UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DISTRICT

ELAINE ROBINSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 4:16-cv-00439-CEJ
	)	
PFIZER INC.,	)	
	)	
Defendant.	)	
	)	
	)	

DEFENDANT PFIZER INC.'S OPPOSITION TO PLAINTIFFS' MOTION TO REMAND AND REQUEST FOR EXPEDITED CONSIDERATION

Defendant Pfizer Inc. ("Pfizer"), by its undersigned attorneys, respectfully submits this memorandum of law in opposition to Plaintiffs' Motion to Remand.

PRELIMINARY STATEMENT

This is a pharmaceutical products liability action in which 64 Plaintiffs from 29 states allege personal injuries from Lipitor. Three motions are currently pending: (1) Pfizer's motion to stay proceedings pending transfer of this action to the Lipitor MDL; (2) Pfizer's motion to dismiss the out-of-state Plaintiffs' claims for lack of personal jurisdiction pursuant to the Supreme Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); and (3) Plaintiffs' motion to remand. Pfizer submits that these motions should be resolved as follows:

First, because the Lipitor MDL Court is now considering jurisdictional issues identical to those raised by Plaintiffs' motion in two other actions removed from Missouri state court, Pfizer respectfully submits that this Court should grant the motion to stay so that these issues may be resolved efficiently and in a consistent manner by the MDL Court.

Second, should the Court elect to decide jurisdictional issues prior to MDL transfer, it should first decide Pfizer's motion to dismiss for lack of personal jurisdiction. Numerous courts have considered personal jurisdiction before subject matter jurisdiction where, as here, the

argument that federal subject matter jurisdiction exists is premised on a lack of personal jurisdiction over non-diverse parties.[1] This Court should do the same and find that it does not have personal jurisdiction over the out-of-state Plaintiffs. Six courts in this District have concluded that, under *Daimler*, Missouri courts do not have personal jurisdiction over Pfizer as to claims brought by out-of-state plaintiffs.[2] Deciding personal jurisdiction first is particularly appropriate because the issues associated with its application are simple and straightforward under the *Daimler* framework. Nor, contrary to Plaintiffs' contentions in their opposition to remand, does Pfizer's compliance with Missouri's mandatory corporate registration statutes confer personal jurisdiction. Finally, the Court should reject Plaintiffs' improper tactics in seeking expedited treatment of their motion to remand while filing a response to Pfizer's motion to dismiss four days late, just hours before this brief was to be filed. The Court should therefore grant Pfizer's motion and retain subject matter jurisdiction as to the Missouri Plaintiffs' claims only.

Third, even if the Court were to first consider the question of federal subject matter jurisdiction that Plaintiffs' remand motion raises, it should find that it has diversity jurisdiction under either of two independent doctrines: (1) fraudulent joinder; and (2) procedural misjoinder. Here, the out-of-state Plaintiffs are fraudulently joined and do not destroy diversity because Missouri courts lack personal jurisdiction over their claims for the reasons set forth in Pfizer's motion to dismiss. Even if the Court addresses subject matter jurisdiction first, it must necessarily consider whether Plaintiffs are fraudulently joined for lack of personal jurisdiction.

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[1] *See In re Testosterone Replacement Therapy Prods. Liab. Litig.*, --- F. Supp. 3d ----, 2016 WL 640520, at *4 (N.D. Ill. Feb. 18, 2016); *Kraft v. Johnson & Johnson*, 97 F. Supp. 3d 846, 851 (S.D.W.Va. 2015); *Locke v. Ethicon*, 58 F. Supp. 3d 757, 760 (S.D. Tex. 2014).

[2] *See, e.g.*, *Bartholome v. Pfizer, Inc.*, 2016 WL 366795 (E.D. Mo. Jan. 29, 2016) (Autrey, J.); *Barron v. Pfizer, Inc.*, 2015 WL 5829867 (E.D. Mo. Oct. 6, 2015) (Shaw, J.); *Clarke v. Pfizer Inc.*, 2015 WL 5243876 (E.D. Mo. Sept. 8, 2015) (Fleissig, J.); *Schwarz v. Pfizer Inc.*, No. 4:15-cv-00579-JAR, Dkt. 11 (E.D. Mo. July 30, 2015) (Ross, J.) (Dkt. 6-1, Ex. A to Pfizer's Mot. to Dismiss); *Keeley v. Pfizer Inc.*, 2015 WL 3999488 (E.D. Mo. July 1, 2015) (Webber, J.); *Huff v. Pfizer, Inc.*, No. 4:15-CV-787-RWS, Dkt. 14 (E.D. Mo. July 10, 2015) (Sippel, J.) (Dkt. 6-2, Ex. B to Pfizer's Mot. to Dismiss); *Fidler v. Pfizer Inc.*, No. 4:15-CV-582-RWS, Dkt. 14 (E.D. Mo. June 25, 2015) (Sippel, J.) (Dkt. 6-3, Ex. C to Pfizer's Mot. to Dismiss).

"The Court cannot simply ignore or summarily reject this argument to make its subject matter jurisdiction analysis easier." *In re Testosterone Therapy Replacement*, 2016 WL 640520, at *3. Because Plaintiffs are fraudulently joined, the Court should dismiss the claims of the out-of-state Plaintiffs and retain jurisdiction over the Missouri Plaintiffs only. Alternatively, this Court should find federal jurisdiction under the procedural misjoinder doctrine because Plaintiffs destroyed complete diversity by egregiously misjoining the claims of 64 unrelated Plaintiffs from 29 different states whose claims did not arise out of the same transaction or occurrence.

Accordingly, the Court should (a) stay proceedings in this case pending transfer to the Lipitor MDL; (b) grant Pfizer's motion to dismiss for lack of personal jurisdiction and find subject matter jurisdiction over the remaining Plaintiffs; or (c) find subject matter jurisdiction under the fraudulent joinder and/or procedural misjoinder doctrines.

BACKGROUND

Plaintiffs are 64 unrelated women residing in 29 different states who allege that they developed type 2 diabetes as a result of ingesting Lipitor, a prescription medication manufactured by Pfizer. On or about February 29, 2016, Plaintiffs filed a single petition in the Circuit Court for St. Louis City, Missouri. (*See* Dkt. 1-3, "Complaint"). On March 31, 2016, Pfizer timely removed this case to this Court on the basis of diversity of citizenship. (*See* Dkt. 1, "Notice").

Pfizer is a citizen of New York and Delaware. (Compl. ¶ 67.) Of the 64 Plaintiffs, 60 allege citizenship in states other than Missouri. (Compl. ¶¶ 4-66.) Six allege New York citizenship and none allege Delaware citizenship. (*Id.*) The non-resident Plaintiffs do not credibly allege that they were prescribed or ingested Lipitor in Missouri, that they were injured in Missouri, that they were injured by conduct that occurred in Missouri, or that any of Defendants' activities in Missouri gave rise to their claims. Indeed, with the exception of allegations relating specifically to the Missouri Plaintiffs, the Complaint is nearly devoid of plausible allegations that connect this case or any of the Plaintiffs to Missouri.

ARGUMENT

I. THE COURT SHOULD STAY THIS ACTION PENDING THE JPML'S DECISION ON TRANSFER TO THE MDL

For the reasons set forth in Pfizer's motion to stay (Dkts. 8-9), this Court should, in the interests of judicial economy and to ensure consistent rulings on the jurisdictional issues raised in this motion, stay proceedings in this action pending transfer to the Lipitor MDL.[3]

II. THE COURT SHOULD DECIDE PERSONAL JURISDICTION BEFORE SUBJECT MATTER JURISDICTION

If this Court decides to resolve jurisdictional issues prior to MDL transfer, it should first decide Pfizer's motion to dismiss for lack of personal jurisdiction. The Supreme Court held in *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), that 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 does not abuse its discretion by turning directly to personal jurisdiction." *Id.* at 588. This Court should decide personal jurisdiction first for four reasons.

First, the Court should decide personal jurisdiction first because Plaintiffs have filed an untimely opposition, four days late, to Pfizer's motion to dismiss the out-of-state Plaintiffs for lack of personal jurisdiction. Plaintiffs should not be permitted to manipulate the order in which the Court addresses these issues by at once seeking expedited resolution of subject matter jurisdiction and attempting to delay resolution of personal jurisdiction by failing to timely oppose Pfizer's motion to dismiss. Pfizer will fully respond to Plaintiffs' opposition to its motion to dismiss by way of a separate reply brief.

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[3] Pfizer recognizes that this Court denied Pfizer's motion to stay a previously-filed Lipitor action, *Lovett v. Pfizer Inc.*, pending transfer to the Lipitor MDL. *Lovett v. Pfizer Inc.*, No. 4:14-cv-458-CEJ (E.D. Mo. Mar. 26, 2014). However, unlike in *Lovett*, the jurisdictional issues raised by Plaintiffs' motion to remand are now fully briefed in cases in the MDL and awaiting the MDL Court's resolution. (*See* Dkt. 9.) Thus the concerns of judicial economy and consistency that motivated Pfizer to seek stays in prior cases are even more prominent here.

Second, deciding personal jurisdiction first is particularly appropriate because the question raised by Plaintiffs' remand motion of whether this Court has federal subject matter jurisdiction depends on whether this Court finds that it has personal jurisdiction over the out-of-state Plaintiffs. Addressing Pfizer's motion to dismiss first is the more efficient approach, as the Court "would be required to consider the personal jurisdiction issue as part of its analysis on the motion to remand, anyway." *Evans v. Johnson & Johnson*, 2014 WL 7342404, at *3 n.1 (S.D. Tex. Dec. 23, 2014). Numerous courts have thus found it appropriate to consider the issue of personal jurisdiction first under similar circumstances.[4]

Third, considering personal jurisdiction first is appropriate because "the question of personal jurisdiction here [is] straightforward, whereas the issue of subject matter jurisdiction raises difficult and novel questions of federal procedural law." *Kraft v. Johnson & Johnson*, 97 F. Supp. 3d 846, 851 (S.D. W. Va. 2015); *accord In re Testosterone Replacement Therapy*, 2016 WL 640520 at *3. While Plaintiffs devote many pages to subject matter jurisdiction, their only attempt to dispute the lack of personal jurisdiction is their brief assertion in their opposition to remand that Pfizer's compliance with Missouri's mandatory business registration statutes somehow confers general jurisdiction in Missouri. But as the Second Circuit recently held, predicating general jurisdiction solely on compliance with mandatory corporate registration requirements does not comport with due process. *Brown v. Lockheed Corp.*, 814 F.3d 619 (2d Cir. Feb. 18, 2016).[5] If a corporation is automatically subject to general jurisdiction in every state in which it registered to do business, *Daimler*'s ruling that a corporation is only subject to

[4] *See id*; *see also In re Testosterone Replacement Therapy*, 2016 WL 640520, at *4; *Thomas v. Mitsubishi Motor N. Am., Inc.*, 436 F. Supp. 2d 1250, 1251-52 (M.D. Ala. 2006); *accord Villar v. Crowley Mar. Corp.*, 780 F. Supp. 1467, 1474 (S.D. Tex. 1992), *aff'd*, 990 F.2d 1489 (5th Cir. 1993) ("[T]he Court must necessarily address the personal jurisdiction question regardless of which motion is addressed first. Thus, judicial economy favors deciding the Motion to Dismiss at the outset.").

[5] While Pfizer recognizes that this Court previously held that compliance with Missouri's mandatory corporate registration statutes conferred jurisdiction by consent, *see Mitchell v. Eli Lilly & Co.*, --- F. Supp. 3d. ----, 2016 WL 362441 (E.D. Mo. Jan. 29, 2016), Pfizer respectfully requests that the Court reevaluate that holding in light of *Brown* and other authority.

general jurisdiction where it is headquartered or incorporated "would be robbed of meaning," as virtually every state in the country has similar statutes. *Id.* at 640; *accord Keeley v. Pfizer Inc.*, 2015 WL 3999488, at *4 (E.D. Mo. July 1, 2015) (Webber, J.); *Neely v. Wyeth LLC*, 2015 WL 1456984, at *3 (E.D. Mo. Mar. 30, 2015) (Ross, J.).[6] The consensus among courts in this District that have recently held that Missouri courts lack personal jurisdiction over Pfizer as to out-of-state Plaintiffs (*see supra* n.2) also shows that this issue is straightforward under *Daimler* and is consistent with a finding that compliance with Missouri's business registration statutes does not confer jurisdiction.

Fourth, not only would deciding subject matter jurisdiction first not dispose of the question of personal jurisdiction, it would also require the Court to address several more complicated issues, including whether Plaintiffs are fraudulently joined. The Court would also be required to address Pfizer's argument that Plaintiffs are procedurally misjoined and that the Supreme Court's decision in *Daimler* calls into question the validity of *In re Prempro Products Liability Litigation*, 591 F.3d 613 (8th Cir. 2010). *See infra* at 13-14. While Pfizer submits that the Court has subject matter jurisdiction over this action due to Plaintiffs' procedural misjoinder and fraudulent joinder, the Court need not even reach those issues if it first addresses and grants the motion to dismiss for lack of personal jurisdiction over Pfizer with respect to the claims of the non-Missouri Plaintiffs.

In sum, because a personal jurisdiction ruling may fully resolve the jurisdictional disputes in this case and involves a simple application of federal constitutional law, this Court should first address and grant Pfizer's motion to dismiss. Granting that motion renders the remaining parties completely diverse, and Plaintiffs' motion to remand should be denied.

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[6] Among the decisions Plaintiffs cite from other judges in this District who addressed the question of subject matter jurisdiction before personal jurisdiction, the removing defendants raised fraudulent joinder as a basis for federal jurisdiction in only one, *Clark*. And although Judge Autrey did not expressly address that argument in *Clark*, he recently granted Pfizer's motion to dismiss claims by an out-of-state plaintiff alleging personal injuries due to the use of Zoloft, finding a lack of personal jurisdiction over Pfizer. *See Bartholome v. Pfizer, Inc.*, 2016 WL 366795 (E.D. Mo. Jan. 29, 2016) (Autrey, J.)

III. SUBJECT MATTER JURISDICTION EXISTS BECAUSE PLAINTIFFS ARE FRAUDULENTLY JOINED AND PROCEDURALLY MISJOINED

A. The Out-of-State Plaintiffs Are Fraudulently Joined

This Court has subject matter jurisdiction because the out-of-state Plaintiffs are fraudulently joined due to lack of personal jurisdiction.[7] There is no general jurisdiction over the out-of-state Plaintiffs' claims because Pfizer is neither headquartered nor incorporated in Missouri, and there is no specific jurisdiction because the out-of-state Plaintiffs' claims arise out of Pfizer's alleged contacts with their home states, not Missouri. These arguments are set forth more fully in the briefing on Pfizer's motion to dismiss for lack of personal jurisdiction, which Pfizer incorporates here by reference. (*See* Dkt. 6.) Pfizer therefore responds here only to Plaintiffs' arguments that specifically concern subject matter jurisdiction.

Plaintiffs' motion to remand does not meaningfully address one of the two independent bases for subject matter jurisdiction that Pfizer has asserted, that Plaintiffs are fraudulently joined because the claims of the out-of-state Plaintiffs fail for lack of personal jurisdiction. *See* Notice at 4-6. Courts have recognized that plaintiffs are subject to the same fraudulent joinder analysis as defendants, for "there is "no logic in prohibiting plaintiffs from defeating diversity jurisdiction by fraudulently joining nondiverse defendants, but allowing them to do so through fraudulently joining nondiverse plaintiffs." *Grennell v. W. S. Life Ins. Co.*, 298 F. Supp. 2d 390, 396 (S.D. W. Va. 2004).[8] One court described it as the "majority view" among district courts that fraudulent

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[7] Pfizer recognizes that this Court previously declined to hold that plaintiffs were fraudulently joined for lack of personal jurisdiction in *Simmons v. Skechers USA, Inc.*, 2015 WL 1604859 (E.D. Mo. Apr. 9, 2015). There, however, the defendants "cite[d] no case that holds that the theory of fraudulent joinder – an inquiry into substantive viability of claims – countenances a procedural challenge to a court's personal jurisdiction over a defendant." *Id.* at *3. The authorities cited herein, in contrast, support that conclusion.

[8] *See also Orrick v. Smithkline Beecham Corp*., 2014 WL 3956547, at *3 (E.D. Mo. Aug. 3, 2014) ("To prove fraudulent joinder of a diversity-destroying plaintiff, the defendant seeking removal must prove that the diversity-destroying plaintiff's claim has 'no reasonable basis in fact and law.'" (quoting *Knudson v. Sys. Painters, Inc.*, 634 F.3d 968, 980 (8th Cir. 2011))); *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 Tex. v. Valmet Sandy-Hill, Inc.*, 2000 WL 303637, at *2 (N.D. Tex. Mar. 22, 2000) ("[T]he court

joinder applies equally to plaintiffs and defendants. *See Taco Bell Corp. v. Dairy Farmers of Am., Inc.*, 727 F. Supp. 2d 604, 607 (W.D. Ky. 2010).

Courts have also found parties to be fraudulently joined based on a lack of personal jurisdiction over the non-diverse parties. For example, in *Villar v. Crowley Mar. Corp.*, 780 F. Supp. 1467 (S.D. Tex. 1992), *aff'd*, 990 F.2d 1489 (5th Cir. 1993),[9] Philippine citizens filed suit against a domestic corporation and a number of foreign corporations. Because it was "undisputed that Plaintiffs are citizens of the Philippines and that Codefendants are alien corporations," the court explained that "at first blush, this Court appears to lack subject matter jurisdiction." *Id.* at 1472. However, the defendants did "not argue that jurisdiction [was] proper because complete diversity exists between Plaintiffs and all Defendants. Rather, they allege[d] that complete diversity exist[ed] between Plaintiffs and [the domestic defendant], and only [the domestic defendant] is subject to personal jurisdiction in Texas. Therefore, removal was proper because the Codefendants were fraudulently joined in an attempt to defeat diversity." *Id.* at 1472-73.

The court explained that this was not a typical fraudulent joinder argument, which "necessarily requires the court to pass judgment on the substantive merits of the plaintiff's claim before the facts and legal issues are fully developed at trial, a difficult and uncertain task at best." *Id.* at 1473. Instead, fraudulent joinder was premised on the argument "that Plaintiffs cannot prevail in state court because they cannot establish personal jurisdiction." *Id.* The court also

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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.").

[9] 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 itself reversed by the Supreme Court in *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999).

noted the burden shifting effect, for while a plaintiff is normally "required to make a *prima facie* showing that personal jurisdiction exists," under the "traditional fraudulent joinder analysis . . . the Court should remand the action unless the [defendants] can prove that there is no possibility that the Plaintiffs can establish personal jurisdiction." *Id.*

Although the *Villar* court chose to address the defendants' motion to dismiss first, it explained that "assuming that Plaintiffs are correct and the Court must consider their Motion to Remand first . . . based on these facts, there is no possibility that Plaintiffs could establish personal jurisdiction over the Codefendants." *Id.* at 1481 n.21. On appeal, the Fifth Circuit affirmed the district court's decision to decide personal jurisdiction first, but it also explained that "[e]ven if we could [overturn precedent and] require the district court to rule on the Villars' motion to remand first, the Villars' argument would still fail because the district court . . . held that there was no possibility that the Villars could prove that the court had personal jurisdiction over the foreign defendants." *Villar v. Crowley Mar. Corp.*, 990 F.2d 1489, 1494-95 (5th Cir. 1993); *accord 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); *Nolan v. Boeing Co.*, 736 F. Supp. 120, 122 (E.D. La. 1990).

The same analysis applies here. Further, permitting fraudulent joinder based on a lack of personal jurisdiction better comports with the underlying purpose of the doctrine: to thwart gamesmanship that denies defendants their right to a federal forum. *See, e.g., Taco Bell Corp.*, 727 F. Supp. 2d at 607. As in *Villar*, if a plaintiff has no possibility of maintaining a cause of action in state court for lack of personal jurisdiction, it is fraudulently joined. *See* 780 F. Supp. 1467 (S.D. Tex. 1992), *aff'd*, 990 F.2d 1489 (5th Cir. 1993). The fraudulent joinder doctrine recognizes that the joinder of a party based on a claim that cannot proceed in state court should not prevent removal to federal court. Whether that claim is barred on the merits or due to lack of personal jurisdiction is immaterial to whether it should be permitted to stand as an obstacle to a defendant's right of removal. Accordingly, Plaintiffs here are fraudulently joined, and this Court has subject matter jurisdiction over this action.

B. Plaintiffs Are Procedurally Misjoined

Subject matter jurisdiction also exists under the procedural misjoinder doctrine, which would disregard Plaintiffs' improper joinder of their unrelated claims in a single action, leaving complete diversity between Pfizer and the 58 diverse Plaintiffs. "Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right," *Wecker v. Nat'l Enameling & Sampling Co.*, 204 U.S. 176, 186 (1907), and "[j]oinder designed solely to deprive federal courts of jurisdiction is fraudulent and will not prevent removal." *Anderson v. Home Ins. Co.*, 724 F.2d 82, 84 (8th Cir. 1984). While the Eighth Circuit has not made a "judgment on the propriety" of the procedural misjoinder doctrine, *Prempro*, 591 F.3d at 622, it has suggested it would apply where (1) the claims have "'no real connection' to each other" under permissive joinder rules and (2) they are "egregiously misjoined"—that is, where there is "evidence that the plaintiffs joined their claims to avoid diversity jurisdiction." *Id.* at 623. Plaintiffs' misjoinder in this case satisfies both of these requirements of the procedural misjoinder doctrine and removal was therefore proper.

1. There is No "Real Connection" Among Plaintiffs

The Eighth Circuit permits joinder under Rule 20(a)(1) only where multiple plaintiffs assert claims "with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences," and there is sufficient commonality in questions of law or fact. *See In re Prempro*, 591 F.3d at 622 (quoting Fed. R. Civ. P. 20(a)(1)).[10] Applying Rule 20, courts in this District and elsewhere have found improper joinder under indistinguishable facts involving multiple users of prescription medicines who joined their unrelated claims in a single complaint.

In *Alday v. Organon USA, Inc.*, 2009 WL 3531802, at *1 (E.D. Mo. Oct. 27, 2009) (Sippel, J.), four plaintiffs, only one of whom was a Missouri resident, sued for injuries allegedly

[10] The result is the same under Missouri procedure, which likewise requires that claims share common questions and arise out of the same transaction or occurrence in order to be properly joined. *See* Mo. Sup. Ct. R. 52.05; *see also In re Fosamax (Alendronate Sodium) Prods. Liab. Litig. (No. II)*, 2012 WL 1118780, at *3 (D.N.J. Apr. 3, 2012) (observing that "Missouri's permissive joinder rule is substantively identical to Fed. R. Civ. P. 20(a)").

caused by their use of the prescription drug NuvaRing. *Id.* The plaintiffs in *Alday* suggested that under a broad reading of "transaction or occurrence," the fact that they all alleged the same injury from NuvaRing was sufficient to satisfy Rule 20. *See id.* (citing Pls.' Resp. Opp'n Def.'s R. 21 Mot. Dismiss Misjoined Pls., ECF No. 17, at *11 (Sept. 23, 2009)). But the court rejected this view because each plaintiff "was injured at different times in different states allegedly from their use of NuvaRing that was presumably prescribed by different healthcare providers." *Alday*, 2009 WL 3531802, at *1.

Likewise, in *Boschert v. Pfizer, Inc.*, 2009 WL 1383183 (E.D. Mo. May 14, 2009), the court reasoned that while the "purpose of Rule 20(a) is to address the broadest possible scope of action," the plaintiffs' allegations that they "all ingested the drug Chantix, albeit for different times and for different durations, and they all developed, to varying degrees, the same type of mental or behavioral injury as a result," were insufficient to meet the "transaction or occurrence" requirement of Rule 20. *Boschert*, 2009 WL 1383183, at *2 (internal quotation marks omitted). Even though "the same transaction or occurrence requirement of Rule 20 may be construed liberally," it was not satisfied, because "the prescriptions were provided through different health care providers, . . . the drug was taken at different times for various durations," Plaintiffs' "medical histories appear to have varied greatly," and "the plaintiffs are all from different states." *Id.* at *3 (internal quotation marks omitted).[11]

Other recent decisions have found improper joinder and denied motions to remand in multi-plaintiff pharmaceutical cases originally filed in Missouri state court. For instance, in *In re Fosamax*, the court explained that the plaintiffs were egregiously misjoined due to the "divergent questions of law and fact" raised by the plaintiffs' claims, including different injuries to different bones, variations in dosage of the medication, how long each plaintiff took the medication, and the purpose of the prescription for each plaintiff. *See In re Fosamax*, 2012 WL 1118780, at *4.

[11] While *Alday* and *Boschert* pre-date the Eighth Circuit's decision in *In re Prempro*, their holdings are entirely consistent with the reasoning in that opinion as they interpreted "transaction or occurrence" in the same manner as the Eighth Circuit.

The court held that because of "the factual, temporal, and geographic diversity among Plaintiffs' claims[,] . . . no reasonable person would normally expect [them] to be tried together," and joinder would "not promote trial convenience" or "expedite the final determination of disputes." *Id.* at *5 (internal quotation marks omitted). More recently, in *In re Propecia (Finasteride) Products Liability Litigation*, 2013 WL 3729570 (E.D.N.Y. May 17, 2013), which involved the personal injury claims of 54 plaintiffs from 23 states and the District of Columbia, the court found misjoinder and denied plaintiffs' motion to remand because "the injuries [alleged would] greatly vary from plaintiff to plaintiff based on factors like age, physical state at the time of taking the drug, and dosage." *Id.* at *13. Numerous other decisions are in accord.[12]

Here, as in each of those cases, there is no "real connection" between each of the Plaintiffs under the permissive joinder rules. Among other differences between the 64 Plaintiffs' claims, each arises from a distinct medical history, including a unique prescription regimen, involving a Plaintiff who was prescribed Lipitor by a different healthcare provider, for Plaintiff-specific reasons. Plaintiffs purchased Lipitor from different pharmacies, for different purposes, at different times, and after different conversations with their individual healthcare providers. They likely have used Lipitor at different dosages and for different durations. Plaintiffs received different care before and after their alleged injuries and have different genetic and other risk factors for heart disease or diabetes. Plaintiffs also took Lipitor and sustained their alleged injuries at different times. And their claims will raise unique legal questions under the law of 29 different states that will govern their claims. *See Dorman v. Emerson Elec. Co.*, 23 F.3d 1354, 1358 (8th Cir. 1994). In sum, as in the cases above, each Plaintiff's claim arises from a unique set of facts, based on her own inherently individualized circumstances.

[12] *Cumba v. Merck & Co., Inc.*, 2009 WL 1351462, at *1 (D.N.J. May 12, 2009); *In re Seroquel Prods. Liab. Litig.*, 2007 U.S. Dist. LEXIS 17603, at *115-22 (M.D. Fla. Mar. 7, 2007); *McNaughton v. Merck & Co., Inc.*, 2004 WL 5180726, at *2-3 (S.D.N.Y. Dec. 17, 2004); *In re Diet Drugs Prods. Liab. Litig.*, 294 F. Supp. 2d 667, 678 (E.D. Pa. 2003); *In re Baycol Prods. Liab. Litig.*, 2002 WL 32155269, at *2 (D. Minn. July 5, 2002); *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 146-48 (S.D.N.Y. 2001); *Chaney v. Gate Pharm. (In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.)*, 1999 WL 554584, at *3 (E.D. Pa. July 16, 1999).

Plaintiffs rest on the fact that they used the same medication they allege caused their injuries, but such conclusory statements paper over the absence of any shared transaction or connection among Plaintiffs' claims. While the use of a common product and a common injury might satisfy the "common question" component of permissive joinder, it manifestly does not show that the claims arise out of the same transaction or occurrence or series of transactions or occurrences. Rather, each Plaintiff's claim arises from an individualized occurrence specific to that Plaintiff's medical treatment and life situation that is in no way connected with the claims of other unrelated Plaintiffs in other states in some sort of series. Allowing the "same product" to suffice for joinder would read the "same transaction or occurrence" requirement out of the rule, a result not intended by the Eighth Circuit nor permitted by principles of statutory construction.

Moreover, the cases cited by Plaintiffs are generally distinguishable because they generally found a lack of egregiousness in the joinder of unrelated plaintiffs, *not* because they determined joinder was proper. *See, e.g.*, *In re Prempro*, 591 F.3d at 623 ("We clarify that we make no judgment on whether the plaintiffs' claims are *properly* joined under Rule 20."). More importantly, as demonstrated above, Plaintiffs' attempt to circumvent the due process limits of personal jurisdiction under *Daimler* by joining unrelated out-of-state plaintiffs with a few Missouri plaintiffs both constitutes evidence of egregious misjoinder and casts doubt on the continued validity of the Eighth Circuit's *Prempro* decision. Plaintiffs' claims have thus been misjoined and the first requirement for procedural misjoinder removal is satisfied.

2. Plaintiffs' Misjoinder Is Egregious

Plaintiffs' misjoinder of claims in this case is egregious because it "reflects an egregious or bad faith intent on the part of the plaintiffs to thwart removal." *In re Prempro*, 591 F.3d at 623.[13] As set forth in Pfizer's motion to dismiss, this joinder is not simply a procedural aberration, it violates due process, and as such, is manifestly egregious.

[13] Pfizer recognizes that this Court has previously held plaintiffs were not procedurally misjoined in remanding two other removed Lipitor actions, *Lovett v. Pfizer Inc.*, No. 4:14-cv-00458, Dkt. 15, and *Davood v. Pfizer Inc.*, No. 4:14-cv-970, Dkt. 15, but notes that this Court found a lack of egregious misjoinder under *Prempro* without the benefit of Pfizer's arguments

Further, to the extent the Eighth Circuit's decision in *Prempro* permitted joinder of plaintiffs that would have similarly violated *Daimler*, its continued vitality is in question in light of *Daimler*. In addition, by finding that joinder was appropriate based solely on the existence of a common issue of fact—namely, whether there was a causal link between the use of HRT drugs and breast cancer—the *Prempro* decision "essentially ignore[s] the 'same transaction' prong of the joinder inquiry" and in so doing "permit[s] the joinder of an unlimited number of plaintiffs who purchase the same or similar drugs from any number of defendants simply because they allege that the drugs caused a common type of injury." *In re Propecia*, 2013 WL 3729570, at *10; *see also In re Fosamax*, 2012 WL 1118780, at *5 (observing that this creates an incentive for plaintiffs to be "intentionally imprecise in naming defendants, which makes it impossible to determine whether some [p]laintiffs truly are non-diverse from [d]efendants").

Accordingly, to the extent the Court determines that remand would be required under *Prempro*, Pfizer submits that the Court should deny, or, alternatively, stay any order of remand,[14] to permit interlocutory review of this important issue by the Eighth Circuit post-*Daimler*.

IV. PLAINTIFFS' REQUEST FOR COSTS AND FEES SHOULD BE DENIED

Plaintiffs' request for costs and fees should be denied. (Opp. at 13-14.) Pfizer has established multiple bases for federal diversity jurisdiction, as set forth above. Moreover, "[a]bsent 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). As set forth above, Pfizer's bases for

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here showing that *Daimler* both establishes egregiousness and places the validity of *Prempro* in doubt.

[14] Because appellate review of remand orders is normally prohibited by statute, *see* 28 U.S.C. § 1447(d), interlocutory review of these issues by the Eighth Circuit would be permissible only if the Court either (a) denies remand or (b) issues a declaration that federal jurisdiction is not proper under *Prempro*, but stays the execution of any order granting relief, so as to facilitate appellate review of that declaration. *See id.* ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . .").

removal are objectively reasonable, having been recognized by numerous courts, and Plaintiffs' specific claims to the contrary lack merit.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion to remand should be denied. The Court should (a) stay proceedings in this case pending transfer to the Lipitor MDL; (b) grant Pfizer's motion to dismiss for lack of personal jurisdiction and find subject matter jurisdiction over the remaining Plaintiffs; or (c) find subject matter jurisdiction under the fraudulent joinder and/or procedural misjoinder doctrines.

Dated: April 15, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 2016, a true and correct copy of the foregoing document was served upon the following via the Court's electronic notification system and/or electronic mail:

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