument that, under *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), a "nonresident defendant can be subjected to judgment only as to matters that arise out of or relate to his contacts with the forum." *Burnham*, 495 U.S. at 616. The Court explained:

> Nothing in *International Shoe* or the cases that have followed it, however, offers support for the . . . proposition petitioner seeks to establish today: that a defendant's presence in the forum is not only unnecessary to validate novel, nontraditional assertions of jurisdiction, but is itself no longer sufficient to establish jurisdiction. That proposition is unfaithful to both elementary logic and the foundations of our due process jurisprudence. The distinction between what is needed to support novel procedures and what is needed to sustain traditional ones is fundamental. . . .

[14] The word "consent" appears nowhere in Pfizer's brief, despite the fact that Plaintiffs argued below – and in numerous other cases -- that Pfizer had consented to jurisdiction.

Burnham, 495 U.S. at 619.

Jurisdiction founded on consent, like jurisdiction founded on physical presence, was a traditional procedure. *See, e.g., Schollenberger*, 96 U.S. at 378 ("a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented."); *Pennoyer*, 95 U.S. at 733, 735 (in order to determine the "personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, *or his voluntary appearance*") (emphasis added); *Louisville, C. & C.R. Co. v. Letson*, 43 U.S. 497, 530 (1844) ("want of jurisdiction of the party only . . . may be removed by the consent"); *Logan v. Patrick*, 9 U.S. 288, 289 (1809) (where defendant could have objected to service of process by which court obtained jurisdiction over him, but didn't, "there could be no doubt of the jurisdiction of the court below."). This Court has specifically recognized this to be so, stating that "consent is a traditional basis for establishing personal jurisdiction." *Ocepeck*, 950 F.2d at 557; *accord Knowlton*, 900 F.2d at 1199.

Moreover, *International Shoe* itself turns on the facts, as recited in the opinion, that defendant "had no agent within the state upon whom service could be made"; that service was made on the defendant within the state by personal service on a salesman (not on an agent designated to receive service); and that the authority of the salesmen was limited and "[n]o salesman has authority to enter into contracts or to make collections." 326

U.S. at 314. It was the absence of an *express* consent to be served in the forum state that led the Court to assess the degree of activity within the state necessary to support jurisdiction, under what might be described as a theory of an implied consent. *See id.* at 318, *citing Smolik v. Philadelphia & Reading Coal & Iron Co.*, 222 F. 148, 151 (S.D.N.Y. 1915) (distinguishing the limitations on implied consent required in the interest of justice, from the scope of an express consent, as reflected in a statute defining the scope of service that could be made on a registered agent for service of process).

Following *International Shoe*, of course, "the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction." *Daimler*, 134 S.Ct. at 754, *quoting Shaffer v. Heitner*, 433 U.S. 186, 197 (1977). But *Goodyear* and *Daimler* are elaborations upon and interpretations of, the contacts-based personal jurisdiction created by *International Shoe*. Indeed, in *Daimler*, the Supreme Court explained the limits of general jurisdiction where a "foreign corporation . . . has not consented to suit in the forum." 134 S.Ct. at 756. Neither *Daimler* nor *Goodyear* has anything to say about jurisdiction where the defendant *has* consented to suit in the forum.

Just as the Supreme Court found that modern concepts of contacts-based jurisdiction did not do away with traditional presence-based

jurisdiction, *see Burnham*, 495 U.S. at 619, so, too, no expansion or contraction of the scope of contacts-based jurisdiction affects the existence of consent-based jurisdiction, which predated both *International Shoe* and is not altered by its progeny. Indeed, it should be self-evident that a defendant who has consented to jurisdiction cannot complain of a lack of due process when that jurisdiction is asserted.[15] This is especially true here because, for more than twenty-five years, since *Knowlton* was decided, it has been clear – if it was not before – that a registered agent under a statute similar to Missouri's constituted consent to general personal jurisdiction. Thus, Pfizer cannot maintain that it did not know what it was consenting to, at the time it registered its agent, or continued the agent's registration, for service of process in Missouri.[16]

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[15] The Missouri Supreme Court has specifically held that service on a registered agent in Missouri is sufficient to confer jurisdiction, rejecting the argument that Missouri's long-arm statute, and the attendant due process test for minimum contacts, is the exclusive means of obtaining jurisdiction over a foreign corporation. *See State ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d 165, 167 (Mo. *banc* 1999).

[16] As discussed above, federal judges within the Eastern District of Missouri have been divided over whether this kind of consent jurisdiction survives *Goodyear, Daimler*, and *Walden*. In *Mitchell*, the district court carefully considered this argument, and rejected the proposition that either *Goodyear, Daimler* or *Walden* had "*sub silentio* reverse[d] *Knowlton*." 159 F.Supp.3d at 977. The court examined all three decisions for their discussions of the role of consent jurisdiction, and found that none showed an intention on the part of the Supreme Court to address or alter existing jurisprudence on

Pfizer suggests that the continuing vitality of consent jurisdiction, as applied to the appointment of an agent for service of process, would undermine the purpose of the holdings in *Goodyear* and *Daimler*. It would be a mistake, however, to suppose that the Supreme Court was making policy, rather than construing the due process clause of the Constitution, when it decided *Goodyear, Daimler*, and *Walden*. Nor, indeed, do any of these cases purport to address consent jurisdiction in any way.

B. Pfizer is Subject to Specific Personal Jurisdiction with Respect to the Claims of All the Plaintiffs

Pfizer is also subject to specific personal jurisdiction in Missouri with regard to the claims of both in-state and out-of-state Plaintiffs based on Pfizer's contacts with Missouri.[17] "Due process requires 'minimum contacts'

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jurisdiction obtained by consent. *Id.* Other cases have adopted *Mitchell's* reasoning. *See, e.g., Chalkey*, 2016 WL 705134, *4; *Regal Beloit*, 2016 WL 3549624, *5. By contrast, the district court decisions that found consent jurisdiction overruled by *Goodyear* or *Daimler* are less well-reasoned, failing to examine closely the actual language used by the Supreme Court or to identify any portion of those opinions that would undermine *Knowlton*, *see Addelson*, 2016 WL 6216124, *4; *Beard*, 2016 WL 1746113, *2; *Keeley*, 2015 WL 3999488, *4 n.2. Although none of these decisions are binding on this Court, Plaintiffs submit that *Mitchell* is soundly reasoned and that this Court should adopt that court's reasoning as its own.

[17] On a Rule 12(b)(2) motion, Plaintiffs need only make a *prima facie* case for personal jurisdiction. *See Downing*, 764 F.3d at 911. Moreover, where "the district court does not hold a hearing and instead relies on pleadings and affidavits, the court must look at the facts in the light most favorable to the

between a nonresident defendant and the forum state, such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Steinbuch v. Cutler*, 518 F.3d 580, 585–86 (8th Cir. 2008), *quoting World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980). "The minimum contact inquiry focuses on whether the defendant purposely availed itself of the privilege of conducting activities within the forum state and thereby invoked the benefits and protections of its laws." *Steinbuch*, 518 F.3d at 586.

Pfizer argues that its contacts with Missouri are insufficient to meet the requirements of due process with respect to the out-of-state Plaintiffs, conceding (as it must) that its contacts are sufficient to support personal jurisdiction with respect to the claims asserted by Missouri residents.[18] Pfizer contends that its contacts are insufficient to support a finding of general jurisdiction under *Goodyear* and *Daimler*, and insufficiently related to the claims of the out-of-state plaintiffs to support a finding of specific jurisdiction for those claims under *Goodyear* and *Walden*. Pfizer is wrong

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nonmoving party, and resolve all factual conflicts in favor of that party." *Pangaea, Inc. v. Flying Burrito LLC*, 647 F.3d 741, 745 (8th Cir. 2011).

[18] Pfizer was served with process within Missouri, not pursuant to a "long-arm" statute. Thus, the only question is whether that service of process comports with the due process clause of the Constitution, and that is the only issue Pfizer raises.

because under this Court's "minimum contacts" jurisprudence, specific jurisdiction is appropriate and *Goodyear, Daimler*, and *Walden* have not altered that analysis.

Pfizer contends that jurisdiction must be assessed separately for each plaintiff and each claim. As discussed below, that is not so, *see* Point III-C, but even if it were, it would be of no help to Pfizer here, because Missouri courts may properly exercise personal jurisdiction over Pfizer with respect to the claims of the out-of-state plaintiffs, separate and apart from their joinder in the same lawsuit with in-state plaintiffs.

1. Pfizer Is Subject to Jurisdiction Under This Court's Five-Factor Test

In assessing whether an exercise of specific personal jurisdiction comports with due process, this Court uses a five-factor test, looking at:

> (1) the nature and quality of the defendant's contacts with the forum state; (2) the quantity of such contacts; (3) the relation of the cause of action to the contacts; (4) the interests of the forum state in providing a forum for its residents; and (5) the convenience of the parties.

Downing, 764 F.3d at 912; *Steinbuch,* 518 F.3d at 586. This test, like other multi-factored tests, is not a rigid test; it involves a weighing of each factor. *See Pangaea, Inc. v. Flying Burrito LLC,* 647 F.3d 741, 746 n. 4 (8th Cir. 2011) (noting the test should not be "mechanically applied"). The first three, often assessed together because they are intertwined, hold more significance than

the last two, which are considered to be secondary and are not dispositive. *See Downing*, 764 F.3d at 912; *Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, S.A.*, 51 F.3d 1383, 1388 (8th Cir. 1995). Importantly, the test involves an examination of the totality of the circumstances. *Myers v. Casino Queen, Inc.*, 689 F.3d 904, 911 (8th Cir. 2012); *Precision Const. Co. v. J.A. Slattery Co., Inc.*, 765 F.2d 114, 118 (8th Cir.1985). "[T]he constitutional touchstone remains whether the defendant purposefully" availed itself of the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985).

In this case, the five factors weigh in favor of exercise of personal jurisdiction over Pfizer with respect to the claims of all Plaintiffs. Pfizer has multiple, extensive contacts with Missouri. It sells millions of dollars of drugs there every year. It has widespread marketing operations in Missouri, as well as research, manufacturing, and distribution centers there. *See* Pltf. App. AA2-26. Nor is Pfizer correct that these contacts are unrelated to the claims of the out-of-state Plaintiffs. Pfizer's activities in Missouri include extensive marketing and promotion of Lipitor; the claims of all of the Plaintiffs arise from Pfizer's marketing and promotion of Lipitor. (R21 ¶¶ 3, 68-70) Whether this connection – that all claims in this case arise from Pfizer's promotion and sale of Lipitor, and that Pfizer's activities in Missouri included the promotion and sale of Lipitor – is sufficient to comport with the

requirements of due process depends on the extent and quality of Pfizer's contacts, as well as on the remaining factors in the five-factor test.

The secondary factors also weigh in in favor of Missouri courts exercising personal jurisdiction over Pfizer. Pfizer has "purposefully availed itself of the protections" of Missouri law in connection with its promotion of Lipitor. *See Burlington Indus., Inc. v. Maples Indus., Inc.*, 97 F.3d 1100, 1103 (8th Cir. 1996). In this context, Missouri has an interest in providing a forum for its residents for claims arising from injuries caused by that drug. *Steinbuch*, 518 F.3d at 586. And any inconvenience to Pfizer of the Missouri forum is outweighed by the efficiency and convenience of combining in one forum numerous cases alleging the same injury from the same product. *See Hargrave v. Oki Nursery*, 646 F.2d 716, 720–21 (2d Cir. 1980); *ESAB Group v. Centricut, Inc.*, 126 F.3d 617, 628 (4th Cir. 1997) (exercising personal jurisdiction over related state law counts joined with RICO count, noting "judicial economy and convenience of the parties is best facilitated by a consideration of all legal theories arising from a single set of operative facts") (internal quotation omitted).[19] Moreover, "[a] plaintiff normally is entitled to select the forum in which it will litigate." *Northrup King*, 51 F.3d at 1389.

[19] This is all the more true because at least three of the cases previously remanded by the Eastern District were also multi-plaintiff actions involving Lipitor and diabetes. *See Davood*, 2014 WL 2589198, *1; *Lovett*, 2014 WL

Pfizer ignores this Court's five-factor test, seeking to substitute a single-factor, mechanical and inflexible test using only the third of the five factors, the relationship of the cause of action to the contacts. Pfizer compounds this error by assuming, without basis, that the claims of the out-of-state Plaintiffs are entirely unrelated to Pfizer's contacts in Missouri. Assuming what needs to be decided, Pfizer readily concludes that if the only criterion is relatedness and if, by hypothesis the claim is unrelated, there is no jurisdiction.

In truth, the required analysis is more nuanced – the Court must assess the extent and quality of the contacts and the degree of relatedness, and consider these factors in relation to each other, in order to determine whether due process is satisfied. *Downing*, 746 at 911-12. Indeed, as the Supreme Court reiterated in *Nicastro,* "contact with and activity directed at a sovereign may justify specific jurisdiction in a suit *arising out of or related to* the defendant's contacts with the forum." 564 U.S. at 881 (emphasis added). This formulation makes clear that the test for specific jurisdiction is broader than the rigid version of "arising under" proposed by Pfizer and

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1255956, *1; *Jackson v. Pfizer Inc.*, No. 4:13-CV-1915, *slip op.* (RWS) (E.D. Mo. Oct. 15, 2013) (unreported). Thus, regardless of the outcome of Plaintiffs' remand motion in this case, Pfizer would have been defending Lipitor diabetes cases in Missouri state court.

encompasses not merely claims that arise directly from the forum activities, but also those that "relate to" that activity. Moreover, this Court's five-factor test makes clear that the related prong itself is both flexible and inter-related with the other factors to be considered.

Finally, Plaintiffs note that, in the district court, they sought jurisdictional discovery to further ascertain the extent of Pfizer's Lipitor-related contacts with Missouri. (R162-63). This Court should not find that Pfizer's contacts are insufficient to support personal jurisdiction with respect to the out-of-state plaintiffs without permitting Plaintiffs an opportunity to take such discovery.

2. Goodyear, Daimler, *and* Walden *Do Not Require a Different Result*

Pfizer contends that *Goodyear, Daimler*, and *Walden* have worked a sea change in the analysis of the contacts necessary to support specific jurisdiction, but that is not so. Both *Goodyear* and *Daimler* are cases about *general* jurisdiction and neither has anything to say about specific jurisdiction. *Walden* does address specific jurisdiction, but the issue there was whether jurisdiction may be predicated on a defendant's conduct with residents of the forum that occurred entirely outside the forum. 134 S. Ct. at 1122-23. It has no applicability here.

In *Goodyear*, the Supreme Court found isolated instances of a defendant's product reaching the forum state were an insufficiently "continuous and systematic" connection to justify the exercise of general Because the plaintiff did not argue that the court below had specific jurisdiction, the Supreme Court had no occasion to delve into the question. *Daimler* has even less to say about specific jurisdiction. Again, the only form of jurisdiction plaintiffs contended was available in *Daimler* was general jurisdiction: plaintiffs were twenty-two Argentinian residents seeking redress in California against a German company for human rights violations alleged to have occurred in Argentina. 134 S. Ct. at 750-51. The Supreme Court discussed specific jurisdiction in its *Daimler* opinion only to point out how well-developed that jurisprudence is, compared to the then-existing more limited jurisprudence of general jurisdiction. *See id.* at 754-56. Nothing in either *Goodyear* or *Daimler* suggests any intention on the part of the Supreme Court to alter or limit existing specific jurisdiction jurisprudence, and Pfizer, while assuming there has been such a change, does not identify a single sentence in either case that would justify its assumption. Indeed, it appears this Court agrees, for it has applied the five-factor test both before and after *Goodyear* and *Daimler*, and appropriately so. *See Downing*, 764 F.3d at 912 (applying five-factor test of *Steinbuch* in post-*Daimler* case).

It is true that, in *Goodyear*, the Court noted that there was no specific personal jurisdiction and that the tire in question in the lawsuit was not among the few that had found their way, in the stream of commerce, to the forum state. *See* 564 U.S. at 519. But it would be a gross and improper over-reading of *Goodyear* to suppose that in that passing reference to the particular facts of *Goodyear*, the Supreme Court intended to upend decades of specific jurisdiction jurisprudence. That conclusion is especially untenable in light of the Supreme Court's treatment of specific jurisdiction three years later in the *Daimler* opinion, in which the Court endorsed and re-affirmed its existing case law on that subject. 134 U.S. at 754-56.

In any case, the facts of *Goodyear* were extreme, and shed no light on the proper analysis of this case. *See* 564 U.S. at 921-22. They illustrate the extreme situation described in *International Shoe*, where the Court explained that "single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there." 326 U.S. at 317.

As described above, however, this case does not involve "single or isolated items of activities," but rather systematic and continuous activity in Missouri specifically with respect to the product at issue in these cases. Moreover, nothing in *International Shoe* nor in *Goodyear* purports to provide a single, one-size-fits-all definition for when a lawsuit is sufficiently

"connected" to the activities in the forum. That is the function of this Court's flexible, multi-factor test. Under that test, as shown above, Missouri courts may exercise personal jurisdiction over the claims of the out-of-state Plaintiffs in this case. Nothing in *Goodyear, Daimler*, or *Walden* requires a different result.[20]

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[20] Pfizer expends substantial ink on its contention that the decision of the California Supreme Court reaching this same conclusion is erroneous, but its arguments are unpersuasive. *See* Pfizer Br. at 34-35, *citing Bristol-Myers Squibb Co. v. Superior Ct.*, 377 P.3d 874 (Cal. 2016). Pfizer focuses on what it claims are the likely sweeping consequences of the *Bristol-Myers* opinion, but fails to identify any defect in the court's reasoning. In *Bristol-Myers*, the California Supreme Court applied its "'substantial connection' test," which "is satisfied if 'there is a substantial nexus or connection between the defendant's forum activities and the plaintiff's claim." 377 P.3d at 885. Under this test, the court noted,

> the intensity of forum contacts and the connection of the claim to those contacts are inversely related. . . .The more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim. Thus, a claim need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction.

Id. In this way, the California test is quite similar to the first three prongs of this Court's five-factor test. Moreover, because the basis of *Bristol-Myers* was the continuing viability of existing specific jurisdiction jurisprudence, *see* 377 P.3d at 799, Pfizer's "parade of horribles" is especially unconvincing.

C. Pfizer Is Subject to Pendent Personal Jurisdiction

Pfizer is wrong, in any event, in its contention that the claims of the out-of-state Plaintiffs must satisfy the requirements for personal jurisdiction on their own. Rather, contrary to Pfizer's argument, courts in Missouri may assert pendent personal jurisdiction because the claims of the out-of-state plaintiffs are sufficiently related to the claims of the in-state plaintiffs with which they are properly joined and as to which Pfizer concedes it is subject to jurisdiction. As noted, the claims of all the Plaintiffs allege the same injury arising from the same product; all Plaintiffs allege their injuries were caused by the same conduct by the Defendant in its nationwide marketing and promotion.

In *Shaffer*, the Supreme Court held that "the relationship among the defendant, the forum, and the *litigation*" is "the central concern of the inquiry into personal jurisdiction." 433 U.S. at 204 (emphasis added). Thus, it is not each *plaintiff's* individual causes of action that must be analyzed, rather it is the litigation as a whole. *See also Goodyear*, 564 U.S. at 924 (specific or case-related jurisdiction is permitted only where "a *suit* arises out of or relates to the defendant's contacts with the forum") (emphasis added); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 nn.8 & 9 (1984) (specific jurisdiction confers "personal jurisdiction over a defendant in a *suit* arising out of or related to the defendant's contacts with the forum") (emphasis

added); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (holding "[i]t is sufficient for purposes of due process that the *suit* was based on a contract which has a substantial connection with [the forum] state.") (emphasis added); *Burger King*, 471 U.S. at 472 (stating that the "'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum . . . and the *litigation* results from alleged injuries that 'arise out of or relate to' those activities.") (emphasis added). In none of these cases did the Supreme Court speak of "plaintiffs" or "claims."

Moreover, although this Court has not addressed the question, other Circuits have found pendent personal jurisdiction to be proper. *See Robinson Eng'g Co. Pension Plan & Trust v. George*, 223 F.3d 445, 449 (7th Cir. 2000); *ESAB Group v. Centricut, Inc.*, 126 F.3d 617, 628 (4th Cir. 1997); *Hargrave v. Oki Nursery, Inc.*, 646 F.2d 716, 719 (2d Cir. 1980); *Oetiker v. Jurid Werke, G.m.b.H.*, 556 F.2d 1, 4–5 (D.C. Cir. 1977); *Robinson v. Penn Cent. Co.*, 484 F.2d 553, 554–55 (3d Cir. 1973).[21] That these cases predate *Goodyear* and *Daimler* is irrelevant, because, as discussed above, neither *Goodyear* nor *Daimler*

[21] As the Third Circuit has noted, where the claims as to which jurisdiction is extended are not those of the original plaintiff, jurisdiction is more properly referred to as "ancillary," rather than "pendent." *Ambromovage v. United Mine Workers of Am.*, 726 F.2d 972, 989 n.48 (3d Cir. 1984).

addresses specific personal jurisdiction, and certainly neither has anything to say about pendent personal jurisdiction.[22]

Pfizer renames pendent personal jurisdiction with the catchy phrase "jurisdiction by joinder" and categorically states that it does not exist. It relies on one case from the Fifth Circuit and one from the First, *see Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266 (5th Cir. 2006); *Phillips Exeter Acad. v. Howard Phillips Fund*, 196 F.3d 284 (1st Cir. 1999), along with several district court decisions. But neither *Seiferth* nor *Phillips Exeter* addresses the question before this Court and neither offers persuasive reasoning for Pfizer's position.

Pfizer claims that *Walden* supports is contention that the contacts for each plaintiff must be assessed separately, but that is not so. In *Walden*, the court found that contacts with Nevada-resident *plaintiffs* were insufficient support jurisdiction where all of those contacts occurred outside Nevada. 134 S. Ct. at 1119-23. The Court held that the contacts with the forum itself, not merely with other parties from the forum, are required. *Id.* Pfizer

[22] Nor is it relevant that courts have more frequently applied the doctrine of pendent personal jurisdiction to the statutory, rather than the constitutional, component of personal jurisdiction. The requirement that the claims arise from a "common nucleus of operative facts" ensures that if personal jurisdiction with respect to one claim is proper, it will not be unfair to subject the defendant to jurisdiction with respect to the other.

attempts to analogize *Walden* to this case, suggesting that Pfizer's contacts with the Missouri Plaintiffs cannot be considered in connection with the claims of the out-of-state Plaintiffs. But *Pfizer's contacts with the Missouri plaintiffs occurred in Missouri*. Those contacts are not merely contacts with another party, as Pfizer would have it, and as was the case in *Walden*, but rather, contacts *with the forum itself*. Nothing in *Walden* precludes extending jurisdiction supported by those contacts to include other, related claims.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's award of attorneys' fees.

November 8, 2016 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 13,901 words excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), as counted by the word-counting feature of Microsoft Word 2013.

/s/ Andrea Bierstein
Andrea Bierstein

CERTIFICATE OF SERVICE FOR ELECTRONIC FILING

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on November 8, 2016. All participants in the appeal are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Andrea Bierstein
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