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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Amici on Behalf of Plaintiffs-Appellees.

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PRELIMINARY STATEMENT

Plaintiffs-Appellees' brief is dedicated to one simple end: avoiding a ruling on the propriety of the "jurisdiction by joinder" theory under which the district court remanded this case to state court. Plaintiffs first contend that their belated disclaimer of the fee award they requested moots this appeal and bars this Court from even considering personal jurisdiction. Then they contend that, even if the Court can hear the appeal, it need not assess personal jurisdiction. Next, they say that if the Court considers personal jurisdiction, it can resolve that issue without addressing jurisdiction by joinder. Plaintiffs finally get around to discussing the district court's rationale only in the last four pages of their 58-page brief, and the only defense they offer for it is the plainly inapplicable doctrine of pendent personal jurisdiction.

Plaintiffs go to such lengths to avoid a ruling on jurisdiction by joinder because rejection of that theory would significantly diminish the status of the Circuit Court for the City of St. Louis as what one amicus aptly terms "a hub of litigation tourism." (ATRA Amicus Br. 8.) Indeed, because remand orders are generally not reviewable, this appeal from an award of removal sanctions presents a rare opportunity to provide appellate guidance on jurisdiction by joinder in light of 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). The district court here is out-of-step with the principles of these decisions. Many other district courts, including a recent decision of the Eastern District of Missouri, have ruled that *Goodyear* and *Daimler* preclude the exercise of personal jurisdiction over claims by non-resident plaintiffs based on the joinder of resident plaintiffs and have upheld removals on grounds

indistinguishable from those Pfizer asserted here. *See Addelson v. Sanofi S.A.*, 2016 WL 6216124 (E.D. Mo. Oct. 25, 2016) (unpublished). That is, by deciding personal jurisdiction first, those courts have held that the presence of non-diverse and non-resident plaintiffs, over whom there is no personal jurisdiction, does not destroy diversity.

The Court should take this opportunity to provide guidance to the district courts on this important issue. In particular, the Court should rule that it has appellate jurisdiction; that the district court erred in exercising personal jurisdiction over the non-resident Plaintiffs' claims; and that Pfizer properly removed this case on diversity grounds in light of the lack of personal jurisdiction over those claims. The sanctions award should be vacated.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO DECIDE THIS APPEAL

Although Plaintiffs contend that they mooted this appeal by disclaiming the sanctions award they requested (Pls. Br. 12-16), they studiously ignore this Court's directly controlling decisions in *United States ex rel. Farmers Home Admin. v. Nelson*, 969 F.2d 626 (8th Cir. 1992), and *Perkins v. Gen. Motors Corp.*, 965 F.2d 597 (8th Cir. 1992). These decisions establish that sanctions orders are appealable even without monetary harm, *Nelson*, 969 F.2d at 629, and, thus, do not become moot "merely because an adversary chooses not to collect the sanctions." *Perkins*, 965 F.2d at 599. Plaintiffs do not even address *Nelson* and *Perkins* by name. Instead, they vaguely point to the discussion of "two cases" in the reply they filed in support of their motion to dismiss this appeal. (Pls. Br. 14.)

That reply, however, failed to distinguish *Nelson* or *Perkins*. Plaintiffs stated in a footnote that *Nelson* does not explicitly address reputational harm. (Pls. Reply in Supp. of Mot. to Dismiss at 7 n.4.) However, Pfizer has experienced not only reputational harm, but also a chilling effect on further removals. (Def. Br. 20.) Moreover, *Nelson* held broadly that, even without monetary harm, a sanction is "a live issue" that can "be redressed by a favorable judicial decision … revers[ing] the determination" of wrongdoing by the district court. 969 F.2d at 629 (quotation omitted).

Plaintiffs also sought to distinguish *Perkins* based on differences in appellate posture. (Pls. Reply in Supp. of Mot. to Dismiss at 3-5.) They failed, however, to explain how these differences are material in light of *Perkins*' clear ruling that a sanctions order is not moot "merely because an adversary chooses not to collect the sanctions." 965 F.2d at 599. Thus, Plaintiffs' mootness argument is foreclosed by this Court's precedent.

Ignoring this binding precedent, Plaintiffs assert that other circuits have held that reputational injury is not "sufficient to prevent a case from becoming moot." (Pls. Br. 13.) That is irrelevant and incorrect. Plaintiffs cite several cases ruling that tangential comments regarding attorney conduct did not inflict an appealable injury. *See In re Williams*, 156 F.3d 86, 92 (1st Cir. 1998); *Butler v. Biocore Med. Techs., Inc.*, 348 F.3d 1163, 1168 (10th Cir. 2003); *In re Metro. Gov't of Nashville & Davidson Cty., Tenn.*, 606 F.3d 855, 862 (6th Cir. 2010). Most of these cases did not even consider a sanctions order. The only one that did recognized that a party subject to formal sanctions has standing to appeal even without monetary harm because "[s]anctions are

not limited to monetary imposts" and "[w]ords alone may suffice" to inflict a concrete and appealable injury. *In re Williams*, 156 F.3d at 92.

One decision cited by Plaintiffs, *Riverhead Sav. Bank v. Nat'l Mortgage Equity Corp.*, 893 F.2d 1109, 1112 (9th Cir. 1990), ruled that a settlement concerning a sanctions award deprives the settling parties and the sanctioned attorneys of standing to appeal. *Id.* at 1112. In *Perkins*, however, this Court specifically rejected this aspect of *Riverhead*. 965 F.2d at 600. Thus, Plaintiffs fail to offer any support under this Court's precedents for their view that the unilateral disclaimer of the fees they sought divests this Court of jurisdiction to review the sanctions award.

Asserting that the sanctions order did not admonish or reprimand Pfizer, Plaintiffs argue that the order does not "cast[] aspersions on anyone's professionalism or reputation" and thus involved nothing more than "'negative comment[s] or observation[s] from a judge's pen.'" (Pls. Br. 15 (citation omitted).) That is also incorrect. This Court has recognized that fee awards under section 1447(c) are "sanctions … 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) (citation omitted). Plaintiffs requested fees under section 1447(c) to punish Pfizer for its alleged "bad faith" and "pattern of procedural abuse and continued disregard for binding Eighth Circuit precedent." (Mem. in Supp. of Mot. to Remand at 14, R137.) The district court granted this request due to Pfizer's alleged disregard of "repeated admonishments and remands to state court" by courts in the Eastern District of Missouri. (Order at 9, R215, A9.)

Plaintiffs also assert that the district court's sanctions award does not create any appealable reputational injury because it was imposed on Pfizer, not its attorneys. (Pls. Br. 15.) But this appeal is properly brought by Pfizer because it, not its attorneys, was sanctioned. None of Plaintiffs' cases suggest that only attorneys have standing to appeal a sanctions order that causes reputational harm. To the contrary, in *Perkins*, the plaintiff as well as her attorney appealed a sanctions order. *See* 965 F.2d at 598, 600. In addition to damaging Pfizer's reputation, the sanctions order has a chilling effect on future removals. (Def. Br. 20.) Plaintiffs' objections to this Court's appellate jurisdiction are unavailing.

II. TO REVIEW THE SANCTIONS AWARD, THIS COURT MUST DETERMINE WHETHER THE DISTRICT COURT'S REMAND WAS LEGALLY CORRECT

Plaintiffs insist that this appeal is "not about the due process limitations of personal jurisdiction" (Pls. Br. 1), and do not even discuss the rationale on which the sanctions order turns until the end of their brief. (*Id.* at 55-59.) Instead, they devote most of their brief to arguing that the remand order might be justified on alternative grounds not asserted by the district court. (*See id.* at 34-38 (arguing that the district court was not required to consider personal jurisdiction before addressing subject matter jurisdiction); *id.* at 39-45 (arguing that Pfizer consented to personal jurisdiction); *id.* at 45-54 (arguing for specific jurisdiction under the Court's "five-factor test").) But Pfizer is not appealing from the remand; it is appealing from the removal sanctions. This appeal thus turns on whether the district court correctly held that Pfizer lacked objectively reasonable grounds for removal. *See Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005).

Because an award under section 1447(c) "based on a legally erroneous remand order constitutes an abuse of discretion," *Legg v. Wyeth*, 428 F.3d 1317, 1320 (11th Cir. 2005), "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, 1076 (9th Cir. 2003). Plaintiffs admit that "as Pfizer contends, review of an award of attorneys' fees on remand brings up for review the underlying question whether the district court was correct in holding that the removal lacked an objectively reasonable basis." (Pls. Br. 18.) Thus, while the Court is not required to determine whether Pfizer's removal was proper, it must address the *actual* reasoning on which the district court granted remand and held that removal was not objectively reasonable. *See Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1254 (9th Cir. 2006) (reversing sanctions award due to legal error without deciding whether removal was proper). Several courts of appeals have thus held that remand orders were erroneous on appeals from an award under section 1447(c). (*See* Def. Br. 15 (collecting cases).)

Here, jurisdiction by joinder was the only reason the district court gave that supported its rejection of two of Pfizer's grounds for removal—*Ruhrgas* and fraudulent joinder of Plaintiffs—and thus its only basis for finding those grounds not objectively reasonable. (*See* Def. Br. 38-39, 42.) Thus, to determine whether the sanctions may be affirmed, it is necessary for the Court to consider *de novo* whether the district court's adoption of jurisdiction by joinder was legally correct. The Court should hold this was error.

III. THE DISTRICT COURT INCORRECTLY HELD THAT IT HAD PERSONAL JURISDICTION OVER THE NON-RESIDENT PLAINTIFFS' CLAIMS

As set forth in Pfizer's opening brief, the district court erred in finding personal jurisdiction over Pfizer in connection with the claims by non-resident Plaintiffs. Pfizer is not subject to general jurisdiction in Missouri (Def. Br. 22-24), and the non-resident Plaintiffs' claims lack the connection to Missouri needed to establish specific jurisdiction. (*Id.* at 25-29.) Jurisdiction by joinder cannot cure the absence of either specific or general jurisdiction. (*Id.* at 29-36.)

Plaintiffs concede that there is no general jurisdiction and do not dispute that there is no specific jurisdiction over the non-resident Plaintiffs' claims when those claims are considered individually. Plaintiffs instead argue that there is personal jurisdiction over the claims by non-resident Plaintiffs based on claims by resident Plaintiffs. They assert this under the pendent personal jurisdiction doctrine and as a matter of specific jurisdiction. These arguments are unpersuasive, and their alternative argument based on consent is both irrelevant and erroneous.

A. The Doctrine of Pendent Personal Jurisdiction Does Not Apply

At the end of their brief, Plaintiffs attempt to defend the district court's adoption of jurisdiction by joinder under the mantle of "pendent personal jurisdiction." (Pls. Br. 55-58.) They say the district court had personal jurisdiction over the claims of non-resident Plaintiffs because they are "pendent" to claims of resident Plaintiffs. (*Id.* at 56.) The district court did not address this theory, and it could not have adopted it as a basis for exercising jurisdiction consistent with constitutional due process. The pendent personal jurisdiction doctrine simply does not apply here.

The federal common law doctrine of pendent personal jurisdiction concerns the joinder of claims, not parties. *See* Wright & Miller, 4A Fed. Prac. & Proc. Civ. § 1069.7 (4th ed.). Under the doctrine, a district court exercising personal jurisdiction over claims against a defendant under a long-arm statute may also take "pendent" personal jurisdiction over other claims brought by the same plaintiff against the same defendant arising out of the same nucleus of operative facts, even where no long-arm statute exists:

> *When a federal statute authorizes* a federal district court to exercise personal jurisdiction over a defendant beyond the borders of the district and the defendant is effectively brought before the court, we can find little reason not to authorize the court to adjudicate a state claim properly within the court's subject matter jurisdiction *so long as the facts of the federal and state claims arise from a common nucleus of operative fact.*

ESAB Grp., Inc. v. Centricut, Inc., 126 F.3d 617, 628 (4th Cir. 1997) (emphasis added); *accord Robinson Eng'g Co. Pension Plan & Trust v. George*, 223 F.3d 445, 449 (7th Cir. 2000).

By its terms, this doctrine is inapplicable. First, pendent personal jurisdiction applies only if, unlike here, the pendent claim is brought by the same plaintiff against the same defendant. *See, e.g.*, *Hargrave v. Oki Nursery, Inc.*, 646 F.2d 716, 721 (2d Cir. 1980). Second, the doctrine applies only if the pendent claim arises out of the same nucleus of operative facts as the primary claim, such that it is "not disputed that Congress could constitutionally extend the service of process" to the pendent claim. *Robinson v. Penn Cent. Co.*, 484 F.2d 553, 554 (3d Cir. 1973). The doctrine does not apply where, as here, claims arise out of different operative facts relating to different plaintiffs, and the defendant thus "lacks minimum contacts with the forum state

regarding the additional claim" sufficient to satisfy due process. Wright & Miller, *supra*, § 1069.7. Thus, as the district judge here held in another case, "[p]endent personal jurisdiction does not stand for the proposition that a second plaintiff can essentially 'piggyback' onto the first plaintiff's properly established personal jurisdiction." *Level 3 Commc'ns, LLC v. Illinois Bell Tel. Co.*, 2014 WL 50856, at *2 (E.D. Mo. Jan. 7, 2014), *order vacated in part on reconsideration*, 2014 WL 1347531 (E.D. Mo. Apr. 4, 2014) (Jackson, J.) (unpublished).

In this regard, Plaintiffs' cases on pendent personal jurisdiction are consistent with the cases cited in Pfizer's opening brief. As those cases recognize, "[p]ermitting 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." *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 274-75 (5th Cir. 2006). "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) (emphasis added). "[P]ersonal jurisdiction over one of the defendants as to a particular claim asserted by [the plaintiff] does not necessarily mean that [the court] has personal jurisdiction over that same defendant as to [the plaintiff's] other claims." *Remick v. Manfredy*, 238 F.3d 248, 255 (3d Cir. 2001). While Plaintiffs insist these cases do not offer "persuasive reasoning for Pfizer's position" (Pls. Br. 57), they fail to offer any reason why those cases do not apply here.

Plaintiffs suggest that pendent personal jurisdiction has simply been applied "more frequently" to the statutory component of personal jurisdiction, rather than

constitutional due process. (*Id.* at 57 n.22.) Yet they fail to cite a single case applying the doctrine to confer jurisdiction where it would otherwise be barred by due process. Applying the pendent personal jurisdiction doctrine in such circumstances "would run afoul of the traditional notions of fair play and substantial justice that form the bedrock of any court's personal jurisdiction analysis." *Demaria v. Nissan N. Am., Inc.*, 2016 WL 374145, at *8 (N.D. Ill. Feb. 1, 2016) (unpublished).

Accordingly, numerous district courts have rejected jurisdiction by joinder on the ground that it would effectively "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," which "would be plainly contrary to 'traditional notions of fair play and substantial justice.'" *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, 164 F. Supp. 3d 1040, 1049 (N.D. Ill. 2016) (quotation omitted); *see also In re Zofran (Ondansetron) Prods. Liab. Litig.*, 2016 WL 2349105, at *5 (D. Mass May 4, 2016) (unpublished); *Addelson*, 2016 WL 6216124, at *3-4; *In re Bard IVC Filters Prods. Liab. Litig.*, 2016 WL 6393595, at *4-5 (D. Ariz. Oct. 28, 2016) (unpublished). Plaintiffs mention only one of these decisions—the recent Eastern District of Missouri opinion in *Addelson*—but only to contend that the court erred in considering personal jurisdiction, not to address its ruling on jurisdiction by joinder. (*See* Pls. Br. 36 n.12.)

Plaintiffs note that, in describing the test for personal jurisdiction, the Supreme Court sometimes has used the words "litigation" and "suit." (*See* Pls. Br. 55-56 (citing cases).) But none of the decisions Plaintiffs cite involved any attempt to exercise jurisdiction over claims by one plaintiff based on jurisdiction over claims by a

different plaintiff. Nor do Plaintiffs explain how the Supreme Court's use of these words can be understood to support the adoption of a jurisdiction-by-joinder theory that was not before the Court in those cases. Plaintiffs have thus failed to offer any persuasive defense of the district court's assertion of personal jurisdiction.

B. Plaintiffs' Specific Jurisdiction Argument Does Not Justify Jurisdiction by Joinder

Plaintiffs argue that under the multi-factor test in *Downing v. Goldman Phipps, PLLC*, 764 F.3d 906 (8th Cir. 2014), which was not applied by the district court, there is specific jurisdiction over claims by non-residents because, like the claims of the Missouri residents, they arise out of Pfizer's promotion and sale of Lipitor. (Pls. Br. 48.) This argument simply re-urges jurisdiction by joinder by another name.

Plaintiffs concede that under *Walden v. Fiore*, 134 S. Ct. 1115 (2014), a defendant's contact "with other parties from the forum," such as the Missouri Plaintiffs here, cannot establish specific jurisdiction. (Pls. Br. 57.) Yet they insist *Walden* is not on point because Pfizer's contacts with the Missouri Plaintiffs occurred in Missouri, and therefore count as forum contacts. (*Id.* at 58.) While this observation establishes personal jurisdiction for the Missouri Plaintiffs, it does nothing for the claims of the non-resident Plaintiffs, which in no way arise from Pfizer's contacts with the Missouri Plaintiffs. The "fortuitous" connection occasioned by the joinder of multiple unrelated Plaintiffs in a single action filed by the same counsel cannot satisfy due process. *Walden*, 134 S. Ct. at 1123-24.

Instead, following the sharply divided decision of the California Supreme Court in *Bristol-Myers Squibb Co. v. Superior Ct.*, 377 P.3d 874 (Cal. 2016), Plaintiffs and their

amici suggest that the relation required to establish specific jurisdiction need not be a causal relationship. (Pls. Br. 48; *see also* NCLC Amicus Br. 11-12.) This theory is contrary to the well-settled requirement, recognized by this Court in *Myers v. Casino Queen, Inc.*, 689 F.3d 904, 912-13 (8th Cir. 2012), that a party asserting specific jurisdiction "must establish some sort of *causal* relationship" between the defendant's forum contacts and the plaintiff's claim. (WLF *Amicus* Br. 17.) Plaintiffs' broad theory of relation without causality was adopted by the California Supreme Court in *Bristol-Myers*, which has prompted a petition for certiorari to resolve the conflict it created with the federal appellate courts. *See* Pet. for Writ of Certiorari, *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, No. 16-466 (U.S. Oct. 7, 2017). As the dissent in *Bristol-Myers* observed, "by reducing relatedness to mere similarity and joinder," this theory improperly extends "specific jurisdiction to the point that, for a large category of defendants, it becomes indistinguishable from general jurisdiction." *Bristol-Myers*, 377 P.3d at 896 (Werdegar, J., dissenting). The theory would, "under the rubric of specific jurisdiction," undo "[w]hat the federal high court wrought in *Daimler*" with regard to general jurisdiction. *Id.* It should therefore be rejected.

Plaintiffs' *amici* also argue that, because Pfizer is already being sued in Missouri by Missouri Plaintiffs, "there is nothing unfair about requiring it to also defend against related injuries of other plaintiffs." (NCLC Amicus Br. 1.) This is wrong. Subjecting Pfizer to suit by Plaintiffs whose claims do not arise from the forum places it at a significant disadvantage at trial, where it will be unable to subpoena live testimony from critical third-party witnesses, such as the non-resident Plaintiffs' prescribing

physicians and others. *See, e.g.*, *Ironworkers Local Union No. 68 & Participating Emp'rs H. & W. Fund v. Amgen, Inc.*, 2008 WL 312309, at *5 (C.D. Cal. Jan. 22, 2008) (unpublished); *Nicholson v. Pfizer Inc.*, 278 A.D.2d 143,143 (N.Y. App. Div. 2000). "[T]o fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to [the] court, jury or most litigants." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511 (1947).

Even more importantly, subjecting Pfizer to suits by plaintiffs from around the country in any forum where it markets a drug will lead to the fundamental unfairness that due process guards against: preventing defendants from "'structur[ing] their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" (U.S. Chamber of Commerce Amicus Br. 17 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).) Complying with "[t]raditional notions of fair play and substantial justice" means that "[t]he relationship between the defendant and the forum must be such that it is 'reasonable … to require the corporation to defend the *particular* suit which is brought there.'" *Woodson*, 444 U.S. at 292 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316-17 (1945)) (emphasis added). Thus, the Constitution looks not just at whether a defendant can be subject to suit in a particular forum, but at *who* can sue the defendant there.

Noting that "Pfizer is a major national corporation" that has "permanent facilities in Missouri" and "regularly litigates cases there," Plaintiffs' *amici* dismiss Pfizer's concerns as mere "formulaic invocations of due process." (NCLC Amicus Br. 16-17.) But by doing so, they assert essentially the same "substantial, continuous,

and systematic course of business" facts that the *Daimler* plaintiffs argued should subject a corporation to general jurisdiction in the forum and which the Supreme Court rejected as "unacceptably grasping." *Daimler*, 134 S. Ct. at 761. Plaintiffs insist *Goodyear* and *Daimler* are limited to general jurisdiction (*see* Pls. Br. 51-54), yet they attempt to establish a theory of specific jurisdiction that is just as broad as the general jurisdiction theory the Supreme Court rejected in *Daimler*.

Furthermore, Plaintiffs' *amici* argue that requiring non-resident Plaintiffs to establish specific jurisdiction over their claims individually "would effectively put an end to nationwide efforts to concentrate similar litigation in one forum," which "would not only be tremendously inefficient for both the defendant and the courts, but would in many cases make plaintiffs' claims economically infeasible." (NCLC Amicus Br. 2.) But plaintiffs are able to pursue coordinated or class litigations in a forum where a defendant is "at home," and therefore subject to general jurisdiction. *Cf. Demaria*, 2016 WL 374145, at *8 (dismissing claims of non-resident named plaintiffs in putative class action due to lack of personal jurisdiction). Moreover, the federal MDL statute establishes a single, nationwide forum for efficient coordinated pretrial proceedings, *see* 28 U.S.C. § 1407, in which the personal jurisdiction of the MDL court is co-extensive with the jurisdiction of the transferor courts where the constituent actions will be tried. *See In re Zofran*, 2016 WL 2349105, at *3. In fact, Pfizer identified *this* case for transfer to the Lipitor MDL, where Plaintiffs' counsel was previously a member of the Plaintiffs' Executive Committee, *see In re Lipitor Prods. Liab. Litig.*, MDL No. 2502, Dkt. 1235, yet Plaintiffs resisted removal and transfer.

Restrictions on specific jurisdiction thus do not prevent the efficient resolution of claims by multiple plaintiffs across the country; they simply prevent plaintiffs from bringing all of those claims in venues where the facts giving rise to those claims did not occur. Yet Plaintiffs, through their expansive and legally untenable view of personal jurisdiction, seek to use the state court in St. Louis as their national court for Lipitor cases, including for trials, and without any ability to subpoena out-of-state witnesses.

C. Plaintiffs' Alternative Theory of Consent by Registration Is Irrelevant and Unpersuasive

Plaintiffs also urge the Court to affirm the sanctions award based on another alternative theory not adopted by the trial court: consent by registration. (Pls. Br. 39-45.) This appeal, however, is from the district court's order imposing sanctions, not from the remand order. The purported existence of an alternative theory of personal jurisdiction sheds no light on whether the district court correctly rejected Pfizer's removal as not objectively reasonable and thus subject to sanction. Moreover, Plaintiff's consent theory is based on an outmoded doctrine rejected by the Supreme Court's modern personal jurisdiction cases and which cannot survive the Supreme Court's decision in *Daimler*.

Plaintiffs argue that Pfizer's compliance with Missouri's mandatory business registration statute constitutes consent to general jurisdiction for any and all suits within the state, such that personal jurisdiction over this entire action is proper. (Pls. Br. 39.) Plaintiffs, however, undermine their own attempt to defend the sanctions order on this basis by conceding, as the Lipitor MDL court held, that "federal courts

in Missouri are split on the question of the continuing vitality of this theory" after *Goodyear* and *Daimler*. (*Id.* at 36 (citing *In re Lipitor Prods. Liab. Litig.*, MDL No. 2502, slip op. at 8 (D.S.C. Oct. 26, 2016) (unpublished)).) In fact, consent by registration was raised and rejected as to Pfizer in multiple different decisions in the Eastern District of Missouri (*see* Def. Br. 24 n.6), and it has been rejected by the only two appellate decisions to consider the issue after *Daimler*. *See Brown v. Lockheed Martin Corp.*, 814 F.3d 619 (2d Cir. 2016); *Genuine Parts Co. v. Cepec*, 137 A.3d 123 (Del. 2016).[1] As the Second Circuit explained, "[i]f mere registration and the accompanying appointment of an in-state agent … nonetheless sufficed to confer general jurisdiction by implicit consent, every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler*'s ruling would be robbed of meaning by a back-door thief." *Brown*, 814 F.3d at 640.

Ignoring this authority, Plaintiffs rely on the holdings of pre-"minimum contacts" Supreme Court decisions. (Pls. Br. 39 (citing *Neirbo Co. v. Bethlehem Shipbuilding*, 308 U.S. 165, 170, 174, 175 (1939); *Ex parte Schollenberger*, 96 U.S. 369 (1877); *Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co.*, 243 U.S. 93 (1917); *Pennoyer v. Neff*, 95 U.S. 714, 735 (1877)).) But none of these cases expressly addressed the theory asserted by Plaintiffs, and, as the Second Circuit observed, *Daimler* instructs that cases based on such "'territorial thinking should not attract heavy reliance today.'" *Brown*, 814 F.3d at 639 (quoting *Daimler*, 134 S. Ct. at 761 n.18).

[1] The issue is also *sub judice* before the Missouri Supreme Court. *See State ex rel. Norfolk-Southern Ry. Co.*, Cause No. SC95514 (Mo. 2016).

Plaintiffs also rely on older decisions of this Court, but to the extent they have not been superseded by the "significant change in the law" occasioned by *Daimler*, *see Neeley v. Wyeth LLC*, 2015 WL 1456984, at *2 (E.D. Mo. Mar. 30, 2015) (unpublished), they show only that designation of a registered agent confers jurisdiction by consent where the exercise of jurisdiction otherwise satisfies due process. *See Sondergard v. Miles, Inc.*, 985 F.2d 1389, 1397 (8th Cir. 1993); *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196 (8th Cir. 1990); *Ytuarte v. Gruner & Jahr Printing & Publ'g Co.*, 935 F.2d 971 (8th Cir. 1991); *Ocepek v. Corporate Transport, Inc.*, 950 F.2d 556 (8th Cir. 1991). As this Court explained in *Sondergard*, even in determining jurisdiction based on designation of a registered agent, the touchstone of any personal jurisdiction analysis is "fair play and substantial justice." 985 F.2d at 1397 (quoting *Int'l Shoe*, 326 U.S. at 316). Mere compliance with a business registration statute cannot confer the sweeping jurisdiction envisioned by the district court's order, much less show that Pfizer's removal was objectively unreasonable.

IV. REMOVAL WAS OBJECTIVELY REASONABLE DUE TO LACK OF PERSONAL JURISDICTION OVER THE CLAIMS BY NON-RESIDENT PLAINTIFFS

As set forth above, this Court may vacate the sanctions because the district court relied on the erroneous theory of jurisdiction by joinder in rejecting Pfizer's removal as not objectively reasonable. Alternatively, the Court may vacate the sanctions if it finds that any one of Pfizer's three grounds for removal was legally correct, and therefore objectively reasonable. In fact, all three grounds were legally correct.

A. Pfizer Had Reasonable Grounds for Removal Based on *Ruhrgas*

Plaintiffs say that defendants like Pfizer who wish to dismiss non-diverse plaintiffs and remove to federal court should first challenge personal jurisdiction in state court. (Pls. Br. 19-21.) But the possibility that Pfizer could have raised these issues in state court does not address whether it was proper for Pfizer to raise them in federal court. In fact, *Ruhrgas* held that federal courts in removed cases may choose to consider the question of personal jurisdiction before addressing subject matter jurisdiction, so long as doing so does not conflict with the "state court's coequal stature" or otherwise interfere unduly with state interests. *Ruhrgas*, 526 U.S. at 587-88. Here, Pfizer's personal jurisdiction challenge is based on the requirements of due process, which are federal in nature and, thus, do not raise any federalism concerns.

Accordingly, numerous courts, including the Fifth Circuit, have held that "a federal court may consider personal jurisdiction issues prior to addressing a motion to remand where 'federal intrusion into state courts' authority is minimized.'" *Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 213 (5th Cir. 2000) (quoting *Ruhrgas*, 526 U.S. at 587). No less than eight federal district courts, including five decisions issued this year, have upheld the *Ruhrgas* removals of multi-plaintiff pharmaceutical and device actions under circumstances indistinguishable from this case.[2] Plaintiffs' brief

[2] *In re Testosterone*, 164 F. Supp. 3d at 1050; *In re Zofran*, 2016 WL 2349105, at *5; *In re Bard IVC Filters*, 2016 WL 6393595, at *4; *Addelson*, 2016 WL 6216124, at *3; *see also Locke v. Ethicon Inc.*, 58 F. Supp. 3d 757, 765 (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).

fails to cite all but one of these cases (*see supra* at 11-12), and they offer no reason suggesting that these decisions were wrong to deny motions to remand under *Ruhrgas* after rejecting jurisdiction by joinder.

Plaintiffs note the existence of "more than 30 decisions from the [Eastern District of Missouri] remanding cases with the same factual and procedural posture" (Pls. Br. 17) and observe that "[t]he district court noted no authority pointing the other way." (*Id.* at 35.) Initially, most of the decisions Plaintiffs cite did not even address *Ruhrgas*. More importantly, whether the sanctions award may be affirmed depends not on the mere outcomes of similar cases in the district court, but on "a de novo examination" of whether the district court's remand decision was "legally correct." *Dahl*, 316 F.3d at 1077. Thus, it is not sufficient for Plaintiffs to simply recite district court decisions supporting their position without offering any reason to favor those decisions over the many others that reject their position. (*See supra* n.2.)

Plaintiffs argue that *Ruhrgas* grounds were not objectively reasonable because *Ruhrgas* does not provide grounds for removal at all, but rather a process for deciding personal jurisdiction before an independent asserted basis for subject matter jurisdiction. (Pls. Br. 18-23.) But whether *Ruhrgas* is characterized as a ground for removal or as an alternate means of disposing of subject matter jurisdiction issues is immaterial. In either case, *Ruhrgas* provided a basis for denial of remand, as many courts have held, and the district court was not permitted to award sanctions unless it found that basis not "objectively reasonable." *See Martin*, 546 U.S. at 141.[3]

[3] Under Plaintiffs' view, *Ruhrgas* grounds could support sanctions only if the independent bases for subject matter jurisdiction—here, fraudulent joinder and

Plaintiffs also contend that Pfizer waived any reliance on *Ruhrgas* "[b]ecause Pfizer never made this [*Ruhrgas*] argument to the district court." (Pls. Br. 4.) That is demonstrably untrue. Citing *Ruhrgas*, Pfizer's notice of removal stated that the district court "has discretion to, and should, decide Pfizer's motion to dismiss *before* assessing whether federal subject-matter jurisdiction exists." (Notice of Removal ¶ 7, R57.) Simultaneous with the removal of this action, Pfizer moved to dismiss the claims of non-resident Plaintiffs for lack of personal jurisdiction. (Mot. to Dismiss, R85.) Pfizer again argued in opposing remand that the district court "should first decide Pfizer's motion to dismiss for lack of personal jurisdiction." (Opp. to Remand at 4, R143.) And Plaintiffs opposed Pfizer's motion to dismiss by arguing that Pfizer "misplaces its reliance on *Ruhrgas*" and that "the Court should decline to consider personal jurisdiction in lieu of subject matter jurisdiction." (Pls. Opp. to Mot. to Dismiss, R158-59.) Finally, because the district court itself considered and rejected Pfizer's personal jurisdiction challenge (Order at 5 n.1, R211, A5), that issue is properly before the Court. *See, e.g.*, *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1260 n.8 (9th Cir. 2010). Plaintiffs cannot credibly claim waiver.

For similar reasons, there is no merit to Plaintiffs' contention that the Court cannot reach personal jurisdiction unless it finds "that the district court abused its discretion in addressing subject-matter jurisdiction first" under *Ruhrgas*. (Pls. Br. 38;

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procedural misjoinder—were themselves not objectively reasonable. The decisions that have applied *Ruhrgas* in similar contexts have not disputed that those bases for subject matter jurisdiction are objectively reasonable, but have held that deciding personal jurisdiction first presents a more "straightforward" method of resolving jurisdictional issues. (*See supra* n.2.)

see also id. at 33-38.) The key premise of this argument—that the district court declined to decide personal jurisdiction under *Ruhrgas*—is false. The district court in fact affirmatively found personal jurisdiction over the "cause of action as a whole" and did not even cite *Ruhrgas*, much less exercise its *Ruhrgas* discretion. (Order at 5 n.1, R211, A5.) Moreover, whether the district court was "permitted to address its own subject-matter jurisdiction first" under *Ruhrgas* (Pls. Br. 5) is irrelevant to this appeal from removal sanctions. The question on appeal is whether the district court properly rejected Pfizer's grounds for removal as not objectively reasonable, not whether the district court might have taken some other action to grant remand. Plaintiffs do not dispute that, if jurisdiction by joinder fails, then *Ruhrgas* would have permitted the district court to resolve any issues of subject matter jurisdiction. The sanctions should be vacated.

B. Pfizer Had Reasonable Grounds for Removal Based on Fraudulent Joinder

Apart from *Ruhrgas*, Pfizer properly removed this case on the alternative ground of fraudulent joinder. (Notice of Removal ¶¶ 90-97, R71-73.) Jurisdiction by joinder was the only aspect of the district court's decision that addressed Pfizer's fraudulent joinder grounds and found them not objectively reasonable.[4] Thus, to determine whether the district court properly rejected those grounds requires this Court to address whether the district court's adoption of jurisdiction by joinder was

[4] Although the district court characterized part of its opinion as addressing fraudulent joinder, that discussion related to the procedural misjoinder doctrine, not Pfizer's assertion of fraudulent joinder of Plaintiffs due to lack of personal jurisdiction. (Order at 4-8, R210-14, A4-8.)

legally correct. Because the district court's adoption of jurisdiction by joinder fails as a matter of law, Plaintiffs should be held to have fraudulently joined the claims of the non-resident Plaintiffs to defeat diversity.

Plaintiffs object to the extension of fraudulent joinder to "claims that fail for a lack of personal jurisdiction." (Pls. Br. 23.)[5] This issue was not addressed by the district court and thus cannot serve as a basis to affirm the award of sanctions. Moreover, Plaintiffs do not dispute that Pfizer's cases support fraudulent joinder based on lack of personal jurisdiction. Instead, they assert, without authority or explanation, that *Ruhrgas* implicitly overruled those cases. (*Id.* at 24 n.7.) There is, however, no inconsistency between the flexible jurisdictional hierarchy adopted by *Ruhrgas* and the assertion of a fraudulent joinder theory based on personal jurisdiction. As the court noted in *Villar v. Crowley Mar. Corp.*, the distinction between the two is essentially one of burden-shifting. 780 F. Supp. 1467 (S.D. Tex. 1992), *aff'd*, 990 F.2d 1489 (5th Cir. 1993). Fraudulent joinder, in contrast to *Ruhrgas*, would require the defendant to "prove that there is no possibility that the Plaintiffs can establish personal jurisdiction," rather than giving the plaintiff the burden to prove jurisdiction. *Id.* at 1473. Because jurisdiction by joinder fails as a matter of law, Plaintiffs cannot show that Pfizer has failed to carry this burden, much less that its attempt to do so was not objectively reasonable.

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[5] Plaintiffs also suggest that the fraudulent joinder doctrine cannot be extended "to a non-diverse plaintiff as well as a non-diverse defendant," but then make no attempt to develop the argument. (Pls. Br. 23.) This Court has indicated otherwise. *See Iowa Pub. Serv. Co. v. Med. Bow Coal Co.*, 556 F.2d 400, 404 (8th Cir. 1977).

C. Procedural Misjoinder Was Objectively Reasonable

Finally, it also was objectively reasonable for Pfizer to assert procedural misjoinder as a ground for removal on the basis that the decisions in *Goodyear* and *Daimler* call into question this Court's decision rejecting the application of that doctrine in *In re Prempro Products Liability Litigation*, 591 F.3d 613, 620 (8th Cir. 2010). Plaintiffs devote much of their brief to recounting the reasoning of *Prempro*, but they do not offer any response to Pfizer's reasons for reevaluating that decision except for an unexplained assertion that personal jurisdiction "has nothing to do with" permissive joinder rules. (Pls. Br. 32.) To the contrary, there is an obvious relationship between the constitutional doctrine of personal jurisdiction and the procedural rules of permissive joinder: since due process requires the claims of each plaintiff in each separate jurisdiction to be evaluated separately for purposes of jurisdiction (*see supra* Point III; Def. Br. 31), the subordinate procedural concerns of permissive joinder must logically yield to the same standard. Otherwise, Rule 20 would permit joinder of parties in a single action that the Constitution itself would forbid. To avoid that result, *Prempro* should be construed in light of the intervening decisions of the Supreme Court in *Daimler* and *Goodyear*, and Pfizer's procedural misjoinder argument should be found objectively reasonable.

CONCLUSION

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

Dated: December 8, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(B)(ii) and (g)(1), I hereby certify that the foregoing brief complies with applicable type-volume limitations because it contains 6,485 words, exclusive of those sections of the brief which, pursuant to FRAP 32(f), do not count toward applicable word limits.

I further certify that this brief has been scanned for viruses and that it is virus free.

Dated: December 8, 2016

/s/ Mark S. Cheffo

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2016, I electronically filed the foregoing reply brief 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 reply brief via electronic mail, to the following non-CM/ECF participants:

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