CA No. 16-2524

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ELAINE ROBINSON, *et al.*,

Plaintiffs-Appellees,

v.

PFIZER, INC.,

Defendant-Appellant.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT, URGING REVERSAL

Richard A. Samp
Mark S. Chenoweth
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302

September 9, 2016

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Washington Legal Foundation (WLF) states that it is a non-profit corporation organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation, nor has it issued any stock owned by a publicly held company.

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Page(s)

Statutes, Rules, and Constitutional Provisions:

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT, URGING REVERSAL

INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a public-interest law firm and policy center headquartered in Washington, DC, with supporters in all 50 States, including many in Missouri.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

WLF has regularly appeared in federal courts to support the right of defendants in a state-court action to remove the case to federal court. *See*, *e.g.*, *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014); *Flagg v. Stryker Corp.*, 819 F.3d 132 (5th Cir. 2016); *Corber v. Xanodyne Pharms., Inc.*, 771 F.3d 1218 (9th Cir. 2015).

WLF is concerned that the court below not only erred when it concluded that this case should be remanded to state court but compounded its error by imposing sanctions on Appellant for having removed the case while "lack[ing] an objectively reasonable basis" for doing so. WLF fears that this inappropriate sanction will

---

[1] Pursuant to Fed.R.App.P. 29(c)(5), WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief. All parties have consented to the filing of this brief.

chill the exercise of legitimate statutory removal rights by litigants who fear that exercising those rights will result in similar sanctions being imposed on them as well.

Due to that chilling effect, WLF believes it is particularly important for the Court to address the issues raised by this appeal. While Appellees have attempted to render this appeal moot by belatedly disclaiming any interest in the fee award they successfully sought in the district court, their ploy does not erase the injury to Appellant (and its counsel)—or the chilling effect—caused by the district court's sanctioning order, which will stand unless reversed by this Court.

STATEMENT OF THE CASE

This appeal arises from a products-liability action filed against Appellant Pfizer, Inc. in Missouri state court by 64 unrelated women from 29 different States; only four of the plaintiffs are residents of Missouri. Each of the plaintiffs alleges that she developed type II diabetes after ingesting a drug manufactured by Pfizer (Lipitor) and prescribed by her physician. The 60 nonresident plaintiffs assert no plausible factual allegations that their claims bear any significant relationship to Missouri.

Pfizer is not a citizen of Missouri; it is incorporated in Delaware and has its principal place of business in New York. Pfizer sells substantial quantities of

Lipitor in all 50 States, including Missouri, but it does not maintain significant business operations within Missouri. Pfizer responded to the complaint by removing it to federal court on the basis of diversity jurisdiction. While recognizing that six of the 64 plaintiffs are citizens of New York (a State in which Pfizer is also a citizen), Pfizer asserted that the citizenship of those six plaintiffs (as well as the citizenship of the other out-of-state plaintiffs) should be disregarded for purposes of determining diversity jurisdiction, because those plaintiffs had been fraudulently joined to the lawsuit.[2]

Pfizer thereafter filed a motion to dismiss the claims of the out-of-state plaintiffs for lack of personal jurisdiction, citing the Supreme Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). Appellees responded by moving to remand the case to state court. They asserted that the claims of the nonresident plaintiffs were properly joined because Missouri courts possessed personal jurisdiction over Pfizer with respect to those claims—and thus that the absence of complete diversity of citizenship (*i.e.*, citizens of New York were both plaintiffs

[2] Pfizer also based its removal petition on procedural misjoinder; that is, the 64 plaintiffs should not have been joined together in a single action because their claims lacked any real connection to each other. If the procedural misjoinder doctrine were applied, Pfizer asserted, complete diversity of citizenship would exist with respect to the separate claims filed by the 58 plaintiffs who do not live in New York.

and defendants) barred removal of the suit under 28 U.S.C. § 1441(a). Appellees expressly requested an award of attorneys' fees and costs, asserting that Pfizer's removal petition was filed "in bad faith and served only to delay the administration of justice and waste the Court's time and resources."

The district court granted the motion to remand without ruling on Pfizer's motion to dismiss. Its April 29, 2016 Memorandum and Order ("Order") summarily rejected Pfizer's principal argument (fraudulent joinder of the nonresident plaintiffs), devoting only a single footnote to that argument. The court concluded that because Missouri courts possessed personal jurisdiction over Pfizer with respect to the claims of the four Missouri plaintiffs (given that those claims arose due to Pfizer's "contacts and conduct in Missouri") and because the claims of the out-of-state plaintiffs were factually similar to those of the Missouri plaintiffs, Missouri courts "may properly exercise personal jurisdiction over defendant with respect to this cause of action as a whole." Order at 5 n.1.

The court devoted most of its Order to explaining its rejection of Pfizer's secondary argument—that the claims of the 64 plaintiffs were sufficiently dissimilar that they should never have been combined into a single lawsuit, and that complete diversity of citizenship existed with respect to the individual claims

of the 58 plaintiffs who were not New York citizens.[3] The court concluded that Appellees' decision to join the separate Lipitor-related claims of 64 plaintiffs into a single lawsuit was not "egregious," and thus that Appellees satisfied the liberal joinder standards established by Fed.R.Civ.P. 20(a). Order 4-8. It held, "Because the joinder of claims in this case does not constitute egregious misjoinder, complete diversity does not exist." *Id.* at 8.

The court then cited numerous cases in which, it asserted, federal district courts in Missouri had ordered remands "under substantially similar circumstances," including eight cases in which Pfizer had sought removal. *Ibid*. In light of that history, the court concluded that granting Appellees' motion for attorneys' fees and costs was appropriate under 28 U.S.C. § 1447(c):

> In light of these repeated admonishments and remands to state court for six years, defendant can no longer argue that its asserted basis for seeking removal to federal court in these circumstances is objectively reasonable. Accordingly, the Court finds that plaintiffs are entitled to just costs and actual expenses because defendant lacked an objectively reasonable basis for seeking removal.

Id. at 9. After Appellees submitted a bill of costs and expenses, the court directed Pfizer to pay them $6,200 in attorneys' fees. May 19, 2016 Memorandum and

---

[3] Pfizer refers to this doctrine as "procedural misjoinder"; the district court referred to it as "fraudulent misjoinder." WLF employs Pfizer's nomenclature, in order to avoid confusion with "fraudulent joinder" as generally understood, the doctrine upon which Pfizer principally relies.

Order at 4. Pfizer is appealing from the sanction.

SUMMARY OF ARGUMENT

The Fourteenth Amendment's Due Process Clause protects individuals and corporations against burdens imposed by States in which they are not residents, whether those burdens are imposed by rules of conduct or judicial process. *See, e.g., J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (plurality) ("[T]hose who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter.").

The U.S. Supreme Court has nonetheless recognized that there are specific instances in which a State's exercise of personal jurisdiction over nonresident defendants does not offend traditional notions of fair play and substantial justice and thus is consistent with the Due Process Clause. In particular, when "a corporation exercises the privilege of conducting activities within a state," the State may "require[ ] the corporation to respond to a suit" brought to enforce "obligations [that] arise out of or are connected with the [corporation's] activities within the state." *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

The obligations that the 60 out-of-state Appellees seek to impose on Pfizer cannot be said to "arise out of" or to be "connected with" Pfizer's activities within Missouri. Those 60 individuals each allege that they suffered injury based on

Lipitor prescriptions written outside of Missouri by nonresident doctors, and that their purchase of, use of, and injury by the drug all occurred outside the State. The legal obligations they seek to impose cannot be deemed to "arise out of" or to be "connected with" Pfizer's Missouri-based activities simply because Pfizer sells its products in Missouri as well as in other States, or simply because it allegedly acted toward some Missouri consumers in a manner that was similar to the manner in which it allegedly acted toward the 60 nonresident Appellees. If mere factual similarity among discrete tort lawsuits were sufficient to authorize Missouri courts to exercise personal jurisdiction over claims asserted by nonresidents against out-of-state defendants, then manufacturers that market their products nationwide could be sued in each of the 50 States with respect to *any* claim arising out of the sale of their products.

In the absence of a connection between the nonresident Appellees' claims and Missouri, the only conceivable basis for haling Pfizer into Missouri courts to answer those claims is an assertion that Pfizer's contacts with Missouri are so continuous and systematic as to render it essentially *at home* in the State. But *Daimler* made plain that such an assertion of "general jurisdiction" can only be sustained in two places: the State in which a corporation maintains its principal place of business and the State of incorporation. Even though Pfizer has

substantial product sales in Missouri, neither of the two bases for exercising general jurisdiction applies here: Pfizer's principal place of business is New York, and it is incorporated in Delaware.

In rejecting Pfizer's fraudulent-joinder claim, the district court concluded in essence that Pfizer is "at home" in Missouri, at least with respect to any legal claims regarding nationally marketed products wherever sold, so long as the products are also sold in Missouri. Order at 5 n.1. Remarkably, the court arrived at that conclusion without ever citing *Daimler*, which condemned as "grasping" and "exorbitant" a California court's efforts to exercise jurisdiction over claims lacking any connection with the State. *Daimler*, 134 S. Ct. at 761.[4] *Daimler* makes clear that Missouri courts lack personal jurisdiction over Pfizer with respect to the claims of the nonresident Appellees and thus that the inclusion of their claims constitutes fraudulent joinder. The district court erred in ruling otherwise.

The district court's remand order is not subject to appellate review. 28 U.S.C. § 1447(d). But its decision to sanction Pfizer for "seeking removal to federal court in these circumstances" is subject to review by this Court. Because federal law quite clearly permitted Pfizer to remove Appellees' complaint to

[4] The California court asserted jurisdiction based solely on the substantial amount of business that a corporate defendant regularly conducted in the State.

federal court, the district court erred when it imposed sanctions against Pfizer under 28 U.S.C. § 1447(c) for having filed a removal petition.

In its order overturning the sanctions, we urge the Court to rule explicitly that Pfizer acted properly in removing the case to federal court. As the district court's citations to numerous other Eastern District of Missouri decisions illustrate, the permissibility of removal under these circumstances is an issue that arises with great frequency within the district and has resulted in conflicting decisions. The federal district judges within the district are in desperate need of guidance on this issue, yet § 1447(d)'s bar on appellate review means that the issue will only rarely reach this Court. WLF urges the Court to use this rare opportunity to provide the much-needed guidance.

Finally, WLF fears that the district court was led astray by its erroneous belief that "[a]ny doubts about the propriety of removal are resolved in favor of remand." Order at 3. While at one time this Court recognized a presumption against removal, the Supreme Court in 2014 made clear that such a presumption is inappropriate. *Dart Cherokee*, 135 S. Ct. at 554. To avoid error in future cases, WLF urges the Court to state explicitly that the district court erred when it invoked a supposed presumption against removal.

ARGUMENT

I. MISSOURI COURTS LACK PERSONAL JURISDICTION OVER PFIZER TO HEAR CLAIMS THAT LACK A SUBSTANTIAL CONNECTION WITH THE STATE

As this Court has long recognized, the Due Process Clause of the Fourteenth Amendment limits the authority of Missouri courts to exercise personal jurisdiction over nonresident defendants that do not voluntarily consent to jurisdiction. *See, e.g.*, *Johnson v. Arden*, 614 F.3d 785, 795 (8th Cir. 2010) (affirming decision that Missouri court lacked personal jurisdiction over defendants and stating that specific personal jurisdiction over nonresident defendants is proper "only if the injury giving rise to the lawsuit occurred within or had some connection to the forum state, meaning that the defendant purposely directed its activities at the forum state and *the claim arose out of or relates to those activities.*") (emphasis added) (quoting *Steinbuch v. Cutler*, 518 F.3d 580, 586 (8th Cir. 2008)). Those strictures protect litigants from inconvenient or distant litigation and recognize the sovereign limits of each State with respect to affairs arising in other States. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980).

Several recent U.S. Supreme Court decisions have served notice that those limitations have real teeth. In particular, the Court has explained that when a claim arises outside of the forum State, the State's courts may not exercise jurisdiction

over the claim simply because a corporate defendant conducts a significant amount of business within the State. *Goodyear Dunlop Tires Operations, S.A. v. Brown* 564 U.S. 915 (2011); *Daimler AG v. Bauman* 134 S. Ct. 746 (2014). Rather, the Due Process Clause permits state courts to exercise personal jurisdiction over such claims only if the non-consenting corporate defendant is "at home" in the forum—meaning that either its principal place of business is within the State or it is incorporated there. *Id*. at 760-62. Because Pfizer is not "at home" in Missouri—*i.e.*, Missouri is neither its principal place of business nor its place of incorporation—it cannot be haled into Missouri courts to answer claims arising in other States simply because (like all large companies that operate on a nationwide basis) it conducts a considerable amount of business in Missouri.

A. Missouri Courts May Not Exercise Jurisdiction over Pfizer with Respect to the Claims of the Out-of-State Appellees, Neither as an Exercise of General Jurisdiction or Specific Jurisdiction

When considering due process limitations on the exercise of personal jurisdiction over out-of-state defendants, courts have found it convenient to describe two categories of personal jurisdiction: general jurisdiction and specific jurisdiction. The Fourteenth Amendment does not, of course, contain two separate Due Process Clauses, and thus the rationale for imposing due process limitations on court authority (outlined above) is equally applicable to both categories of

personal jurisdiction.

The U.S. Supreme Court in *Daimler* provides a detailed explanation of its use of the terms general and specific jurisdiction. It explained that "general jurisdiction" describes:

> [S]ituations where a foreign corporation's "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." [*Int'l Shoe*], 326 U.S., at 318. As we have since explained, "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."

Id. at 754 (quoting *Goodyear*, 564 U.S. at 919).

It explained that "specific jurisdiction," on the other hand, describes exercises of jurisdiction under the circumstances outlined in *Int'l Shoe*, which "held that a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has certain minimum contacts with the State such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Ibid* (citations omitted). The specific jurisdiction inquiry focuses on "the relationship among the defendant, the forum, and the litigation." *Ibid.* As its name implies, "specific" jurisdiction depends on the specific facts of the claim before the court; it is limited to cases in which the defendant's forum

contacts "gave rise to the liabilities sued on," *ibid* (quoting *Int'l Shoe*, 326 U.S. at 317), and "in which the suit 'aris[es] out of or relate[s] to the defendant's contacts with the forum.'" *Ibid* (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)).

Acting through a subsidiary, the defendant car manufacturer in *Daimler* each year shipped cars worth hundreds of millions of dollars for sale to California consumers. *Daimler* nonetheless held that California-based courts lacked personal jurisdiction over the manufacturer in connection with claims that arose outside the State, regardless whether the claimed jurisdiction was described as "specific" or "general." It held that specific jurisdiction was unavailable because, although the manufacturer's and/or its subsidiary's contacts with California were "continuous and systematic," those contacts did not "give rise to the liabilities sued on." *Id.* at 761-62. It held that general jurisdiction was unavailable because the manufacturer was not "at home" in California—given that neither the manufacturer nor the subsidiary had either its principal place of business or its place of incorporation within the State. *Ibid.* The Court rejected the plaintiffs' request that it approve "the exercise of general jurisdiction in every State in which a corporation engages in a substantial, continuous, and systematic course of business," characterizing the plaintiff's proposed formulation as "too grasping." *Id.* at 761.

This case is indistinguishable from *Daimler*. As was true of the California courts in *Daimler*, Missouri courts may not exercise specific jurisdiction over Pfizer with respect to the claims of the out-of-state Appellees because—despite Pfizer's substantial contacts with Missouri, including selling Lipitor to numerous Missouri residents—those contacts did not give rise to the liabilities for which the out-of-state Appellees filed suit. Nor do those substantial contacts permit Missouri courts to exercise general jurisdiction over Pfizer, given that Pfizer is not "at home" in the State.

The district court reached a contrary conclusion without even discussing *Daimler*. The district court reasoned as follows:

> The parties do not dispute ... that Missouri courts have personal jurisdiction over [Pfizer] with respect to the in-state plaintiffs' claims. Missouri courts, thus, may properly exercise personal jurisdiction over [Pfizer] with respect to the cause of action as a whole arising out of or related to its contacts and conduct in Missouri.

Order at 5 n.1.[5] But nothing in *Daimler* suggests that a court may exercise jurisdiction over a claim that lacks any connection to the forum simply because it bears a factual similarity to a separate claim over which jurisdiction is undisputed and the two claims have been joined together in a single lawsuit.

---

[5] The district court did not specify the precise basis (*i.e.*, either specific or general jurisdiction) for concluding that Pfizer could be required to defend out-of-state claims in a Missouri court.

To the contrary, *Daimler* held that specific jurisdiction is limited to instances in which the defendant's forum contacts "gave rise to the liabilities sued on." 134 S. Ct. at 754 (quoting *Int'l Shoe*, 326 U.S. at 317). Similarly, this Court limits specific jurisdiction to those instances in which "the defendant purposely directed its activities at the forum state and the claim arose out of or relates to those activities." *Johnson*, 614 F.3d at 795. While Pfizer conducts substantial business activities in Missouri and the claims of the in-state Appellees arguably "arose out of or relates to those activities," the same cannot be said regarding the claims of the 60 out-of-state Appellees. Those 60 individuals each allege that they suffered injury based on Lipitor prescriptions written outside Missouri by nonresident doctors, and that their purchase of, use of, and injury by the drug all occurred outside the State. They do not allege that the drugs they ingested were shipped to them from Missouri. There is simply no allegation that Pfizer's Missouri activities played *any* role in their alleged injuries.

By basing its jurisdictional finding on Pfizer's substantial Lipitor sales in Missouri (as well as the presence of Missouri-based legal claims that are the inevitable result of such sales), the district court was effectively ruling that Missouri courts may exercise personal jurisdiction over Pfizer with respect to *any* claim against the company, even claims that bear no relationship to the State and

are filed by nonresidents. All the district court required is the inclusion of at least one easily-found Missouri plaintiff. An assertion of jurisdiction under these circumstances fits comfortably within any commonly understood definition of "general jurisdiction" and thus, as *Daimler* explained, is constitutionally impermissible with respect to any corporation not "at home" in Missouri.[6]

B. This Court Has Determined that Injuries "Arise Out of or Relate to" the Defendant's Forum Activities Only if the Relationship Is Causal in Nature

Appellees do not contest that, as explained in *Daimler* and *Johnson*, a state court may exercise specific jurisdiction over an out-of-state defendant only if the alleged injuries "arise out of or relate to" the defendant's activities within or directed at the forum. Rather, Appellees and the district court assert that the "relate to" standard is satisfied here; they point to a subject-matter relationship between Pfizer's activities in Missouri (*i.e.*, its sales of Lipitor to Missouri residents and the resulting tort claims by some Missouri residents) and the injuries suffered by the out-of-state Appellees.

---

[6] Although older Eighth Circuit decisions authorized state courts to exercise general jurisdiction over a corporation whenever its forum contacts were "continuous and systematic" and "substantial for the forum," *Lakin v. Prudential Securities, Inc.*, 348 F.3d 704, 708-09 (8th Cir. 2003), *Daimler* overruled those decisions by limiting the exercise of general jurisdiction to those states in which a corporation is "at home"—*i.e.*, where it maintains its principal place of business or is incorporated.

That assertion lacks merit. This Court has made clear that a claim does not "relate to" a defendant's activities within the forum State (for purposes of establishing specific jurisdiction) simply because the *subject matter* of the claim bears some relationship to forum activity. Rather, a party asserting specific jurisdiction must establish some sort of *causal* relationship—that the injury was actually caused, at least in part, by the forum activity. *Myers v. Casino Queen, Inc.*, 689 F.3d 904, 912-13 (8th Cir. 2012). Appellees have not and cannot establish any sort of causal relationship.

Myers recognized that the exercise of specific jurisdiction is permissible only if "a defendant directs its activities at residents of the forum state, 'and the litigation results from alleged injuries that arise out of or relate to those activities.'" *Id.* at 912 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). *Myers* observed that while the Supreme Court has not fully explained "the scope of the arise out of or relate to" requirement, the federal appeals courts each have adopted one of three approaches to defining the scope of that requirement—and each of those approaches requires some showing of causation.

First, some appeals courts have adopted the least plaintiff-friendly approach, the "proximate cause standard," which "requires the defendant's contacts with the forum state to be the 'legal cause' (*i.e.*, proximate cause) of the plaintiff's injuries."

Ibid. Second, some appeals courts have adopted a "more relaxed" standard that "requires only 'but for' causation. As the name indicates, this standard is satisfied when the plaintiff's claim would not have arisen in the absence of the defendant's contacts." *Ibid* (quoting *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 319 (3d Cir. 2007)). Yet a third standard, the "substantial connection standard," falls somewhere between the proximate-cause standard and the but-for cause standard. *Ibid*.

Myers concluded that this Court's approach most closely resembles the substantial connection standard, in that it has adopted a "flexible approach" to *Burger King*'s and *Johnson*'s arise-out-of-or-relate-to requirement that "emphasize[s] the importance of proximate causation, but ... allows a slight loosening of that standard when circumstances dictate." *Id*. at 913 (quoting *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708, 716 (1st Cir. 1996)). Importantly, however, regardless of which of the three standards is applied, the Court made clear that meeting the "relate to" requirement necessitates some sort of causal relationship between the injury and the forum activity. Thus, even under the most relaxed standard (the but-for cause standard), it is insufficient to demonstrate that the defendant's forum activity "relates to" the out-of-state plaintiffs' claims merely in the sense that the forum activity has given rise to tort claims that are factually

similar to the plaintiffs' claims.

At issue in *Myers* was a negligence claim against an East St. Louis, Illinois casino filed by a Missouri resident who was beaten and robbed by criminals who followed him home to Missouri after he cashed out his casino winnings. The casino engaged in an extensive advertising and promotional campaign designed to entice Missouri residents to visit its premises, and the plaintiff was attracted to the casino by that campaign. The Court concluded that the casino could, consistently with due process, be haled into Missouri courts to answer the plaintiff's claims; his injury "related to" the casino's business activities in Missouri because, among other things, the casino's Missouri-based advertising and promotional campaign was at least a but-for cause of the plaintiff's injuries. *Id.* at 913-14.

In sharp contrast, Appellees cannot demonstrate a causal relationship between the injuries suffered by the out-of-state Appellees and Pfizer's activities in Missouri. Suppose, hypothetically, that Pfizer operated as it does today, except that none of its Missouri business activities had ever occurred. Even under that extreme scenario, the causal chain that led to the nonresident Appellees' injuries would not be broken. Pfizer's work on the manufacture, labeling, and marketing of Lipitor (none of which occurred in Missouri) still would have gone forward; the delivery of Lipitor to the 28 States in which the nonresident Appellees reside still

would have occurred. Their doctors, their pharmacists, and Pfizer's sales representatives all would have performed their usual functions within their States of residence; and the nonresident Appellees would have suffered the same alleged injuries.

Because nothing that Pfizer has done within Missouri is a but-for cause of the alleged injuries, Pfizer's contacts with Missouri do not sufficiently "relate to" the nonresident Appellees' claims to warrant an exercise of specific jurisdiction under the but-for cause standard. *A fortiori*, exercise of specific jurisdiction is unwarranted under the stricter "substantial connection test" adopted by this Court in *Myers*.

II. PFIZER'S REMOVAL OF THE CASE TO FEDERAL COURT WAS WARRANTED UNDER THE FRAUDULENT-JOINDER DOCTRINE, AND THUS THE SANCTION MUST BE REVERSED

As demonstrated above, the claims of the 60 out-of-state Appellees were not properly included in the complaint because Missouri courts lack personal jurisdiction over Pfizer with respect to those claims. Under those circumstances, the fraudulent-joinder doctrine permits Pfizer to disregard the citizenship of those 60 Appellees (and in particular, to disregard the citizenship of the six Appellees who are citizens of New York) when determining the existence of diversity jurisdiction. *See, e.g.*, *Knudson v. Systems Painters, Inc.*, 634 F.3d 968 (8th Cir.

2011). When those Appellees are disregarded, removal of this case under 28 U.S.C. § 1441(a) becomes proper because the federal district courts had original jurisdiction of the proceeding under 28 U.S.C. § 1332—in light of the complete diversity of citizenship between Pfizer and the in-state Appellees.[7]

"A party has been fraudulently joined if there is no reasonable basis for predicting that the state law might impose liability based upon the facts involved." *Bradley Timberland Resources v. Bradley Lumber Co.*, 712 F.3d 401, 405 (8th Cir. 2013). Here, there is "no reasonable basis" for concluding that Missouri law might impose liability on Pfizer with respect to the claims of the out-of-state Appellees because they have alleged no facts from which a Missouri court could conclude that it could exercise personal jurisdiction over Pfizer with respect to those claims.

Fraudulent joinder is more frequently invoked when the diversity-destroying party improperly added to the lawsuit is a defendant. However, the doctrine's logic applies just as strongly when the diversity-destroying party is a plaintiff. The Court's fraudulent-joinder case law refers to improperly joined "parties," not to improperly joined "defendants"—thereby implicitly recognizing that the doctrine

---

[7] The premise of the fraudulent-joinder doctrine is that a plaintiff should not be permitted to prevent the defendant from exercising its removal rights by improperly adding parties to the proceedings for the sole purpose of negating the existence of complete diversity of citizenship. *See, e.g., Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U.S. 146, 152 (1914).

is equally applicable to defendants and plaintiffs. *See, e.g., ibid*. Moreover, Pfizer has cited numerous cases from federal courts across the country that have applied the fraudulent-joinder doctrine to cases of this sort, in which the fraudulently joined parties are plaintiffs who are added to the case solely to eliminate complete diversity of citizenship and for whom there is no "realistic basis" for concluding that they might prevail in the forum State. Appellant Br. 40 & n.12.[8]

The district court sanctioned Pfizer under 28 U.S.C. § 1447(c) based on its finding that Pfizer's removal of the case to federal court was not "objectively reasonable." As demonstrated above, that finding constituted legal error and cannot stand. WLF respectfully urges the Court, in its opinion reversing the sanction, not to limit itself to a holding that Pfizer's conduct was "reasonable." While such a ruling would rectify the reputational injury suffered by Pfizer, it would not provide litigants and district courts within the Eighth Circuit with the guidance they desperately need regarding the circumstances under which § 1441(a)

[8] WLF agrees with Pfizer that removal was proper under a straightforward application of the fraudulent-joinder doctrine. WLF further agrees with Pfizer that even if the district court legitimately concluded that the application of the doctrine implicated difficult-to-resolve removal-jurisdiction issues, it could and should have avoided any need to resolve those issues by first addressing—and granting—Pfizer's motion to dismiss. The Supreme Court has directed that constitutionally based personal-jurisdiction issues should be addressed in advance of statutory subject-matter jurisdiction issues under these circumstances. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 588 (1999).

permits removal of lawsuits from state to federal court. As the district court's citations to numerous other Eastern District of Missouri decisions illustrate, Order at 8, the permissibility of removal under these circumstances is an issue that arises with great frequency within the district and has resulted in conflicting decisions. WLF urges the Court to rule explicitly that removal is proper under the facts of this case. Because § 1447(d) bars appellate review of remand orders, the propriety of adding nonresident, non-diverse plaintiffs to lawsuits as a means of blocking removal jurisdiction is an issue that will only rarely reach this Court. Because the issue is now squarely before the Court (in the context of appellate review of a sanction imposed under § 1447(c)), the Court should use this opportunity to provide much-needed guidance.

A. The District Court Erred in Focusing on Pfizer's Procedural-Misjoinder Claim to the Exclusion of Its Fraudulent-Joinder Claim

In opposing the motion to remand, Pfizer relied primarily on the fraudulent-joinder argument discussed above: the citizenship of the out-of-state Appellees should be disregarded when determining diversity jurisdiction because there is no reasonable basis for predicting that they could prevail on their claims in a Missouri court. Pfizer relied alternatively on a procedural-misjoinder claim; that is, the 64 plaintiffs should not have been joined together in a single action because their

claims lacked any real connection to one another.[9]

In its Order remanding the case and imposing sanctions on Pfizer, the district court largely ignored Pfizer's fraudulent-joinder argument (confining its comments to a single footnote) and instead devoted most of its pages to the procedural-misjoinder argument.

The district court's decision to largely ignore the fraudulent-joinder argument appears to have been based on its mistaken impression that the two arguments were mutually exclusive—that only one of the two arguments could be applicable in any given case. *See, e.g.*, Order at 5 ("Here, defendant is not asking the Court to assess the out-of-state plaintiffs' claims to determine if the plaintiffs have a cause of action under substantive state law; rather, defendants are challenging the propriety of joining the out-of-state plaintiffs into a single action. Correctly characterized, defendants' argument is based on the theory of

---

[9] WLF does not address procedural misjoinder. This Court recently stated that it has not decided whether to accept the procedural misjoinder doctrine as a valid ground for removal in a case in which diversity jurisdiction is otherwise lacking. *In re Prempro Products Liability Litig.*, 591 F.3d 613 (8th Cir. 2010). WLF also does not address another issue raised by Appellees below but not addressed by the district court: whether removal was improper because Pfizer allegedly consented to general jurisdiction in Missouri when it agreed (as required by state law) to the appointment of an agent to receive service of process. The consent-jurisdiction argument is untenable in the aftermath of the *Daimler* decision. *See, e.g., Brown v. Lockheed Martin Corp.*, 814 F.3d 619 (2d Cir. 2016); *Genuine Parts Co. v. Cepec*, 137 A.3d 123 (Del. 2016).

[procedural] misjoinder.").

To the contrary, fraudulent joinder and procedural misjoinder are completely independent doctrines. Procedural misjoinder does not contest the authority of a court to exercise personal jurisdiction over any of the plaintiffs who have been joined the lawsuit; rather, it asserts that the plaintiffs should not have been joined together because their claims are too dissimilar. On the other hand, fraudulent joinder does not assert that claims joined in a single lawsuit are too dissimilar; rather, it contends that some of the plaintiffs were added for the purpose of defeating diversity jurisdiction and without any realistic expectation that their claims would succeed. There is no reason to conclude that if one of the doctrines is applicable to a case, the other is not independently applicable. The district court erred when it sought to re-characterize Pfizer's fraudulent-joinder claim as a procedural misjoinder claim.

B. Appellees' Belated Disclaimer of Any Interest in Collecting Its Fee Award Does Not Prevent Pfizer from Seeking to Overturn the Sanction Imposed by the District Court

Appellees accompanied their motion to remand with a request for an award of attorneys' fees and costs, asserting that Pfizer's removal petition was filed "in bad faith and served only to delay the administration of justice and waste the Court's time and resources." The district court agreed with Appellees that an

award of fees and costs was appropriate under 28 U.S.C. § 1447(c), concluding that Pfizer could "no longer argue that its asserted basis for seeking removal to federal court in these circumstances is objectively reasonable." Order at 9. After Appellees submitted a bill of costs and expenses, the court directed Pfizer to pay them $6,200 in attorneys' fees.

Appellees began to have second thoughts about their fee request only after Pfizer filed its notice of appeal. Four weeks after Pfizer filed its notice, Appellees filed a document with the district court entitled "Satisfaction of Judgment"; the document declared that Appellees "disclaimed any interest in collecting [their] award." The very same day, Appellees filed a motion to dismiss the appeal, asserting that their disclaimer rendered Pfizer's appeal moot.

The motion to dismiss should be denied. While Appellees' abandonment of their fee award provides Pfizer with partial relief, the district court's sanctions order remains intact. "A case becomes moot ... only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016) (citations omitted). "As long as the parties have a concrete interest, *however small*, in the outcome of the litigation, the case is not moot." *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (emphasis added). Pfizer has an interest in overturning the district court's sanctions order,

which explicitly admonished it for having filed a federal court paper that was not "objectively reasonable." This Court has explicitly held that appeals from orders imposing litigation sanctions are not rendered moot "merely because an adversary chooses not to collect the sanctions." *Perkins v. General Motors Corp.*, 965 F.2d 597, 599 (8th Cir. 1992).

The Supreme Court has warned that it takes a jaundiced view of "postcertiorari maneuvers designed to insulate a decision from review by this Court." *Knox v. Service Employees Int'l Union*, 132 S. Ct. 2277, 2287 (2012). In *Knox*, following the Supreme Court's agreement to review the merits of a fee dispute between a labor union and several workers in its bargaining unit, the union sought to render the case moot by offering to pay full compensation to the workers. In rejecting the union's mootness claims, the Court said that such maneuvering "must be viewed with a critical eye" and concluded that the union's offer still provided the Court with an opportunity to provide some additional effectual relief—in the form of improved notice of the availability of compensation. *Ibid.*

This Court should view Appellees' belated efforts to moot the appeal with a similar "critical eye." There is every reason to believe that Appellees' counsel will respond to future removal petitions by pointing to the sanctions order as evidence that Pfizer is a recidivist that continues to file removal petitions that lack "an

objectively reasonable basis." Accordingly, Pfizer can achieve "effectual relief" by maintaining this appeal; it can seek to overturn the sanction order that, unless overturned, will continue to besmirch its reputation.

III. THE DISTRICT COURT ERRED WHEN IT INVOKED A PRESUMPTION AGAINST REMOVAL

Underlying the district court's decision to grant the remand motion was its understanding that removal statutes should be construed strictly against defendants seeking to exercise their removal rights. It stated, "Any doubts about the propriety of removal are resolved in favor of remand." Order at 3.

The district court's adoption of a presumption against removal was legal error. While at one time this Court recognized a presumption against removal, the Supreme Court in 2014 made clear that such a presumption is inappropriate. *Dart Cherokee*, 135 S. Ct. at 554. To avoid error in future cases, WLF urges the Court to state explicitly that the district court erred when it invoked a presumption against removal.

Dart Cherokee involved a removal petition filed pursuant to 28 U.S.C. § 1453, a provision of the Class Action Fairness Act (CAFA). As here, the district court in *Dart Cherokee* remanded the case to state court. In its decision reversing the remand decision, the Supreme Court explicitly faulted the district court for

presuming that the law disfavors removal petitions:

> In remanding the case to state court, the District Court relied, in part, on a purported "presumption against removal." ... We need not here decide whether a presumption is proper in mine-run diversity cases. It suffices to point out that no antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court.

Ibid.

While *Dart Cherokee* limited its express disapproval of a presumption against removal to CAFA cases, the rationale for its holding—that no federal statute endorses such a presumption—applies with equal force to all removal petitions. The district court's presumption against removal has no foundation in federal statutes or Supreme Court decisions, and it is contrary to normal rules of statutory construction.

The right of removal has played a central role in the American court system since the 18th Century. The Judiciary Act of 1789 granted diversity jurisdiction to the federal courts. But those concerned about the problem of biased state courts realized that diversity jurisdiction could not by itself fully address the problem: it provided no protection to out-of-state defendants sued in state court. Section 12 of the Judiciary Act addressed that latter concern by authorizing an out-of-state defendant sued by a resident plaintiff in state court to remove the case to federal

court. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80. The right of removal "has been in constant use ever since." *Tennessee v. Davis*, 100 U.S. 257, 265 (1880). The Supreme Court has long recognized that the right of removal was intended to grant defendants the same protections from local prejudice in state court that diversity jurisdiction grants to plaintiffs. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 348 (1816).

Recent Supreme Court decisions have decided removability questions solely by reference to the relevant statutory language, rejecting claims that removal statutes ought to be strictly construed. *See, e.g., Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 697 (2003). Nothing in the text of 28 U.S.C. § 1441(a) or any other removal statute relevant to this case includes any hint that district courts should entertain a presumption against removal.

There is no basis for asserting that removing a case to federal court raises federalism concerns because it somehow poses an affront to state court. Indeed, it is no more an affront to state courts to permit out-of-state defendants to remove cases to federal court than it is to permit out-of-state plaintiffs to invoke diversity jurisdiction in order to file federal-court lawsuits that raise state-law claims.

In sum, the presumption against removal invoked by the district court conflicts with *Dart Cherokee* and is contrary to normal rules of statutory

construction. Because employing that presumption may well have tipped the balance in favor of the remand decision here and is likely to do so again in future cases, WLF urges the Court to include in its opinion language that strongly disavows the existence of a supposed presumption against removal.

CONCLUSION

The Court should reverse the district court's orders that sanctioned Appellant for filing a removal petition.

Respectfully submitted,

/s/ Richard A. Samp
Richard A. Samp
Mark S. Chenoweth
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: September 9, 2016

CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* Washington Legal Foundation. Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify:

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because: this brief contains 7,000 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because: this brief has been prepared in a proportionately spaced typeface using WordPerfect X5 Times New Roman.

3. A virus-detection program (VIPRE Business, Version 5.0.4464) has scanned the electronic file, and no virus was detected.

/s/ Richard A. Samp
Richard A. Samp

Attorney for Washington Legal Foundation

Dated: September 9, 2016

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of September, 2016 I electronically filed the foregoing brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court for the U.S. Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
Richard A. Samp