Case No. 16-2524

United States Court of Appeals for the Eighth Circuit

ELAINE ROBINSON, et al.,*

Plaintiffs-Appellees,

-versus-

PFIZER INC.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Missouri (Jackson, J.)
Case No. 4:16-cv-00439-CEJ

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This is an appeal from a sanctions award, issued under 28 U.S.C. § 1447(c), against Defendant-Appellant Pfizer Inc. for removing a multi-plaintiff pharmaceutical products liability action to the Eastern District of Missouri. Pfizer based removal on the Supreme Court's watershed decisions in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011), and *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), which held that general personal jurisdiction exists only where a defendant is "at home"—for a corporation, typically its principal place of business and state of incorporation. Following district court decisions from across the country, Pfizer asked the court here to dismiss claims by non-resident Plaintiffs for lack of personal jurisdiction under *Goodyear* and *Daimler* and to retain jurisdiction over claims by resident Plaintiffs.

The district court refused. In a footnote, it found personal jurisdiction over claims by the non-resident Plaintiffs based on a novel theory of "jurisdiction by joinder": that because personal jurisdiction exists as to claims by a few Missouri Plaintiffs, it exists as to claims of *all* Plaintiffs by virtue of their joinder in a single action. In addition, relying upon Eastern District of Missouri decisions rejecting removal in similar cases, the district court ruled that Pfizer's removal was not "objectively reasonable" and imposed sanctions. Pfizer appeals those sanctions.

While the district court's remand order is not appealable, its removal sanctions are, and this Court may review the merits of the remand in reviewing the sanctions. The district court's sanctions cannot be upheld because "jurisdiction by joinder" is contrary to due process and the grounds for removal it rejected as not "objectively reasonable" were legally correct. Pfizer requests 20 minutes for argument.

CORPORATE DISCLOSURE STATEMENT

Defendant-Appellant Pfizer Inc. states that it has no parent corporation and that there is no publicly held corporation that owns 10% or more of its stock.

/s/ Mark S. Cheffo
Mark S. Cheffo

Counsel for Defendant-Appellant Pfizer Inc.

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INTRODUCTION

This appeal raises important issues concerning the intersection of federal subject matter jurisdiction and due process limits on personal jurisdiction under the Supreme Court's landmark decisions in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011), and *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

Plaintiffs are 64 unrelated women from 29 different states who filed a single Complaint alleging that each developed diabetes as a result of using Pfizer's prescription medication Lipitor. The Complaint is typical of the multi-plaintiff tort actions routinely filed in Missouri state court for the City of St. Louis, which have been filed on behalf of more than 5,000 plaintiffs in the last ten years alone.[1] These actions, which are typically filed against defendants that are neither incorporated nor headquartered in Missouri, are designed to frustrate the complete-diversity requirement of 28 U.S.C. § 1332 and thus to prevent removal to federal court. While the vast majority of the plaintiffs in these actions are diverse from the defendants, they are invariably joined with a few unrelated plaintiffs who are not. Likewise, although the vast majority of the plaintiffs are not from Missouri, they are joined with a few local plaintiffs who ostensibly establish proper venue in Missouri.

Historically, the non-resident plaintiffs in these actions have proceeded in Missouri courts on a theory of general personal jurisdiction—that the defendant may be sued even for claims that do not arise in the forum because it was doing business in the forum and its activities there were "continuous and systematic." But the

[1] For examples of such actions removed to the Eastern District of Missouri in the last ten years, see the Exhibit attached to Pfizer's Addendum at page A15.

Supreme Court's recent decisions in *Goodyear* and *Daimler* foreclose this theory. In these opinions, the Supreme Court ruled that a defendant is subject to general jurisdiction *only* where it is "at home," which in all but exceptional cases for a corporation is its state of incorporation and principal place of business. Thus, under *Goodyear* and *Daimler*, due process prohibits general personal jurisdiction over a non-resident defendant. Nor can non-resident plaintiffs in these cases establish specific jurisdiction—that is, jurisdiction based on the case itself—because their claims do not arise from the defendant's contacts with the forum.

This lack of personal jurisdiction has important implications for subject matter jurisdiction, and thus also for removal to federal court. Following *Goodyear* and *Daimler*, district courts around the country have permitted removal of cases like this one by dismissing the non-resident plaintiffs for lack of personal jurisdiction and exercising subject matter jurisdiction over the resident plaintiffs, who are completely diverse from the non-resident defendants. Based on these and other authorities, Pfizer removed this case to the Eastern District of Missouri.

In this case, however, the district court (Jackson, J.) not only remanded this action to state court, but also held that Pfizer's grounds for removal were not "objectively reasonable," and therefore warranted sanctions under 28 U.S.C. § 1447(c). Without addressing *Goodyear* or *Daimler*, the district court held in a footnote that it had specific personal jurisdiction over the non-resident Plaintiffs' claims simply by virtue of their joinder with the Missouri Plaintiffs' claims. Ignoring the many decisions that have adopted Pfizer's jurisdictional grounds in analogous cases, the district court awarded sanctions on the reasoning that those grounds have been

rejected by judges in the Eastern District of Missouri, and thus were not objectively reasonable.

This case offers this Court a rare opportunity to provide guidance to the district courts on these important questions of due process and subject matter jurisdiction. Although the district court's remand order itself is not reviewable, *see* 28 U.S.C. § 1447(d), its imposition of sanctions is, and in reviewing the sanctions, this Court may examine the merits of the underlying remand order. Those sanctions should be vacated because the they are predicated on legal error. Pfizer's removal of this case was not only objectively reasonable, it also was legally correct. The district court's "jurisdiction by joinder" theory violates due process. It would turn the Supreme Court's decisions in *Goodyear* and *Daimler* on their head by subjecting non-resident defendants to claims unrelated to their forum activities simply because they have done business in the forum.

Other courts of appeals have used their review of removal sanctions under section 1447(c) to decide jurisdictional questions of first impression, and this appeal presents the Court with the opportunity to clarify important issues that have divided the district courts. Plaintiffs have attempted to block review of these issues by disclaiming a monetary interest in the very fee award they requested. That maneuver is in vain. It is well-settled that a sanctions order imposes injury above and beyond any fees awarded, and therefore a party cannot prevent review of a sanctions order by the simple expedient of disclaiming the award.

The sanctions award should be vacated.

STATEMENT OF JURISDICTION

The district court ordered that Plaintiffs were entitled to fees on April 29, 2016 (Order at 9, R215, A9),[2] and it entered a sanctions award against Pfizer for $6,200 on May 19, 2016. (Award at 4, R225, A14.) This Court has appellate jurisdiction to review that award pursuant to Pfizer's timely notice of appeal filed May 20, 2016. (*See* Notice, R226); 28 U.S.C. § 1291.

Although the district court's order of remand is not reviewable, *see* 28 U.S.C. § 1447(d), this Court has "jurisdiction to review … the district court's grant of attorney's fees and costs," which "is a final order subject to review under 28 U.S.C. § 1291." *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006). Sanctions under section 1447(c) are generally appropriate only where grounds for removal are not "objectively reasonable." *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005). Thus, "to determine whether [the award] was erroneous," the Court "must undertake a de novo examination of whether the remand order was legally correct." *Dahl v. Rosenfeld*, 316 F.3d 1074, 1077 (9th Cir. 2003) (quotation omitted).

Attempting to block review, Plaintiffs have unilaterally disclaimed a monetary interest in the fee award and have moved to dismiss the appeal as moot. (COA Dkt. 6/22/16.) This issue was referred to the merits panel. (COA Dkt. 7/19/16.) For the reasons set forth in Pfizer's opposition (COA Dkt. 7/1/16) and in Point I of the argument, this appeal is not moot, and Plaintiffs' motion to dismiss should be denied.

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[2] Items in the Record, submitted in Pfizer's Appendix, are cited as "R__." Items included in the Addendum to Pfizer's brief are cited as "A__." Items on this Court's docket are cited as "COA Dkt.," followed by the date of entry.

STATEMENT OF ISSUES

This appeal presents three issues of jurisdiction—one of appellate jurisdiction, one of personal jurisdiction, and one of subject matter jurisdiction:

Appellate Jurisdiction

Issue: May a plaintiff strip a court of appeals of jurisdiction to review an award of attorneys' fees issued in connection with a remand under 28 U.S.C. § 1447(c) by unilaterally disclaiming a monetary interest in the award?

Answer: The Court should hold it has appellate jurisdiction to review the award and its reasoning.

Authorities: *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005); *U.S. ex rel. Farmers Home Admin. v. Nelson*, 969 F.2d 626 (8th Cir. 1992); *Perkins v. Gen. Motors Corp.*, 965 F.2d 597 (8th Cir. 1992); 28 U.S.C. §§ 1291, 1447(c).

Personal Jurisdiction

Issue: May a court, consistent with due process, exercise personal jurisdiction over claims by non-resident plaintiffs against a non-resident defendant based solely on their joinder in a single complaint with claims of resident plaintiffs over which the court has specific jurisdiction?

Answer: The Court should hold that joinder does not confer personal jurisdiction over claims by non-resident plaintiffs.

Authorities: *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011); *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Walden v. Fiore*, 134 S. Ct. 1115 (2014); Mo. Rev. Stat. § 506.500.3; Fed. R. Civ. P. 20; Mo. S. Ct. R. 52.05(a).

Subject Matter Jurisdiction

Issue: May a non-resident defendant remove a multi-plaintiff action to federal court on the ground that there is no personal jurisdiction over claims by non-resident plaintiffs against the defendant, such that dismissal of those plaintiffs renders the remaining parties completely diverse?

Answer: The Court should hold the lack of personal jurisdiction over claims by non-resident plaintiffs gives rise to subject matter jurisdiction where it renders the parties completely diverse.

Authorities: *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999); *Villar v. Crowley Mar. Corp.*, 780 F. Supp. 1467 (S.D. Tex. 1992), *aff'd*, 990 F.2d 1489 (5th Cir. 1993); *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, 2016 WL 640520 (N.D. Ill. Feb. 18, 2016) (to be published in F. Supp. 3d); *In re Zofran (Ondansetron) Prods. Liab. Litig.*, 2016 WL 2349105 (D. Mass May 4, 2016) (unpublished); 28 U.S.C. §§ 1332(a), 1441.

STATEMENT OF THE CASE AND THE FACTS

A. Filing and Removal of the Complaint

Plaintiffs in this action are women who allege they developed type 2 diabetes as a result of ingesting Lipitor, a prescription medication manufactured by Pfizer and approved by the FDA to lower cholesterol. The Complaint was filed on behalf of 64 unrelated women from 29 different states. (Compl. ¶¶ 4-66, R27-35.) Of those 64 Plaintiffs, only four allege citizenship in Missouri and only six allege citizenship the same as Pfizer, a citizen of New York and Delaware. (*See id.* ¶¶ 4-67, R27-35.)

The non-resident Plaintiffs do not allege any connection to Missouri. For example, they do not allege that they were prescribed or ingested Lipitor in Missouri, that they sustained any injury in Missouri or as a result of conduct that occurred in Missouri, or that any activity by Pfizer in Missouri gave rise to their claims. Their claims will not be governed by Missouri law, but by the laws of the 29 different states where they reside. *See Dorman v. Emerson Elec. Co.*, 23 F.3d 1354, 1358 (8th Cir. 1994). Nor do these non-resident Plaintiffs plead any relation to the six Missouri Plaintiffs. The only common ground they allege with the Missouri Plaintiffs is that they took the same drug and experienced the same injury. Thus, the Complaint lacks allegations that connect the claims of the non-resident Plaintiffs to Pfizer's activities in Missouri.

Pfizer timely removed this action to federal court based on three separate and independent grounds for diversity jurisdiction:

(1) ***Ruhrgas* Removal:** Under *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), the district court should decide personal jurisdiction before subject matter jurisdiction and dismiss claims by non-resident Plaintiffs for lack of personal jurisdiction under *Goodyear* and *Daimler*, thus leaving complete diversity between resident Plaintiffs and Pfizer.

(2) **Fraudulent Joinder:** The non-resident Plaintiffs are fraudulently joined because the Missouri courts lack personal jurisdiction over their claims, and the district court therefore should disregard their citizenship and retain jurisdiction over claims by resident Plaintiffs only.

(3) **Procedural Misjoinder:** The claims of multiple unrelated Plaintiffs cannot be joined in a single action under Federal Rule of Civil Procedure 20 and in light of *Goodyear* and *Daimler*, and the district court therefore should sever their claims and retain jurisdiction over all Plaintiffs who are individually diverse from Pfizer.

(Notice of Removal at 7-29, R60-82.)

Along with its removal, Pfizer filed a motion to dismiss the claims of the non-resident Plaintiffs for lack of jurisdiction. (Dkt. 5, R85.)[3] Plaintiffs opposed Pfizer's motion to dismiss and motion to stay (Dkt. 13, R156; Dkt. 16, R170) and filed a motion to remand in which they requested an award of attorneys' fees under section 1447(c). (Dkt. 11, R122.) Pfizer opposed Plaintiffs' motion to remand and request for sanctions. (Dkt. 14, R140.)

B. Remand and Award of Sanctions

The district court denied Pfizer's motion to stay and granted remand. Although all of Pfizer's jurisdictional grounds were based on the lack of personal jurisdiction under *Goodyear* and *Daimler*, the district court only briefly addressed the personal jurisdiction issue. (Order at 5 n.1, R211, A5.) It made no mention of Pfizer's request under *Ruhrgas* to dismiss the claims of non-resident plaintiffs for lack of personal jurisdiction. The district court also conflated Pfizer's distinct jurisdictional grounds of fraudulent joinder and procedural joinder, construing Pfizer's

[3] Pfizer also moved to stay this case (Dkt. 8, R105) pending its transfer to the Lipitor MDL in the District of South Carolina, where the Honorable Richard M. Gergel is presiding over thousands of similar claims. *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.*, MDL No. 2502 (D.S.C.). In the Lipitor MDL, which was created in February 2014, the court is currently addressing motions for summary judgment as to all cases based on earlier rulings excluding critical expert testimony under Federal Rule of Evidence 702. Those rulings include the MDL judge's determinations that Plaintiffs have failed to proffer any admissible expert testimony that Lipitor causes diabetes at any dose except 80 mg. *See In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prod. Liab. Litig.*, MDL No. 2502, 2016 WL 1251828 (D.S.C. Mar. 30, 2016) (unpublished). Plaintiffs' counsel in this case served on the Plaintiffs' Executive Committee in the MDL until November 2015, when he resigned. *Lipitor*, MDL 2502, Dkt. 1235. Pfizer's motion to stay this case pending MDL transfer was denied. (Order at 2-3, R208-209, A2-3.)

removal as relating only to procedural misjoinder. (*See* Order at 4-8, R210-14, A4-8.) The district court rejected the application of procedural misjoinder under this Court's prior decision in *In re Prempro Products Liability Litigation*, 591 F.3d 613 (8th Cir. 2010), but did not consider the effect of the Supreme Court's intervening decisions in *Goodyear* and *Daimler* on personal jurisdiction, which was not addressed in *Prempro*. (*Id.* at 6-7, R212-13, A6-7.)

Although the lack of personal jurisdiction over claims by non-resident Plaintiffs under *Goodyear* and *Daimler* was the central issue in Pfizer's removal, the district court confined its discussion of personal jurisdiction to a footnote. There, the district court found that it had personal jurisdiction over Pfizer with respect to the claims of the non-resident plaintiffs based on a theory of "jurisdiction by joinder": that it had personal jurisdiction over Pfizer relating to all the claims in the case because there was personal jurisdiction with respect to the claims of the Missouri residents.

> According to defendant, no federal or state court in Missouri can exercise personal jurisdiction over defendant and comport with due process with respect to the out-of-state plaintiffs' claims. ***The parties do not dispute, however, that Missouri courts have personal jurisdiction over defendant with respect to the in-state plaintiffs' claims. Missouri courts, thus, may properly exercise personal jurisdiction over defendant with respect to this cause of action as a whole arising out of or related to its contacts and conduct in Missouri.***

(Order at 5 n.1, R211, A5 (emphasis added, citations omitted).)

The district court also granted plaintiffs' request for sanctions under section 1447(c). (*Id.* at 8-9, R214-15, A8-9.) It did so because it found that Pfizer "lacked an objectively reasonable basis for seeking removal." (*Id.* at 9, R215, A9.) The district

court stated that in light of "repeated admonishments and remands to state court" by courts in the Eastern District of Missouri, which have universally rejected these grounds, Pfizer "can no longer argue that its asserted basis for seeking removal to federal court in these circumstances is objectively reasonable." (*Id.*) Accordingly, the court ordered Plaintiffs to submit proof of their actual expenses incurred in opposing removal. (*Id.* at 9-10, R215-16, A9-10.)

C. The Fee Award and Pfizer's Appeal

Pursuant to the Court's Order, Plaintiffs submitted an accounting of their time in support of the award, seeking $14,800. (*See* Aff. of Eric Johnson, R217.) On May 19, 2016, the district court awarded them $6,200. (Award, R222, A11.) The following day, Plaintiffs sent Pfizer instructions for making a wire transfer to their account. (*See* COA Dkt. 7/1/16, Ex. 5.) On the same day, Pfizer timely noticed an appeal. (*See* Notice, R226.)

D. Plaintiffs' Attempt to Moot Pfizer's Appeal

Four weeks after Pfizer filed its appeal, on June 16, 2016, Plaintiffs filed a purported "satisfaction of judgment" with the district court disclaiming a monetary interest in the fee award they requested. (Dkt. 28, R228.) The following week, on June 22, 2016, more than a month after the appeal was filed and 20 days after docketing, Plaintiffs moved to dismiss the appeal as moot (COA Dkt. 6/22/16), which Pfizer opposed. (COA Dkt. 7/1/16.) That motion was referred to the merits panel. (COA Dkt. 7/19/16.)

SUMMARY OF ARGUMENT

The district court's decision awarding sanctions should be vacated. Because the district court awarded sanctions based on its finding that Pfizer's removal was not "objectively reasonable," this Court must vacate the sanctions if it determines that Pfizer's removal was proper. The Court should find that Pfizer's removal was proper and decide the issues in this appeal as follows:

Appellate Jurisdiction

The Court should hold that it has appellate jurisdiction to review the fee award under section 1447(c) notwithstanding Plaintiffs' unilateral disclaimer of monetary interest in the award. Fundamentally, section 1447(c) is a sanctions provision, as this Court's precedents and the statute's legislative history instruct. As a sanction, the award gives rise to a legal injury separate and apart from monetary harm—the determination by a court that the sanctioned party, here Pfizer, has engaged in improper litigation conduct. That injury is redressable on appeal through "a favorable judicial decision … revers[ing] the determination" that Pfizer engaged in improper conduct, even though the order "'may not require the award of process or the payment of damages.'" *U.S. ex rel. Farmers Home Admin. v. Nelson*, 969 F.2d 626, 629 (8th Cir. 1992) (quotation omitted). This Court thus has appellate jurisdiction to review the award and the reasoning on which it was based, and Plaintiffs' motion to dismiss should be denied.

Personal Jurisdiction

The Court should hold that the district court erred in finding that it had personal jurisdiction over claims by non-resident Plaintiffs against Pfizer. The two

species of personal jurisdiction recognized by the Supreme Court are (i) general, or all-purpose, jurisdiction, and (ii) specific, or case-related, jurisdiction. Under *Goodyear* and *Daimler*, the fact that Pfizer is "doing business" in Missouri is insufficient to support general jurisdiction because Pfizer is not "at home" in Missouri. Neither is there specific jurisdiction in Missouri over claims by non-resident Plaintiffs because those claims do not arise from Pfizer's contacts with Missouri. Nor does the fact that Pfizer marketed Lipitor to other persons in Missouri provide specific jurisdiction over the non-resident Plaintiffs' claims. Even where a defendant's contacts with the forum are "intertwined with his transactions or interactions with … other parties," such as the resident Plaintiffs here, that fact, "standing alone, is an insufficient basis for jurisdiction." *Walden v. Fiore*, 134 S. Ct. 1115, 1123 (2014).

The district court held in a footnote that there was specific jurisdiction over claims by non-resident Plaintiffs—not because those claims arose from Pfizer's contacts with Missouri, but because they were joined to claims of resident Plaintiffs. (Order at 5 n.1, R211, A5.) But in so doing, the district court allowed specific jurisdiction to do what *Goodyear* and *Daimler* prohibited for general jurisdiction, subjecting Pfizer to jurisdiction for claims unrelated to its forum contacts simply because it is doing business in Missouri. This "jurisdiction by joinder" theory presents a vast and legally untenable expansion of minimum contacts jurisdiction as defined by the Supreme Court and would subvert the "traditional notions of fair play and substantial justice" that due process is intended to protect. Because jurisdiction by joinder "would unfairly allow Plaintiffs to bypass the requirements of personal jurisdiction," *Executone of Columbus, Inc. v. Inter-Tel, Inc.*, 2006 WL 3043115, at *6 (S.D.

Ohio Oct. 4, 2006) (unpublished), district courts have rejected the theory in analogous cases, including cases arising out of Missouri courts. This Court should do so here for the same reasons.

Subject Matter Jurisdiction

The Court should hold that Pfizer properly removed this action based on the lack of personal jurisdiction over claims by non-resident Plaintiffs. Pfizer asserted three independent grounds for removal, each of which was based, in whole or in part, on the lack of personal jurisdiction under *Goodyear* and *Daimler* over claims by non-resident Plaintiffs. Yet the district court rejected all three grounds in the footnote quoted above and held that none were "objectively reasonable."

Pfizer submits that all three of its grounds for removal were legally correct, and thus objectively reasonable, such that the sanctions must be vacated. Because sanctions cannot be awarded where removal was proper, the Court need only find that any one of Pfizer's three grounds was proper to vacate the award. As an initial matter, this Court should find that this action was properly removed under *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999). In *Ruhrgas*, the Supreme Court held that a court may decide personal jurisdiction before subject matter jurisdiction in a removed case where the resolution of personal jurisdiction will simplify or dispose of any issues of subject matter jurisdiction. Based on *Ruhrgas*, courts around the country have denied remand motions and exercised diversity jurisdiction in similar multi-plaintiff cases where they have found a lack of personal jurisdiction over claims by non-resident Plaintiffs.

Although it is not necessary for the Court to consider other grounds if it finds *Ruhrgas* removal proper, Pfizer's other grounds for removal were also proper and objectively reasonable. As an alternative to deciding personal jurisdiction first under *Ruhrgas*, this Court may also find that the non-resident Plaintiffs were fraudulently joined due to lack of personal jurisdiction over their claims, such that their citizenship may be disregarded for diversity purposes. In addition, the lack of personal jurisdiction over claims by the non-resident Plaintiffs supports a determination that Plaintiffs' claims are not properly joined under Rule 20, such that diversity jurisdiction exists under the procedural misjoinder doctrine.

The district court rejected all of Pfizer's grounds for removal as not objectively reasonable based on an erroneous ruling that would extend personal jurisdiction far beyond the due process limits of *Goodyear* and *Daimler*. That holding was error, and the district court's award of sanctions under section 1447(c) should be vacated.

STANDARD OF REVIEW

This Court reviews the district court's sanctions award for abuse of discretion but reviews *de novo* the legal determinations in the remand order on which that award was based. A district court generally "may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." *Martin*, 546 U.S. at 141. Thus, although this Court will "review the award of fees and costs for abuse of discretion," *Durham*, 445 F.3d at 1250, "to determine whether [the fee award] was erroneous," the Court "must undertake a de novo examination of whether the remand order was legally correct." *Dahl*, 316 F.3d at 1077 (quotation omitted). "[A]n award of attorneys' fees based on a legally erroneous remand order

constitutes an abuse of discretion," *Legg v. Wyeth*, 428 F.3d 1317, 1320 (11th Cir. 2005), and fees cannot be awarded under section 1447(c) where this Court concludes "that removal was not improper." *Convent Corp. v. City of N. Little Rock, Ark.*, 784 F.3d 479, 481 (8th Cir. 2015) (per curiam).

Although remand orders are not directly reviewable, a sanctions award under 28 U.S.C. § 1447(d) may be vacated if the underlying remand order is legally erroneous. Other courts of appeals reviewing sanctions under section 1447(c) have held underlying remand orders erroneous, even as to questions of first impression. *See, e.g.*, *Legg*, 428 F.3d at 1322, 1325; *Roxbury Condo. Ass'n, Inc. v. Anthony S. Cupo Agency*, 316 F.3d 224, 227 (3d Cir. 2003); *Miranti v. Lee*, 3 F.3d 925, 928 (5th Cir. 1993); *Durham*, 445 F.3d at 1250; *Dahl*, 316 F.3d at 1079. This Court should do so as well.

ARGUMENT

I. PLAINTIFFS' DISCLAIMER OF MONETARY INTEREST DOES NOT STRIP THE COURT OF JURISDICTION TO REVIEW THE SANCTIONS ORDER

This Court has jurisdiction to review the sanctions imposed on Pfizer, and Plaintiffs' belated disclaimer[4] of a monetary interest in the sanctions award does not strip the Court of that jurisdiction. A fee award under section 1447(c) is a sanction, and because sanctions cause reputational harm, this Court has jurisdiction to review the sanctions against Pfizer even absent any monetary harm.

[4] The motion to dismiss that Plaintiffs filed in connection with their disclaimer is also untimely. Under Eighth Circuit Rule 47A(b), "[e]xcept for good cause or on the motion of the court, a motion to dismiss based on jurisdiction must be filed within fourteen days after the court has docketed the appeal." Plaintiffs, however, did not file their motion to dismiss until June 22, 2016, more than a month after Pfizer noticed this appeal on May 20, 2016 (Notice, R226), and nearly three weeks after the appeal was docketed on June 2, 2016. (COA Dkt. 6/2/16.)

A. Fee Awards Under Section 1447(c) Are Sanctions

Section 1447(c) authorizes sanctions for improper removal. In particular, a court may impose costs, including attorney's fees, "where the removing party lacked an objectively reasonable basis for seeking removal." *Martin*, 546 U.S. at 141. Such costs are imposed "to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party." *Id.* at 140-41 (emphasis added). Thus, like awards under Rule 11 and 28 U.S.C. § 1927, fee awards under section 1447(c) are "sanctions … expressly authorized by federal laws intended to protect the integrity of the judicial process." *Dakota, Minn. & E. R.R. Corp. v. Schieffer*, 715 F.3d 712, 712 (8th Cir. 2013) (citing *Wells Fargo Bank W., Nat'l Ass'n. v. Burns*, 100 F. App'x 599 (8th Cir. 2004) (per curiam)). As the Senate Report accompanying the enactment of section 1447(c) explained, the statute provides a basis to award "expenses incurred in resisting an improper removal," while Rule 11 "can be used to impose *a more severe sanction* when appropriate." 134 Cong. Rec. S16284-01 (Oct. 14, 1988) (emphasis added); *accord Johnson v. AGCO Corp.*, 159 F.3d 1114, 1116 (8th Cir. 1998). Accordingly, the courts of appeals repeatedly have described fee awards under section 1447(c) as "sanctions."[5]

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[5] *See, e.g.*, *Unanue-Casal v. Unanue-Casal*, 898 F.2d 839, 843 (1st Cir. 1990); *In-Touch Mgmt. Sys., Inc. v. Gothelf*, 182 F.3d 900, 1999 WL 376081, at *1 (2d Cir. 1999) (table); *Brown v. Brown*, 977 F.2d 571, 1992 WL 266856, at *1 (4th Cir. 1992) (table) ("The district court may assess sanctions when denying a removal petition."); *In re Crescent City Estates, LLC*, 588 F.3d 822, 831 (4th Cir. 2009) ("Where an attorney's decision to remove *is* particularly blameworthy, courts do not need § 1447(c) to impose sanctions."); *LaGrotte v. Simmons Airlines, Inc.*, 250 F.3d 739, 2001 WL 274124, at *3 (5th Cir. 2001) (table) ("[W]e do have jurisdiction over the district court's order of sanctions finding bad-faith removal and imposing costs and attorney fees under §

Plaintiffs sought the fee award to punish Pfizer. Plaintiffs claimed that Pfizer's "actions here were done in bad faith and served only to delay the administration of justice and waste the Court's time and resources." (Mem. in Supp. of Mot. to Remand at 14, R137.) Seeking an expression of "'the displeasure of a district court whose authority has been improperly invoked,'" Plaintiffs requested an award of attorneys' fees that would redress Pfizer's alleged "pattern of procedural abuse and continued disregard for binding Eighth Circuit precedent and, more importantly the time and resources of this District." (*Id.*) The district court accepted these arguments, and it awarded plaintiffs attorney's fees and other costs on the ground that, in light of "repeated admonishments and remands to state court" by courts in the Eastern District of Missouri, Pfizer "can no longer argue that its asserted basis for seeking removal to federal court in these circumstances is objectively reasonable."

1447(c)."); *MidSouth Bank, N.A. v. McZeal*, 463 F. App'x 308, 309 (5th Cir. 2012) (district court granted "request for removal sanctions under 28 U.S.C. § 1447(c) after finding that [defendant] lacked an objectively reasonable basis for removal"); *Taylor v. Currie*, 208 F. App'x 401, 2006 WL 3690371, at *1 (6th Cir. 2006); *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 332 (6th Cir. 2007) ("Removal absent an objectively reasonable basis may also subject an attorney to the imposition of sanctions …."); *Lundahl v. Home Depot, Inc.*, 594 F. App'x 453, 454 (10th Cir. 2014) (plaintiff "requested sanctions … under 28 U.S.C. § 1447(c) and Fed. R. Civ. P. 11 based on their wrongful removal").

Although the Seventh Circuit previously held "that § 1447(c) is not a sanctions rule," but merely "a fee-shifting statute," *Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407, 410 (7th Cir. 2000), the Supreme Court specifically rejected that view in *Martin*. *See* 546 U.S. at 137-38. The Seventh Circuit has since acknowledged that section 1447(c) is a sanctions provision. *Franke v. Cana Invs., LLC*, 333 F. App'x 106, 107 (7th Cir. 2009) ("Franke should count himself lucky that the district judge did not award attorneys' fees, or other sanctions, under 28 U.S.C. § 1447(c)."); *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 813 (7th Cir. 2015) ("[F]rivolous removal leads to sanctions, potentially including fee-shifting, see 28 U.S.C. § 1447(c).").

(Order at 9, R215, A9.) Thus, the district court awarded Plaintiffs fees and costs as a sanction against Pfizer.

B. Plaintiffs' Disclaimer of Monetary Interest in the Award Does Not Moot Pfizer's Appeal From the Sanctions

After seeking a fee award as a sanction against Pfizer and providing instructions to Pfizer for payment, Plaintiffs tried to prevent review of that order by disclaiming any intent to collect on the fee award. Sanctions, however, create an injury separate and apart from any monetary penalty imposed. Consequently, it is well settled that a party cannot moot a sanctions award by simply refusing to enforce it.

As this Court has recognized, a sanctions order is an adverse determination that constitutes an injury in itself and which a sanctioned party "should be permitted to seek to reverse on appeal" even in the absence of monetary harm. *Nelson*, 969 F.2d at 629. In *Nelson*, this Court considered whether it had appellate jurisdiction to review "an adjudication that [a federal agency] was in violation of federal law" by violating an automatic stay in bankruptcy, even though that ruling ultimately did not alter the rights or status of the parties in the underlying bankruptcy proceeding. *Id.* at 629. This Court explained that "[c]learly this is very much a live issue insofar as the [agency] is concerned," since the finding of "violation of federal law is indeed a sanction, and one that the [agency] should be permitted to seek to reverse on appeal." *Id.* The injury from the sanction could "be redressed by a favorable judicial decision … revers[ing] the determination that the [agency] violated federal bankruptcy law." *Id.* (quotation omitted). Thus, a justiciable controversy may exist even though "'the adjudication of the rights of the litigants may not require the award of process or the

payment of damages.'" *Id.* (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937)). Consequently, an appellee cannot moot a sanctions order by refusing to collect the monetary award imposed by the order.

Moreover, this Court has specifically held that, because of the interest of the Court in litigation sanctions, such orders do not become moot "merely because an adversary chooses not to collect the sanctions." *Perkins v. Gen. Motors Corp.*, 965 F.2d 597, 599 (8th Cir. 1992). In *Perkins*, after the district court imposed Rule 11 sanctions on the plaintiff, the parties settled and jointly moved to vacate the sanctions order. *Id.* at 598. This Court rejected the plaintiff's contention that the parties' agreement mooted the plaintiff's appeal of the sanctions order, explaining that while parties "are entitled to bargain with adversaries to drop a motion for sanctions, … they cannot unilaterally bargain away the court's discretion in imposing sanctions and the public's interest in ensuring compliance with the rules of procedure." *Id.* at 600. So, too, here. Plaintiffs' unilateral and belated decision not to collect the award of fees does not vacate the underlying district court opinion and order, which stands as a sanctions decision against Pfizer to its continuing harm.

Other circuits agree. For example, the Third Circuit, citing *Perkins*, has held that a financial settlement between parties "did not moot the appeals" from a sanctions order "because the Appellants experienced (and continue to experience) reputational harm." *Grider v. Keystone Health Plan Cent., Inc.*, 580 F.3d 119, 133 (3d Cir. 2009); *accord Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 542-43 (3d Cir. 2007). Likewise, the Second Circuit has held that where "the parties have entered into a voluntary agreement not to collect a monetary sanctions award," a sanctioned attorney

who was not party to the agreement had standing to appeal based on reputational harm. *Agee v. Paramount Commc'ns, Inc.*, 114 F.3d 395, 399 (2d Cir. 1997). The Eleventh Circuit has reached the same conclusion, holding that party settlement did not moot an attorney's standing to appeal a sanctions order, which "was imposed pursuant to the inherent powers of the district court and is not subject to revocation by the parties." *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1200 (11th Cir. 1985).

Ultimately, "monetary penalties or losses are not an essential for an appeal" of sanctions, since the contrary view would suggest that a nominal fine is more important than, for example, "a finding and declaration by a court" concerning the sanctioned party's misconduct. *Walker v. City of Mesquite, Tex.*, 129 F.3d 831, 832 (5th Cir. 1997). While the district court awarded $6,200 in fees, it also expressly found that Pfizer's attempt to exercise its removal rights was not "objectively reasonable." The impact of that ruling on Pfizer's reputation, as well as the impact it may have on future attempts by Pfizer to remove based on the Supreme Court's decisions in *Goodyear* and *Daimler*, is far greater than the fee award. Plaintiffs' disclaimer of the $6,200 fee award does not remove that injury and thus does not moot this appeal. Plaintiffs' motion to dismiss should therefore be denied.

II. THE DISTRICT COURT ERRED IN FINDING PERSONAL JURISDICTION OVER CLAIMS BY NON-RESIDENT PLAINTIFFS

An essential premise of the district court's rejection of Pfizer's three grounds for removal as not objectively reasonable was its conclusion that it had personal jurisdiction over this entire action. The district court held, in a footnote, that it had

jurisdiction over claims by non-resident Plaintiffs by sole virtue of their joinder with the claims of Missouri residents. (Order at 5 n.1, R211, A5.) This was error.

To establish personal jurisdiction in Missouri, a court must find both that "the defendant's conduct satisfies Missouri's long-arm statute" and that "the defendant has sufficient minimum contacts with Missouri such that asserting personal jurisdiction over the defendant comports with due process." *Bryant v. Smith Interior Design Group, Inc.*, 310 S.W.3d 227, 231 (Mo. 2010) (en banc). To comport with due process, the exercise of personal jurisdiction must "not offend 'traditional notions of fair play and substantial justice.'" *World-Wide Volkswagen Corp v. Woodson*, 444 U.S. 286, 292 (1980). The Supreme Court has recognized two species of "minimum contacts" personal jurisdiction that satisfy due process: general jurisdiction and specific jurisdiction. *See Goodyear*, 564 U.S. at 923. General jurisdiction concerns the circumstances where a court may exercise jurisdiction over a defendant for causes of action unrelated to the defendant's in-state activities, while specific jurisdiction is authorized when a defendant's in-state activities gave rise to the plaintiff's claims. *Daimler*, 134 S. Ct. at 754.

Neither species of jurisdiction applies to the claims of the non-resident Plaintiffs here. *Goodyear* and *Daimler* limit general jurisdiction to where a defendant is "at home." There is no such jurisdiction here because Missouri is not Pfizer's home—it is not incorporated in Missouri and does not have its principal place of business in Missouri. Nor is there specific jurisdiction in connection with the claims by non-residents Plaintiffs because those claims do not arise out of or relate to any of Pfizer's activities in Missouri. Finally, the district court's theory of jurisdiction by

joinder—that specific jurisdiction extends even to claims by non-resident Plaintiffs joined in the same action—violates due process. Indeed, it would permit a court to accomplish exactly what *Goodyear* and *Daimler* prohibit: subjecting a defendant to suit in a forum on claims that do not arise from its forum contacts, simply by virtue of doing business in the forum.

A. *Goodyear* and *Daimler* Prohibit General Jurisdiction Over Pfizer in Missouri

General jurisdiction gives a court authority to "hear any and all claims" against a defendant without regard to the connection of those claims to the forum. *Goodyear*, 564 U.S. at 919. The district court lacked general jurisdiction over Pfizer because Pfizer is not incorporated in Missouri and does not have its principal place of business there.

Before the Supreme Court's decisions in *Goodyear* and *Daimler*, this Court permitted forum states to exercise general jurisdiction over a corporate defendant so long as the defendant's forum contacts were "continuous and systematic" and "substantial for the forum." *See Lakin v. Prudential Sec., Inc.*, 348 F.3d 704, 708-09 (8th Cir. 2003). As a result, "courts widely embraced the notion that any corporation 'doing business' in a state was subject to general jurisdiction there—i.e., that state may assert jurisdiction over any claim asserted against a defendant having regular and consistent commercial activities in the forum, no matter how removed the facts of the claim are from those activities." Meir Feder, *Goodyear, "Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. Rev. 671, 675 (2012) (quotation omitted).

In *Goodyear*, however, the Supreme Court rejected this position and adopted a narrower view of general jurisdiction. *Goodyear* clarified that the test for general jurisdiction is not simply whether forum contacts are "continuous and systematic," but rather whether they are "so 'continuous and systematic' as to render them essentially *at home* in the forum State." 564 U.S. at 919 (emphasis added). The Court cited a corporation's principal place of business and state of incorporation as examples of where it is "at home." *Id.* at 924; *see also Viasystems, Inc. v. EBM-Papst St. Georgen GmbH & Co., KG*, 646 F.3d 589, 595 (8th Cir. 2011).

Three years later, the Supreme Court made the point even more explicitly in *Daimler*. It held that "[w]ith respect to a corporation, the place of incorporation and principal place of business are paradigm bases for general jurisdiction." *Daimler*, 134 S. Ct. at 760 (quotation omitted). "Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable" and would be the *only* fora for general jurisdiction other than in an "exceptional case." *Id.* at 760-61 & n.19. Such "'[s]imple jurisdictional rules,'" the Court observed, "'promote greater predictability.'" *Id.* at 760 (quoting *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010)).

Daimler also flatly rejected the notion that doing substantial business in the forum subjects a corporation to general jurisdiction. The plaintiffs in *Daimler* asked the Supreme Court to "approve the exercise of general jurisdiction in every State in which a corporation engages in a substantial, continuous, and systematic course of business." *Id.* at 761. Although similar tests had previously been adopted by many courts, including this one, *see, e.g.*, *Lakin*, 348 F.3d at 708-09, the Supreme Court

rejected this formulation of general jurisdiction as "unacceptably grasping." *Daimler*, 134 S. Ct. at 761. "Such exorbitant exercises of all-purpose jurisdiction," the Court observed, "would scarcely permit out-of-state defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Id.* at 761-62 (quotation omitted). Thus, absent "exceptional" circumstances not alleged here, a corporation is "at home," and subject to general jurisdiction, only where it is incorporated or has its principal place of business. *See id.* at 760-61.

Under *Goodyear* and *Daimler*, courts located in Missouri cannot exercise general jurisdiction over Pfizer because Pfizer is neither headquartered nor incorporated in Missouri. Courts in the Eastern District of Missouri have repeatedly and properly refused to exercise general jurisdiction over Pfizer in Missouri.[6] It makes no difference that Pfizer markets its products in Missouri because such activity does not give Pfizer a connection with the state sufficient "to render it at home here." *Bartholome*, 2016 WL 366795, at *2. Thus, non-resident plaintiffs can no longer use general jurisdiction to establish personal jurisdiction over Pfizer in Missouri.

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[6] *See, e.g.*, *Bartholome v. Pfizer, Inc.*, 2016 WL 366795 (E.D. Mo. Jan. 29, 2016) (unpublished) (Autrey, J.); *Barron v. Pfizer, Inc.*, 2015 WL 5829867 (E.D. Mo. Oct. 6, 2015) (unpublished) (Shaw, J.); *Clarke v. Pfizer Inc.*, 2015 WL 5243876 (E.D. Mo. Sept. 8, 2015) (unpublished) (Fleissig, J.); *Schwarz v. Pfizer Inc.*, No. 4:15-cv-00579-JAR, slip op., Dkt. 11 (E.D. Mo. July 30, 2015) (unpublished) (Ross, J.); *Keeley v. Pfizer Inc.*, 2015 WL 3999488 (E.D. Mo. July 1, 2015) (unpublished) (Webber, J.); *Huff v. Pfizer, Inc.*, No. 4:15-CV-787-RWS, slip op., Dkt. 14 (E.D. Mo. July 10, 2015) (unpublished) (Sippel, J.); *Fidler v. Pfizer Inc.*, No. 4:15-CV-582-RWS, slip op., Dkt. 14 (E.D. Mo. June 25, 2015) (unpublished) (Sippel, J.).

B. Non-Resident Plaintiffs Cannot Obtain Specific Jurisdiction Over Pfizer in Missouri

The district court also lacked specific jurisdiction over Pfizer with respect to the claims of the non-resident Plaintiffs. None of those Plaintiffs allege that they were prescribed Lipitor in Missouri, that they ingested Lipitor in Missouri, that they experienced any injury there, or that Pfizer took any action in Missouri that led to their injury. As a consequence, the non-resident Plaintiffs' claims lack any nexus to Pfizer's Missouri contacts sufficient to justify the exercise of specific jurisdiction, and Pfizer's forum activities relating to the resident Plaintiffs cannot fill that gap.

Specific or case-related jurisdiction is permitted only where a "suit arises out of or relates to the defendant's contacts with the forum." *Goodyear*, 564 U.S. at 924 (internal quotations and alterations omitted). Specific jurisdiction requires a showing that "the injury giving rise to the lawsuit occurred within or had some connection to the forum state." *Steinbuch v. Cutler*, 518 F.3d 580, 586 (8th Cir. 2008). It requires both that "the defendant purposely directed its activities at the forum state" and that "the claim arose out of or relates to those activities." *Id.*

The connection between the forum state and the plaintiff's claim required to establish specific jurisdiction must be the defendant's connection. In *Walden v. Fiore*, 134 S. Ct. 1115 (2014), the Supreme Court made it clear that due process forbids exercising specific jurisdiction over a claim based on a defendant's contact with a another party in the forum state. In *Walden*, a Nevada couple filed suit in Nevada federal court alleging injury from conduct in Georgia by a Georgia federal agent. 134 S. Ct. at 1119-20. The Supreme Court held that the plaintiffs' connection to Nevada could not confer personal jurisdiction over the defendant because personal

jurisdiction "must arise out of contacts that the 'defendant *himself*' creates with the forum State." *Id.* at 1122. As the Court explained, due process "requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State." *Id.* at 1123 (2014) (internal quotation marks omitted). Due process restricts personal jurisdiction in order to "protect the liberty of the nonresident defendant," and therefore the requirements of due process cannot be satisfied by contacts between "plaintiffs or third parties." *Id.* at 1122. Thus, the Supreme Court concluded, even where a defendant's contacts with the forum are "intertwined with his transactions or interactions with … other parties," that fact, "standing alone, is an insufficient basis for jurisdiction." *Id.* at 1123.

In keeping with these principles, numerous courts have recognized that specific jurisdiction must be analyzed on a plaintiff-by-plaintiff and claim-by-claim basis. "Questions of specific jurisdiction are always tied to the particular claims asserted," *Phillips Exeter Acad. v. Howard Phillips Fund, Inc.*, 196 F.3d 284, 289 (1st Cir. 1999), and "[e]ach plaintiff … must show that its claim arises out of or is related to the defendant's contacts with the forum," *Tulsa Cancer Inst., PLLC v. Genentech Inc.*, 2016 WL 141859, at *3 (N.D. Okla. Jan. 12, 2016) (unpublished).[7] "If a defendant does not

[7] *See also Shafik v. Curran*, 2010 WL 2510194, at *4 (M.D. Pa. June 17, 2010) (unpublished) ("[T]he Court will independently assess . . . whether specific jurisdiction exists as to the claims raised by each Plaintiff."); *Arnold v. Goldstar Fin. Sys., Inc.*, 2002 WL 1941546, at *3 (N.D. Ill. Aug. 22, 2002) (unpublished) ("The personal jurisdiction analysis . . . must be plaintiff-specific."); *Level 3 Commc'ns, LLC v. Ill. Bell Tel. Co.*, 2014 WL 50856, at *2-3 (E.D. Mo. Jan. 7, 2014) (unpublished), *vacated in part on reconsideration*, 2014 WL 1347531 (E.D. Mo. Apr. 4, 2014) (unpublished); *Turi v. Main St. Adoption Servs., LLP*, 2009 WL 2923248, at *13 (E.D. Mich. Sept. 9, 2009)

have enough contacts to justify the exercise of general jurisdiction, the Due Process Clause prohibits the exercise of jurisdiction over any claim that does not arise out of or result from the defendant's forum contacts." *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 274-75 (5th Cir. 2006). "Permitting the legitimate exercise of specific jurisdiction over one claim to justify the exercise of specific jurisdiction over a different claim that does not arise out of or relate to the defendants' forum contacts would violate the Due Process Clause." *Id.* at 275.

Nor can specific jurisdiction be exercised based on Pfizer's general activities in Missouri unrelated to the claims of the non-resident Plaintiffs. It is axiomatic that a corporation's "continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945). Thus, Missouri courts do not acquire personal jurisdiction over non-resident Plaintiffs' claims simply because Pfizer sold Lipitor to other Plaintiffs in Missouri.

Other circuits have reached the same conclusion in dealing with claims by non-residents against non-resident pharmaceutical defendants in products liability cases like this. In *Glater v. Eli Lilly & Co.*, the plaintiff sued a manufacturer of a prescription medication in New Hampshire federal court for alleged injuries from exposure to the medication *in utero*. 744 F.2d 213, 214-15 (1st Cir. 1984). Although

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(unpublished), *aff'd in relevant part, rev'd in part and remanded on other grounds*, 633 F.3d 496 (6th Cir. 2011); *Affordable Healthcare, LLC v. Protus IP Solutions, Inc.*, 2009 WL 749536, at *3 (E.D. Mo. Mar. 19, 2009) (unpublished); *Paulucci v. William Morris Agency, Inc.*, 952 F. Supp. 1335, 1341 (D. Minn. 1997); *Zumbro, Inc. v. Cal. Natural Prods.*, 861 F. Supp. 773, 779 (D. Minn. 1994).

the plaintiff's mother took the medication in Massachusetts, the plaintiffs argued that specific jurisdiction was proper in New Hampshire because the manufacturer had marketed the medication nationwide, including in New Hampshire. *Id.* The First Circuit rejected this argument, holding that the plaintiff's "cause of action did not arise from [the defendant's] New Hampshire activities," but rather from its activities in Massachusetts, where the medication was purchased and consumed. *Id.* at 216. Authorizing the plaintiffs' theory of specific jurisdiction, the court explained, would oblige it "to hold that *any* … nonresident injured out of state by a drug sold and consumed out of state" could file suit in Missouri, which "would amount to retributive jurisdiction [that] comports with neither logic nor fairness." *Id.* at 216 n.4.

Likewise, in *Ratliff v. Cooper Laboratories, Inc.*, the Fourth Circuit summarily rejected a similar theory of specific jurisdiction. 444 F.2d 745 (4th Cir. 1971). *Ratliff* involved two actions alleging personal injuries from prescription medications that were filed by non-resident plaintiffs in South Carolina federal court. *Id.* at 746. Observing that the plaintiffs' causes of action "arose outside the forum and were unconnected with the defendant's activities in South Carolina," the Court noted there was "lack of a 'rational nexus' between the forum state and the relevant facts surrounding the claims presented" that would be required to support specific jurisdiction. *Id.* at 748.

Applying these principles in other cases involving Pfizer, district courts have consistently ruled that the allegation that Pfizer "marketed, promoted, and sold [a medication] in Missouri does not establish specific jurisdiction" over claims of plaintiffs from other states who did not purchase the medication in Missouri. *Keeley*,

2015 WL 3999488, at *3.[8] If all that specific jurisdiction required was the defendant's marketing and sale of a product in a forum state, "a national company could be sued by any resident of any state in any state. This does not comport with traditional notions of fair play and substantial justice as required by the Constitution." *Id.* (citation omitted). Rather, it would lead to the very result rejected by *Daimler* as "unacceptably grasping": *de facto* general jurisdiction over any corporation doing substantial business in the forum. None of the non-resident Plaintiffs here have alleged or proven any facts showing that their claims arise out of Pfizer's contacts with Missouri. There is thus no specific jurisdiction over their claims.

C. Jurisdiction by Joinder Violates Due Process

In finding that it had personal jurisdiction over Pfizer with regard to the claims of non-resident Plaintiffs, the district court did not determine that it had general jurisdiction over Pfizer under *Goodyear* and *Daimler*. Instead, in a footnote, it held that because it had specific jurisdiction over claims by resident Plaintiffs, it could also

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[8] *See also*, *e.g.*, *Bartholome*, 2016 WL 366795, at *1 ("Defendant's only contacts with Missouri are that they marketed and sold Zoloft in Missouri. These contacts do not relate to the causes of action in this suit, which arise out of Mother Plaintiff's ingestion of Zoloft in Florida and Minor Plaintiff's subsequent birth."); *Barron*, 2015 WL 5829867, at *1 (Pfizer's "only contacts with Missouri are that they marketed and sold Zoloft in Missouri. These contacts do not relate to the causes of action in this suit, which arise out Ms. Barron's ingestion of Zoloft in Florida and Alexander Barron's subsequent birth" with birth defects plaintiffs alleged were caused by Zoloft); *Clarke v. Pfizer Inc.*, 2015 WL 5243876, at *2 (E.D. Mo. Sept. 8, 2015) (unpublished) (Fleissig, J.) (Pfizer and Greenstone's "only contacts with Missouri are that they marketed and sold Zoloft in Missouri. Plaintiff fails to show how these contacts with Missouri relate to the causes of action in this suit," given that the plaintiffs were allegedly injured in Nebraska); *accord In re Plavix Related Cases*, 2014 WL 3928240, at *1, 8-9 (Ill. Cir. Ct. Aug. 11, 2014) (unpublished).

exercise jurisdiction over the claims of non-resident Plaintiffs joined in the same action: "Missouri courts have personal jurisdiction over defendant with respect to the in-state plaintiffs' claims. Missouri courts, thus, may properly exercise personal jurisdiction over defendant with respect to this cause of action as a whole arising out of or related to its contacts and conduct in Missouri." (Order at 5 n.1, R211, A5.)

This theory of "jurisdiction by joinder" would vastly exceed the bounds of due process and render the protections of *Goodyear* and *Daimler* a nullity, allowing specific jurisdiction to supplant the limited scope of general jurisdiction. The fact that other judges of the Eastern District of Missouri have repeated the same error cannot save the district court's sanctions award—rather, it renders appellate guidance by this Court all the more important.

As the Fifth Circuit has recognized, "[t]here is no such thing as supplemental specific personal jurisdiction." *Seifirth*, 472 F.3d at 275 n.5. The Supreme Court held in *Walden* that specific jurisdiction must be established based on the contacts that the defendant itself establishes with the forum and cannot be based on forum contacts by "plaintiffs or third parties." 134 S. Ct. at 1122. "Permitting the legitimate exercise of specific jurisdiction over one claim to justify the exercise of specific jurisdiction over a different claim that does not arise out of or relate to the defendants' forum contacts would violate the Due Process Clause." *Seifirth*, at 276. Specific jurisdiction must be tied to the particular claims asserted, *see Philips Exeter Acad.*, 196 F.3d at 289, and "if separate claims are pled, specific personal jurisdiction must independently exist for each claim and the existence of personal jurisdiction for one claim will not provide the

basis for another claim." *Seiferth*, 472 F.3d at 275 n.6; *see also supra* at 26 & note 7 (collecting cases).

Because this separate analysis is required as a matter of due process, it cannot be circumvented by using permissive joinder rules to extend specific jurisdiction from claims of residents to those of non-residents. Even if it is assumed that permissive joinder rules authorize the joinder of these unrelated Plaintiffs' claims here—which Pfizer disputes (*see* Point III.C, *infra*)—such joinder cannot cure the absence of personal jurisdiction over the non-resident Plaintiffs' claims. Doing so "would unfairly allow Plaintiffs to bypass the requirements of personal jurisdiction." *Executone*, 2006 WL 3043115, at *6. As the district judge here recognized in another case, "[i]t is well-established that the requirement for personal jurisdiction cannot be bypassed by proving proper joinder." *Level 3 Commc'ns.*, 2014 WL 50856, at *2-3. Just as states cannot use long-arm statutes to extend their territorial jurisdiction beyond the scope permitted by the due process clause, *see, e.g.*, *Shaffer v. Heitner*, 433 U.S. 186 (1977), they cannot use procedural rules to accomplish what they are barred from doing by statute.[9]

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[9] Missouri law is in accord. In fact, Missouri's long-arm statute requires a claim-specific analysis, instructing that "[o]nly causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section." Mo. Rev. Stat. § 506.500.3. Moreover, Missouri procedure "clearly and explicitly states that the Rules of Civil Procedure, of which Rule 52.05(a) is a part, 'shall not be construed to extend or limit the jurisdiction of the Courts of Missouri or the venue of civil actions therein.'" *State ex rel. Turnbough v. Gaertner*, 589 S.W.2d 290, 292 (Mo. 1979) (en banc). "[J]oinder of separate claims under Rule 52.05(a) does not affect the substantive rights of the parties, and the separate causes joined remain separate as if they had been sued on separately." *Hampton v. Cantrell*, 464 S.W.2d 744, 749 (Mo. Ct. App. 1971) (citing *De*

District courts considering these issues in the wake of *Goodyear* and *Daimler* have accordingly rejected jurisdiction by joinder as contrary to due process, including MDL courts considering multi-plaintiff pharmaceutical cases removed from Missouri state courts. The MDL court in *In re Testosterone Replacement Therapy Products Liability Litigation*, 2016 WL 640520 (N.D. Ill. Feb. 18, 2016), explained that "[u]nder the theory plaintiffs propose, the alleged sale and promotion of [the drug] within Missouri, which allegedly caused a Missouri plaintiff's injury, would subject defendants to general personal jurisdiction in Missouri for claims brought by any plaintiff who allegedly suffered injury by purchasing and using [that drug] anywhere in the country." *Id.*, at *6. "Such a result," the court held, "would be plainly contrary to 'traditional notions of fair play and substantial justice.'" *Id.* (quotation omitted).

Similarly, in *Zofran*, the MDL court granted a motion to dismiss non-Missouri plaintiffs' claims for lack of personal jurisdiction because those plaintiffs did not allege that they "were prescribed Zofran in Missouri, took Zofran in Missouri, or that their children suffered injuries in Missouri," and they could not "connect[] the conduct of [the manufacturer] in Missouri, if any, to their own claims." *In re Zofran (Ondansetron) Prods. Liab. Litig.*, 2016 WL 2349105, at *5 (D. Mass May 4, 2016) (unpublished). Because the non-Missouri plaintiffs could only support specific jurisdiction "'in the abstract or by analogy'" to the Missouri plaintiffs' claims, it was "clear that a Missouri court would not have specific personal jurisdiction over the claims brought by those out-of-state plaintiffs." *Id.* (quoting *Testosterone*, 2016 WL 640520, at *5).

Vito v. Hoffman, 199 F.2d 468, 470 (D.C. Cir. 1952)); *accord Stewart v. Sturms*, 784 S.W.2d 257, 260 (Mo. Ct. App. 1989).

In support of its "jurisdiction by joinder" theory, the district court cited three Supreme Court decisions. (*See* Order at 5 n.1, R211, A5 (citing *Shaffer v. Heitner*, 433 U.S. 186 (1977), *Walden v. Fiore*, 134 S. Ct. 1115 (2014), and *Keeton v. Hustler Magazines, Inc.*, 465 U.S. 770 (1984)).) None of these decisions support the district court's theory. Indeed, one of them, *Walden v. Fiore*, directly contradicts the theory. As shown above, *Walden* recognizes that personal jurisdiction over a defendant must be based on the defendant's contacts with the forum states, not the contacts of another party. *See* 134 S. Ct. at 1122. Accordingly, "nothing in *Walden* indicates that a court may exercise personal jurisdiction over a claim against defendants unrelated to their conduct within the forum states." *Testosterone*, 2016 WL 640520, at *5.

The district court's reliance upon *Shaffer v. Heitner* is similarly misplaced. The district court quoted *Shaffer* for the proposition that personal jurisdiction depends upon "the relationship among the defendant, the forum, and the litigation." (Order at 5 n.1, R211, A5 (quoting *Shaffer*, 433 U.S. at 204).) Initially, this quotation is simply a general statement of the contrast between the modern "minimum contacts" regime for personal jurisdiction and "the mutually exclusive sovereignty of the States" on which the prior regime was based. 433 U.S. at 204. Moreover, the relationship between defendant, forum, and litigation does not support the district court's holding here: exercising personal jurisdiction over the claim of one plaintiff based merely on its similarity to the claim of another plaintiff. *Cf. Walden*, 134 S. Ct. at 1122. And as noted above, *Shaffer* specifically holds that state laws may not extend personal jurisdiction beyond the limits imposed by due process. *See supra* at 31.

Neither does *Keeton* support the district court's finding of specific jurisdiction where the defendant's forum activities do not give rise to a plaintiff's claims. In *Keeton*, the plaintiff sued a magazine for libel in New Hampshire, though neither plaintiff nor defendant were residents of New Hampshire. 465 U.S. at 772. The Supreme Court held that New Hampshire courts could exercise specific jurisdiction over the magazine because its "regular circulation of magazines" in New Hampshire injured the plaintiff's reputation in New Hampshire. *Id.* at 779-80. Here, unlike *Keeton*, the non-resident Plaintiffs cannot point to any action taken by Pfizer in Missouri that caused injury to them in Missouri. As the *Testosterone* court explained in rejecting a similar argument, nothing in *Keeton* suggests that "the plaintiff could have brought suit in New Hampshire if, for example, the magazine circulated within the state contained only libelous statements related to *other, unrelated plaintiffs*." 2016 WL 640520, at *5 (emphasis added).[10]

Only one appellate decision is to the contrary: the Supreme Court of California just held in a 4-3 split decision that California courts could exercise specific jurisdiction over claims by non-resident plaintiffs who were joined in a single action with claims of resident plaintiffs. *Bristol-Myers Squibb Co. v. Superior Court*, 2016 WL 4506107, at *1 (Cal. Aug. 29, 2016) (to be published in P.3d). The decision of the

[10] The First Circuit distinguished *Keeton* from the pharmaceutical personal injury claim at issue in *Glater*, which was "much more localized than libel, for it arises with respect to only a single victim in a particular location at a given time," and thus can support specific jurisdiction only where the defendant's actions gave rise to the plaintiff's claim. *Glater*, 744 F.2d at 216; *accord In re Plavix Related Cases*, 2014 WL 3928240, at *8.

California Supreme Court is neither binding on the federal courts, nor is it, as the dissent observed, "supported by specific jurisdiction decisions from the United States Supreme Court, [the California Supreme Court], or the lower federal and state courts." *Id.* at *20 (Werdegar, J., dissenting). The *Bristol-Myers* decision essentially nationalizes questions of personal jurisdiction by asserting that "all the plaintiffs' claims arise out of BMS's nationwide marketing and distribution of Plavix," *id.* at *12 (majority opinion), rather than considering whether each plaintiff's claim has a legally cognizable nexus with the defendant's forum activities, as due process requires. *See supra* Point II.B.

As a result, *Bristol-Myers* would accomplish under the guise of "specific jurisdiction" virtually the same sweeping "general jurisdiction" that the United States Supreme Court denounced as unconstitutional in *Goodyear* and *Daimler*. The dissent aptly noted this danger:

> [T]he majority expands specific jurisdiction to the point that, for a large category of defendants, it becomes indistinguishable from general jurisdiction. At least for consumer companies operating nationwide, with substantial sales in California, the majority creates the equivalent of general jurisdiction in California courts. What the federal high court wrought in *Daimler* ... this court undoes today under the rubric of specific jurisdiction.

Id. at *20 (Werdegar, J., dissenting). "Such an aggressive assertion of personal jurisdiction is inconsistent with the limits set by due process." *Id.* at *33. No matter the label applied, the *Bristol-Myers* majority untenably stretches specific jurisdiction in a fashion that is every bit as "grasping" and "exorbitant" as what the United States Supreme Court rejected as violative of due process. *Daimler*, 134 S. Ct. at 761.

The Supreme Court's decisions in *Goodyear* and *Daimler* thus foreclose the district court's broad extension of specific jurisdiction. As the *Testosterone* court summarized, it is "unfair and contrary to the rationale underlying the minimum contacts doctrine to allow plaintiffs to use the Missouri plaintiff's claims as a hook to reel defendants into a series of separate trials in a distant and inconvenient forum to try issues unrelated to their conduct within the forum." 2016 WL 640520, at *6. The district court's assertion of personal jurisdiction over the claims of non-resident Plaintiffs was therefore legal error.

III. PFIZER PROPERLY REMOVED THIS ACTION DUE TO LACK OF PERSONAL JURISDICTION OVER CLAIMS BY NON-RESIDENT PLAINTIFFS

This Court should hold that Pfizer properly removed this action based on the lack of personal jurisdiction over claims by non-resident Plaintiffs. The district court's rejection of each of Pfizer's three independent grounds for removal was based, in whole or in part, on its erroneous finding of personal jurisdiction over claims by non-resident Plaintiffs. The district court held not only that it had such personal jurisdiction, but also that because similar grounds for removal have been repeatedly rejected in the Eastern District of Missouri, it was not "objectively reasonable" for Pfizer to do so here and sanctions were warranted. (Order at 8-10, R214-16, A8-10.) To the contrary, *Goodyear* and *Daimler* prohibit personal jurisdiction over the claims by the non-resident Plaintiffs, and many other district courts have upheld removals on the same grounds Pfizer asserted here. The district court thus awarded sanctions on an erroneous legal premise and its award must be vacated.

This Court has previously acknowledged that sanctions cannot be awarded under section 1447(c) where the Court concludes "that removal was not improper." *Convent Corp.*, 784 F.3d at 481. Thus, the district court's sanctions award must be vacated if this Court determines that even one of Pfizer's three asserted grounds for removal was legally proper. As set forth below, all three were proper.

A. The Case Was Properly Removed by Submitting Personal Jurisdiction for Preliminary Decision Under *Ruhrgas*

The first theory under which Pfizer removed, and the only one that the Court need consider in order to overturn the sanctions award, was based upon the Supreme Court's decision in *Ruhrgas AG v. Marathan Oil Co.*, 526 U.S. 574 (1999). Pfizer asserted that the district court may resolve personal jurisdiction before subject matter jurisdiction under *Ruhrgas* as a way of dispensing with any lack of complete diversity. (Notice of Removal ¶¶ 4-11, R4-6.) In *Ruhrgas*, the Supreme Court held that "in cases removed from state court … there is no unyielding jurisdictional hierarchy" between personal jurisdiction and subject matter jurisdiction. 526 U.S. at 578. Thus, where "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 has discretion to decide personal jurisdiction first where it will obviate questions of subject matter jurisdiction. *Id.* at 588. Under *Ruhrgas*, the district court could therefore avoid complex questions of subject matter jurisdiction in this multi-plaintiff action by dismissing claims by non-resident Plaintiffs for lack of personal jurisdiction and retaining jurisdiction over claims by remaining resident plaintiffs. (Notice of Removal ¶¶ 4-11, R4-6.)

Federal district courts around the country have repeatedly upheld such removals based on lack of personal jurisdiction over claims by non-resident plaintiffs,[11] including in two pharmaceutical cases removed from Missouri state court and transferred to MDL courts. *Testosterone*, 2016 WL 640520; *Zofran*, 2016 WL 2349105. These courts have held that "[t]he personal jurisdiction question … is more straightforward and does not present a complex question of state law," and thus is appropriate for disposition prior to deciding subject matter jurisdiction. *Testosterone*, 2016 WL 640520, at *3 (quotation omitted). On the other hand, "subject-matter jurisdiction presents complex issues, including the doctrine of [procedural] misjoinder." *Aclin*, 2016 WL 3093246, at *2. In addition, to decide subject matter jurisdiction, a district court would have to evaluate the question of fraudulent joinder of plaintiffs due to lack of personal jurisdiction, *see Zofran*, 2016 WL 2349105, at *2, and thus "would be required to consider the personal jurisdiction issue as part of its analysis on the motion to remand, anyway." *Evans*, 2014 WL 7342404, at *3 n.1. The clarity of the issues concerning personal jurisdiction under *Goodyear* and *Daimler*, contrasted with the complexity of subject matter jurisdiction, thus warrants deciding personal jurisdiction first under *Ruhrgas*.

The district court did not discuss Pfizer's grounds for removal under *Ruhrgas* or any of the above authorities. Instead, it implicitly rejected these grounds by holding that it had personal jurisdiction over the entire action under the "jurisdiction by

[11] *See, e.g.*, *Locke v. Ethicon Inc.*, 58 F. Supp. 3d 757, 760 (S.D. Tex. 2014); *Evans v. Johnson & Johnson*, 2014 WL 7342404 (S.D. Tex. Dec. 23, 2014) (unpublished); *Kraft v. Johnson & Johnson*, 97 F. Supp. 3d 846 (S.D. W. Va. 2015); *Aclin v. PD-RX Pharms. Inc.*, 2016 WL 3093246 (W.D. Okla. June 1, 2016) (unpublished).

joinder" theory. (Order at 5 n.1, R211, A5.) Yet for the reasons explained in Point II.B above, "jurisdiction by joinder" violates due process and cannot support the district court's assertion of personal jurisdiction over the entire action. Absent any basis for personal jurisdiction over the claims of non-resident Plaintiffs, the application of *Ruhrgas* as a means of simplifying a lack of complete diversity is readily apparent. No matter that courts in the Eastern District of Missouri have frequently rejected removal in similar cases and for the same reasons as the district court (*see* Order at 8-10, R214-16, A8-10), grounds that are legally correct under the precedents of the Supreme Court are objectively reasonable. The district court's sanctions award must therefore be vacated.

B. The Non-Resident Plaintiffs Are Fraudulently Joined Due to Lack of Personal Jurisdiction

Because removal was justified based on *Ruhrgas*, the Court need not reach Pfizer's alternative theories of fraudulent joinder and fraudulent misjoinder. If, however, the Court considers Pfizer's fraudulent joinder theory, it should find removal proper under that theory. Where, as here, the district court cannot exercise personal jurisdiction over the claims of the non-resident Plaintiffs, those Plaintiffs cannot plausibly pursue their claims against Pfizer to judgment in Missouri, and they are thus properly treated as having been fraudulently joined to defeat diversity. In that instance, the district court should disregard the citizenship of the non-resident Plaintiffs, dismiss their claims without prejudice, and retain diversity jurisdiction over the Missouri Plaintiffs' claims only. (Notice of Removal ¶¶ 81-97, R65-73.)

Although fraudulent joinder is typically asserted with regard to defendants, many courts have held that the doctrine applies equally to "a diversity destroying plaintiff" whose claim has "'no reasonable basis in fact and law.'" *Orrick v. Smithkline Beecham Corp.*, 2014 WL 3956547, at *3 (E.D. Mo. Aug. 13, 2014) (unpublished) (quotation omitted).[12] It is just as improper to attempt to frustrate complete diversity with a plaintiff who has no claim as with a defendant against whom a plaintiff has no claim. While this Court has not directly confronted the issue, it has suggested that "if the 'nondiverse' plaintiff is not a real party in interest, and is purely a formal or nominal party, his or its presence in the case may be ignored in determining jurisdiction . . . [a]nd such a party may be dropped from the case." *Iowa Pub. Serv. Co. v. Med. Bow Coal Co.*, 556 F.2d 400, 404 (8th Cir. 1977). This Court's decision in *Iowa*

[12] *See also, e.g.*, *McGee v. Fresenius Med. Care N. Am., Inc.*, 2014 WL 2993755, at *1-2 (E.D. Mo. July 3, 2014) (unpublished) (applying fraudulent joinder analysis to non-diverse plaintiffs); *Witherspoon v. Bayer Healthcare Pharms. Inc.*, 2013 WL 6069009, at *3-5 (E.D. Mo. Nov. 18, 2013) (unpublished) (finding non-diverse plaintiff to be fraudulently joined); *Taco Bell Corp. v. Dairy Farmers of Am., Inc.*, 727 F. Supp. 2d 604, 607 (W.D. Ky. 2010) (noting that the majority of courts hold that the fraudulent joinder analysis applies to both plaintiffs and defendants); *Miller v. Home Depot, U.S.A., Inc.*, 199 F. Supp. 2d 502, 508 (W.D. La. 2001) ("The fraudulent joinder doctrine can be applied to the alleged fraudulent joinder of a plaintiff."); *Elk Corp. of Texas v. Valmet Sandy-Hill, Inc.*, 2000 WL 303637, at *2 (N.D. Tex. Mar. 22, 2000) (unpublished) ("[T]he court concludes that the fraudulent joinder doctrine may be applied where a defendant claims that a plaintiff has been fraudulently joined."); *Nelson v. St. Paul Fire & Marine Ins. Co.*, 897 F. Supp. 328, 331 (S.D. Tex. 1995); *Glass Molders, Pottery, Plastics & Allied Workers Int'l Union, AFL-CIO v. Wickes Cos., Inc.*, 707 F. Supp. 174, 181 (D.N.J. 1989); *see also* 29A Fed. Proc., L. Ed. § 69:26 ("In making this [fraudulent joinder] determination, the court should inquire into the joinder of plaintiffs as well as defendants."); 32A Am. Jur. 2d Federal Courts § 1395 ("In determining whether there has been a fraudulent joinder to defeat federal jurisdiction, the court ought to inquire into the joinder of plaintiffs as well as defendants.").

Public has thus been cited in support of the proposition that "[t]he majority of courts to consider this issue … have held that [fraudulent joinder] is applicable to both defendants and plaintiffs." *See Murray Energy Holdings Co. v. Bloomberg, L.P.*, 2016 WL 3355456, at *3 (S.D. Ohio June 17, 2016) (unpublished).

In addition, courts have long recognized that fraudulent joinder may be premised on a lack of personal jurisdiction.[13] For example, in *Villar v. Crowley Mar. Corp.*, 780 F. Supp. 1467 (S.D. Tex. 1992), the defendants asserted fraudulent joinder based not "on the substantive merits of the plaintiff's claim," but rather on the fact "that Plaintiffs cannot prevail in state court because they cannot establish personal jurisdiction." 780 F. Supp. at 1473. The court noted that the effect of predicating fraudulent joinder on lack of personal jurisdiction was burden-shifting: while it is normally the plaintiff who is "required to make a *prima facie* showing that personal jurisdiction exists," a fraudulent joinder theory would require the defendant to "prove that there is no possibility that the Plaintiffs can establish personal jurisdiction." *Id.* The *Villar* court then stated, as an alternative ground for upholding removal, that the non-diverse codefendants were fraudulently joined because there was "no possibility that Plaintiffs could establish personal jurisdiction over the Codefendants." *Id.* at 1481 n.21.[14] The Fifth Circuit affirmed, stating that jurisdiction could be predicated

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[13] *See, e.g.*, *Villar v. Crowley Mar. Corp.*, 780 F. Supp. 1467 (S.D. Tex. 1992), *aff'd*, 990 F.2d 1489 (5th Cir. 1993); *Thomas v. Mitsubishi Motor N. Am., Inc.*, 436 F. Supp. 2d 1250, 1251 (M.D. Ala. 2006); *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).

[14] The primary basis for the district court's denial of remand in *Villar* was its finding, affirmed by the Fifth Circuit, that issues of personal jurisdiction could be

on the district court's finding "that there was no possibility that the Villars could prove that the court had personal jurisdiction over the foreign defendants." *Villar*, 990 F.2d at 1494-95.

The district court here rejected fraudulent joinder, but not on the terms it was asserted. Instead of considering the above authorities, the district court mistakenly conflated fraudulent joinder with "procedural misjoinder," the primary focus of its remand order. (Order at 3-8, R209-14, A3-8.) The district court then dispensed with Pfizer's personal jurisdiction grounds by holding in a footnote that it had personal jurisdiction over the entire action. (Order at 5 n.1, R211, A5.) For the reasons stated above, that theory violates due process, and thus the district court erred in rejecting Pfizer's fraudulent joinder arguments as not "objectively reasonable." The award of sanctions should therefore be vacated.

C. Plaintiffs Are Procedurally Misjoined

Finally, as an additional alternative, the Court may vacate the sanctions by holding that the district court had subject matter jurisdiction under the procedural misjoinder doctrine (sometimes termed "fraudulent misjoinder"). The procedural misjoinder doctrine provides that where plaintiffs' claims are misjoined because they do not "aris[e] out of the same transaction, occurrence, or series of transactions or

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decided before subject matter jurisdiction where they would dispose of questions of subject matter jurisdiction. *See Villar*, 990 F.2d at 1494-95. Though the Fifth Circuit's decision in *Villar* was abrogated by *Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211 (5th Cir. 1998), which held that "district courts should decide issues of subject-matter jurisdiction first," *id.* at 214, that decision was reversed by the Supreme Court in *Ruhrgas*, 526 U.S. 574, discussed above.

occurrences," Fed. R. Civ. P. 20(a)(1)(A), the court may disregard the improper joinder for purposes of removal and retain diversity jurisdiction over all plaintiffs who are diverse from the defendants. *See Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996).[15]

Courts have held that procedural misjoinder authorized the removal of similar multi-plaintiff actions from Missouri state courts by severing each plaintiff into a separate action and retaining jurisdiction over those where the parties are completely diverse. *See, e.g.*, *In re Benicar (Olmesartan) Prods. Liab. Litig.*, 2016 WL 4059650 (D.N.J. July 27, 2016) (to be published in F. Supp. 3d); *Propecia*, 2013 WL 3729570, at *13; *In re Fosamax (Alendronate Sodium) Prods. Liab. Litig. (No. II)*, 2012 WL 1118780, at *3 (D.N.J. Apr. 3, 2012) (unpublished). Prior to *Goodyear* and *Daimler*, this Court held that the procedural misjoinder doctrine would require a showing of "egregious" misjoinder that was not met in a multi-plaintiff pharmaceutical case because the

[15] At least two courts of appeals have expressly adopted the procedural misjoinder doctrine. *See Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529, 533 (5th Cir. 2006); *In re Benjamin Moore & Co.*, 309 F.3d 296, 298 (5th Cir. 2002); *Tapscott*, 77 F.3d at 1360. Similar to fraudulent joinder, procedural misjoinder represents a practical acknowledgement that "federal courts are in the best position to respond to the problem of misjoined parties and removal," and "requiring defendants to seek [severance] in state court puts the diversity removal docket in jeopardy and fails adequately to protect defendants' access to federal court." Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 Ala. L. Rev. 779, 809 (2006). It is especially compelling "in the context of MultiDistrict Litigation." *Sutton v. Davol, Inc.*, 251 F.R.D. 500, 504 (E.D. Cal. 2008). "If plaintiffs can escape the MDL by joining multiple, unconnected and non-diverse parties in a state court of their choice, they defeat the purposes of the MDL and deny defendants their right to removal." *In re Propecia (Finasteride) Prod. Liab. Litig.*, 2013 WL 3729570, at *8 (E.D.N.Y. May 17, 2013) (unpublished); *accord In re Diet Drugs Prods. Liab. Litig.*, 2007 WL 2458021, at *1 (E.D. Pa. Aug. 23, 2007) (unpublished).

claims of the plaintiffs were "logically related." *Prempro*, 591 F.3d at 622-24. The *Prempro* decision did not consider whether the Missouri courts had personal jurisdiction over claims by non-resident plaintiffs in that action.

Here, the district court devoted the majority of its remand decision to the issue of procedural misjoinder, which it held failed under *Prempro* and its progeny in the district courts. (Order at 3-8, R209-14, A3-8.) But the district court failed to address Pfizer's most important ground for procedural misjoinder: that, in light of lack of personal jurisdiction over claims by non-resident plaintiffs under the intervening decisions in *Goodyear* and *Daimler*, joining those claims with those of unrelated resident plaintiffs is an "egregious" misjoinder under *Prempro* that would warrant removal under the procedural misjoinder doctrine. (*See* Opp. to Remand at 6, 13-14, R145, R152-53.) As set forth above, due process requires a separate analysis of specific jurisdiction as to each individual plaintiff. The rules of procedure should not be more lenient than the Constitution, treating the claims of non-resident plaintiffs as to whom there is no jurisdiction as properly joined and "logically related" to unrelated plaintiffs from Missouri.

The district court rejected these grounds by relying on decisions that rejected procedural misjoinder in similar cases.[16] But because those other decisions did not

[16] In rejecting Pfizer's assertion of procedural misjoinder as not objectively reasonable, the district court characterized Pfizer as claiming "that diversity jurisdiction exists because the out-of-state plaintiffs' claims were … procedurally misjoined." (Order at 2, R208, A2.) Pfizer in fact maintains that all Plaintiffs are procedurally misjoined because none of their claims arise "out of the same transaction, occurrence, or series of transactions or occurrences" as required by Federal Rule 20.

address the effect of *Goodyear* and *Daimler*'s sea change in personal jurisdiction—and thus their effect on *Prempro*—they cannot show that Pfizer's grounds for removal on that basis were not "objectively reasonable." Rather, these problems of personal jurisdiction, together with other grounds relating to the distinct and unrelated origin of such claims, raise serious questions concerning the satisfaction of the "same transaction or occurrence" test under Rule 20. This Court is therefore warranted in finding that the lack of personal jurisdiction over claims of unrelated Plaintiffs joined in the same action constitutes an egregious misjoinder under *Prempro*.

Legions of decisions have held that these personal injury products liability claims arise out of unique and individualized medical events.[17] At a minimum, these authorities applying the procedural misjoinder doctrine in similar circumstances—including post-*Prempro* decisions permitting removal from Missouri state courts[18]—

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[17] *See, e.g.*, *Benicar*, 2016 WL 4059650; *McGrew v. Howmedica Osteonics Corp.*, 2015 WL 159367, *2 (S.D. Ill. 2015) (unpublished); *Hill v. Eli Lilly & Co.*, 2015 WL 5714647, at *6 (S.D. Ind. Sept. 29, 2015) (unpublished); *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 146-48 (S.D.N.Y. 2001); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 294 F. Supp. 2d 667, 678 (E.D. Pa. 2003); *Adams v. I-Flow Corp.*, 2010 WL 1339948, at *8 (C.D. Cal. Mar. 30, 2010); *Fosamax*, 2012 WL 1118780, at *5; *Propecia*, 2013 WL 3729570, at *14; *Stinnette v. Medtronic Inc.*, 2010 WL 767558, at *2 (S.D. Tex. Mar. 3, 2010) (unpublished); *Cumba v. Merck & Co.*, 2009 WL 1351462, at *1 (D.N.J. May 12, 2009) (unpublished); *In re Seroquel Prods. Liab. Litig.*, 2007 WL 737589, at *1 (M.D. Fla. Mar. 7, 2007) (unpublished); *McNaughton v. Merck & Co.*, 2004 WL 5180726, at *3 (S.D.N.Y. Dec. 17, 2004) (unpublished); *In re Baycol Prods. Liab. Litig.*, 2002 WL 32155269, at *2-3 (D. Minn. July 5, 2002) (unpublished); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 1999 WL 554584, at *4 (E.D. Pa. July 16, 1999) (unpublished); *Warner v. Stryker Corp.*, 2009 WL 1773170, at *1-2 (D. Or. June 22, 2009) (unpublished).

[18] *See, e.g.*, *In re Benicar*, 2016 WL 4059650; *In re Fosamax*, 2012 WL 1118780, at *5; *In re Propecia*, 2013 WL 3729570, at *14.

show that Pfizer's procedural misjoinder grounds were objectively reasonable. The additional due process problems with this joinder under *Goodyear* and *Daimler*, unaddressed by the district court, simply bolster this analysis. The district court's sanctions award should therefore be vacated.

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's award of sanctions under section 1447(c).

Dated: September 7, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(C), I hereby certify that the foregoing brief complies with applicable type-volume limitations because it contains 13,431 words, exclusive of those sections of the brief which, pursuant to FRAP 32(a)(7)(B)(iii), do not count toward applicable word limits.

I further certify that this brief and addendum have been scanned for viruses and that they are virus free.

Dated: September 7, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of September, 2016, I electronically filed the foregoing brief and addendum with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing brief and addendum via electronic mail, to the following non-CM/ECF participants:

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