No. 19-278

IN THE

Supreme Court of the United States

PFIZER, INC. AND GREENSTONE LLC,

Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal

RESPONDENTS' BRIEF IN OPPOSITION

CHARLES G. ORR
BARON & BUDD, P.C.
3102 Oak Lawn Ave., #1100
Dallas, Texas 75219
(214) 521-3605

BURTON LEBLANC
Counsel of Record
BARON & BUDD, P.C.
2600 Citiplace Dr.
Baton Rouge, LA 70808
(225) 927-5441
bleblanc@baronbudd.com

Attorneys for respondents Alida Adamyan, et al.

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QUESTIONS PRESENTED

The state trial court in this case held that "Pfizer . . . acceded to the jurisdiction of the court by seeking a ruling on the merits of the California cases [while they were in federal court following removal.]" Pet. App. 12. In its Petition for Review to the California Supreme Court, Pfizer conceded that "federal law is unmistakably clear that forfeiture occurs when a party litigates on the merits, not jurisdiction." Petition for Review, *Pfizer Inc. v. Superior Court of California*, No. S255942, at 10 (May 23, 2019). And in this Court, Pfizer acknowledged that "a defendant forfeits personal jurisdiction if it litigates on the merits." Pet. 19.

Yet, Pfizer now claims that the California courts "crafted" a new "forfeiture rule" under which a party is held to forfeit its personal jurisdiction defense by removing and litigating subject matter jurisdiction without first moving to dismiss on personal jurisdiction grounds. *E.g.*, Pet. i.

Thus, the questions presented are:

1. Did the state court hold, as Pfizer asserts, that Pfizer waived its personal jurisdiction defense solely by litigating subject matter jurisdiction first, or did that court actually hold that, by litigating the merits against Plaintiffs before asserting its personal jurisdiction defense, Pfizer forfeited its personal jurisdiction defense?

2. Does this Court's decision in *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), allow a party, like Pfizer did here, to seek a merits determination before moving to dismiss on personal jurisdiction grounds?

PARTIES TO THE PROCEEDING AND RELATED CASES

The parties to the proceeding are listed in the petition for a writ of certiorari.

The following proceedings are directly related to this case:

- *Lipitor Cases*, No. JCCP 4761, in the Superior Court of the State of California for the County of Los Angeles, judgment not yet entered.

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INTRODUCTION

There are at least three reasons why this Court should deny Pfizer's petition for writ of certiorari:

1. The case doesn't present the question Pfizer asks the Court to answer. Pfizer's question presented is premised on a false assertion: Pfizer says that the state trial court ruled that Pfizer forfeited its right to contest personal jurisdiction "because [it] did not file a personal jurisdiction motion simultaneous with [its] attempt to establish subject matter jurisdiction in federal court." Pet. i. The state court did no such thing: It explicitly held that Pfizer waived its personal jurisdiction defense because it "litigat[ed] the ultimate merits" in a federal Multidistrict Litigation (MDL) court by insisting it was entitled to summary judgment against the Plaintiffs—not because it litigated subject matter jurisdiction before personal jurisdiction. Pet. App. 14. Pfizer's assertion that the case presents the question "whether, under federal law, a defendant's efforts to establish federal subject matter jurisdiction can result in forfeiture of an otherwise fully preserved challenge to personal jurisdiction," Pet.i, rests entirely on its mischaracterization of the decision below. Pfizer's claim that the state court's refusal to dismiss on personal jurisdiction grounds "is quite literally unprecedented," Pet. 2, is similarly predicated on Pfizer's miscasting of what the state court actually held. The state court relied on precedent from both this Court and lower federal courts supporting its ruling that a party forfeits a jurisdiction defense by litigating the merits before seeking dismissal on personal jurisdiction grounds. Pfizer ignores those authorities, just as it ignores the actual basis of the trial court's ruling.

2. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), supports the state court's decision. Pfizer strangely claims that it was excused from raising the issue of personal jurisdiction even while litigating the merits because the various federal courts to which Plaintiffs' claims were removed and transferred were precluded by *Ruhrgas* from deciding personal jurisdiction before deciding subject-matter jurisdiction. The argument makes no sense. *Ruhrgas* held that both subject-matter and personal jurisdiction are threshold issues that should be decided early in the litigation and that a trial court has broad discretion to decide it lacks personal jurisdiction *before* determining whether it has subject-matter jurisdiction. The only reason the federal courts here couldn't decide personal jurisdiction first, before subject-matter is that Pfizer chose never to raise personal jurisdiction in those courts—Pfizer challenged personal jurisdiction only after years of litigation (including a summary judgment motion), and only to avoid being in state court. While the federal courts might have elected not to decide personal jurisdiction first (had Pfizer bothered to ask), nothing in *Ruhrgas* compelled such a result.

3. The trial court correctly found that Pfizer delayed asserting its personal jurisdiction defense while it moved for summary judgment against Plaintiffs. Pfizer acknowledges that "a defendant forfeits personal jurisdiction if it litigates on the merits" Pet. 19. Plaintiffs agree. Pfizer's assertion that it didn't seek a merits disposition against Plaintiffs is belied by its motion for summary judgment and reply in support of that motion in the MDL. The state court order denying Pfizer's motion to dismiss on personal

jurisdiction grounds discussed Pfizer's summary judgment at length, yet Pfizer treats that order as if it didn't.

STATEMENT OF THE CASE

I. Plaintiffs began filing cases in California state court in 2013 and early 2014.

Lipitor plaintiffs began filing claims in California state court in mid-2013. R.Ex.Vol.2, at 167, ¶ 4.[1] In September 2013, a handful of plaintiffs sought creation of a Judicial Council Coordination Proceeding (JCCP) to manage the Lipitor cases efficiently.[2] R.Ex.Vol.2, at 206-29. The Judicial Council granted the coordination petition in early December 2013. R.Ex.Vol.2, at 231-32.

By the date of the first status conference in the JCCP (February 25, 2014), about 1,800 plaintiffs (including hundreds of non-California residents) had filed Lipitor personal injury claims in California state court. R.Ex.Vol.2, at 240:25-28.

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[1] References to "R.Ex.Vol._" are to the record in the California Court of Appeal.

[2] In California state court, cases sharing common questions of fact or law can be coordinated by the California Judicial Council into JCCPs. *See generally* Cal. Code Civ. Pro. §§ 404-404.9; Cal. Rules of Court, Rule 3.501(8)-(9).

II. In March 2014, Pfizer removed the California cases but did not seek dismissal on personal jurisdiction grounds.

Pfizer responded to this wave of California filings not by asserting a personal jurisdiction challenge but by removing all cases to federal court, both on diversity grounds and as an alleged mass action under the Class Action Fairness Act (CAFA).[3] R.Ex.Vol.2, at 268-301. Nowhere in any removal pleadings did Pfizer assert that the California federal courts to which Pfizer was removing the cases lacked personal jurisdiction over Pfizer. R.Ex.Vol.2, at 167, ¶ 7.

Concurrently with its March 2014 removal, Pfizer asked the Judicial Panel on Multidistrict Litigation (JPML) to transfer the cases to the recently created federal MDL for Lipitor cases. R.Ex.Vol.2, at 309-11. Pfizer also filed motions to stay pending transfer. R.Ex.Vol.6, at 1260-73. Again, nothing in these or Pfizer's other removal-related pleadings suggested that Pfizer intended to raise personal jurisdiction. R.Ex.Vol.2, at 167-68, ¶ 8.[4]

Once in the JPML, many Plaintiffs filed motions asking the JPML to send the cases back to California

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[3] CAFA defines a "mass action" as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact . . . ." 28 U.S.C. § 1332(d)(11)(B)(i).

[4] Pfizer later filed federal court answers that mention personal jurisdiction in a long list of boilerplate affirmative defenses. R.Ex.Vol.5, at 1212, 1255 (personal jurisdiction mentioned as affirmative defense number 35 of 37).

federal court for resolution of Plaintiffs' remand motions. R.Ex.Vol.2, at 319-25. Pfizer opposed such motions, urging that common issues raised across all the cases should be decided by a single judge (the MDL judge). R.Ex.Vol.2, at 327-38. Again, Pfizer neglected to mention any alleged lack of personal jurisdiction.

Pfizer's strategic decision not to raise personal jurisdiction challenges at this stage is in sharp contrast to what Pfizer did in Lipitor cases filed in Missouri state court. In many of those cases (unlike the California cases), Pfizer moved concurrently with its removals to dismiss the claims of the non-Missouri residents for lack of personal jurisdiction. R.Ex.Vol.2, at 372-87. Pfizer then urged the MDL court to address personal jurisdiction first, before deciding subject-matter jurisdiction.[5] R.Ex.Vol.3, at 419-20. So even while Pfizer was seeking a ruling that *all* California state court Lipitor cases belonged in federal court (without raising personal jurisdiction challenges to those cases), Pfizer was simultaneously urging the federal courts – Missouri and MDL – to dismiss the claims of non-Missouri plaintiffs for lack of personal jurisdiction before addressing subject-matter jurisdiction..

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[5] When Missouri plaintiffs asserted that the federal court should decide subject-matter jurisdiction first, before addressing personal jurisdiction, Pfizer replied that "[t]his Court can and should decide Pfizer's motion to dismiss for lack of personal jurisdiction before deciding whether federal subject-matter jurisdiction exists because the Court 'has before it a straightforward personal jurisdiction issue presenting no complex question of state law." R.Ex.Vol.2, at 389 (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 588 (1999)).

III. Long before asserting its personal jurisdiction defense, Pfizer litigated the merits against Plaintiffs (including moving for summary judgment against them).

A. Pfizer sought discovery from Plaintiffs and obtained an order requiring Plaintiffs to participate in discovery.

Immediately upon landing in the MDL, Pfizer invoked the court's power over the California cases by seeking discovery from Plaintiffs. At the first status conference after their cases arrived in the MDL, Plaintiffs advised the MDL judge (Judge Gergel) that they would seek to stay imminent discovery obligations—Plaintiff Fact Sheets (PFSs) that would otherwise be due 30 days from the date of transfer into the MDL—pending determination of their forthcoming remand motions. R.Ex.Vol.3, at 478:22-481:2. Pfizer's counsel responded that "at a minimum" Plaintiffs should be ordered to "provide [to Pfizer] pharmacy information, proof of use, and, you know, information." *Id.* at 482:18-483:2. Pfizer said nothing about any alleged lack of personal jurisdiction.

Pfizer then asked the MDL court to impose two distinct discovery obligations on Plaintiffs (again, without mentioning personal jurisdiction). First, Pfizer asked the MDL court to require Plaintiffs to "participat[e] in depositions of common witnesses in the MDL." R.Ex.Vol.6, at 1283 n.1. Second, Pfizer sought an order from the MDL court compelling Plaintiffs to "provide [to Pfizer and co-defendant McKesson] (1) the identity and address of the pharmacies from which the Plaintiffs obtained Lipitor; (2) the dates on which they purchased or obtained Lipi-

tor; and (3) a signed authorization to collect records from their pharmacies." *Id.* at 1-2. Pfizer acknowledged that it intended to use this discovery not just for purposes of litigating subject-matter jurisdiction, but "to evaluat[e] the viability of Plaintiffs' claims against McKesson and [the discovery] therefore bears on . . . the merits of those claims." *Id.* at 6.

Judge Gergel entered an order partially granting Plaintiffs' stay motion, holding that PFS discovery was stayed but, as Pfizer requested, Plaintiffs "[we]re NOT exempt from participation in the depositions of common witnesses in the MDL." R.Ex.Vol.6, at 1340, ¶ 2.[6] Judge Gergel denied Pfizer the discovery it sought from Plaintiffs, without prejudice. R.Ex.Vol.6, at 1343-46. But the fact that Pfizer did not get the discovery it requested does not obviate the fact that Pfizer invoked the MDL court's power to order Plaintiffs to provide that discovery.

B. Pfizer sought summary judgment against Plaintiffs.

In January 2015, the magistrate judge in the MDL issued orders in the California cases rejecting Pfizer's diversity arguments but sending the question of whether there was federal subject matter jurisdiction under CAFA's mass action provision[7] back to the California federal courts for them to resolve. R.Ex.Vol.2, at 170, ¶ 25.[8] Pfizer appealed the magis-

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[6] Nothing about the stay order precluded Pfizer from timely raising and litigating its personal jurisdiction challenge.

[7] *See supra* n.3.

[8] The CAFA issue fell outside the MDL court's jurisdiction because the case could be properly included in the MDL only if

(*Footnote continued*)

trate's orders to Judge Gergel but again failed to raise or even mention personal jurisdiction in its appeals. R.Ex.Vol.3, at 536-72.

Meanwhile, Pfizer was litigating the claims of thousands of plaintiffs whose claims were properly in the MDL court. Pfizer ultimately persuaded Judge Gergel that some trial pool plaintiffs failed to proffer admissible expert testimony as to both general and specific causation. R.Ex.Vol.2, at 170, ¶ 27. Judge Gergel then entered a case management order stating that any MDL plaintiff who believed her case differed from those in which the causation experts were struck must provide prompt notice to the court, which would then enter a briefing schedule for expert witness discovery. R.Ex.Vol.3, at 574-75.

Pfizer then filed an omnibus summary judgment motion (MSJ) in the MDL court on June 24, 2016, seeking summary judgment "in *all cases*" in the MDL (including Plaintiffs'). App. 117[9] (emphasis added). Pfizer's reply in support of its MSJ reiterated that Pfizer believed the MDL court could and should enter summary judgment against Plaintiffs. Pet. App. 21-54. In that brief, Pfizer included a section under the heading "This Court Has Subject Matter Jurisdiction in All Cases." Pet. App. 51. The first sentence in that section says, "This Court has subject matter jurisdiction over all cases in the MDL and the Court's expert

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there was conventional diversity jurisdiction; CAFA expressly excludes mass actions from MDL proceedings unless a majority of the plaintiffs request transfer to the MDL. 28 U.S.C. § 1332(d)(11)(C)(i).

[9] Citations to "App. _" are to the Appendix to this Opposition.

rulings warrant summary judgment in every case." Pet. App. 51-52. Although Pfizer's MSJ and reply in support clearly targeted Plaintiffs, Pfizer again failed to raise or even mention its personal jurisdiction defense.

IV. Plaintiffs' cases were transferred back to California federal court, whereupon Pfizer indicated personal jurisdiction was "moot" if the California *federal* courts kept the cases.

On October 21, 2016, Judge Gergel heard oral argument on Plaintiffs' remand motions (he also heard argument on the Missouri plaintiffs' remand motions, including personal jurisdiction contentions). R.Ex.Vol.6, at 1396-1455. Judge Gergel then issued a series of orders finding there was no conventional diversity jurisdiction over the California cases and transferring them to the JPML with the suggestion that it return them to the California federal court for determination of the CAFA mass action issue. R.Ex.Vol.2, at 171-72, ¶ 34.

During the first status conference in California after remand from the MDL, on February 1, 2017 (nearly three years after Pfizer first removed the cases), Pfizer's counsel brought up the personal jurisdiction issue to claim that Pfizer had not waived that issue (even though Pfizer had spent years litigating against Plaintiffs, including moving for summary judgment against them, without ever attempting to assert its personal jurisdiction defense). Pet. App. 65; R.Ex.Vol.6, at 1488:9-17. In the same breath, however, Pfizer's counsel also declared that the personal jurisdiction issue would "be moot" – would "go away" – if the California federal court determined that

there was CAFA subject-matter jurisdiction. Pet. App. 66; R.Ex.Vol.6, at 1488:9-17, 1488:23-25.[10]

California federal judge Cormac Carney heard oral argument on Plaintiffs' remand motion on May 22, 2017. R.Ex.Vol.3, at 608-49. The next day, Judge Carney issued his order remanding these cases back to California state court. R.Ex.Vol.6, at 1492-1507.[11]

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[10] Pfizer wrongly claims that the California federal court "acknowledged that Pfizer had not 'waived any . . . defenses or arguments or issues.'" Pet. 8. The court made no such acknowledgment. Rather, the court simply stated that, by taking up CAFA mass action jurisdiction first, it was not thereby holding that Pfizer had waived any other defenses. Pet. App. 66 (" . . . I don't mean to suggest that you've waived any of your other defenses or arguments or issues that might be there, but all I'm saying is I don't want to do anything about the case until I've decided this CAFA is a jurisdictional issue [sic].")

[11] Judge Carney held that less than 100 plaintiffs had sought coordination into the JCCP, either by initially moving to create the JCCP or by seeking to add on to the existing JCCP. No. 8:17-mc-00005-CJC, *In re: Pfizer* (C.D. Cal., May 23, 2017), Dkt. 20. As of the date of the remand hearing (and equally true today), only 65 plaintiffs asked for their cases to be part of the JCCP. Pfizer petitioned the Ninth Circuit for permission to appeal Judge Carney's remand order, which the Ninth Circuit denied. No. 17-80094, Dkt. 17. Pfizer neither moved for en banc reconsideration nor filed a petition for writ of certiorari.

V. Rather than asserting its personal jurisdiction defense, Pfizer instead removed Plaintiffs' cases a second time.

On remand to the JCCP court, instead of teeing up a personal jurisdiction challenge, Pfizer chose to jockey for position with Plaintiffs over how the cases would be coordinated into the JCCP. Even while Pfizer was stating, in pleadings and in open court, that it wanted the benefits of coordination of all the California cases into this JCCP, Pfizer was trying to box Plaintiffs into seeking add-on in a way that arguably would trigger CAFA mass action jurisdiction so that Pfizer could remove a second time.[12]

After the JCCP court issued *sua sponte* add-on orders bringing all the Plaintiffs into the JCCP, Pfizer again removed the cases en masse as an alleged CAFA mass action (and again, Pfizer's removal papers failed to mention any personal jurisdiction issue). R.Ex.Vol.4, at 730-46. On May 10, 2018, however, Judge Carney entered an order remanding the cases back to the JCCP court because, he found, there had been no proposal for a joint trial of claims of more than 100 plaintiffs, as CAFA required for mass action jurisdiction. R.Ex.Vol.4, at 753-63.[13] (Af-

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[12] *See, e.g.*, R.Ex.Vol.7, at 1567:26-27 (noting, in status report's "Defendants' position" section prepared by Pfizer several months after cases had been remanded, that "[a]s of yet, Pfizer has not filed any jurisdictional briefing as it has been waiting for Plaintiffs to pick a path forward regarding coordination").

[13] More specifically, Judge Carney rejected Pfizer's argument that the JCCP court's *sua sponte* order coordinating Plaintiffs' claims into the JCCP was not a proposal for a joint trial for two reasons: (1) judges don't propose, they order; and

(*Footnote continued*)

ter the Ninth Circuit denied Pfizer's petition for permission to appeal this remand order, as well as Pfizer's motion for rehearing en banc, Pfizer filed a petition for writ of certiorari asking this Court to reverse Judge Carney's remand order. No. 18-1578, *Pfizer Inc. v. Adamyan, et al.* This Court denied that petition on October 7, 2019.)

VI. Pfizer finally moved to dismiss on personal jurisdiction grounds.

In August 2018 (five years after the first cases were filed in California, four years after Pfizer's first unsuccessful removal, two years after Pfizer moved for summary judgment against Plaintiffs, and shortly after Pfizer's unsuccessful second removal), Pfizer finally filed its personal jurisdiction motion in the JCCP court. R.Ex.Vol.1, at 90-117.[14] Plaintiffs filed their Opposition [App. 41-96],[15] and the JCCP court

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(2) even if the *sua sponte* order could be a proposal for a joint trial, it wasn't here because the JCCP court made clear in both a prior order and in remarks on the record in a prior hearing that coordination of Plaintiffs' claims almost certainly would not result in a joint trial of the claims of even two plaintiffs, much less 100 or more. *In re Lipitor*, No. CV-18-01725-CJC (C.D. Cal., May 10, 2018). Just as Pfizer ignored in this case what the state court actually held, it did the same in its petition in No. 18-1578, which this Court denied on October 7, 2019.

[14] Under California procedural law, a defendant challenges the court's personal jurisdiction over it by filing a motion to quash service of process, which is what Pfizer filed here. Cal. Code Civ. Pro. § 418.10(a)(1).

[15] Pfizer misstates the content of Plaintiffs' briefing in the state court proceedings. Pfizer asserts that "[Plaintiffs] contended only that Pfizer had forfeited its right to assert [its personal jurisdiction defense] by removing the cases to federal court and litigating subject-matter jurisdiction." Pet. 9. Even a

(*Footnote continued*)

heard argument on the motion on February 13, 2019. R.Ex.Vol.1, 21-58. One month later, on March 15, 2019, the JCCP court entered its Opinion and Order denying Pfizer's motion. Pet. App. 3-19. The JCCP court held that, while the case was in the MDL, Pfizer, after passing on numerous opportunities to move for dismissal on personal jurisdiction grounds, instead sought judgment on the merits against Plaintiffs, thereby forfeiting its personal jurisdiction challenge. Pet. App. 12-14.

Pfizer petitioned the Second Court of Appeal for a Writ of Mandate. Pet. App. 68-122; No. B296917 (Petition for Writ of Mandate, filed April 12, 2019). After Plaintiffs filed a preliminary opposition in response, the Court of Appeal denied Pfizer's petition. Pet. App. 1-2; Order, May 13, 2019. Pfizer then petitioned the California Supreme Court for review. No. S255942 (Petition for Review, filed May 23, 2019). The California Supreme Court denied that petition on July 31, 2019. Pet. App. 20. This petition followed.

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cursory review of Plaintiffs' opposition to Pfizer's personal jurisdiction motion in the trial court [App. 51-52, 86-90 ("Pfizer . . . waived/forfeited its [personal juridsdiction] challenge by seeking affirmative relief, in the form of merits discovery and summary judgment, against the California Plaintiffs.")] and Plaintiffs' opposition to Pfizer's petition for review in the California Supreme Court [App. 7, 8-9, 24-31 ("Pfizer forfeited its personal jurisdiction defense against the JCCP Plaintiffs, first, by seeking discovery against them, and then (more importantly), by moving for summary judgment against them.")] demonstrates the falsity of Pfizer's assertion.

REASONS FOR DENYING THE WRIT

I. This case presents neither the question nor the conflict in authority that Pfizer says it does.

Pfizer's entire petition is predicated on red herrings. Pfizer wrongly claims that the California courts' decisions conflict with century-old precedents holding that a party does not forfeit its personal jurisdiction defense merely by removing a case from state court to federal court. Pfizer accordingly asks this Court to decide one question, and one question only: "whether, under federal law, a defendant's efforts to establish federal subject matter jurisdiction can result in forfeiture of an otherwise fully preserved challenge to personal jurisdiction." Pet. i. But neither that question, nor the claimed conflict with precedents of this Court and other courts, is presented by this case, because neither Plaintiffs nor the California courts posited mere removal as the basis for finding Pfizer forfeited its personal jurisdiction defense. Nor did Plaintiffs contend, or the California courts hold, that Pfizer waived its personal jurisdiction defense by litigating subject-matter jurisdiction, as Pfizer now asserts. The basis for the courts' forfeiture holding was that, following removal, Pfizer delayed for years in raising personal jurisdiction and instead *litigated the merits* against Plaintiffs.

A. The state court did not hold that Pfizer forfeited its personal jurisdiction merely by removing the cases or by litigating subject-matter jurisdiction.

The California state court's order never once suggested that merely by removing, or by litigating subject-matter jurisdiction, Pfizer waived its personal

jurisdiction defense. Rather, the court closely analyzed Pfizer's post-removal litigation conduct before the federal courts to determine whether it met what the court acknowledged is the "more forgiving" standard of federal law "with respect to waiver or forfeiture of a defense of lack of personal jurisdiction." Pet. App. 5. And the conduct that the court focused on was not Pfizer's litigation of subject-matter jurisdiction in its effort to avoid remand to state court. Rather, what the court found determinative was that, without moving for dismissal on personal-jurisdiction grounds, Pfizer sought a merits judgment against the California Plaintiffs by moving for summary judgment against them together with the other plaintiffs in the MDL.

In reaching that determination, the court painstakingly described the summary judgment proceedings, Pet. App. 5-8, and explained that Pfizer had explicitly requested summary judgment in "*all* cases," including Plaintiffs'. *Id.* at 6. The court cited repeated statements in Pfizer's papers that had made clear that what it wanted was a merits resolution in its favor as to the parties who sought remand as well as all other plaintiffs. *Id.* at 6-7.

Based on its determination that Pfizer had sought summary judgment on the merits against Plaintiffs long before moving for dismissal on the basis of its personal-jurisdiction defenses, the court held that, under federal procedural law, Pfizer had forfeited the personal jurisdiction defense. Pet. App. 8-15. In so holding, the court relied only in part (and properly) on Pfizer's lengthy delay in moving to dismiss for lack of personal jurisdiction while it participated in pretrial proceedings that provided ample opportunity for such a motion. *See id.* at 8-12.

B. Far from being "quite literally unprecedented," the state court's ruling was anchored in authorities from this Court and the lower federal courts.

Importantly, "[b]eyond delay," the trial court found that Pfizer "acceded to the [personal] jurisdiction of the court by seeking a ruling on the merits of the California cases before the transferee court." *Id.* at 12. Citing abundant authority from this and other courts that parties waive personal-jurisdiction defenses when they fail to assert them by motion before contesting the merits in motions for summary judgment, *see id.* at 12-14, the court concluded that Pfizer had similarly failed to preserve its personal-jurisdiction defense "while litigating the ultimate merits of [the] case." *Id.* at 14. In short, "the Pfizer Defendants asked the transferee court to enter judgment on their behalf against those Plaintiffs, thus acquiescing in the jurisdiction of the court." *Id.* at 14.

Nothing in that holding conflicts in any way with the many cases Pfizer cites asserting the uncontested proposition that a party does not waive personal jurisdiction merely by removing a case to federal court.[16] Nor does the state court's holding conflict

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[16] Nor did Plaintiffs claim that mere removal, without more, equals waiver of a personal jurisdiction defense. App. 78-79 ("To be clear, Plaintiffs do not contend that the act of removal alone amounted to a waiver or forfeiture of personal jurisdiction by Pfizer. . . But, by removing . . . and proceeding to attempt to litigate California Plaintiffs' claims without advancing its [personal jurisdiction defense] in a timely manner, Pfizer waived/forfeited th[at] [defense].").

with the corollary that Pfizer seeks to tease out of such cases (without any actual supporting case law) that a party who removes a case may litigate subject-matter jurisdiction indefinitely without waiving a personal-jurisdiction defense that it has failed to assert in a timely motion. The state court's ruling was not based in any way on Pfizer's litigation of subject-matter jurisdiction.

As to the issue the state court actually decided, Pfizer makes no pretense of asserting a conflict in authority but attempts to obscure matters by claiming that the state court's holding was "quite literally unprecedented." Pet. 2. This is not so. The state court first noted this Court's holding that the "actions of a defendant may amount to a legal submission to the jurisdiction of the court, *whether voluntary or not*." Pet. App. 12 (quoting *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704-05 (1982) (emphasis added)). The court then cited and relied on three circuit court opinions for the proposition that party legally submits to the jurisdiction of a court by litigating the merits of the claim in that court before moving to dismiss on personal jurisdiction grounds.[17] Pet. App. 12-13. The authorities

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[17] *Brokerwood Prods. Int'l (U.S.), Inc. v. Cuisine Crotone, Inc.*, 104 F. App'x 376, 380 (5th Cir. 2004) (noting that party forfeits personal jurisdiction defense by "manifest[ing] an intent to submit to the court's jurisdiction"); *Fidelity & Cas. Co. of N.Y. v. Tex. E. Transmission Corp.*, 15 F.3d 1230, 1236 (3d Cir. 1994) (holding that party waived personal jurisdiction challenge by moving for summary judgment on counterclaim before moving to dismiss on personal jurisdiction grounds); *Wyrough & Loser, Inc. v. Pelmor Labs., Inc.*, 376 F.2d 543, 547 (3d Cir. 1967) (holding that party waived personal jurisdiction defense by actively participating in preliminary injunction hearing and

(*Footnote continued*)

cited and relied on by the state court are but a few examples of cases illustrating "the well-established rule that parties who choose to litigate actively on the merits thereby surrender any jurisdictional objections."[18]

While the state court grounded its ruling on abundant federal authorities, Pfizer cites no cases holding that a defendant may remove a case, litigate the *merits* without moving to dismiss for lack of personal jurisdiction, and avoid a finding of waiver merely because the federal court's subject-matter jurisdiction had not yet been decided while the defendant was proceeding to litigate everything *but* personal jurisdiction.

Accordingly, even assuming Pfizer were correct that a party doesn't waive personal jurisdiction following removal so long as it only litigates the validity of removal, nothing in the state courts' decisions conflicts with that view. The state court based its decision on a principle *Pfizer acknowledges to be correct*: "a defendant forfeits personal jurisdiction if it litigates on the merits." Pet. at 19.

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waiting until after court ruled against it to assert personal jurisdiction defense).

[18] *PaineWebber Inc. v. Chase Manhattan Private Bank (Switzerland)*, 260 F.3d 453, 459 (5th Cir. 2001); *see also, e.g.*, *In re Asbestos Prods. Liab. Litig.*, 921 F.3d 98, 105-07 (3d Cir. 2019) ("[A] party who requests affirmative relief and rulings from a court is considered to have waived the personal jurisdiction defense."); *Bel-Ray Co. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 443-44 (3d Cir. 1999) (holding that defendant waived personal jurisdiction defense by moving for summary judgment on counterclaim one month before contesting personal jurisdiction).

II. Neither *Ruhrgas* nor anything else precluded Pfizer from timely moving to dismiss on personal jursdiction grounds.

Pfizer also contends that it somehow was precluded by *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), from asserting its personal jurisdiction defense before subject-matter jurisdiction was decided. *See, e.g.*, Pet. 22 (stating Pfizer "was not only permitted, but required, to litigate subject matter jurisdictions before personal jurisdiction"). Oddly asserting that the MDL court was "powerless" to decide personal jurisdiction, Pfizer claims to have been "punished" by the California courts for asking the MDL court to dispose of Plaintiffs' claims on the merits before moving to dismiss on personal jurisdiction grounds. Pet. 23. Pfizer is wrong.

Ruhrgas is clear that jurisdiction, whether over the subject matter or the litigant, is a threshold matter to be determined before a court reaches the merits. 526 U.S. at 577-78. Nothing in the state court's order has anything to do with second-guessing what the MDL court did or didn't decide regarding its jurisdiction over these cases, or with punishing Pfizer. The state court's discussion of *Ruhrgas* warrants quotation:

> [Pfizer's] reliance on *Ruhrgas* . . . is misplaced. The holding in *Ruhrgas* was that district courts, which normally first decide the issue of subject matter jurisdiction, may instead properly decide the issue of personal jurisdiction at the outset. . . . The case does not address the issue of when a defendant forfeits its de-

> fense of lack of personal jurisdiction. Quite the opposite, the case highlights the fact that [Pfizer] could have asked the federal courts to first decide the issue of personal jurisdiction *before* addressing the issue of subject matter jurisdiction raised by the Plaintiffs in the California cases.

Pet. App. 15.

Under *Ruhrgas*, a court has considerable discretion to decide the order in which it takes up subject-matter jurisdiction and personal jurisdiction, but a court has *no* power to make a merits determination without first resolving threshold jurisdictional issues. *Ruhrgas*, 526 U.S. at 577-78. Yet in the MDL court, Pfizer did not feel constrained by *Ruhrgas* from asserting merits arguments while subject-matter jurisdiction remained undecided. How, then, did *Ruhrgas* prevent Pfizer from asserting its personal jurisdiction arguments? Pfizer *chose* to present the merits arguments and not personal jurisdiction arguments, which (as Pfizer concedes) is the classic situation in which a personal jurisdiction defense is forfeited.

Far from "punish[ing]" Pfizer for "litigating subject-matter jurisdiction first," the state court's decision follows logically from the fact that Pfizer failed to assert its personal jurisdiction defense while litigating not just subject-matter jurisdiction, but the merits. Even if the federal court might have chosen to sequence its jurisdictional decisions to address subject-matter jurisdiction first, nothing in *Ruhrgas* prevented Pfizer from moving to dismiss on personal

jurisdiction grounds while federal subject-matter jurisdiction remained unresolved. Indeed, in the cases against it that were removed from the Missouri state courts, Pfizer did just that, by moving to dismiss for lack of personal jurisdiction at the same time it removed the cases.

This case well illustrates why courts adjudicating the issue of whether a party has waived or forfeited its personal jurisdiction defense must consider the "strong policy to conserve judicial time and effort; preliminary matters such as defective service, personal jurisdiction and venue should be raised and disposed of before the court considers the merits or quasimerits of a controversy." *Wyrough & Loser, Inc. v. Pelmor Labs., Inc.*, 376 F.2d 543, 547 (3d Cir. 1967). The inefficiencies, and the great costs to judicial administration caused by Pfizer's failure to timely move to dismiss on personal jurisdiction grounds meant that ***fourteen different courts*** (or sets of courts) and their respective staffs had to expend effort, in some instances very significant effort, on these cases before Pfizer finally got around to asserting personal jurisdiction.[19]

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[19] These were, in order: (1) California state courts; (2) California federal courts; (3) the Judicial Panel on Multi-District Litigation (JPML); (4) the MDL court; (5) the MDL magistrate judge; (6) the MDL court again; (7) the JPML again; (8) the California federal courts again; (9) a Ninth Circuit panel; (10) the California state courts again; (11) a California federal court again; (12) a Ninth Circuit panel again; (13) the Ninth Circuit en banc; and (14) this Court. Only while the courts in numbers 12-14 of this list were addressing Pfizer's continued efforts to get out of California state court did Pfizer finally move to dismiss on personal jurisdiction grounds. Plaintiffs note here the

(*Footnote continued*)

Finally, Pfizer seems to claim that it had the right to waive its personal jurisdiction defense (and to so advise the federal courts) to the extent it stayed in federal court as a result of its CAFA removals yet retain the right to assert that defense if the cases were remanded to state court. Pet. 24 and n.5. Pfizer cites no authority for the proposition that a party can selectively waive personal jurisdiction where, as here, the state and federal courts' personal jurisdiction are co-extensive. Under these circumstances (and especially in light of the fact that Pfizer sought a merits ruling against Plaintiffs long before asserting its personal jurisdiction defense), the state courts did not err in the slightest in holding that Pfizer forfeited its personal jurisdiction defense.

III. The state court correctly held that Pfizer waived or forfeited its personal jurisdiction defense by litigating the merits against Plaintiffs.

Because Pfizer has no argument that the state courts erred or created any form of precedential conflict in holding that extended merits litigation can waive a personal jurisdiction defense, its argument necessarily boils down to the assertion that the trial

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absurdity of Pfizer's remark that "there is no doubt that plaintiffs' counsel will pursue a similar tack in future cases if the rulings in this case are allowed to stand." Pet. 11; *see also* Pet. 17 ("[T]hat is precisely what Plaintiffs attempted here – to force Pfizer to give up its right to removal or give up personal jurisdiction."). Plaintiffs' counsel assures this Court that Plaintiffs did not pursue a tack of spending years tied up in federal court following Pfizer's faulty CAFA removals as part of a plot to somehow force Pfizer to forfeit its personal jurisdiction defense. Pfizer's forfeiture was all its own.

court was wrong to find that it litigated on the merits. That assertion, however, is nothing more than a fact-bound claim that the lower court erred in its understanding of the course of proceedings in this case. Such a claim of error is not a ground for the exercise of this court's discretionary review—especially when the asserted error was made in an unreported opinion by a state trial court and determined not to warrant discretionary appellate review in similarly unreported decisions of an intermediate appellate court and state supreme court. In any event, the claim of error is meritless: The state court's ruling was correct.

A. Pfizer sought discovery from Plaintiffs without asserting its personal jurisdiction defense.

As detailed above, Pfizer asked Judge Gergel in the MDL court to enter an order requiring Plaintiffs to provide discovery regarding where and when they obtained their Lipitor, including pharmacy records. R.Ex.Vol.6, at 1283-91. Pfizer conceded that this discovery was directed at the merits of Plaintiffs' claims. *Id.* at 1288 ("The information at issue is important to evaluating the viability of Plaintiffs' claims against McKesson and it therefore bears on both the merits of those claims and the jurisdictional issues that this Court will be deciding.").

Pfizer also successfully sought to impose other discovery obligations on Plaintiffs. At Pfizer's request, Plaintiffs were require to participate in the depositions of so-called "common witnesses" in the MDL proceeding. *Id.* at 1283 n.1 ("Pfizer submits that, to the extent the Court stays Plaintiffs' discov-

ery obligations, it should not exempt Plaintiffs from participation in depositions of common witnesses in the MDL . . . "); R.Ex.Vol.6, at 1340, ¶ 2 (granting Plaintiffs' motion to stay discovery in part only and stating, "The Parties in these cases are NOT exempt from participation in the depositions of common witnesses in the MDL").

This requirement, sensible as it might seem, nevertheless reflected an affirmative request by Pfizer to the MDL court – a court that possessed personal jurisdiction only if the California transferor court and the California state court did[20] – for relief that presumed the MDL court's power to afford that relief. Moreover, the common witness depositions played a significant role in the exclusion of the MDL plaintiffs' general and specific causation experts, which in turn formed the basis for Pfizer's omnibus motion for summary judgment against all plaintiffs, including California Plaintiffs.

B. Pfizer moved for summary judgment against Plaintiffs without asserting its personal jurisdiction defense.

Pfizer didn't just seek discovery against Plaintiffs in the MDL court – it moved for summary judgment

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[20] *See, e.g.*, *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, 136 F. Supp. 3d 968, 973 (N.D. Ill. 2015) ("Following a transfer [to an MDL], the transferee judge has all the jurisdiction and powers over pretrial proceedings in the actions transferred to him that the transferor judge would have had in the absence of transfer.") (internal quotation omitted); *see also In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145,163 (2d Cir. 1987); *In re FMC Corp. Patent Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.L. 1976).

against them. After Pfizer secured favorable rulings from the MDL court on the admissibility of the MDL plaintiffs' causation experts, Pfizer filed an omnibus motion for summary judgment (the MSJ) against *all* plaintiffs in the MDL. App. 97-119.

Mischaracterizing both its own MSJ briefing and the state court's order denying its personal jurisdiction motion, Pfizer now claims that, in holding that Pfizer forfeited its personal jurisdiction defense by seeking a merits determination, the state court relied solely on language in a footnote in Pfizer's reply brief and that the footnote didn't reflect a request for summary judgment. Pet. 10, 23-24:

> In [the concluding] footnote [of Pfizer's reply], Pfizer stated that the MDL judge, after finding subject matter jurisdiction in these cases, could 'issue a similar order' *commencing summary judgment procedures in these cases* as it had done for the others in the MDL. . . . The [state] court held that Pfizer's statement was 'seeking a ruling on the merits of the California cases' that forfeited its jurisdictional defenses in California state court.

Pet. 23 (emphasis added). The state court's order and Pfizer's MSJ and reply brief belie these assertions. Pfizer was not merely advising the MDL court that it could one day commence summary judgment proceedings against Plaintiffs – Pfizer was actively seeking summary judgment against Plaintiffs right then and there.

When indicating which plaintiffs it sought summary judgment against, Pfizer's MSJ referenced "*all* Plaintiffs" eight separate times.[21] Then, as the state court noted in its order denying Pfizer's personal jurisdiction motion, Pfizer concluded its MSJ with these words: " . . . Defendants are entitled to summary judgment *in all cases*." Pet. App. 5 (emphasis added) (quoting App. 117). Having closely parsed Pfizer's MSJ, the state court had no trouble concluding that this MSJ was made against "*all* [p]laintiffs" in the MDL, which included Plaintiffs. Pet. App. 5-6; (" . . . Pfizer . . . made no exception from [its] Omnibus Motion for Summary Judgment as to the non-California Plaintiffs in the California cases . . . ."). Pfizer's MSJ thus included Plaintiffs.[22]

Pfizer's reply brief in support of its MSJ reinforced the state court's conclusion. The court's order noted that, in its reply brief, Pfizer "*maintained* [its] position that 'the record and the law . . . require en-

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[21] App. 98, 105 (three times), 106, 114 (three times).

[22] This holding could not have surprised Pfizer. During the hearing on Pfizer's motion to dismiss, before Pfizer's counsel began his prepared remarks, the state court judge expressed concern that Pfizer was failing to give credence to Plaintiffs' contention that, by moving for summary judgment, Pfizer forfeited its personal jurisdiction defense:

> So I'm concerned about the summary judgment. So [Pfizer] cite[s] federal authority that says that when you submit the merits of the case to the court, you've submitted to the jurisdiction of the court. [¶] And I'm quite concerned about that in the context of the summary judgment proceeding, which in your reply [in support of Pfizer's motion to dismiss] is the [last] thing you address. I think it's probably [the last] because it's the hardest to address.

try of summary judgment in *all* cases.'" Pet. App. 6 (emphasis added). Pfizer stated in the reply brief that the MDL court "has subject matter jurisdiction over *all cases* in the MDL and the [c]ourt's expert rulings warrant summary judgment *in every case*." Pet. App. 51-52 (emphasis added). Making clear that Pfizer was seeking summary judgment against Plaintiffs as part of its omnibus MSJ, Pfizer's reply brief asked for alternative relief only if the MDL court was not then willing to grant summary judgment against Plaintiffs: "To the extent the Court defers ruling on summary judgment in cases where Plaintiffs have moved to remand, Defendants reserve the right to *renew* their motion and seek other relief at an appropriate time." Pet. App. 52 (emphasis added).[23] And, as the state court indicated, in both its MSJ and its reply brief, even as Pfizer sought summary judgment against *all* plaintiffs, Pfizer failed to make any reference to its boilerplate personal jurisdiction defense. Pet. App. 5-6.

Pfizer is simply wrong in asserting now that it didn't try to take advantage of the MDL court's rulings against the MDL plaintiffs' causation experts to obtain merits relief against Plaintiffs. Pfizer clearly did so. Accordingly, Pfizer litigated the merits of Plaintiffs' claims in the MDL court and thereby forfeited its personal jurisdiction challenge.

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[23] The language Pfizer employed in this sentence is incompatible with Pfizer's contention in its petition that it was merely alerting the MDL court that summary judgment proceedings against Plaintiffs could be commenced sometime in the future. A party does not reserve a right to *renew* its summary judgment motion should the court *defer* ruling on that motion if the motion is not presently being made.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES G. ORR
BARON & BUDD, P.C.
3102 Oak Lawn Ave.,
#1100
Dallas, Texas 75219
(214) 521-3605

BURTON LEBLANC
Counsel of Record
BARON & BUDD, P.C.
2600 Citiplace Dr.
Baton Rouge, LA 70808
(225) 927-5441
bleblanc@baronbudd.com

Attorneys for respondents Alida Adamyan, et al.
October 23, 2019

APPENDIX

APPENDIX

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case No.: S255942

[Filed June 26, 2019]

PFIZER INC., *et al.*	)
	)
Petitioners,	)
	)
v.	)
	)
THE SUPREME COURT OF CALIFORNIA, COUNTY OF LOS ANGELES,	)
	)
Respondent;	)
	)
NON-CALIFORNIA RESIDENTS, *et al.,*	)
	)
Real Parties in Interest.	)

After a Decision by the Court of Appeal
Second Appellate District, Division One
Court of Appeal No. B296917

App. 2

Superior Court, Los Angeles County,
JCCP 4761, Hon. Carolyn Kuhl, Judge

ANSWER TO PETITION FOR REVIEW

ROBINS CLOUD LLP
Bill Robins III (SBN 296101)
808 Wilshire Blvd., Suite 450
Santa Monica, CA 90401
Tel: (310) 929-4200
Fax: (310) 566-5900
robins@robinscloud.com
Attorneys for Real Parties in Interest/Plaintiffs

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Real Parties in Interest (the JCCP Plaintiffs against whom Pfizer waited five years to raise threshold personal jurisdiction and *forum non conveniens* (FNC) motions) respectfully submit this Answer to Pfizer's Petition for Review.

QUESTIONS PRESENTED

1. Did the Court of Appeal err in summarily denying Pfizer's Petition for Writ of Mandate where the JCCP court, in evaluating Pfizer's extensive litigation conduct over a several-year period and across numerous different courts, determined that Pfizer forfeited its personal jurisdiction defense by failing to raise it despite numerous opportunities to do so and by moving for summary judgment against the JCCP Plaintiffs?

JCCP Plaintiffs' Answer: No.

Pfizer's Answer: Yes.

2. Did the Court of Appeal err in summarily denying Pfizer's Petition for Writ of Mandate where the JCCP court exercised considerable discretion in declining to dismiss the JCCP Plaintiffs' claims under the equitable doctrine of FNC?

3. JCCP Plaintiffs' Answer: No.

4. Pfizer's Answer: Yes.

REASONS WHY REVIEW SHOULD BE DENIED

For five years, Pfizer did everything it could to avoid litigating the JCCP Plaintiffs' claims in California state court *except* seek dismissal on personal jurisdiction or

FNC grounds. Passing on numerous opportunities to raise these issues, Pfizer chose instead to litigate against the JCCP Plaintiffs in the MDL court (which, although located in South Carolina, was a California court for purposes of personal jurisdiction[1]) and in California *federal* court. Moreover, Pfizer moved for summary judgment against the JCCP Plaintiffs while the cases were in the MDL court.

Accordingly, there are at least four reasons why this Court should deny Pfizer's Petition for Review:

1. Pfizer claims that the JCCP court's refusal to dismiss on personal jurisdiction grounds "is quite literally unprecedented." Pet. at 9. Pfizer is wrong. Judge Kuhl relied on a remarkably similar case, *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58 (2d. Cir. 1999), in determining that Pfizer forfeited its personal jurisdiction defense. Judge Kuhl described *Hamilton* at length and noted that "[t]he facts of *Hamilton* are similar to those presented here." Order at 5:26-7:28. Like the defendant in *Hamilton*, Pfizer chose to forego numerous opportunities to assert its personal jurisdiction defense, thereby forfeiting it.

2. Pfizer moved for summary judgment against the JCCP Plaintiffs. Pfizer acknowledges that "federal law

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[1] *See, e.g.*, *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, 136 F. Supp. 3d 968, 973 (N.D. Ill. 2015) ("Following a transfer [to an MDL], the transferee judge has all the jurisdiction and powers over pretrial proceedings in the actions transferred to him that the transferor judge would have had in the absence of transfer.") (internal quotation omitted); *see also In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145,163 (2d Cir. 1987); *In re FMC Corp. Patent Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.L. 1976).

is unmistakably clear that forfeiture occurs when a party litigates on the merits, not jurisdiction." Pet. at 10. JCCP Plaintiffs agree. Pfizer's assertion that it didn't seek merits disposition against the JCCP Plaintiffs is belied by the motion for summary judgment and reply in support of that motion that Pfizer filed in the MDL. Judge Kuhl discussed this at length, yet Pfizer treats Judge Kuhl's order as if she didn't.

3. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), supports Judge Kuhl's decision. Pfizer strangely claims that the federal courts in this case were precluded by *Ruhrgas* from deciding personal jurisdiction before deciding subject matter jurisdiction. This makes no sense. *Ruhrgas* held that both subject matter and personal jurisdiction are threshold issues that should be decided early in the litigation and that a trial court is free to decide it lacks personal jurisdiction before determining whether it has subject matter jurisdiction. The only reason the federal court here couldn't decide personal jurisdiction first, before subject matter, is because Pfizer never raised personal jurisdiction in those courts, choosing instead to challenge personal jurisdiction only after five years of litigation, and only to avoid being in state court. Nothing in *Ruhrgas* compels a different result than the one Judge Kuhl and the Court of Appeal reached here.

4. Before it moved for dismissal on FNC grounds, Pfizer invoked the benefits of coordination at every step of the five-year journey it forced the JCCP Plaintiffs to take through dozens of courts. The JCCP court was

well within its broad discretion to deny Pfizer's FNC motion.

BACKGROUND

I. Plaintiffs began filing cases in California state court in 2013 and early 2014.

Lipitor plaintiffs began filing claims in California state court in mid-2013. R. Ex. Vol. 2, at 167, ¶ 4. In September 2013, a handful of plaintiffs sought creation of a JCCP to manage the Lipitor cases efficiently. R. Ex. Vol. 2, at 206-29. The Judicial Council granted the coordination petition in early December 2013. R. Ex. Vol. 2, at 231-32.

By the date of the first status conference in the JCCP (February 25, 2014), about 1,800 plaintiffs (including hundreds of non-California residents) had filed Lipitor personal injury claims in California state court. R. Ex. Vol. 2, at 240:25-28.

II. In March 2014, Pfizer removed the California cases without raising personal jurisdiction or FNC challenges.

Pfizer responded to this wave of California filings not by asserting a personal jurisdiction or forum challenge but by removing all cases to federal court as an alleged CAFA mass action. R. Ex. Vol. 2, at 268-301.[2] Nowhere in any removal pleadings did Pfizer say

[2] In the record below, Plaintiffs provided pleadings from individual cases that are substantially similar to those the parties filed in all the removed California state court actions in the California and federal MDL courts. R. Ex. Vol. 2, at 167, ¶ 7.

the California federal courts to which Pfizer was removing the cases lacked personal jurisdiction over Pfizer or were inconvenient forums. R. Ex. Vol. 2, at 167, ¶ 7.

Concurrently with removal, Pfizer sought transfer of the cases to the recently created federal MDL. R. Ex. Vol. 2, at 309-11. Pfizer also filed motions to stay pending transfer. R. Ex. Vol. 6, at 1260-73. Again, nothing in these or Pfizer's other removal-related pleadings suggested that Pfizer intended to raise personal jurisdiction or forum challenges. R. Ex. Vol. 2, at 167-68, ¶ 8.[3]

Once in the JPML, many JCCP Plaintiffs filed motions asking the JPML to send the cases back to California federal court for resolution of Plaintiffs' remand motions. R. Ex. Vol. 2, at 319-25. Pfizer opposed such motions, urging that the common issues raised across all the cases should be decided by a single judge (the MDL judge). R. Ex. Vol. 2, at 327-38.

Pfizer's strategic decision to not raise personal jurisdiction challenges at this stage is in sharp contrast to what Pfizer did in Lipitor cases filed in Missouri state court. In many of those cases (unlike the California cases), concurrent with its removals, Pfizer moved to dismiss the claims of the non-Missouri residents alleging lack of personal jurisdiction. R. Ex.

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[3] Pfizer filed federal court answers in which they mention personal jurisdiction and forum in a long list of boilerplate affirmative defenses. R. Ex. Vol. 5, at 1212, 1254-55 (FNC mentioned as affirmative defense number 34 of 37, and personal jurisdiction mentioned as affirmative defense number 35 of 37).

Vol. 2, at 372-87.[4] Pfizer then urged the MDL court to address personal jurisdiction first, before deciding subject matter jurisdiction. R. Ex. Vol. 3, at 419-20. So even while Pfizer was seeking a ruling that *all* California state court Lipitor cases belonged in federal court (without raising personal jurisdiction challenges to those cases), Pfizer was simultaneously urging the federal courts – Missouri and MDL – to dismiss the claims of non-Missouri plaintiffs for lack of personal jurisdiction.

III. Pfizer litigated the merits against the JCCP Plaintiffs (including moving for summary judgment against them).

A. Pfizer sought discovery from the JCCP Plaintiffs.

Once in federal court, Pfizer invoked the court's power over the cases by seeking discovery from the JCCP Plaintiffs. At the first status conference after their cases arrived in the MDL, Plaintiffs advised the MDL judge (Judge Gergel) that they would seek to stay imminent discovery obligations (Plaintiff Fact Sheets [PFSs] would be due 30 days from the date of transfer into the MDL) pending determination of their

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[4] When Missouri plaintiffs asserted that the federal court should decide subject matter jurisdiction first, before addressing personal jurisdiction, Pfizer replied that "[t]h[e] [c]ourt can and should decide Pfizer's motion to dismiss for lack of personal jurisdiction before deciding whether federal subject-matter jurisdiction exists because the [c]ourt 'has before it a straightforward personal jurisdiction issue presenting no complex question of state law." R. Ex. Vol. 2, at 389 (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 588 (1999)).

forthcoming remand motions. R. Ex. Vol. 3, at 478:22-481:2. Pfizer's counsel responded that "at a minimum" the California state court Lipitor Plaintiffs should be ordered to "provide [to Pfizer] pharmacy information, proof of use, and, you know, information." *Id.* at 482:18-483:2.

Pfizer asked the MDL court to impose two distinct discovery obligations on the JCCP Plaintiffs. First, Pfizer asked the MDL court to require the JCCP Plaintiffs to "participat[e] in depositions of common witnesses in the MDL." R. Ex. Vol. 6, at 1283 n.1. Second, Pfizer sought an order from the MDL court compelling the JCCP Plaintiffs to "provide [to Pfizer and McKesson] (1) the identity and address of the pharmacies from which the Plaintiffs obtained Lipitor; (2) the dates on which they purchased or obtained Lipitor; and (3) a signed authorization to collect records from their pharmacies." *Id.* at 1-2. Pfizer acknowledged that it intended to use this discovery "to evaluat[e] the viability of Plaintiffs' claims against McKesson and [the discovery] therefore bears on . . . the merits of those claims." *Id.* at 6.

Judge Gergel entered an order partially granting Plaintiffs' stay motion, holding that PFS discovery was stayed but, as Pfizer requested, the JCCP Plaintiffs "[we]re NOT exempt from participation in the depositions of common witnesses in the MDL." R. Ex. Vol. 6, at 1340, ¶ 2.[5] Judge Gergel denied Pfizer the discovery it sought from the JCCP Plaintiffs, without

[5] Nothing about the stay order precluded Pfizer from timely raising and litigating its PJ/FNC challenge.

prejudice. R. Ex. Vol. 6, at 1343-46. But the fact that Pfizer did not succeed in getting the discovery it requested does not obviate the fact that Pfizer invoked the MDL court's power to order Plaintiffs to provide that discovery.

B. Pfizer sought summary judgment against the JCCP Plaintiffs.

In January 2015, the magistrate judge issued orders in the California cases rejecting Pfizer's diversity arguments but sending the CAFA mass action issue back to the California federal courts for them to resolve. R. Ex. Vol. 2, at 170, ¶ 25. Pfizer appealed the magistrate's orders to Judge Gergel but failed to raise personal jurisdiction or FNC in its appeals. R. Ex. Vol. 3, at 536-72.

Meanwhile, Pfizer was litigating the claims of thousands of plaintiffs whose claims were properly in the MDL court. Pfizer ultimately persuaded Judge Gergel that bellwether plaintiffs failed to proffer admissible expert testimony as to both general and specific causation. R. Ex. Vol. 2, at 170, ¶ 27. Judge Gergel then entered a CMO stating that any MDL plaintiff who believed her case differed from those in which the causation experts were struck must provide prompt notice to the court, which would then enter a briefing schedule for expert witness discovery. R. Ex. Vol. 3, at 574-75.

Pfizer then filed its omnibus summary judgment motion (MSJ) in the MDL court on June 24, 2016, seeking summary judgment "in all cases" in the MDL (including the JCCP Plaintiffs). R. Ex. Vol. 6, at 1362.

Pfizer's reply in support of its MSJ reiterated that Pfizer believed the MDL court could and should enter summary judgment against the JCCP Plaintiffs. R. Ex. Vol. 6, at 1366-94. In that brief, Pfizer included a section under the heading "This Court Has Subject Matter Jurisdiction in All Cases." *Id.* at 1391. The first sentence in that section says, "This Court has subject matter jurisdiction over all cases in the MDL and the Court's expert rulings warrant summary judgment in every case." *Id.*

IV. The JCCP Plaintiffs' cases were remanded back to California federal court, whereupon Pfizer indicated personal jurisdiction is "moot" if the California *federal* courts keep the cases.

On October 21, 2016, Judge Gergel heard oral argument on the JCCP Plaintiffs' remand motions (he also heard argument on the Missouri plaintiffs' remand motions, including personal jurisdiction contentions). R. Ex. Vol. 6, at 1396-1455. Judge Gergel then issued a series of remand orders sending the Missouri cases back to Missouri state court and the California cases to the JPML with the MDL court's suggestion that the cases be returned to California federal court for determination of the CAFA issue. R. Ex. Vol. 2, at 171-72, ¶ 34.

During the first status conference in California after remand from the MDL, Pfizer's counsel brought up the personal jurisdiction issue to claim that Pfizer had not waived that issue (even though Pfizer had spent years litigating against the JCCP Plaintiffs without ever attempting to assert its personal jurisdiction defense).

R. Ex. Vol. 6, at 11488:9-17. In the same breath, however, Pfizer's counsel also declared that the personal jurisdiction issue would "be moot" – would "go away" – if the California federal court determined that there was CAFA subject matter jurisdiction. *Id.* at 1488:9-17, 1488:23-25.

California federal judge Cormac Carney heard oral argument on the California Plaintiffs' remand motion on May 22, 2017. R. Ex. Vol. 3, at 608-49. The next day, Judge Carney issued his order remanding these cases back to California state court. R. Ex. Vol. 6, at 1492-1507.

V. Rather than asserting its PJ/FNC motion, Pfizer instead removed the JCCP Plaintiffs' cases a second time.

On remand to the JCCP court, instead of teeing up a personal jurisdiction/FNC challenge, Pfizer chose to jockey for position with the JCCP Plaintiffs over how the cases would be coordinated into the JCCP. Even while Pfizer was stating, in pleadings and in open court, that it wanted the benefits of coordination of all the California cases into this JCCP, Pfizer was trying to box Plaintiffs into seeking add-on in a way that arguably would trigger CAFA mass action jurisdiction so that Pfizer could remove a second time.[6]

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[6] *See, e.g.*, R. Ex. Vol. 7, at 1567:26-27 (noting, in status report's "Defendants' position" section prepared by Pfizer several months after cases had been remanded, that "[a]s of yet, Pfizer has not filed any jurisdictional briefing as it has been waiting for Plaintiffs to pick a path forward regarding coordination").

Pfizer's strategy worked, in a manner of speaking. After the JCCP court issued *sua sponte* add-on orders bringing all the Plaintiffs into the JCCP, Pfizer again removed the cases en masse as an alleged CAFA mass action. R. Ex. Vol. 4, at 730-46. Two points merit mention here: First, the sole basis for federal subject matter jurisdiction alleged by Pfizer in this second removal was CAFA mass action, and under CAFA, this means the cases would stay in California even if Plaintiffs' remand motion had proven unsuccessful.[7] Second, even assuming Plaintiffs would acquiesce in the cases being transferred out of California, Judge Gergel already had closed the MDL to new or transferred cases, having entered CMOs that (1) precluded direct filing in the MDL [R. Ex. Vol. 4, at 748], and (2) suggested to the JPML that it no longer transfer any more cases into the MDL. R. Ex. Vol. 4, at 750-51. So by removing a second time without raising personal jurisdiction or FNC in its removal notice, Pfizer was effectively asserting to Judge Carney that the cases should be litigated in his courtroom, in Orange County, California.

On May 10, 2018, Judge Carney entered an order remanding the cases back to the JCCP court. R. Ex. Vol. 4, at 753-63. Pfizer petitioned for permission to appeal that order to the Ninth Circuit. R. Ex. Vol. 4, at 765-856. On August 22, 2018, about two weeks after Pfizer finally filed its PJ/FNC motion in the JCCP

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[7] Under 28 U.S.C. § 1332(d)(11)(C)(I), a case removed on CAFA mass action grounds cannot be transferred to an MDL unless 50% or more of plaintiffs consent to the transfer. Plaintiffs had long since made clear they would not so consent.

court, the Ninth Circuit entered a one-sentence order denying Pfizer's petition for permission to appeal. R. Ex. Vol. 4, at 858. Pfizer filed a petition for *en banc* rehearing of the denial of Pfizer's petition for permission to appeal [R. Ex. Vol. 4, at 860-85], which was summarily denied. No. 18-80059, Dkt. 13 (Jan. 22, 2019). Pfizer recently filed a petition for writ of certiorari in the U.S. Supreme Court. No. 18-1578 (*Pfizer Inc. v. Adamyan, et al.*, pet. filed June 21, 2019).

Meanwhile, in August 2018 (five years after the first cases were filed in California), Pfizer finally got around to filing its PJ/FNC motion in the JCCP court after its second removal proved as unsuccessful as its first. R. Ex. Vol. 1, at 90-117. Plaintiffs filed their Opposition [R. Ex. Vol. 2, at 131-65], and the JCCP court heard argument on the PJ/FNC motion on February 13, 2019. R. Ex. Vol. 1, 21-58. One month later, on March 15, 2019, the JCCP court entered its Opinion and Order denying Pfizer's PJ/FNC motion. R. Ex. Vol. 1, at 7-19. Pfizer petitioned the Second Court of Appeal for a Writ of Mandate. No. B296917 (Petition for Writ of Mandate, filed April 12, 2019); Pet. at 17. After the JCCP Plaintiffs filed a preliminary opposition (but not a full brief) in response, the Court of Appeal summarily denied the petition on May 13, 2019, holding, "The respondent court did not err in denying the motion to quash service of summons for lack of personal jurisdiction, and the respondent court was within its discretion in denying the motion to dismiss

the action of the ground of FNC." Order, May 13, 2019; Pet. at 17.[8]

ARGUMENT AND AUTHORITIES

Pfizer wants this Court to see this case as *Bristol-Myers* redux. It isn't. Unlike the defendants in *Bristol-Myers*, who timely moved to dismiss the cases on personal jurisdiction grounds after the cases were coordinated into a JCCP, Pfizer elected to forego its personal jurisdiction defense and try instead to win the case on the merits in the MDL court. Only after that didn't work as to the JCCP Plaintiffs did Pfizer blow the dust off its boilerplate personal jurisdiction and FNC claims and, after having passed on opportunity after opportunity to raise those defenses, finally assert them. The JCCP court was correct that, five years in and fourteen courts (or sets of courts) later, it was too late for Pfizer to assert a threshold PJ/FNC challenge.

I. Far from "unprecedented," the JCCP court's decision followed federal case law almost directly on point.

Pfizer strangely claims that the JCCP court's "ruling [that Pfizer forfeited its personal jurisdiction defense], issued under federal law, is quite literally unprecedented." Pet. at 9. The JCCP court not only followed a long line of federal cases regarding waiver of

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[8] Pfizer states that "a divided panel of the Court of Appeal affirmed over a dissent by Judge Baker." Pet. at 9. Actually, Judge Baker only noted that he "would issue an order to show cause" requiring a full brief from the JCCP Plaintiffs. He did not take a position on the merits.

personal jurisdiction through extensive litigation activity without asserting that defense,[9] it discussed at length and relied on *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58 (2d. Cir. 1999), a case almost directly on point (which is remarkable, given the unique posture of this coordinated proceeding).

A. *Hamilton* discussed.

In *Hamilton*, the plaintiff filed an asbestos claim in New York federal district court in June 1994. *Id.* at 60. Defendant Atlas's answer included a personal jurisdiction defense. *Id.* That November, the case was transferred to an MDL proceeding in Pennsylvania. *Id.* After more than three years of litigation in the MDL,

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[9] Federal law on waiver/forfeiture of personal jurisdiction challenges differs in some significant respects from California law. Federal Rule of Civil Procedure 12(h)(1) provides that a party prevents waiver of a personal jurisdiction challenge by including that defense in its answer. But "Rule 12(h)(1) [only] specifies the minimum steps that a party must take . . . to preserve a [personal jurisdiction] defense. It does not follow . . . that a party's failure to satisfy those minimum steps constitutes the only circumstance under which the party [can] waive[] [the] defense. Most defenses, including . . . lack of personal jurisdiction, may be waived as a result of the course of conduct pursued by a party during litigation." *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1318 (9th Cir. 1998). As Judge Posner explained, this is because "[i]t would defeat the purpose of requiring prompt assertion of the defense of lack of personal jurisdiction if the defendant, having raised an objection to personal jurisdiction at the outset as required, could without any penalty fail or refuse to press it, creating the impression that he had abandoned it, and not seek to correct that impression until he appealed from an adverse final judgment on the merits." *Rice v. Nova Biomedical Corp.*, 38 F.3d 909, 914 (7th Cir. 1994).

the case was transferred back to New York. *Id.* In August 1998, more than four years after the case was filed, Atlas moved to dismiss for lack of personal jurisdiction. *Id.* The district court granted that motion. *Id.*

While acknowledging that Atlas had "met the formal requirements of [Rule] 12(h)(1)," the Second Circuit noted that "a delay in challenging personal jurisdiction by motion to dismiss may result in waiver even where . . . the defense was asserted in a timely answer." *Id.* (internal quotation omitted, ellipses in original). The court then indicated "that the issue is more properly considered one of forfeiture than of waiver. The term 'waiver' is best reserved for a litigant's intentional relinquishment of a known right. Where a litigant's action or inaction is deemed to incur the consequence of loss of a right, or, as here, a defense, the term 'forfeiture' is more appropriate." *Id.* at 61.

Noting that review of whether the district court abused its discretion in holding that Atlas did not forfeit its personal jurisdiction challenge should involve "consider[ation] [of] all the relevant circumstances," the Second Circuit began its analysis "with the considerable length of time – four years – between the assertion of the defense in the answer and the litigation of the defense in a motion." *Id.* Significantly, the court stated, "Although the passage of time alone is generally not sufficient to indicate forfeiture of a procedural right, the time period provides the context in which to assess the significance of the defendant's conduct, both the litigation activity that occurred and

the opportunities to litigate the jurisdictional issue that were foregone." *Id.*

The Second Circuit noted that "[c]onsiderable pretrial activity occurred in this case" during the four years between Atlas's answer and its motion to dismiss. *Id.* While in the MDL court, Atlas participated in both merits discovery and settlement conferences. *Id.* "Most significantly, Atlas had four distinct opportunities to move to dismiss during the four-year-interval [but failed to do so]." *Id.* Atlas could have asserted, but chose not to assert, its personal jurisdiction defense: (1) during the time period before MDL transfer; (2) by way of objection to MDL transfer when that was proposed; (3) during the three years the case was in the MDL; and (4) immediately upon transfer back to the New York federal court. *Id.* at 61-62. "In sum, Atlas participated in pretrial proceedings but never moved to dismiss for lack of personal jurisdiction despite several clear opportunities to do so during the four-year interval after filing its answer. These circumstances establish a forfeiture." *Id.* at 62. Thus, the Second Circuit concluded not merely that Atlas had forfeited its personal jurisdiction challenge, "but also that this is the rare case where a district judge's contrary ruling exceeds the bounds of allowable discretion." *Id.* at 62-63.

B. *Hamilton* applied.

Judge Kuhl correctly noted that "[t]he facts of *Hamilton* are similar to those presented here." Order at 6:17. Like Atlas, Pfizer did not move to dismiss the claims of the JCCP Plaintiffs upon removal but instead sought transfer of the cases to the MDL. Pfizer did not

seek dismissal for lack of personal jurisdiction during the lengthy period that the claims of the JCCP Plaintiffs were in the MDL, but instead sought and obtained an order requiring the JCCP Plaintiffs to participate in depositions and sought discovery against the JCCP Plaintiffs to establish that their claims lacked merit as to McKesson. And, as discussed below, Pfizer sought summary judgement against the JCCP Plaintiffs in the MDL. Finally, upon transfer of the cases back to California federal court, Pfizer again did not seek dismissal based on lack of personal jurisdiction (or on FNC grounds) but instead told the Orange County-based federal court that the personal jurisdiction issue would be mooted by an order denying the JCCP Plaintiffs' remand motion.[10]

The JCCP court discussed *Hamilton* (and other federal authorities also on point) at length in concluding that Pfizer's extensive litigation conduct in the federal courts amounted to a forfeiture of its personal jurisdiction defense. Order at 5:26-7:28. Pfizer tries to portray the JCCP court's order as "unprecedented" by belatedly trying to re-frame the issue, arguing that all it did (during the five-year-period between when the JCCP Plaintiffs first began filing claims and when it finally got around to asserting

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[10] "[W]e have a personal jurisdiction affirmative defense that . . . we think it will be moot frankly to the extent that we're here before Your Honor in this Court, as we think we should be under CAFA. . . . The [personal] jurisdictional issue goes away to the extent that Your Honor determines that there's CAFA jurisdiction."

R. Ex. Vol. 6, at 1488:9-25.

its personal jurisdiction defense) was "litigate subject matter jurisdiction." Pet. at 9-10, 22, 23. But as shown below, that is not what Pfizer did.

II. Pfizer litigated the merits against the JCCP Plaintiffs before seeking dismissal on PJ/FNC ground.

Pfizer acknowledges that "federal law is unmistakably clear that forfeiture [of a defendant's personal jurisdiction defense] occurs when a party litigates on the merits, not jurisdiction." Pet. at 10. The JCCP Plaintiffs agree. And Pfizer forfeited its personal jurisdiction defense against the JCCP Plaintiffs, first, by seeking discovery as to them, and then (more importantly), by moving for summary judgment against them.

A. Pfizer sought discovery from the JCCP Plaintiffs without asserting its PJ/FNC defenses.

As detailed above, Pfizer asked Judge Gergel in the MDL court to enter an order requiring the JCCP Plaintiffs to provide discovery regarding where and when they obtained their Lipitor, including pharmacy records. R. Ex. Vol. 6, at 1283-91. Pfizer conceded that this discovery was directed at the merits of the JCCP Plaintiffs' claims. *Id.* at 1288 ("The information at issue is important to evaluating the viability of Plaintiffs' claims against McKesson and it therefore bears on both the merits of those claims and the jurisdictional issues that this Court will be deciding.").

Pfizer also sought, and was granted, additional discovery requirements against the JCCP Plaintiffs.

Specifically, at Pfizer's request, the JCCP Plaintiffs were obligated to participate in the depositions of so-called "common witnesses" in the MDL proceeding. *Id.* at 1283 n.1 ("Pfizer submits that, to the extent the Court stays Plaintiffs' discovery obligations, it should not exempt Plaintiffs from participation in depositions of common witnesses in the MDL . . . "); R. Ex. Vol. 6, at 1340, ¶ 2 (granting JCCP Plaintiffs' motion to stay discovery in part only and stating, "The Parties in these cases are NOT exempt from participation in the depositions of common witnesses in the MDL"). This requirement, while seemingly sensible since the JCCP Plaintiffs were either going to litigate their claims in the MDL or in California courts and might as well participate in common witness depositions for the sake of comity and efficiency, nevertheless reflected an affirmative request by Pfizer to the MDL court – a court with that level of personal jurisdiction only that the California transferor courts had – for relief that presumed the MDL court's power to afford that relief. Seeking a court order requiring the JCCP Plaintiffs to participate in discovery is both a general appearance under California law and a forfeiture of personal jurisdiction under federal law. *Mansour v. Superior Court* (1995) 38 Cal. App. 4th 1750, 1757 (California law); *Hamilton*, 197 F.3d at 61 (federal law).

B. Pfizer moved for summary judgment against the JCCP Plaintiffs without asserting its PJ/FNC defenses.

Pfizer didn't just seek discovery against the JCCP Plaintiffs in the MDL court – it also included the JCCP Plaintiffs in an omnibus summary judgment motion

(MSJ). After Pfizer secured favorable rulings from the MDL court on the admissibility of the MDL plaintiffs' causation experts, Pfizer asked Judge Gergel to grant summary judgment against all plaintiffs in the MDL. R. Ex. Vol. 6, at 1348-64. Pfizer didn't just make it clear once in its MSJ that it was seeking summary judgment against all plaintiffs then in the MDL (which included the JCCP Plaintiffs): When indicating which plaintiffs it sought summary judgment against, Pfizer's MSJ references "*all* Plaintiffs" seven separate times.[11] Then, as Judge Kuhl noted, Pfizer ended its MSJ with these words: " . . . Defendants are entitled to summary judgment *in all cases*." R. Ex. Vol. 1, at 9:5-6 (emphasis added) (quoting R. Ex. Vol. 6, at 1362).

1. Judge Kuhl relied on more than just a single footnote.

Pfizer now claims that Judge Kuhl relied only on language in a footnote in Pfizer's reply brief in holding that Pfizer forfeited its personal jurisdiction challenge by moving for summary judgment against the JCCP Plaintiffs: "Nor is there merit to the Superior Court's alternate basis for finding forfeiture – that Pfizer showed intent to litigate the merits by referring to these cases in a single footnote of a reply brief in support of summary judgment in other cases in the Lipitor MDL." Pet. at 10. Pfizer further asserts that the footnote at issue "specifically stated that any future summary judgment motion in these cases was contingent on the court finding it had subject matter

[11] R. Ex. Vol. 6, at 1349, 1353 (twice), 1354 (twice), and 1360 (twice).

jurisdiction proper, which it did not." Pet. at 10. Close analysis of Pfizer's Reply Brief, as well as the JCCP court's order, belies these assertions.

Judge Kuhl recognized that Pfizer's MSJ was made against "*all* Plaintiffs" in the MDL, which included the JCCP Plaintiffs. R. Ex. Vol. 1, at 9:5-14 (". . . Pfizer . . . made no exception from [its] Omnibus Motion for Summary Judgment as to the non-California Plaintiffs in the California cases . . . ."). Then, Judge Kuhl noted that in its reply brief, Pfizer "maintained [its] position that 'the record and the law . . . require entry of summary judgment in *all* cases.'" R. Ex. Vol. 1, at 9:20-25 (quoting R. Ex. Vol. 6, at 1374). Judge Kuhl noted that in both instances, even as Pfizer sought summary judgment against *all* plaintiffs, Pfizer failed to make any reference to the boilerplate affirmative defense that the MDL court lacked personal jurisdiction over Pfizer. R. Ex. Vol. 1, at 9:5-25.

2. The language in Pfizer's reply brief reflects that Pfizer sought summary judgment against the JCCP Plaintiffs.

Here is a cut-and-paste of what Pfizer actually said in its reply in support of its omnibus MSJ:

IV. THIS COURT HAS SUBJECT MATTER JURISDICTION IN ALL CASES

This Court has subject matter jurisdiction over all cases in the MDL and the Court's expert rulings warrant summary judgment in every case.[9] Certain Plaintiffs contend that their cases should not be subject to Defendants' motion because they moved to remand.

[1583, 1584] Pfizer incorporates its oppositions to Plaintiffs' remand motions and its objections to recommendations by the Magistrate Judge. To the extent the Court defers ruling on summary judgment in cases where Plaintiffs have moved to remand, Defendants reserve the right to renew their motion and seek other relief at an appropriate time.

> [9] As to Plaintiffs with remand motions who asserted that they did not intend to act under CMO 65, the Court can issue a similar order after addressing the remand motions. . . .

R. Ex. Vol. 6, at 1391. A sentence-by-sentence analysis of this section demonstrates that Pfizer was indeed seeking entry of summary judgment against the JCCP Plaintiffs:

The Heading – "THIS COURT HAS SUBJECT MATTER JURISDICTION IN ALL CASES."

- Subject matter jurisdiction was not at issue for the 3,000 plaintiffs who either chose to be in the MDL or who acquiesced in transfer to the MDL. So this section isn't about them. This section is about the JCCP Plaintiffs, who asserted the MDL court did not have subject matter jurisdiction over them. Pfizer is taking the position that the MDL court has jurisdiction over the JCCP Plaintiffs.

The First Sentence – "This Court has subject matter jurisdiction over all cases in the MDL and the Court's expert rulings warrant summary judgment in every case."

- This sentence sets forth Pfizer's position that the MDL court has the power to grant summary judgment against every case in the MDL, which included the JCCP Plaintiffs, and that summary judgment is warranted in every case.

The Second Sentence – "Certain Plaintiffs contend that their cases should not be subject to Defendants' motion because they moved to remand. [1583, 1584]."

- This sentence identifies the JCCP Plaintiffs as asserting that summary judgment against them would be improper because of their pending remand motions. The citation to Dkt. # 1583 is a citation to the JCCP Plaintiffs' response to Pfizer's omnibus MSJ. (Orr Decl. at Ex. CC)

The Third Sentence – "Pfizer incorporates its oppositions to Plaintiffs' remand motions and its objections to recommendations by the Magistrate Judge."

- This sentence incorporates Pfizer's briefing on the JCCP Plaintiffs' remand motions. Why would Pfizer do this – incorporate its opposition to the remand motions – except to alert the MDL court that it should deny the remand motions as part of Pfizer's summary judgment request?

The Fourth Sentence – "To the extent the Court defers ruling on summary judgment in cases where Plaintiffs have moved to remand, Defendants reserve the right to renew their motion and seek other relief at an appropriate time."

- This is a request for alternative relief. "***To the extent*** the Court defers ruling on summary judgment" is another way of saying Pfizer doesn't think the MDL court needs to do that, but should grant summary judgment against the JCCP Plaintiffs now. But if the court disagrees and "***defers***" the decision against the JCCP Plaintiffs Pfizer was seeking here, Pfizer wants the court to know it ***is*** seeking summary judgment against those Plaintiffs ***now*** and will "***renew***" that motion once the remand issue is decided. This sentence says, "We want it now but if the Court feels like it needs to wait, we'll renew it later on."

The Footnote – "As to Plaintiffs with remand motions who asserted that they did not intend to act under CMO 65, the Court can issue a similar order after addressing the remand motions. . . ."

- This footnote really says that there is another path to summary judgment against the JCCP Plaintiffs if the MDL court is hesitant to go there now. It does ***not*** say that Pfizer agreed with those Plaintiffs that summary judgment would be improper as to those Plaintiffs given the posture of the case.

In a word, Pfizer is simply wrong in asserting now that it didn't try to take advantage of the MDL court's rulings against the MDL plaintiffs' causation experts to obtain merits relief against the JCCP Plaintiffs. Pfizer clearly did so. Accordingly, Pfizer litigated the merits of the JCCP Plaintiffs' claims in the MDL court, thereby forfeiting its personal jurisdiction challenge

finally made years later once Pfizer realized it was stuck in California state court.

III. Neither *Ruhrgas* nor anything else precluded Pfizer from timely moving to dismiss on PJ/FNC grounds.

Pfizer contends that it was precluded, somehow, from asserting its personal jurisdiction defense by *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999). This argument is as odd as it is wrong.

Pfizer claims that *Ruhrgas* mandates a sequencing of threshold jurisdictional issues in these cases (the MDL court *had* to decide subject matter first), even as it made clear that federal courts enjoy discretion to decide personal jurisdiction before subject matter. Pet. at 25-26. Pfizer was deliberate in how it framed this issue, making it appear as though Pfizer is being punished:

> Because "[t]he federal design" affords courts discretion to sequence their resolution of jurisdictional issues, [*Ruhrgas*], at 586-87, it would be a truly draconian result to penalize with forfeiture a litigant's invocation of judicial discretion to decide one jurisdictional basis before another. [¶] Thus, by requiring Pfizer to have litigated the issue of personal jurisdiction first or lose its right to do so, the [California] courts below rejected *Ruhrgas*'s flexible jurisdictional sequencing in favor of a rigid hierarchy. They effectively placed themselves in

> the shoes of the MDL court to compel the retroactive exercise of its *Ruhrgas* discretion.

Pet. at 26.

This passage is stunning. It is not even close to what actually happened. First, *Ruhrgas* is clear that jurisdiction, whether over the subject matter or the litigant, is a threshold matter to be determined before a court reaches the merits. 526 U.S. at 577-78. Here, as shown, Pfizer sought a merits determination against the JCCP Plaintiffs. In so doing, Pfizer not only passed the threshold, it crossed the Rubicon. *See id.*, 526 U.S. at 584 (noting that personal jurisdiction is based in individual liberty and, "[t]herefore, a party may insist that the limitation [on judicial power] be observed, or he may forgo that right, effectively consenting to the court's exercise of adjudicatory authority").

Second, nothing in the JCCP court's order has anything to do with second-guessing what the MDL court did or didn't decide regarding its jurisdiction over these cases. The JCCP court's discussion of *Ruhrgas* warrants quotation:

> [Pfizer's] reliance on *Ruhrgas* . . . is misplaced. The holding in *Ruhrgas* was that district courts, which normally first decide the issue of subject matter jurisdiction, may instead properly decide the issue of personal jurisdiction at the outset. . . . The case does not address the issue of when a defendant forfeits its defense of lack of personal jurisdiction. Quite the opposite, the case highlights the fact that [Pfizer] could have asked the federal courts to first decide the issue

> of personal jurisdiction *before* addressing the issue of subject matter jurisdiction raised by the Plaintiffs in the California cases.

R. Ex. Vol. 1, at 15:20-27.

Judge Kuhl's allusion to the fact that Pfizer did not assert personal jurisdiction in the federal courts is well-placed. Far from "draconian punishment" of Pfizer for litigating subject matter first, the JCCP court's decision follows logically from the fact that *Pfizer failed to assert its personal jurisdiction defense at all in the federal courts*. Pfizer did not "invoke" the federal court's "discretion" to "sequence" its determination of subject matter jurisdiction before personal jurisdiction here. It didn't assert its personal jurisdiction defense against the JCCP Plaintiffs until long after the federal courts had twice remanded the cases back to it, almost five years after the JCCP Plaintiffs began filing their cases in California state court. (And this, in sharp contrast to the Missouri state court cases, where Pfizer moved to dismiss for lack of personal jurisdiction at the same time it removed the cases.)

Moreover, it's odd for Pfizer to claim that the federal courts would have been powerless in any event to decide personal jurisdiction first (assuming Pfizer had actually asserted that defense in the federal courts). Pfizer seems to treat the JCCP Plaintiffs as a monolith here, claiming that "Pfizer's personal jurisdiction defense regarding the non-resident Plaintiffs would neither dispose of *the whole case* nor simplify the consideration of subject matter jurisdiction (given the presence of a non-diverse forum defendant)." Pet. at 26 (emphasis added). This makes no sense. If the courts

(federal or state) lacked personal jurisdiction over the claims of non-resident Plaintiffs against Pfizer, then an order so stating would end *those cases* as to those Plaintiffs' claims against Pfizer. *See, e.g.*, *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017). What would Pfizer care that those Plaintiffs might proceed against a co-defendant? And given Pfizer's strenuous assertions that *BMS* compels the same result here, how can Pfizer plausibly claim that the personal jurisdiction issues are somehow more complex than those under CAFA (which has triggered two removals and years of extensive litigation)?

Finally, the JCCP Plaintiffs feel compelled to comment on Pfizer's claim that its willingness to waive its personal jurisdiction if the cases remain in federal court raises far different considerations than its apprehension about being in state court (and thus neither the JCCP Plaintiffs nor the California state courts could reasonably infer that Pfizer forfeited its personal jurisdiction defense by its actions in federal court). Pet. at 28. There is a reason both federal law and California state law treat personal jurisdiction as a threshold issue that must be asserted early or else it is waived or forfeited. The inefficiencies, and the great costs to judicial administration, are well illustrated here by what happens when a party, like Pfizer, waits several years to finally assert this threshold issue. Here, Pfizer's failure to timely move to dismiss on personal jurisdiction grounds meant that ***fourteen different courts (or sets of courts) had to expend effort, in some instances very significant effort, on these cases before Pfizer finally got around to asserting personal jurisdiction***:

1. **California state courts**
2. **California federal courts**
3. **The Judicial Panel on Multi-District Litigation (JPML)**
4. **The MDL court**
5. **The MDL magistrate judge**
6. **The MDL court** again
7. **The JPML** again
8. **The California federal courts** again
9. **A Ninth Circuit panel**
10. **The California state courts** again
11. **California federal court** again
12. **A Ninth Circuit panel** again
13. **The Ninth Circuit *en banc***
14. **The U.S. Supreme Court**

Only while the courts in numbers 12-14 above were addressing Pfizer's continued attempts to get out of California state court (and some five years or so after the first California state court Lipitor cases were filed) did Pfizer finally move to dismiss on personal jurisdiction grounds.

Far from treating personal jurisdiction as the threshold issue that *Ruhrgas* and long lines of California state court precedent make clear it is, Pfizer caused dozens of courts and their staffs to have to

expend countless hours on these matters before it asserted its personal jurisdiction defense. Under these circumstances, Judge Kuhl did not err in the slightest in holding that Pfizer forfeited its personal jurisdiction defense.

IV. The JCCP court properly exercised its broad discretion to deny Pfizer's FNC motion.

Judge Kuhl did not abuse her considerable discretion in declining to dismiss the JCCP Plaintiffs under the equitable doctrine of FNC. At virtually every step in the long, tortured path that these cases have taken, Pfizer invoked the efficiencies and conveniences for the courts, the parties, and the witnesses that flow from litigating all Lipitor claims in coordinated proceedings before California courts (or in the MDL, which is functionally a California court for personal jurisdiction purposes). Having repeatedly invoked the benefits that flow from coordination, Pfizer should not be heard to complain now that California isn't a convenient forum after all and the claims of non-resident JCCP Plaintiffs should be scattered across the other 49 states.

For example, immediately after Pfizer removed the cases in early 2014, Pfizer filed motions to stay some of the actions in California federal court pending transfer of the cases to the MDL. In such motions, Pfizer argued that a stay pending transfer would "promote efficiency by allowing joint determination of common issues," and would "prevent prejudice to Pfizer, including the risk of inconsistent rulings from different courts and being forced to litigate the same issues in multiple forums."

R. Ex. Vol. 6, at 1261. Similarly, when Plaintiffs objected to Pfizer's notices of related case, Pfizer's response, while recognizing that Plaintiffs raised jurisdictional objections that other Lipitor cases did not have, nonetheless urged, "[T]here are . . . substantial efficiencies to be gained by determination of common substantive issues, such as causation and warnings, by a single judge [in a coordinated proceeding]." R. Ex. Vol. 4, at 912. Pfizer thereafter opposed the JCCP Plaintiffs' efforts to prevent transfer of the cases to the MDL, arguing that the California cases "share common questions of fact with the Lipitor products liability actions already pending in the MDL, [and] the resolution of those common questions in the MDL would further the convenience of the parties and witnesses." R. Ex. Vol. 2, at 327.

Then, once the cases made their way back to the JCCP court after Judge Carney's first remand order, Pfizer established a pattern of invoking the benefits of coordinating the cases even while resisting being the party to move for that coordination (so that it could continue its strategy of trying to get these cases into federal court). For example, at the July 11, 2017 status conference in this Court, Pfizer's counsel told this Court that "[Pfizer] fully support[s] the coordination petition. It makes sense. We think there's a lot of reasons to have coordination. We're not looking for multiple types of litigation around the state or take up different courts." R. Ex. Vol. 4, at 929:16-20. During that same status conference, Pfizer's counsel reiterated this point: "We have a different view of what coordination would be like. [But] [w]e all agree with coordination." *Id.* at 942:6-8. Then again at the August

4, 2017 JCCP status conference, Pfizer's counsel stated, "We do want coordination, your Honor. You know, and we've all been, you know, candid with the Court." R. Ex. Vol. 5, at 1113:6-7.

Pfizer cannot have it both ways. Pfizer cannot claim on the one hand that it promotes efficiency and convenience for the parties and witnesses for all the Lipitor cases to be coordinated into an MDL in Charleston, South Carolina, but on the other, a JCCP in Los Angeles County District Court is so inconvenient that it warrants, five years into the litigation, dismissal of Plaintiffs' claims and scattering them across the country in thousands of different courts. Just as failure to timely assert personal jurisdictional challenges results in forfeiture, such unreasonable delay by Pfizer in asserting a forum defense forfeits its forum challenge.

Judge Kuhl was appropriately skeptical of Pfizer's offer to toll limitations because that offer was laden with conditions that arguably made it unreasonable (which included Pfizer's insistence that Plaintiffs should have to file their now-coordinated cases as single-plaintiff actions). R. Ex. Vol. 1, at 16:19-18:1. Judge Kuhl detailed the "strong reasons in favor of litigating all of these similar cases in [the] coordinated proceeding of a complex court," reasons that Pfizer itself endorsed for four years and abandoned only upon filing its PJ/FNC motion:

> [Pfizer] repeatedly endorsed the benefits of litigating all of these claims together. [Pfizer] twice removed this group of California cases under [CAFA] without expressing concern that

> individual evidence (testimony from individual physicians) would not be able to be effectively presented. Indeed, . . . [Pfizer] expressed to [California federal judge] Cormac J. Carney that, if he kept the cases in federal court, [Pfizer] would not assert a lack of personal jurisdiction as to the non-California Plaintiffs. Thus, [Pfizer] ha[s] endorsed a procedural posture giving rise to the circumstances [Pfizer] now argue[s] would create an inconvenient forum. [Pfizer] ha[s] always, up until now, advocated for keeping these cases in one forum. Requiring [Pfizer] to try all, instead of some, of the cases in California will not pose a great burden, as [Pfizer] now attempt[s] to assert. Plaintiffs would greatly benefit from managing the cases in a coordinated fashion. Plaintiffs have waited years while their cases have been removed, transferred, and remanded. It would be inequitable at this time to require them to start the process over again in other states.

R. Ex. Vol. 1, at 17:12-18:1. Far from an abuse of discretion, Judge Kuhl's FNC decision is equitable, sound, and well within her substantial discretion, and there is no reason for this Court to disturb Judge Kuhl's or the Court of Appeal's decisions.

CONCLUSION

For the foregoing reasons, the JCCP Plaintiffs respectfully request that this Court enter an order denying Pfizer's Petition for Review. The JCCP Plaintiffs further request such other relief to which they may be entitled.

Dated: June 26, 2019

Respectfully submitted,

/s/ Bill Robins III
Bill Robins III
ROBINS CLOUD LLP
808 Wilshire Blvd., Suite 450
Santa Monica, CA 90401
Tel: (310) 929-4200
Fax: (310) 566-5900
robins@robinscloud.com

Attorneys for Real Parties in Interest/Plaintiffs

* * *

[*Certificate of Compliance and Certificate of Service Omitted in the Printing of this Appendix*]

APPENDIX B

Charles G. Orr (admitted pro hac vice)
corr@mulliganlaw.com
THE MULLIGAN LAW FIRM
3710 Rawlins Street, #901
Dallas, Texas 75219
Tel: 214-219-9779
Fax: 214-520-8789

Attorney for JCCP Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF LOS ANGELES, CENTRAL CIVIL WEST

Case No. JCCP 4761

[Filed September 21, 2018]

COORDINATION PROCEEDING SPECIAL TITLE (RULE 3.550)	)
LIPITOR CASES	)
This document relates to:	)
ALL CASES IN WHICH NON-CALIFORNIA RESIDENTS HAVE ASSERTED CLAIMS	)

PLAINTIFFS' OPPOSITION TO DEFENDANT PFIZER INC. AND GREENSTONE LLC'S MOTION TO (1) QUASH SERVICE OF SUMMONS WITH REGARD TO THE CLAIMS OF NON-CALIFORNIA PLAINTIFFS FOR LACK OF PERSONAL JURISDICTION; OR (2) DISMISS THE CLAIMS OF NON-CALIFORNIA PLAINTIFFS FOR *FORUM NON CONVENIENS*

Date: Nov. 7, 2018
Time: 1:45 p.m.
Judge: Hon. Carolyn Kuhl
Dept.: 12

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Five years after this JCCP was created, Pfizer realized that its strategy of claiming these cases belong in federal court as a CAFA "mass action" is unlikely to succeed. So now, almost five years after the cases at issue were filed, Pfizer suddenly claims that California courts lack personal jurisdiction, and that California is an inconvenient forum for these cases.

It's too late. It was too late years ago, but it's definitely too late now. This Court should deny Pfizer's PJ/FNC motion.[1] Pfizer forfeited its PJ/FNC challenges long ago.

PRELIMINARY STATEMENT

In early 2014, when the Plaintiffs subject to Pfizer's August 2018 PJ/FNC motion began filing their claims in California state court, Pfizer had a choice. Like Pfizer did in Missouri state court Lipitor cases that included claims of non-Missouri residents, Pfizer could have asserted, immediately, that California courts don't have personal jurisdiction over the claims of non-California residents and sought dismissal of those claims. Instead, Pfizer chose to go all in on CAFA mass action removal, seeking a ruling from the federal courts that all of the Plaintiffs who asserted claims in California state court – California and non-California resident Plaintiffs alike – belong in federal court, not

[1] Pfizer's "Motion to (1) Quash Service of Summons With Regard to the Claims of Non-California Plaintiffs for Lack of Personal Jurisdiction; or (2) Dismiss the Claims of Non-California Plaintiffs for *Forum Non Conveniens*" is referred to in this Opposition as Pfizer's PJ/FNC motion.

state court. Indeed, Pfizer is still making that claim today.[2]

The consequence of Pfizer's choice to go all in on CAFA mass action jurisdiction – and to seek discovery from Plaintiffs and then try to get summary judgment against them in the MDL – is that Pfizer has forfeited its PJ/FNC motion. There are several reasons for this:

- The federal courts in which Pfizer has spent years now trying to litigate these cases are, for purposes of personal jurisdiction, *California* courts. As Pfizer well knows (since Pfizer cited the law so holding when it sought dismissal on personal jurisdiction grounds against non-Missouri residents in Missouri-state-court-filed cases), the MDL court only has that level of personal jurisdiction over claims transferred to it that the transferor court (here, a *California* court) has. And Pfizer's efforts, including its

[2] Pfizer twice has removed every Lipitor case filed in California state court under CAFA. Both times, Judge Carney remanded the cases because Pfizer was wrong and there was no CAFA mass action jurisdiction. Both times, Pfizer appealed to the Ninth Circuit. Both times, the Ninth Circuit determined, in summary one-sentence orders, that the appeals did not present any issue sufficient to warrant exercise of the appellate court's discretionary jurisdiction to hear the appeal. The most recent such ruling came on August 22, 2018, after Pfizer filed its PJ/FNC motion. *See* Declaration of Charles G. Orr (Orr Decl.) at ¶ 2, Ex. A (Order denying permission to appeal, *Adamyan, et al. v. Pfizer, Inc.*, No. 18-80059, Aug. 22, 2018). On September 5, Pfizer petitioned the Ninth Circuit *en banc* to rehear this order. Orr Decl. at ¶ 3, Ex. B (Pfizer's Aug. 22, 2018 *en banc* petition). Pfizer's *en banc* petition contains nary a peep about personal jurisdiction.

most recent (and ongoing) one, to force these claims into *California* federal court, necessarily presume the power of *California* federal courts for litigation of these claims. Pfizer should not be heard to now claim that California *state* court lacks personal jurisdiction or is "inconvenient."

- Not only has Pfizer, for years, vigorously pursued litigation of these claims in a *California* forum, Pfizer sought relief from those (federal) *California* forums against all California state court Plaintiffs, resident and non-resident alike, including both merits discovery and summary judgment. By seeking such relief from *California* (federal) courts against Plaintiffs, Pfizer forfeited its PJ/FNC motion.

- Pfizer has repeatedly acknowledged, in pleadings and on the record in open court, the convenience afforded to the courts and the parties from litigating the claims of *all* California Plaintiffs, resident and non-resident alike, in coordinated proceedings in *California* forums. Pfizer should not be heard now to suddenly shift 180 degrees and assert the opposite.

For five years now, Pfizer's litigation strategy – and Pfizer's own words – has belied the claims Pfizer now tries to make in its PJ/FNC motion. This Court should hold Pfizer to its choices – and its word. This Court should deny Pfizer's PJ/FNC motion.[3]

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[3] At the August 4, 2017 status conference in this JCCP, Plaintiffs' counsel advised Pfizer and the Court that Plaintiffs would be

BACKGROUND

Before launching into a discussion of the many ways that Pfizer forfeited its PJ/FNC motion, an examination of how we got here is appropriate.

I. Plaintiffs began filing cases in California state court in 2013 and early 2014.

Lipitor plaintiffs began filing claims in California state court in mid-2013. Orr Decl. at ¶ 4. In September 2013, a handful of plaintiffs sought creation of a JCCP to manage the Lipitor cases efficiently. Orr Decl. at ¶ 4, Ex. C (amended coordination petition). The Judicial Council granted the coordination petition in early December 2013. Orr Decl. at ¶ 5, Ex. D (order assigning coordination trial judge for Lipitor JCCP).

By the date of the first status conference in this JCCP (February 25, 2014), about 1,800 plaintiffs (including hundreds of non-California residents) had filed Lipitor personal injury claims in California state

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arguing waiver in response to Pfizer's forthcoming PJ/FNC motion. Orr Decl. at ¶ 57, Ex. BBB (transcript) at 19:12-22 ("A preview of things to come. We're going to be arguing waiver [in response to the PJ/FNC challenge]."). Yet Pfizer's PJ/FNC motion contains not one word about how Pfizer preserved its PJ/FNC challenge, or any argument that its motion is timely. Instead, Pfizer argues PJ/FNC as if it had raised and presented these challenges at the outset of this litigation as the threshold issues that they are. Plaintiffs note this so that the Court can contextualize why Pfizer's PJ/FNC challenge and this Opposition feel like the proverbial ships passing in the night. Plaintiffs have been aware for years that Pfizer waived/forfeited its PJ/FNC challenge, yet Pfizer still appears not to have given the matter any thought.

court. Orr Decl. at ¶ 6, Ex. E (Lipitor JCCP status conference transcript, Feb. 25, 2014).

II. In early March 2014, Pfizer executed its strategic decision to remove the cases as a mass action (without raising personal jurisdiction or forum challenges like Pfizer did in the Missouri state court cases).

Pfizer responded to this wave of California filings not by asserting a personal jurisdiction or forum challenge but by removing all filed cases – including several actions involving the claims of California-resident plaintiffs only – to federal court as an alleged CAFA mass action. Orr Decl. at ¶ 7, Ex. F (notice of removal).[4] Nowhere in any notice of removal did Pfizer say anything about the California federal court to which Pfizer was removing the cases being an inconvenient forum or lacking in personal jurisdiction over Pfizer. Orr Decl. at ¶ 7.

Concurrently with removal, Pfizer sought immediate transfer of the cases to the recently created

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[4] The notice of removal attached to the Orr Declaration is from *Banks, et al. v. Pfizer Inc., et al.*, No. 2:14-cv-01908, United States District Court for the Central District of California. This notice is substantially similar to those Pfizer filed for all the California state court Plaintiffs, both at this time and as to California state court cases filed thereafter between 2014 and Judge Carney's remand following Pfizer's initial removal. Orr Decl. at ¶ 7. Through this Opposition, Plaintiffs provide pleadings from this particular case and represent that these pleadings are substantially similar to those Pfizer filed in all the removed California state court actions in the California and federal MDL courts. Orr Decl. at ¶ 7.

federal MDL. Orr Decl. at ¶ 8, Ex. G (Pfizer's notice of potential tag-along actions, seeking transfer of *Banks* and other cases to federal MDL court in South Carolina). Pfizer also filed motions to stay pending transfer to the MDL court in cases that it wrongfully removed from California state court. *See, e.g.*, Orr Decl. at ¶ 10, Ex. I (Pfizer stay motion in *Little*).[5] Again, nothing in these or any of Pfizer's other removal-related pleadings suggested that Pfizer intended to raise personal jurisdiction or forum challenges. Orr Decl. at ¶ 8.[6]

Once in the JPML and awaiting transfer, many if not most California state court Lipitor Plaintiffs filed motions to vacate conditional transfer orders, asking the JPML to send the cases back to California federal court for resolution of Plaintiffs' remand motions. Orr

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[5] Because the Lipitor cases removed the Central District were all assigned to Judge Carney at the outset, and because Judge Carney had already established a pattern of staying Lipitor cases pending transfer to the MDL Judge Carney entered *sua sponte* stay orders in many of the California state court cases, including *Banks*. Orr Decl. at ¶ 9, Ex H (*sua sponte* stay order in *Banks*).

[6] Pfizer filed an answer in federal court in *Banks* in which they mention personal jurisdiction and forum in a long list of boilerplate affirmative defenses. Orr Decl. at ¶ 11, Ex. I (Pfizer answer in *Banks*, filed March 17, 2014, Dkt. #22) (FNC mentioned as affirmative defense number 34 of 37, and personal jurisdiction mentioned as affirmative defense number 35 of 37, at pages 44-45). But as shown below, this is the *only* time Pfizer even mentioned either of these defenses as to the California state court Plaintiffs until December 30, 2016, after Judge Gergel rejected removal on fraudulent joinder grounds and the JPML remanded the cases back to California federal court for consideration of the CAFA mass action issue. Orr Decl. at ¶ 10.

Decl. at ¶ 12, Ex. K (motion to vacate transfer and memorandum in support filed in *Banks* in the JPML on April 9, 2014). Pfizer opposed these motions to vacate on efficiency grounds, urging that the common issues raised across all the cases filed by the California state court Lipitor Plaintiffs should be decided by a single judge – the MDL judge. Orr Decl. at ¶ 13, Ex. L (Pfizer opposition to motion to vacate transfer order in *Banks*, filed in the JPML on April 30, 2014). Pfizer also rejected the notion that Plaintiffs would be unduly prejudiced by delay resulting from transfer to the MDL court before resolution of Pfizer's claim that these cases belonged in a single coordinated proceeding in federal court. *Id.* at 7 ("Finally, Plaintiffs cannot avoid MDL transfer based on their generalized assertion, again without support, that it will delay their case. All transfer involves some delay, but that delay is warranted where, as here, transfer will produce greater benefits through the coordinated, efficient resolution of actions that share common questions of law or fact . . . .").

Pfizer's strategic decision to not raise personal jurisdiction or forum challenges at this stage is in sharp contrast to the strategic decisions Pfizer made for Lipitor cases filed in Missouri state court. In those cases, Pfizer predicated its removal on the Missouri courts' lack of personal jurisdiction over Pfizer as to the claims of the non-Missouri resident plaintiffs, leaving only Missouri plaintiffs over whom the federal courts would have subject matter jurisdiction by way of diversity. Orr Decl. at ¶ 14, Ex. M (notice of removal filed March 27, 2015, in *Scotino, et al. v. Pfizer Inc.*, No. 4-15-cv-00540, United States District Court for the

Eastern District of Missouri, Dkt. #1 (*Scotino*)).[7] Indeed, simultaneously with its removal of *Scotino*, Pfizer moved to dismiss the claims of the non-Missouri residents alleging lack of personal jurisdiction. Orr Decl. at ¶ 15, Ex. N (memo in support of Pfizer's motion to dismiss claims of out-of-state plaintiffs in *Scotino*, Dkt. #7).[8] Pfizer continued this strategy in the Missouri state court cases (like *Scotino*) that were transferred to the MDL before disposition of the plaintiffs' remand motions. In the MDL, Pfizer renewed its motion to dismiss [Orr Decl. at ¶ 17, Ex. P (Pfizer's MDL motion to dismiss in *Scotino*, which simply identified by docket number Pfizer's motion to dismiss that it filed concurrently with removing *Scotino*)], and urged the MDL court to address personal jurisdiction first, before deciding subject matter jurisdiction. Orr Decl. at ¶ 18, Ex. Q (Pfizer's appeal of magistrate judge's decision recommending grant of Scotino's motion to remand) at 4 ("Th[e] [MDL] Court should first address, and grant, Pfizer's pending motions to dismiss the out-of-state

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[7] Pfizer made its no-personal-jurisdiction-as-to-claims-of-non-resident-plaintiffs argument in other Missouri state court cases as well. Orr Decl. at ¶ 14. The *Scotino* case is typical of how Pfizer raised the issue in these cases. Orr Decl. at ¶ 14.

[8] When the *Scotino* plaintiffs asserted that the federal court should decide subject matter jurisdiction first, before addressing personal jurisdiction, Pfizer replied that "[t]h[e] [c]ourt can and should decide Pfizer's motion to dismiss for lack of personal jurisdiction before deciding whether federal subject-matter jurisdiction exists because the [c]ourt 'has before it a straightforward personal jurisdiction issue presenting no complex question of state law." Orr Decl. at ¶ 15, Ex. O (Pfizer's reply in support of motion to dismiss on personal jurisdiction grounds in *Scotino*, Dkt. #22) (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 588 (1999)).

Plaintiffs due to lack of personal jurisdiction, as that ruling would necessarily dispense with any question as to its subject matter jurisdiction over the remaining Missouri Plaintiffs, who are completely diverse from Pfizer."). So even while Pfizer was seeking a ruling that *all* California state court Lipitor cases belonged in federal court as a CAFA mass action (without raising personal jurisdiction or forum challenges to those cases), Pfizer was simultaneously urging the federal courts – Missouri and MDL – to dismiss the claims of non-Missouri plaintiffs for lack of personal jurisdiction (while keeping the Missouri resident plaintiffs on diversity grounds).

III. Pfizer sought relief from the MDL court and the California federal courts that those courts could only afford Pfizer if they had the power to adjudicate the cases.

Immediately after the JPML transferred the California state court Lipitor cases to the MDL, Pfizer began an over-two-year effort to not only secure a ruling that the California state court Plaintiffs – California and non-California resident alike – belonged in the MDL, but to obtain various forms of relief that presumed the MDL court's power to adjudicate the California state court Plaintiffs' claims.

A. Pfizer sought discovery from Plaintiffs.

First, Pfizer invoked the Court's power over all parties by seeking discovery from the California state court Plaintiffs. Because an MDL CMO obligated plaintiffs to serve a verified PFS along with signed

authorizations and medical and pharmacy records within 30 days from the date their case was transferred to the MDL, Plaintiffs appeared by telephone at the first status conference after their cases arrived in the MDL to advise the MDL judge (Judge Gergel) that they would seek to stay their PFS obligations pending determination of their forthcoming remand motions. Orr Decl. at ¶ 19, Ex. R (transcript of June 13, 2014 status conference in Lipitor MDL) at 46:22-49:2. Judge Gergel advised that he would be assigning the remand motions to a magistrate judge and that they would be decided quickly, so he was inclined to grant the stay once Plaintiffs filed their motion. *Id.* at 55:21-56:6. In response to Judge Gergel's inquiry about Plaintiffs' stay request, Pfizer's counsel indicated that "at a minimum" the California state court Lipitor Plaintiffs should be ordered to "provide [to Pfizer] pharmacy information, proof of use, and, you know, information." *Id.* at 50:18-51:2.

Plaintiffs filed their motion to stay their PFS obligations pending determination of their remand motions. Orr Decl. at ¶ 20, Ex. S (stay motion). Pfizer's response [Orr Decl. at ¶ 21, Ex. T (Pfizer response to stay motion)] asked the MDL court to impose two distinct discovery obligations on the California Plaintiffs. First, Pfizer asked the MDL court to require the California Plaintiffs to "participat[e] in depositions of common witnesses in the MDL." *Id.* at 1 n.1. Second, Pfizer sought an order from the MDL court compelling the California Plaintiffs to "provide [to Pfizer and McKesson] (1) the identity and address of the pharmacies from which the Plaintiffs obtained Lipitor; (2) the dates on which they purchased or obtained

Lipitor; and (3) a signed authorization to collect records from their pharmacies." *Id.* at 1-2. Pfizer sought this discovery to try to show that some California Plaintiffs took Lipitor that hadn't been distributed by McKesson, which Pfizer alleged would demonstrate that McKesson was fraudulently joined, establishing the federal court's subject matter jurisdiction over those Plaintiffs' claims. Importantly, Pfizer sought this so-called "jurisdictional discovery" not to establish the *lack* of jurisdiction over California Plaintiffs, but to demonstrate the *existence* of the court's power to adjudicate Plaintiffs' claims against Pfizer in that forum. Moreover, Pfizer expressly acknowledged that it intended to use this discovery "to evaluat[e] the viability of Plaintiffs' claims against McKesson and [the discovery] therefore bears on . . . the merits of those claims." *Id.* at 6.

Judge Gergel thereafter issued CMO 10, in which he partially granted Plaintiffs' stay motion, holding that PFS discovery was stayed but, as Pfizer requested, the California Plaintiffs "are NOT exempt from participation in the depositions of common witnesses in the MDL." Orr Decl. at ¶ 22, Ex. U (MDL CMO 10) at 1, ¶ 2.[9] Judge Gergel also ordered Plaintiffs to respond to Pfizer's request for so-called jurisdictional discovery. *Id.* at 1, ¶ 3. Plaintiffs' reply noted that Pfizer was wrong in asserting that its discovery requests were narrowly tailored and limited, as they would "necessitate full-scale discovery by both Plaintiffs and Defendants of the merits of Plaintiffs' claims arising

[9] To be clear, Judge Gergel stayed discovery only. Nothing about Judge Gergel's stay order precluded Pfizer in any way from timely raising and litigating its PJ/FNC challenge.

out of McKesson's role in the promotion, marketing and distribution of Lipitor." Orr Decl. at ¶ 23, Ex. V (Plaintiffs' reply to Pfizer's discovery request) at 1.

Judge Gergel denied Pfizer the discovery it sought from the California Plaintiffs, without prejudice. Orr Decl. at ¶ 24, Ex. W (MDL CMO 11).[10] But the fact that Pfizer did not succeed in getting the discovery it requested does not obviate the fact that Pfizer invoked the MDL court's power to order Plaintiffs to provide that discovery.

B. Pfizer enjoyed success against plaintiffs in the MDL while the California Plaintiffs' remand motions awaited consideration by Judge Gergel.

Although the MDL court suggested that Plaintiffs' remand motions would be promptly resolved, they weren't. This was true for the California Plaintiffs (about whom Pfizer never raised personal jurisdiction or forum challenges) and the Missouri plaintiffs (about whom Pfizer did raise personal jurisdiction challenges). In January 2015, the magistrate judge issued orders in the California cases rejecting Pfizer's fraudulent joinder/procedural misjoinder arguments but sending the CAFA mass action issue back to the California federal courts for them to resolve. Orr Decl. at ¶ 25.

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[10] Judge Gergel reasoned that Plaintiffs' remand motions may be resolvable without need of the requested discovery, but if it became apparent that the discovery was needed to properly consider those motions, the Court could revisit its decision. Orr Decl. at ¶ 24, Ex. W.

Pfizer appealed the magistrate's order to Judge Gergel. Orr Decl. at ¶ 26, Ex. X (Pfizer appeal of magistrate remand orders, filed February 6, 2015). Again, despite comprehensively briefing the many reasons Pfizer claimed the MDL court had jurisdiction over all California Plaintiffs – resident and non-resident alike – Pfizer neglected to raise personal jurisdiction or forum concerns. To the contrary, Pfizer was affirmatively seeking a ruling that jurisdiction and forum over all California Plaintiffs was proper in the MDL court.

Meanwhile, Pfizer was litigating the claims of thousands of plaintiffs whose claims were properly in the MDL court. Indeed, Pfizer enjoyed great success against those plaintiffs, ultimately persuading Judge Gergel that the bellwether plaintiffs failed to proffer admissible expert testimony as to both general and specific causation. Orr Decl. at ¶ 27. Ultimately, Judge Gergel entered a CMO stating that any MDL plaintiff who believed her case differed from the cases in which the causation experts were struck must provide prompt notice to the court, which would then enter a briefing schedule for expert witness identification, and expert reports and depositions. Orr Decl. at ¶ 27, Ex. Y (MDL CMO 65). The California Plaintiffs filed a notice advising Judge Gergel that they did not intend to respond to this CMO because discovery in their cases remained stayed and their cases were still subject to Pfizer's appeal of the magistrate's remand orders. Orr Decl. at ¶ 28, Ex. Z (notice filed February 9, 2016).

C. Pfizer sought summary judgment against Plaintiffs.

Pfizer filed its omnibus summary judgment motion (MSJ) in the MDL court on June 24, 2016. Orr Decl. at ¶ 29. Ex. AA (Pfizer omnibus MSJ). This motion included a cryptic reference to the California Plaintiffs, leaving ambiguity as to whether Pfizer intended its MSJ to apply to those Plaintiffs. Orr Decl. at ¶ 29, Ex. AA at 2 and n.1.[11] Plaintiffs, accordingly, filed a brief response to the MSJ advising the MDL court that Plaintiffs did not believe their cases should be included within the scope of the MSJ. Orr Decl. at ¶ 31, Ex. CC (Plaintiffs' response to MSJ).

Pfizer's reply made clear that Pfizer believed Judge Gergel could and should enter summary judgment against the California Plaintiffs. Orr Decl. at 32, Ex. DD (Pfizer reply in support of MSJ). In that brief, Pfizer included a section under the heading "This Court Has Subject Matter Jurisdiction in All Cases." *Id.* at 19. The first sentence in that section says, "This Court has subject matter jurisdiction over all cases in the MDL and the Court's expert rulings warrant summary judgment in every case." *Id.* Lest there be any doubt that, through this section, Pfizer was telling Judge

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[11] It should be noted here that McKesson, which was not a defendant in most, if not all, cases that were properly in the MDL but is a defendant in all the California cases, filed a joinder to Pfizer's omnibus MSJ. Orr Decl. at ¶ 30, Ex. BB (McKesson notice of joinder to Pfizer MSJ). The attachment to McKesson's joinder leaves no room for ambiguity – it listed the cases in which McKesson was seeking summary judgment via Pfizer's omnibus MSJ and it included all the California cases then pending.

Gergel he should enter summary judgment against the California Plaintiffs, Pfizer included a footnote directly referencing those Plaintiffs: "As to Plaintiffs with remand motions who asserted that they did not intend to act under CMO 65, the Court can issue a similar order after addressing the remand motions." *Id.* at 1 n.9.

IV. Only after Pfizer's strategic decision to remove these cases as a CAFA mass action failed (i.e., after years of litigation) did Pfizer suddenly decide to mention its personal jurisdiction and forum challenges.

On October 21, 2016, more than two years after the California Plaintiffs filed their remand motions in the MDL, Judge Gergel finally heard oral argument on those motions (the MDL court also heard argument on the Missouri plaintiffs' remand motions, where Pfizer raised personal jurisdiction challenges). Orr Decl. at ¶ 33, Ex. EE (transcript of hearing on California Plaintiffs and Missouri plaintiffs' remand motions). Pfizer urged Judge Gergel to conclude that *all* the California cases belonged in the MDL. This was in sharp contrast to what Pfizer asserted as to the Missouri plaintiffs, namely, that Judge Gergel should decide personal jurisdiction first as to the non-Missouri resident plaintiffs and then, after dismissing those plaintiffs, should conclude that complete diversity exists as to the remaining Missouri resident plaintiffs.

Judge Gergel was unpersuaded, however, and ultimately issued a series of remand orders sending the Missouri cases back to Missouri state court and the California cases to the JPML with the MDL court's

suggestion that the cases be returned to California federal court for determination of the CAFA issue. Orr Decl. at ¶ 34.[12]

Upon the JPML's transfer of the California cases back to California federal courts, suddenly, for the first time in years, Pfizer decided to raise personal jurisdiction and forum as issues. This, Pfizer did by filing, on December 30, 2016, status reports for the California federal judges in most, if not all, of the California cases. Orr Decl. at ¶ 35, Ex. FF (Pfizer "status report" in *Banks*). In these pleadings, Pfizer "request[ed] a status conference with [the California federal] [c]ourt[s] to address certain *threshold* jurisdictional and venue issues, such as: (1) th[e] [federal] [c]ourt's [CAFA mass action] jurisdiction; (2) transfer of venue . . . ; (3) severance . . . ; and (4) dismissal of claims by non-residents against Pfizer for lack of personal jurisdiction." *Id.* at 2:18-23 (emphasis added). It took Pfizer *nearly three years* (following significant and protracted litigation of Pfizer's claim that the California Plaintiffs *belonged* in

[12] Judge Gergel elected not to decide the merits of Pfizer's CAFA mass action contention because of 28 U.S.C. § 1332(d)(11)(C)(I), which states that any "mass action" removed under CAFA "shall not thereafter be transferred to any other court pursuant to section 1407 [the MDL statue], or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407." Having denied Pfizer's alternate bases for alleged federal subject matter jurisdiction so that the mass action issue was the only remaining issue, and because no California Plaintiff consented to transfer to the MDL, Judge Gergel determined that the mass action issue should be decided in the California transferor courts.

the MDL court, or at least in California federal court) to identify its desire to litigate the "threshold" issues of personal jurisdiction and forum.

Judge Carney set a status conference for February 1, 2017. Orr Decl. at ¶ 36, Ex. GG (status conference transcript). Consistent with the choice Pfizer made in March 2014 to go all in on CAFA, Judge Carney indicated at the outset of this status conference that he would decide subject matter jurisdiction before any other issue. *Id.* at 3:14-21. Later in the conference, Pfizer's counsel brought up the personal jurisdiction issue to claim that Pfizer had not waived that issue (even though Pfizer had spent years litigating its claim that the federal courts did have subject matter jurisdiction without ever attempting to litigate the personal jurisdiction defense). *Id.* at 11:9-17. In the same breath, however, Pfizer's counsel also declared that the personal jurisdiction issue would "be moot" – would "go away" – if Judge Carney determined that there was CAFA subject matter jurisdiction. *Id.* at 11:9-17, 11:23-25.

Judge Carney heard oral argument on the California Plaintiffs' remand motion on May 22, 2017. Orr Decl. at ¶ 37, Ex. HH (remand argument transcript). The next day, Judge Carney issued his order remanding these cases back to California state court. Orr Decl. at ¶ 38, Ex. II (remand order).

V. Even though Pfizer purported to "preserve" its personal jurisdiction and forum defenses following the return of the cases to California, Pfizer was (and still is) trying to wedge the cases into California federal court on CAFA grounds.

Pfizer's first pleading in this JCCP after the first remand order was its opposition to Plaintiffs' proposed amended order for add-on procedures, filed July 7, 2017. Orr Decl. at ¶ 39, Ex. JJ (Pfizer opposition). In this pleading, for the first time in the JCCP court, Pfizer included an express statement that, by filing in the JCCP, it does not waive its personal jurisdiction defense. *Id.* at 2 n.1. Yet Pfizer previously filed no fewer than ten pleadings in this JCCP, none of which so much as mentioned a personal jurisdiction or forum challenge.[13]

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[13] These included: (1) Defendant Pfizer Inc.'s Status Report, filed March 24, 2014; (2) Defendant Pfizer Inc.'s Status Report, filed July 24, 2014; (3) Defendant Pfizer Inc.'s Status Report, filed Dec. 29, 2014; (4) Joint Status Report, filed May 4, 2015; (5) Joint Status Report Regarding Removed Cases, filed January 4, 2016; (6) Status Report, filed May 19, 2016; (7) Joint Status Report Regarding Removed Cases, filed Nov. 21, 2016; (8) Joint Status Report Regarding Removed Cases, filed April 14, 2017l (9) Joint Status Report Regarding Removed Cases, filed May 30, 2017; and (10) Joint Status Report Regarding Removed Cases, filed June 1, 2017. True and correct copies of each of these pleadings are attached to the Orr Declaration. Orr Decl. at ¶ 40, Ex. KK. None of these pleadings "reserves" Pfizer's personal jurisdiction or forum challenges. To the contrary, several expressly state that Pfizer intends to litigate these cases collectively – California and non-California resident Plaintiffs alike – in the MDL court.

Instead of teeing up the threatened personal jurisdiction/forum challenge, though, Pfizer chose to jockey for position with the California Plaintiffs over how the cases would be coordinated into this JCCP. All the while Pfizer was stating, in pleadings and in open court, that it wanted the benefits of coordination of all the California cases into this JCCP,[14] Pfizer was trying to box Plaintiffs into seeking add-on in a way that arguably would trigger CAFA mass action jurisdiction so that Pfizer could remove a second time.[15]

Pfizer's strategy worked, in a manner of speaking. After this Court's *sua sponte* add-on orders brought all the Plaintiffs into this JCCP, Pfizer again removed the cases en masse as an alleged CAFA mass action. Orr Decl. at ¶ 41, Ex. LL (Pfizer's notice of removal filed March 1, 2018). Nothing in Pfizer's removal notice suggested in any way that Pfizer *contests* the personal jurisdiction of the California *federal* court over Plaintiffs' claims against Pfizer; to the contrary, the thrust of the removal is that the cases *belong* in California federal court as a CAFA mass action. Two points merit mention here: First, the sole basis for federal subject matter jurisdiction alleged by Pfizer in this second removal was CAFA mass action, and under

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[14] Examples of Pfizer invoking the benefits of JCCP coordination will be provided *infra*.

[15] *See, e.g.*, Orr Decl. at ¶ 51, Ex. VV (joint status report filed Oct. 12, 2017) at 5:26-27 (noting, in "Defendants' position" section prepared by Pfizer several months after cases had been remanded, that "[a]s of yet, Pfizer has not filed any jurisdictional briefing as it has been waiting for Plaintiffs to pick a path forward regarding coordination").

CAFA, this means the cases would stay in California even if Plaintiffs' remand motion had proven unsuccessful.[16] Second, even assuming Plaintiffs would acquiesce in the cases being transferred out of California, Judge Gergel already had shut down the MDL to new or transferred cases, having entered CMOs that (1) precluded direct filing in the MDL,[17] and (2) suggested to the JPML that it no longer transfer any more cases into the MDL.[18] So by removing a second time without raising personal jurisdiction in its removal notice, Pfizer was effectively asserting to Judge Carney that the cases should be litigated in his courtroom, in Orange County, California.

On May 10, 2018, Judge Carney entered an order remanding the cases back to this Court. Orr Decl. at ¶ 44, Ex. OO (remand order). Pfizer petitioned for permission to appeal that order to the Ninth Circuit, thereby continuing to seek to litigate Plaintiffs' claims in *California federal court*, even while claiming this JCCP court (a *California state court*) lacks personal jurisdiction over the non-California resident Plaintiffs. Orr Decl. at ¶ 45, Ex. PP (Pfizer petition for permission to appeal second remand order). On August 22, 2018,

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[16] As noted above, under 28 U.S.C. § 1332(d)(11)(C)(I), a case removed on CAFA mass action grounds cannot be transferred to an MDL unless 50% or more of plaintiffs consent to the transfer. Plaintiffs had long since made clear they would not so consent.

[17] Orr Decl. at ¶ 42, Ex. MM (MDL CMO precluding direct filing, entered in Jan. 2017).

[18] Orr Decl. at ¶ 43, Ex. NN (MDL CMO suggesting no further transfer of cases into MDL, entered in Jan. 2017).

about two weeks after Pfizer filed its PJ/FNC motion in this Court, the Ninth Circuit entered a one sentence order denying Pfizer's petition for permission to appeal. Orr Decl. at ¶ 46, Ex. QQ (order denying petition to appeal). Unwilling to finally give up its claim that these cases belong in California *federal* court, Pfizer has now filed a petition for *en banc* rehearing of the denial of Pfizer's petition for permission to appeal. Orr Decl. at ¶ 47, Ex. RR (Pfizer petition for rehearing *en banc*). Pfizer is still trying to litigate these cases in a California court in Orange County even while it claims this JCCP has no power over it and isn't the right forum for these cases.

ARGUMENT AND AUTHORITIES

Pfizer's counsel to Judge Carney, in Orange County, California, on February 1, 2017:

> *"[W]e have a personal jurisdiction affirmative defense that . . . we think it will be moot frankly to the extent that we're here before Your Honor in this Court, as we think we should be under CAFA. . . . The [personal] jurisdictional issue goes away to the extent that Your Honor determines that there's CAFA jurisdiction."*

Reporter's Transcript of Status Conference, Feb. 1, 2017, No. 8:17-mc-00005, Central District of California, at 11:9-25 (Orr Decl. at ¶ 36, Ex. GG)

Pfizer answered and litigated against Plaintiffs, long before moving to quash service for lack of personal jurisdiction or for dismissal based on *forum non conveniens*. Under long-standing California law, Pfizer waived its PJ/FNC motion.

Federal law is equally unavailing for Pfizer. Pfizer might not have waived PJ/FNC under federal procedural law, if one were to apply federal procedural law to Pfizer's actions in California federal courts, the MDL, and the JPML. But Pfizer definitely forfeited its PJ/FNC challenge. Pfizer has vigorously litigated (and is continuing to litigate) its assertion that these cases should proceed in *California* federal court (or in the MDL, which as Pfizer knows has personal jurisdiction only to the extent the transferor courts – *California* courts – have personal jurisdiction). Moreover, Pfizer has foregone several opportunities to seek dismissal on PJ/FNC grounds during the four-plus years that these cases have been extant, instead seeking rulings that the cases should be tried in *California* federal court. Finally, Pfizer's counsel stated, on the record in open court to Judge Carney, that *personal jurisdiction* would be moot if Judge Carney determined there was federal subject matter jurisdiction under CAFA.

I. Applicable law.

A. California law on waiver/forfeiture of personal jurisdiction and forum challenges.

Under well-settled California law, a party waives any personal jurisdiction defense when that party makes a general appearance. "[I]t has long been the rule in California that a party waives any objection to the court's exercise of personal jurisdiction when the party makes a general appearance in the action." *Roy v. Superior Court* (2005) 127 Cal. App. 4th 337, 341. A party's general appearance is the same as personal service of a summons on that party. Code Civ. Proc.

§ 410.50; *Hamilton v. Asbestos Corp.* (2000) 22 Cal. 4th 1127, 1147. A party makes a general appearance when, "either directly or through counsel, [that party] participates in an action in some manner which recognizes the authority of the court to proceed. It does not require any formal or technical act." *Mansour v. Superior Court* (1995) 38 Cal. App. 4th 1750, 1756. "If the defendant raises any other questions, or asks for any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, his appearance is general." *Id.* at 1756-57 (internal quotation omitted). A defendant's answer, even if it raises personal jurisdiction, does not preserve the issue, which must be raised at the outset of litigation, before any other pleading, by a motion to quash service. *Roy*, 127 Cal. App. 4th at 345. (This differs from federal procedural law, where a defendant that includes a personal jurisdiction defense in its answer avoids waiver at the outset. *See, e.g.*, *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1318 (9th Cir. 1998). But as will be shown below, this is of no use to Pfizer, which waived PJ/FNC whether California or federal law applies.)

Even where a party technically does not "waive" a defense like personal jurisdiction or FNC in the sense of intentionally relinquishing a known right, that party can forfeit the right through its litigation conduct, and/or by failing to raise the issue in a timely fashion. *See, e.g.*, *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal. 4th 307, 314-15 (distinguishing "waiver," which refers to intentional relinquishment of known right, from "forfeiture," which is failure to make timely assertion of right, and noting that some cases use "waiver" when

they really mean "forfeiture").[19] "The rule that a general appearance 'waives' objections to defective service [like lack of personal jurisdiction] is actually a matter of forfeiture, not waiver." *Fireman's Fund Ins. Co. v. Sparks Constr., Inc.* (2004) 114 Cal. App. 4th 1135, 1147. A party forfeits its personal jurisdiction challenge when that party "takes part in the action or in some manner recognizes the authority of the court to proceed." *In re Marriage of Obrecht* (2016) 245 Cal. App. 4th 1, 7. This is so even if the party "is unaware that a jurisdictional objection is available." *Id.* at 8; *see also Platt Pacific*, 6 Cal. 4th at 314-15 (party can waive/forfeit right "regardless of the party's intent to abandon or relinquish the right"). FNC, like personal jurisdiction, is waived or forfeited when a defendant fails to timely assert it while instead litigating issues unrelated to the propriety of the California forum. *Martinez v. Ford Motor Co.* (2010) 185 Cal. App. 4th 9, 17-18.

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[19] *See also In re S.B.* (2004) 32 Cal. 4th 1287, 1293 n.2 ("Although the loss of the right to challenge a ruling on appeal because of the failure to object in the trial court is often referred to as a 'waiver,' the correct legal term for the loss of a right based on failure to timely assert it is 'forfeiture,' because a person who fails to preserve a claim forfeits that claim. In contrast, a waiver is 'the intentional relinquishment or abandonment of a known right.'") (internal quotation omitted).

B. Federal law on waiver/forfeiture of personal jurisdiction and forum challenges.

Because Pfizer removed these cases before the deadline for Pfizer to have either filed a motion to quash service or otherwise answer, much of the "waiver/forfeiture" conduct by Pfizer occurred in federal court. Federal law on waiver/forfeiture of personal jurisdiction challenges differs in some significant respects from California law. In particular, Federal Rule of Civil Procedure 12(h)(1) provides that a party prevents waiver of a personal jurisdiction challenge by including that defense in its answer. But "Rule 12(h)(1) [only] specifies the minimum steps that a party must take . . . to preserve a [personal jurisdiction] defense. It does not follow . . . that a party's failure to satisfy those minimum steps constitutes the only circumstance under which the party [can] waive[] [the] defense. Most defenses, including . . . lack of personal jurisdiction, may be waived as a result of the course of conduct pursued by a party during litigation." *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1318 (9th Cir. 1998).[20] As Judge Posner explained for the Seventh

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[20] *See also, e.g.*, *Continental Bank, N.A. v. Meyer*, 10 F.3d 1293, 1297 (7th Cir. 1993) (holding that while Defendants raised personal jurisdiction defense in answer and thereby did not "waive" it under Rule 12(h)(1), Defendants waived personal jurisdiction by "fully participat[ing] in litigation of the merits for over two-and-a-half years without actively contesting personal jurisdiction . . . The district court could properly conclude that the defendants' delay in urging this threshold issue manifest[ed] an intent to submit to the court's jurisdiction"); *Minemyer v. R-Boc Representatives, Inc.*, 283 F.R.D. 392, 395-97 (N.D. Ill. 2012)

Circuit Court of Appeals, this is because "[i]t would defeat the purpose of requiring prompt assertion of the defense of lack of personal jurisdiction if the defendant, having raised an objection to personal jurisdiction at the outset as required, could without any penalty fail or refuse to press it, creating the impression that he had abandoned it, and not seek to correct that impression until he appealed from an adverse final judgment on the merits." *Rice v. Nova Biomedical Corp.*, 38 F.3d 909, 914 (7th Cir. 1994).

A particularly apt federal case on this matter is *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58 (2d Cir. 1999). In *Hamilton*, the plaintiff filed an asbestos claim in New York federal district court in June 1994. *Id.* at 60. Defendant Atlas answered the following month and included a personal jurisdiction defense in its answer. *Id.* That November, the case was transferred to an MDL proceeding in the Eastern District of Pennsylvania. *Id.* After more than three years of litigation in the MDL, the case was then transferred back to the Southern District of New York. *Id.* Then, in August 1998, more than four years after the case was

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(noting that defendant raised personal jurisdiction objection at outset but failed to press that objection for four-and-a-half years, thereby waiving it through "sandbagging," "[w]hether intended or not"); *cf. Pullar v. Cappelli*, 148 A.3d 551, 556-57 (R.I. 2016) (adopting federal court distinction between "waiver" and "forfeiture" in personal jurisdiction context and noting, "Federal courts consistently invoke the doctrine of forfeiture when a defendant fails seasonably to argue for application of the jurisdictional defense, or submits to the jurisdiction of the court through conduct, even when the defendant asserted the defense in its answer.").

filed, Atlas moved to dismiss for lack of personal jurisdiction. *Id.* The district court ultimately granted that motion. *Id.*

While acknowledging that Atlas had "met the formal requirements of [Rule] 12(h)(1)," the Second Circuit noted that "a delay in challenging personal jurisdiction by motion to dismiss may result in waiver even where . . . the defense was asserted in a timely answer." *Id.* (internal quotation omitted, ellipses in original). The court then indicated "that the issue is more properly considered one of forfeiture than of waiver. The term 'waiver' is best reserved for a litigant's intentional relinquishment of a known right. Where a litigant's action or inaction is deemed to incur the consequence of loss of a right, or, as here, a defense, the term 'forfeiture' is more appropriate." *Id.* at 61.

Noting that its review of whether the district court abused its discretion in holding that Atlas did not forfeit its personal jurisdiction challenge should involve "consider[ation] [of] all the relevant circumstances," the Second Circuit began its analysis "with the considerable length of time – four years – between the assertion of the defense in the answer and the litigation of the defense in a motion." *Id.* Significantly, the court stated, "Although the passage of time alone is generally not sufficient to indicate forfeiture of a procedural right, the time period provides the context in which to assess the significance of the defendant's conduct, both the litigation activity that occurred and the opportunities to litigate the jurisdictional issue that were foregone." *Id.*

The Second Circuit noted that "[c]onsiderable pretrial activity occurred in this case" during the four years between Atlas's answer and its motion to dismiss. *Id.* While in the MDL court, Atlas participated in both merits discovery and settlement conferences. *Id.* "Most significantly, Atlas had four distinct opportunities to move to dismiss during the four-year-interval [but failed to do so]." *Id.* Atlas could have asserted, but chose not to assert, its personal jurisdiction defense: (1) during the time period before MDL transfer; (2) by way of objection to MDL transfer when that was proposed; (3) during the three years the case was in the MDL;[21] and (4) immediately upon transfer back to the New York federal court. *Id.* at 61-62. "In sum, Atlas participated in pretrial proceedings but never moved to dismiss for lack of personal jurisdiction despite several clear opportunities to do so during the four-year interval after filing its answer. These circumstances establish a forfeiture." *Id.* at 62. Thus, the Second Circuit concluded not merely that Atlas had forfeited its personal jurisdiction challenge, "but also that this is the rare case where a district judge's contrary ruling exceeds the bounds of allowable discretion." *Id.* at 62-63.

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[21] The Second Circuit noted in this context that an MDL court "has all the pretrial jurisdiction the transferor [court] would have had if the transfer had not occurred." *Id.* at 62 (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1435 (2d Cir. 1993)). As will be shown *infra*, Pfizer cited *Agent Orange* for this very same principle in urging Judge Gergel in the Lipitor MDL to dismiss on personal jurisdiction grounds the claims of non-Missouri resident plaintiffs in the Missouri cases.

Whether viewed through the California lens of waiver via general appearance, or through the federal lens of forfeiture through considerable litigation activity while foregoing opportunity after opportunity to raise the threshold issue, Pfizer's conduct here forecloses its PJ/FNC motion.

II. Pfizer waived/forfeited its PJ/FNC challenge by removing and answering in federal court.

By removing this case on CAFA and diversity grounds and answering without first moving to quash in California state court or without promptly moving to dismiss in federal court, Pfizer waived or forfeited its PJ/FNC challenge. Pfizer's motion should be evaluated under California state procedural law, which provides that a party who answers a lawsuit without first moving to quash service of process on grounds of lack of personal jurisdiction waives that challenge. *Roy*, 127 Cal. App. 4th at 345. Pfizer did this here, and it doesn't matter that Pfizer filed its answers to the California Plaintiffs' lawsuits in federal court as opposed to state court, since by removing and asserting that the federal courts should exercise their power to adjudicate these claims, Pfizer generally appeared in the cases. *Mansour*, 38 Cal. App. 4th at 1756-57; *Obrecht*, 245 Cal. App. 4th at 7. To be clear, Plaintiffs do not contend that the act of removal alone amounted to a waiver or forfeiture of personal jurisdiction by Pfizer. *See, e.g.*, *Sirius America Ins Co. v. SCPIE Indem. Co.*, 461 F. Supp. 2d 155, 159 (S.D.N.Y. 2006) (removal alone, without more, does not waive personal jurisdiction defense). But, by removing on the grounds that the

cases *belong* in federal court, then answering and proceeding to attempt to litigate California Plaintiffs' claims without advancing its PJ/forum challenges in a timely manner, Pfizer waived/forfeited those challenges under longstanding California law. This is especially true when one contrasts Pfizer's strategy in the California state cases with the strategy Pfizer employed in the Missouri state cases, where Pfizer's removal was predicated on lack of personal jurisdiction and was done concurrently with a motion to dismiss the claims of the non-Missouri resident plaintiffs.

III. Pfizer waived/forfeited its PJ/FNC challenge by attempting, and continuing to attempt, to have all the California JCCP Plaintiffs' claims litigated in a coordinated proceeding in a California forum.

Pfizer's litigation conduct in the California state court cases has been four years of asking federal courts to decide they have the power to adjudicate the California Plaintiffs' cases. Since March 2014, when Pfizer first began removing these cases, Pfizer has repeatedly asked, first, the MDL court and, then, California federal courts to hold that these cases belong in those courts, not California state court.

A. The Lipitor MDL court had personal jurisdiction to the extent the transferor courts – *California* courts – had personal jurisdiction.

At the outset, it is noteworthy that the personal jurisdiction the Lipitor MDL court had over the claims of the California Plaintiffs against Pfizer was precisely

that level of personal jurisdiction that the transferor courts – all of which were *California* federal courts – had over those claims and parties. *See, e.g.*, *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, 136 F. Supp. 3d 968, 973 (N.D. Ill. 2015) ("Following a transfer [to an MDL], the transferee judge has all the jurisdiction and powers over pretrial proceedings in the actions transferred to him that the transferor judge would have had in the absence of transfer.") (internal quotation omitted).[22] This has been the law since 1976 at the latest. *In re FMC Corp. Patent Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.L. 1976). And Pfizer did not hesitate to exploit this law to advance its position in the Missouri state cases that the non-Missouri resident plaintiffs should be dismissed for lack of personal jurisdiction in those cases. Orr Decl. at ¶ 48, Ex. SS (Pfizer reply brief in support of Pfizer's appeal to Judge Gergel of magistrate judge's order granting remand in *Scotino*), at 4 ("[A] transferee court can exercise personal jurisdiction over a defendant to the extent that the transferor court could.") (citing *In re "Agent Orange"*, 818 F.2d at 163).

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[22] *See also In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145,163 (2d Cir. 1987); *In re: Helicopter Crash Near Wendle Creek, British Columbia, on August 8, 2002*, 542 F. Supp. 2d 1362, 1363 (J.P.M.L 2008).

B. Pfizer urged the MDL court to exercise jurisdiction over the California Plaintiffs' claims against it and have those claims litigated in that coordinated proceeding.

When Pfizer removed the California cases en masse on March 12, 2014, Pfizer did *not* claim that the *California* federal courts to which it was removing those cases lacked personal jurisdiction over Pfizer in these cases. Orr Decl. at ¶ 7, Ex. F (removal notice in *Banks*). Instead, Pfizer promptly noticed the cases for transfer to the MDL court. Orr Decl. at ¶ 8, Ex. G (motion to transfer in *Banks*). Pfizer then spent years trying to persuade the MDL court that the California Plaintiffs' claims against Pfizer should be litigated in the MDL.

Because the MDL court only had that level of personal jurisdiction over Pfizer in these cases that the *California* transferor courts had, Pfizer's efforts to have the claims adjudicated in the MDL were tantamount to Pfizer asserting that the claims belonged in a California forum. Far from claiming that the MDL court *lacks* jurisdiction, like it did with the Missouri non-resident plaintiffs, Pfizer strenuously sought a holding by the MDL court that it *had* jurisdiction over the California Plaintiffs' claims.

It is no answer to this that Pfizer was seeking a subject matter jurisdiction determination rather than a personal jurisdiction determination, for both are threshold issues that should be determined at the outset. *See, e.g.*, *Roy*, 127 Cal. App. 4th at 493 (noting that requirement for early resolution of personal

jurisdiction challenges "serves the cause of judicial economy . . . because all other objections become moot if the motion to quash [for lack of personal jurisdiction] is granted"). It is inconsistent with Pfizer's long, tenacious efforts to obtain a finding that the cases all belonged in the MDL court – California and non-California Plaintiffs alike – for Pfizer to now claim that the MDL court never had personal jurisdiction over these cases in the first place.

Similarly, Pfizer should not now be heard to complain that California *state* court is an inhospitable, inconvenient forum in which to adjudicate all these cases. Pfizer has long touted the efficiencies and conveniences that the parties would all enjoy from having *all* Lipitor cases, including those of all California Plaintiffs, litigated in the MDL court. *See, e.g.*, Orr Decl. at ¶ 10, Ex. I (Pfizer motion to stay pending transfer in *Little*); Orr Decl. at ¶ 13, Ex. L (Pfizer opposition to motion to vacate conditional transfer order in *Banks*). Pfizer's sudden shift in position on the convenience of the forum is misplaced and should be rejected.

C. Pfizer continues to this day to claim the California state court cases all belong in California federal court in coordinated proceedings.

After Judge Gergel granted California Plaintiffs' remand motions in part as to Pfizer's fraudulent joinder/diversity arguments and sent the cases back to California federal courts for resolution of the CAFA mass action jurisdiction issue, Pfizer abandoned the diversity argument but continued to vigorously assert

that the California federal courts should keep the cases for litigation there. While Pfizer paid lip service to its personal jurisdiction and forum defenses,[23] Pfizer told Judge Carney (in whose court the vast majority of the California Plaintiffs' cases were):

> [W]e have a personal jurisdiction affirmative defense that . . . we think it will be moot frankly to the extent that we're here before Your Honor in this Court, as we think we should be under CAFA. . . . The [personal] jurisdictional issue goes away to the extent that Your Honor determines that there's CAFA jurisdiction.

Orr Decl. at ¶ 48, Ex. SS (status conference transcript, February 1, 2017). Then, after Judge Carney and the other California federal judges rejected Pfizer's CAFA mass action claim,[24] Pfizer petitioned the Ninth Circuit for permission to appeal those decisions, again urging that the cases *belonged* in California federal court. Orr Decl. at ¶ 52, Ex. WW (Pfizer's petition for permission

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[23] *See, e.g.*, Orr Decl. at ¶ 35, Ex. FF (Pfizer "status report" in *Banks* case, filed in Judge Carney's court on Dec. 30, 2016) at 2:18-23 (mentioning "threshold" issues of personal jurisdiction and venue).

[24] Orr Decl. at ¶ 38, Ex. II (Judge Carney remand order for first removal). Judges in the Northern District and Eastern District of California issued similar remand orders in the handful of California Plaintiffs' cases that were transferred back from the MDL to those courts. *See Little v. Pfizer Inc.*, No. 3:14-cv-01177, N.D. Cal., Dkt. #138 (remand order entered August 9, 2017); *Alanis v. Pfizer Inc.*, No. 1:14-cv-00365, E.D. Cal. Dkt. #42 (remand order entered August 16, 2017).

to appeal, filed June 2, 2017).[25] The Ninth Circuit summarily denied this request. Orr Decl. at ¶ 55, Ex. ZZ.

Undaunted, Pfizer spent the next several months in California state court litigating the way in which California Plaintiffs' claims would be added on to the JCCP, hoping for another crack at a CAFA removal. Pfizer did advise this Court that someday, in the future, it would raise personal jurisdiction and forum challenges, but first Pfizer wanted the cases coordinated (which belies Pfizer's claim that the coordinated forum in California is inconvenient). Orr Decl. at ¶ 50, Ex. UU (status conference transcript) at 12:16-20; Orr Decl. at ¶ 51, Ex. VV (joint status report filed Oct. 12, 2017) at 5:26-27. Pfizer's goal all along, as this Court well knows, was to get Plaintiffs (and short of that, this Court) to add the cases on, so that Pfizer could remove them a second time to California federal court. Indeed, Pfizer did just that on the heels of this Court's *sua sponte* add-on orders. Orr Decl. at ¶ 41, Ex. LL (removal notice, filed March 1, 2018). Nothing in Pfizer's removal papers even hinted that Pfizer would

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[25] Before filing its appeal, Pfizer first attempted to invoke the power of the California federal court to stay the proceedings in California state court while Pfizer continued to pursue a holding that the cases belonged in California federal court. Orr Decl. at ¶ 53, Ex. XX (Pfizer motion to stay state court proceedings during Ninth Circuit appeal of first remand order). Judge Carney denied this motion. Orr Decl. at ¶ 54, Ex. YY. But the important point for present purposes is that Pfizer was trying to use the power of one California court to halt proceedings in another California court, not for the purpose of challenging personal jurisdiction in California, but to establish that the cases should stay in California.

contest the personal jurisdiction of the federal court in Orange County, California, or the convenience of litigating the cases in Orange County, California.

Judge Carney again remanded the cases. Orr Decl. at ¶ 44, Ex. OO. Pfizer again petitioned the Ninth Circuit for permission to appeal. Orr Decl. at ¶ 45, Ex. PP.[26] The Ninth Circuit again denied Pfizer's petition in a single-sentence order. Orr Decl. at ¶ 46, Ex. QQ. This time, Pfizer petitioned the Ninth Circuit for rehearing en banc. Orr Decl. at ¶ 47, Ex. RR. That rehearing request remains pending as of the time this Opposition brief is being filed, which means Pfizer is telling one court (the Ninth Circuit) that these cases should be litigated in a California federal court while telling another court (this Court) that these cases don't belong in California state court.

This is the very sort of sandbagging that the *Hamilton* opinion counseled against. Pfizer has had opportunity after opportunity to timely raise its personal jurisdiction and forum defenses (like Pfizer did in the Missouri cases). But instead of timely asserting those defenses and securing a ruling on them as to California Plaintiffs, as required under both California and federal law, Pfizer has tried to have it both ways: Get a ruling that these cases belong in California federal court but have in the wings the

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[26] Pfizer filed its PJ/FNC challenge while this petition for permission to appeal was pending. So while Pfizer was telling the Ninth Circuit that the claims of the California state court Plaintiffs – California resident and non-resident alike – against Pfizer belong in a California court, it was simultaneously telling this Court that the claims don't belong in a California court.

backup argument, should Pfizer find itself stuck in state court, that California courts don't have power over Pfizer after all and California isn't the right place for these cases after all. The law is clear: Pfizer forfeited its PJ/FNC challenges long ago and over and over again during the past four-plus years.

IV. Pfizer waived/forfeited its PJ/FNC challenge, not merely by acknowledging the authority of courts in California forums over the Lipitor claims of the California Plaintiffs, but by seeking relief from those courts against all California Plaintiffs.

Pfizer also waived/forfeited its PJ/FNC challenge by seeking affirmative relief, in the form of merits discovery and summary judgment, against the California Plaintiffs. Such acts constitute a general appearance under California law and therefore amount to a waiver of personal jurisdiction. *Mansour*, 38 Cal. App. 4th at 1756-57; *see also Roy*, 127 Cal. App. 4th at 345. Such acts also constitute a forfeiture of Pfizer's PJ/FNC challenge, as Pfizer undertook them during the four-year period after the cases were filed but well before Pfizer sought any relief on its PJ/FNC challenge. *Hamilton*, 197 F.3d at 61-62.

A. Pfizer sought discovery from California Plaintiffs without raising PJ/FNC.

As detailed above, Pfizer asked Judge Gergel in the MDL court to enter an order requiring every California state court Plaintiff, without regard to residency, to provide discovery regarding where and when they

obtained their Lipitor, including pharmacy records. Orr Decl. at ¶ 21, Ex. T (Pfizer response to California Plaintiffs' motion to stay discovery, seeking discovery against California Plaintiffs). Pfizer couched this request as one for "jurisdictional discovery," but also conceded that this discovery was directed at the merits of Plaintiffs' claims. *Id.* at 6 ("The information at issue is important to evaluating the viability of Plaintiffs' claims against McKesson and it therefore bears on both the merits of those claims and the jurisdictional issues that this Court will be deciding."). Indeed, Pfizer sought this discovery not to *contest* the MDL court's jurisdiction over Pfizer, but to *establish* that court's jurisdiction. *Id.* Pfizer wanted to prove that at least some, and hopefully for Pfizer most, California Plaintiffs took Lipitor that was not distributed by McKesson, thereby establishing McKesson's "fraudulent joinder" by those Plaintiffs and thus the MDL court's diversity jurisdiction over those Plaintiffs' claims. *Id.*

Under California law, "initiating discovery unrelated to the issue of jurisdiction" constitutes a general appearance. *Mansour*, 38 Cal. App. 4th at 1757. Were Pfizer to claim it didn't generally appear when it sought "jurisdictional discovery" from California Plaintiffs in the MDL court, Pfizer would be mistaken. In evaluating whether a party has generally appeared, California courts look not to the party's expressed intent, but to the character of the relief sought. *Hernandez v. Nat'l Dairy Prods.* (1945) 126 Cal. App. 2d 490, 492; *see also Cal. Overseas Bank v. French Am. Banking Corp.* (1984) 154 Cal. App. 3d 179, 184-85 (superseded on other grounds by statute (Code Civ.

Proc. § 418.10(e)). The discovery Pfizer sought was only "jurisdictional" in the sense that Pfizer wanted it to prove that Plaintiffs had no viable claim against McKesson, not to establish the absence of personal jurisdiction over Pfizer. Pfizer "initiated discovery to *establish* jurisdiction," not to refute it.

Pfizer also sought, and was granted, additional discovery requirements against California Plaintiffs. Specifically, at Pfizer's request, California Plaintiffs were obligated to participate in the depositions of so-called "common witnesses" in the MDL proceeding. Orr Decl. at ¶ 21, Ex. T at 1 n.1 ("Pfizer submits that, to the extent the Court stays Plaintiffs' discovery obligations, it should not exempt Plaintiffs from participation in depositions of common witnesses in the MDL . . . "); Orr Decl. at ¶ 22, Ex. U (MDL CMO 10) at 1, ¶ 2 (granting California Plaintiffs' motion to stay discovery in part only and stating, "The Parties in these cases are NOT exempt from participation in the depositions of common witnesses in the MDL"). This requirement, while seemingly sensible since the California Plaintiffs were either going to litigate their claims in the MDL or in California courts and might as well participate in common witness depositions for the sake of comity and efficiency, nevertheless reflected an affirmative request by Pfizer to the MDL court – a court with that level of personal jurisdiction only that the California transferor courts had – for relief that presumed the MDL court's power to afford that relief. Seeking a court order requiring the Plaintiffs to participate in discovery is both a general appearance under California law and a forfeiture of personal jurisdiction under federal law. *Mansour*, 38 Cal. App.

4th at 1757 (California law)[27]; *Hamilton*, 197 F.3d at 61 (federal law).

B. Pfizer sought summary judgment against California Plaintiffs without raising PJ/FNC.

Pfizer didn't just seek discovery against California Plaintiffs in the MDL court – it also asked that court to include California Plaintiffs in an omnibus summary judgment motion. Orr Decl. at ¶¶ 29, 32, Exs. AA, DD. As detailed above, Pfizer secured favorable rulings from the MDL court on the admissibility of the MDL plaintiffs' general and specific causation experts and, based on those rulings, asked Judge Gergel to grant summary judgment against all plaintiffs in the MDL. Orr Decl. at ¶ 29. Ex. AA. Because that omnibus summary judgment was ambiguous as to whether Pfizer meant to include California Plaintiffs, those Plaintiffs filed a brief response asserting that they should not be included within the scope of that omnibus motion. Orr Decl. at ¶ 31, Ex. CC. Pfizer's reply removed all doubt: Pfizer asserted that the MDL court had jurisdiction over every case in the MDL (including the California and Missouri plaintiffs with pending remand motions) and therefore was in a position to enter summary judgment as to *all* plaintiffs in the MDL. Orr Decl. at ¶ 32, Ex. DD. And if the MDL court wasn't prepared to enter summary judgment

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[27] *Mansour* indicates that "initiating discovery *unrelated* to the issue of jurisdiction" constitutes a general appearance. It should be even more the case that "initiating discovery *to establish* jurisdiction" is a general appearance that waives personal jurisdiction challenges.

against California Plaintiffs because they still had a pending remand motion, Pfizer had a ready solution: "As to Plaintiffs with remand motions who asserted that they did not intend to act under CMO 65 [i.e., California Plaintiffs], the [MDL] [c]ourt can issue a similar order after addressing the remand motions." *Id.* at 19 n.9. Judge Gergel didn't bite – he properly refused to grant Pfizer summary judgment against California Plaintiffs while Plaintiffs' challenge to the court's subject matter jurisdiction remained unresolved. Orr Decl. at 56, Ex. AAA (MDL CMO 82) at 1 n.1 (noting that Judge Gergel's disposition of Pfizer's omnibus summary judgment motion does not apply to California Plaintiffs). But that doesn't obviate the fact that Pfizer invoked the MDL court's power to try to prevail on the merits against California Plaintiffs, an act that necessarily recognized the court's personal jurisdiction over Pfizer. *Mansour*, 38 Cal. App. 4th at 1756-57; *see also California Overseas Bank*, 154 Cal. App. 3d at 185 ("Having addressed the merits of the case, [defendant] submitted itself to the jurisdiction of the court.").

Pfizer should not be heard now to complain of this Court's power to adjudicate these cases in this coordinated proceeding in light of Pfizer's having sought summary judgment against California Plaintiffs instead of timely acting on its PJ/FNC challenge. *See, e.g.*, *Hamilton*, 197 F.3d at 61-63; *Roy*, 127 Cal. App. 4th at 344-45.

V. Pfizer waived/forfeited its PJ/FNC challenge by repeatedly recognizing the convenience afforded to the courts and the parties from litigating the claims of all California Plaintiffs in California forums.

At virtually every step in the long, tortured path that these cases have taken, Pfizer has invoked the efficiencies and conveniences for the courts, the parties, and the witnesses that flow from litigating all Lipitor claims in coordinated proceedings before California courts (or in the MDL, which is functionally a California court for personal jurisdiction purposes). Having repeatedly invoked the benefits that flow from coordination, Pfizer has forfeited its claim that California isn't a convenient forum after all and the claims of non-resident California Plaintiffs should be scattered across the other 49 states.[28]

For example, immediately after Pfizer removed the cases in early 2014, Pfizer filed motions to stay some of the actions in California federal court pending transfer of the cases to the MDL.[29] In such motions, Pfizer

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[28] Pfizer's citation to two prior decisions in Los Angeles County JCCPs in which timely asserted FNC motions were granted is a non-sequitur. PJ/FNC motion at 10 (citing decisions in *In re Crestor Prod. Liab. Cases*, JCCP No. 4713, and *Accutane Drug Cases*, JCCP No. 4740). Had Pfizer timely asserted its FNC challenge here, these authorities may have had some bearing on this Court's consideration of Pfizer's FNC challenge. Neither decision has anything to do with timeliness or waiver/forfeiture.

[29] Pfizer didn't need to file stay motions in most, if not all, of the cases removed to the Central District, because that district already

argued that a stay pending transfer would "promote efficiency by allowing joint determination of common issues," and would "prevent prejudice to Pfizer, including the risk of inconsistent rulings from different courts and being forced to litigate the same issues in multiple forums." Orr Decl. at ¶ 10, Ex. I (Pfizer motion to stay in *Little* case, filed in the Northern District of California on March 20, 2014). Similarly, when Plaintiffs objected to Pfizer's notices of related case, Pfizer's response, while recognizing that Plaintiffs raised jurisdictional objections that other Lipitor cases did not have, nonetheless urged, "[T]here are . . . substantial efficiencies to be gained by determination of common substantive issues, such as causation and warnings, by a single judge [in a coordinated proceeding]." Orr Decl. at ¶ 49, Ex. TT (response to objections to Pfizer's notice of related cases in *Banks*, filed March 19, 2014). Pfizer thereafter opposed California Plaintiffs' efforts to prevent transfer of the cases to the MDL, arguing that the California cases "share common questions of fact with the Lipitor products liability actions already pending in the MDL, [and] the resolution of those common questions in the MDL would further the convenience of the parties and witnesses." Orr Decl. at ¶ 13, Ex. L (Pfizer opposition to motion to vacate conditional transfer order).

Then, once the cases made their way back to this JCCP after Judge Carney's first remand order, Pfizer established a pattern of invoking the benefits of coordinating the cases even while resisting being the

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had a pattern of sua sponte staying Lipitor cases pending transfer to the MDL.

party to move for that coordination (so that it could continue its strategy of trying to get these cases into federal court). For example, at the July 11, 2017 status conference in this Court, Pfizer's counsel told this Court that "[Pfizer] fully support[s] the coordination petition. It makes sense. We think there's a lot of reasons to have coordination. We're not looking for multiple types of litigation around the state or take up different courts." Orr Decl. at ¶ 50, Ex. UU (status conference transcript) at 12:16-20. During that same status conference, Pfizer's counsel reiterated this point: "We have a different view of what coordination would be like. [But] [w]e all agree with coordination." *Id.* at 25:6-8. Then again at the August 4, 2017 JCCP status conference, Pfizer's counsel stated, "We do want coordination, your Honor. You know, and we've all been, you know, candid with the Court." Orr Decl. at ¶ 57, Ex. BBB (transcript) at 16:6-7.[30]

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[30] Pfizer's PJ/FNC motion urges the alleged prejudice to Pfizer of having to try cases where Pfizer cannot compel the in-person attendance of critical witnesses. PJ/FNC motion at 14:3-14. Yet Pfizer showed no concern for this prejudice while working up potential bellwether cases in the MDL. To the contrary, Pfizer not only waived its right under *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) (MDL is limited by statute to pretrial proceedings so party cannot be forced to try cases in MDL unless party waives this right), to preclude cases from being tried in the MDL, it criticized certain Plaintiffs' firms for their refusal to waive *Lexecon* in a significant number of their cases. Orr Decl. at 19, Ex. R (transcript of MDL status conference) at 20:24-24:3. In other words, Pfizer was more than happy to endure the prejudice and inconvenience of trying cases in South Carolina federal court involving plaintiffs from across the country; it just doesn't want that prejudice and inconvenience now, here in Los Angeles County state court. Moreover, Pfizer's PJ/FNC motion asserts that FNC is

Pfizer cannot have it both ways. Pfizer cannot claim on the one hand that it promotes efficiency and convenience, for the parties and witnesses, for all the Lipitor cases to be coordinated into a single MDL proceeding in Charleston, South Carolina, but on the other, a JCCP in Los Angeles County District Court is so inconvenient that it warrants, well over four years into the litigation, dismissal of Plaintiffs' claims and scattering them across the country in thousands of different courts. Just as failure to timely assert personal jurisdictional challenges results in forfeiture, such unreasonable delay by Pfizer in asserting a forum defense forfeits its forum challenge.[31]

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proper so that this Court does not have to shoulder the difficult choice of law issues that will come from likely having to apply the home state law of non-resident plaintiffs. PJ/FNC motion at 18:9-16. But Pfizer told the JPML, when Plaintiffs opposed transfer of their cases to the MDL, that "an appeal to unique state-law issues is of no use, since MDL courts routinely issue decisions under the law of multiple different states." Orr Decl. at ¶ 13, Ex. L (Pfizer opposition to Plaintiffs' motion to vacate transfer to MDL) at 7 n.1. This Court is just as capable of applying a different state's laws to any individual case in this JCCP as the MDL court.

[31] Although Pfizer did not indicate in the name of its PJ/FNC motion that it was moving to sever the Plaintiffs' claims, Pfizer essentially made such a motion in the course of its PJ/FNC motion. The sole reason Pfizer seeks this relief is because it is an essential condition precedent to this Court granting Pfizer's FNC motion. Since this Court should deny that motion, the Court need not, and should not, reach Pfizer's implied severance motion. If the Court is inclined to reach that issue despite otherwise denying Pfizer's PJ/FNC challenge, Plaintiffs respectfully request that this Court afford Plaintiffs the opportunity to separately respond to that motion.

CONCLUSION AND REQUEST FOR RELIEF

Pfizer knew how to raise personal jurisdiction and forum challenges at the time it began removing California Plaintiffs' claims to federal court. Pfizer raised just such challenges in identically situated cases in Missouri state court. Pfizer made a strategic decision in the California cases to go all in on trying to establish that the federal courts had, and should exercise, the power to adjudicate California Plaintiffs' claims against Pfizer.

It's simply too late now, well over four years after the March 2014 en masse removal by Pfizer of these cases, for Pfizer to complain that this Court lacks personal jurisdiction over it, or that Los Angeles County is such an inconvenient forum that the cases must be dismissed. Whatever the correct nomenclature, Pfizer waived and/or forfeited those claims long ago.

Plaintiffs respectfully request that this Court enter an order denying Pfizer's PJ/FNC motion. Plaintiffs further request such other relief to which they may be justly entitled.

DATED: September 21, 2018

Respectfully submitted,

THE MULLIGAN LAW FIRM

By: /s/ *Charles G. Orr*
Charles G. Orr

Counsel for JCCP Plaintiffs

* * *

[*Proof of Service Omitted in the Printing of this Appendix*]

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

MDL No. 2:14-mn-02502-RMG

This Document Relates to
All Actions

[Filed June 24, 2016]

IN RE: LIPITOR (ATORVASTATIN CALCIUM) MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	)

DEFENDANTS' OMNIBUS MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

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Pursuant to CMO 79, Defendants Pfizer Inc., Pfizer International LLC, and Greenstone LLC respectfully move for summary judgment. A full explanation of the motion is provided in the supporting memorandum herein.

PRELIMINARY STATEMENT

Defendants are entitled to summary judgment because Plaintiffs lack admissible expert testimony to establish causation, an essential element of all of their claims. Plaintiffs claim that Lipitor caused them to develop type 2 diabetes. "'[I]n order to carry the burden of proving a plaintiff's injury was caused by exposure to a specified substance,' a plaintiff must demonstrate general and specific causation." *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.*, 2016 WL 1251828, at *1 (D.S.C. Mar. 30, 2016) ("CMO 68") (quoting *Zellers v. NexTech Ne., LLC*, 533 F. App'x 192, 196 (4th Cir. 2013) (per curiam), *cert. denied*, 134 S. Ct. 911 (2014)). "'General causation is whether a substance is capable of causing a particular injury or condition in the general population and specific causation is whether a substance caused a particular individual's injury.'" *Id.* (quoting *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 881 (10th Cir. 2005)). In cases like these, "'[w]here a medical causal relation issue is not one within the common knowledge of the layman,'" Plaintiffs must prove general and specific causation through admissible expert testimony. *In re Bausch & Lomb Inc. Contacts Lens Sol. Prods. Liab. Litig.*, 693 F. Supp. 2d 515, 518 (D.S.C. 2010) (Norton, J.) (citation omitted), *aff'd sub nom Fernandez-Pineiro v. Bausch & Lomb, Inc.*, 429 F.

App'x 249 (4th Cir. 2011) (per curiam). Plaintiffs cannot do so here.

First, based on this Court's general causation ruling, summary judgment is warranted as to all Plaintiffs who took doses of Lipitor below 80 mg before developing diabetes because they lack admissible expert testimony establishing general causation. The Court excluded *all* of Plaintiffs' experts' general causation opinions *except* for Dr. Sonal Singh's opinion that the 80 mg dose is capable of causing diabetes. CMO 68, 2016 WL 1251828, at *19. All Plaintiffs who took lower doses of Lipitor – including 10, 20, and 40 mg – lack the necessary expert proof of general causation, and their claims thus fail as a matter of law.

Second, and independently, all Plaintiffs lack admissible expert testimony to prove specific causation. The Court excluded the specific causation opinions of Plaintiffs' experts in the first two cases prepared for trial, *Daniels v. Pfizer Inc.*, 2:14-cv-01400, and *Hempstead v. Pfizer Inc.*, 2:14-cv-1879. *See In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.*, 2015 WL 9165589 (D.S.C. Dec. 11, 2015) ("CMO 55"); *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.*, 2016 WL 2851445 (D.S.C. May 11, 2016) ("CMO 76"). After the Court issued CMO 55, in which it excluded Dr. Elizabeth Murphy's specific causation opinion in *Hempstead*, Plaintiffs' lead counsel "advised the Court . . . that, if the Court's ruling [in CMO 55] is correctly decided, then none of the cases now pending in the MDL will be able to survive summary judgment on the issue of specific causation." CMO 65 [1352] at 1. In response, in

CMO 65, the Court provided all Plaintiffs an opportunity to come forward and dispute that statement. No Plaintiff did so.[1] Thus, summary judgment is warranted because no Plaintiff has "distinguished [her case] from the Court's ruling in CMO 55," CMO 65 at 1, and, as a result, no Plaintiff can prove specific causation.

BACKGROUND

The parties and Court agreed from the start of this MDL that it was necessary to adopt a process for the disclosure and discovery of expert opinions on general and specific causation and a procedure for making and hearing *Daubert* motions addressing those opinions. *See, e.g.*, Amended CMO 6 [148] at 7-11; CMO 19 [539] at 4-6; CMO 29 [746]. The Court afforded Plaintiffs ample opportunity to develop admissible and sufficient causation evidence.

General Causation. Plaintiffs proffered general causation opinions from four experts: Drs. Edwin Gale, Michael Quon, Barbara Roberts, and Sonal Singh.[2] After full discovery, briefing, and two days of argument

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[1] Certain Plaintiffs filed a notice stating that "they do not intend to undertake any action in response to Case Management Order No. 65" because their cases are subject to pending remand motions. Pls.' Notice Regarding CMO 65 [1373] at 1.

[2] Plaintiffs also offered related opinions on association from Prof. Nicholas Jewell, a biostatistician, the majority of which were excluded. *See In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.*, 2015 WL 7422613 (D.S.C. Nov. 20, 2015) ("CMO 54"), *motion for reconsideration granted in part*, *amended by* 2016 WL 827067 (D.S.C. Feb. 29, 2016) ("CMO 67").

on Pfizer's motion to exclude those opinions, the Court requested supplemental briefing to address "whether Plaintiffs' experts have offered sufficient evidence to support their opinions that Lipitor causes diabetes in female patients at a dosage level less than 80 mg." Sept. 25, 2015 Text Order [1149]. Following supplemental briefing and another hearing, the Court ruled that "Plaintiffs must have expert testimony that Lipitor causes, or is capable of causing, diabetes at particular dosages." *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.*, 2015 WL 6941132, at *6 (D.S.C. Oct. 22, 2015) ("CMO 49"). The Court allowed Plaintiffs to submit supplemental reports to address "whether Lipitor causes diabetes at dosages of 10 mg, 20 mg, 40 mg, and 80 mg." *Id.* Plaintiffs proffered supplemental reports from Drs. Quon, Roberts, and Singh.

After briefing and another hearing on Plaintiffs' experts' dose-specific opinions, the Court excluded the general causation opinions of Drs. Gale, Quon, and Roberts in their entirety as unreliable and inadmissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and Rule 702. CMO 68, 2016 WL 1251828, at *19. The Court also excluded Dr. Singh's opinion that Lipitor 10 mg could cause type 2 diabetes. *Id.* The Court held that "Dr. Singh's 10 mg opinion is not based on sufficient facts and data and that he did not reliably apply the epidemiological/Bradford Hill method." *Id.* at *11. With respect to general causation at the 20 mg and 40 mg dosages of Lipitor, "Dr. Singh testifie[d] that he cannot reach an opinion about whether 20 mg and 40 mg of Lipitor causes diabetes without the conclusion that 10 mg of Lipitor causes

diabetes." *Id*. And "[b]ecause the Court . . . disallowed Dr. Singh's causation opinion for Lipitor 10 mg, . . . Dr. Singh, by his own testimony, is unable to offer a causation opinion regarding Lipitor 20 mg or Lipitor 40 mg." *Id*. The Court permitted Dr. Singh to proceed with his general causation opinion as to Lipitor 80 mg. *Id*. at *7.

Specific Causation. As to specific causation, Plaintiffs proffered the opinion of Dr. David Handshoe in *Daniels* and *Hempstead* and the opinion of Dr. Murphy in *Hempstead*. After full discovery, briefing, and hearings, the Court granted Pfizer's motions to exclude both experts' opinions in their entirety. *See* CMO 55, 2015 WL 9165589; CMO 76, 2016 WL 2851445. In CMO 55, the Court held that Dr. Murphy's specific causation opinion was unreliable and inadmissible under *Daubert* and Rule 702 because it was "not based on 'sufficient facts or data,' and to the extent that she purports to be applying a differential diagnoses methodology, she has not reliably applied this methodology." CMO 55, 2015 WL 9165589, at *14. The Court denied Plaintiffs' motion for reconsideration of its order. *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.*, 2016 WL 2940782 (D.S.C. May 6, 2016) ("CMO 75"). The Court explained in its rulings that while "Dr. Murphy recognized that Plaintiff had a number of statistically significant risk factors for diabetes beyond ingestion of Lipitor," CMO 55, 2015 WL 9165589, at *13, "she never provided any explanation as to why these other risk factors, alone or in combination, were not sufficient to cause diabetes independent of Lipitor exposure." CMO 75, 2016 WL 2940782, at *2.

After the Court issued CMO 55 excluding Dr. Murphy, it held a conference and asked Plaintiffs' lead counsel if Plaintiffs "would have any class of cases or factual presentation or new theory that might survive specific causation, assuming the correctness of the Murphy order." 1/22/16 Hr'g Tr. at 9:12-20. Plaintiffs' counsel responded: "The short answer is no, sir, Your Honor, we don't." *Id.* at 9:21-24. The Court asked: "[I]f we assume for a minute that the critical question then is whether the Court is correct regarding the standard, if you are telling me, Mr. Hahn, that if I'm correct, then you are not going to have a case that survives summary judgment?" *Id.* at 10:10-14. Plaintiffs' counsel responded: "Yes, sir." *Id.* at 10:15. Plaintiffs' lead counsel also agreed at the conference that an order to show cause would be an appropriate procedure to determine if any other plaintiff or plaintiff's counsel disagreed with his representation. *Id.* at 10:16-13:10.

Following the conference, the Court issued CMO 65, giving notice "that any Plaintiff who disputes the position taken by Plaintiffs' Lead Counsel and asserts that her case can survive summary judgment on specific causation even if the Court's ruling in CMO 55 is upheld on appeal . . . shall provide notice to the Court within 15 days of this order and set forth with specificity how her case is distinguished from the Court's ruling in CMO 55." CMO 65 at 1. The Court stated that if a Plaintiff gave notice, the Court would set a schedule for expert discovery and *Daubert* briefing. *Id.* No Plaintiff provided notice that she could offer specific causation testimony that would survive the Court's analysis in CMO 55 or that she could prove specific causation without admissible expert testimony.

In CMO 79, the Court permitted Defendants to file "an omnibus summary judgment motion" based on "the lack of general causation and specific causation expert testimony." CMO 79 [1548] at 1.

ARGUMENT

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. The "plain language" of Rule 56 "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "[A] complete failure of proof concerning an essential element of the [plaintiff's] case necessarily renders all other facts immaterial," *id.* at 323, and "necessitates a grant of summary judgment in favor of the defendant." *Zellers*, 533 F. App'x at 200.

Causation is a required element of product liability claims. *See*, *e.g.*, *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 203 (4th Cir. 2001). "To establish medical causation in a product liability case, a plaintiff must show both general causation and specific causation." *In re Bausch & Lomb*, 693 F. Supp. 2d at 518. Proof of causation requires "relevant and reliable expert testimony, as the health effects of toxic exposure to chemicals are beyond the knowledge and experience of the average layperson." *Zellers*, 533 F. App'x at 200; *accord McClure v. Wyeth*, 2012 WL 952856, at *1 (D.S.C. Mar. 20, 2012) (Herlong, J.); *In re Bausch &*

Lomb, 693 F. Supp. 2d at 518.[3] Because Plaintiffs lack the expert testimony necessary to prove causation here, Defendants are entitled to summary judgment.

I. SUMMARY JUDGMENT IS REQUIRED AS TO PLAINTIFFS WHOSE CLAIMS ARE BASED ON USE OF LIPITOR BELOW 80 MG BECAUSE THEY LACK ADMISSIBLE AND SUFFICIENT EVIDENCE OF GENERAL CAUSATION

As this Court has explained, "Plaintiffs must demonstrate, with general causation testimony, that particular doses of Lipitor are capable of causing diabetes." CMO 49, 2015 WL 6941132, at *6. None of the Plaintiffs who ingested Lipitor only at doses below 80 mg – including the 10, 20, and 40 mg doses – can make this showing because this Court has excluded their experts' general causation opinions at those doses. *See* CMO 68, 2016 WL 1251828, at *19. Because these Plaintiffs lack admissible expert testimony on general causation, "there is a complete failure of proof on the critical element of causation," and summary judgment is warranted. *Zellers*, 533 F. App'x at 200.

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[3] Plaintiffs' counsel recently asserted for the first time that New Mexico may be an exception to the general rule that all states require expert testimony to prove causation in cases like these. *See* 6/8/16 Hr'g Tr. at 11:13-18. New Mexico case law, however, confirms that "[e]xpert testimony is necessary" to show general and specific causation in cases that, like these, involve complex medical and scientific issues outside the knowledge and experience of a lay juror. *Farris v. Intel Corp.*, 493 F. Supp. 2d 1174, 1186 (D.N.M. 2007); *accord Andrews v. U.S. Steel Corp.*, 250 P.3d 887, 890 (N.M. Ct. App. 2011).

It is well established that where "expert opinion evidence regarding causation is inadmissible . . . summary judgment ***must*** be granted to defendants." *Rutigliano v. Valley Bus. Forms*, 929 F. Supp. 779, 783 (D.N.J. 1996) (emphasis added), *aff'd*, 118 F.3d 1577 (3d Cir. 1997); *accord Wells v. SmithKline Beecham Corp.*, 601 F.3d 375, 381 (5th Cir. 2010). Courts around the country routinely grant and affirm summary judgment where, as here, plaintiffs failed to pass the *Daubert* threshold on general causation. *See, e.g.*, *Chapman v. Procter & Gamble Distrib., LLC*, 766 F.3d 1296, 1316-17 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 2312 (2015); *Wells*, 601 F.3d at 381; *Ruggiero v. Warner-Lambert Co.*, 424 F.3d 249, 254-55 (2d Cir. 2005); *Norris*, 397 F.3d at 884-86; *Miller v. Pfizer, Inc.*, 356 F.3d 1326, 1335-36 (10th Cir. 2004), *cert. denied*, 543 U.S. 917 (2004); *In re Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig.*, 2016 WL 1320799, at *10-11 (E.D. Pa. Apr. 5, 2016), *appeal filed*, (3d Cir. May 12, 2016); *In re Bausch & Lomb Inc. Contacts Lens Sol. Prods. Liab. Litig.*, 2010 WL 1727807, at *1-3 (D.S.C. Apr. 26, 2010) (Norton, J.), *aff'd sub nom Fernandez-Pineiro,* 429 F. App'x 249; *In re Bausch & Lomb*, 693 F. Supp. 2d at 517-19; *In re Viagra Prods. Liab. Litig.*, 658 F. Supp. 2d 950, 967-69 (D. Minn. 2009); *In re Human Tissue Prods. Liab. Litig.*, 582 F. Supp. 2d 644, 690-91 (D.N.J. 2008); *In re Rezulin Prods. Liab. Litig.*, 441 F. Supp. 2d 567, 579 (S.D.N.Y. 2006); *Soldo v. Sandoz Pharms. Corp.*, 244 F. Supp. 2d 434, 577-78 (W.D. Pa. 2003); *Siharath v. Sandoz Pharms. Corp.*, 131 F. Supp. 2d 1347, 1373-74 (N.D. Ga. 2001), *aff'd*, *Rider v. Sandoz Pharms. Corp.*, 295 F.3d 1194 (11th Cir. 2002), *reh'g denied,* 48 F. App'x 330 (11th Cir. 2002); *Wade-Greaux v. Whitehall Labs.,*

Inc., 874 F. Supp. 1441, 1485-86 (D.V.I. 1994), *aff'd*, 46 F.3d 1120 (3d Cir. 1994).

In the Zoloft MDL, for example, after excluding the opinions of plaintiffs' general causation experts as unreliable and inadmissible, the court held that summary judgment was warranted because "[a]t the end of the day, Plaintiffs have failed to raise a jury question on the necessary predicate to success in any case: that Zoloft was capable of causing their injuries." *In re Zoloft*, 2016 WL 1320799, at *11. Likewise, in the Bausch & Lomb MDL, in which plaintiffs alleged that a contact lens solution caused their eye injuries, Judge Norton granted summary judgment as to plaintiffs who alleged that the product caused them to develop "non-*Fusarium*" eye infections. *In re Bausch & Lomb*, 693 F. Supp. 2d at 517. "With the exclusion of plaintiffs' causation expert regarding eye infections other than *Fusarium* keratitis, it has become clear that the remaining plaintiffs have no admissible evidence to support their allegation that defendant's . . . contact lens solution caused the eye infections they experienced. Consequently, these plaintiffs cannot prove an essential element in each of their cases." *Id.* at 517. The Fourth Circuit affirmed. *Fernandez-Pineiro*, 429 F. App'x 249.

For the same reason, Defendants here are entitled to summary judgment as to the claims of Plaintiffs who took Lipitor doses below 80 mg.[4]

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[4] In addition, because "[e]vidence concerning specific causation in toxic tort cases is admissible only as a follow-up to admissible general-causation evidence," *In re Bausch & Lomb*, 693 F. Supp.

II. SUMMARY JUDGMENT IS REQUIRED BECAUSE ALL PLAINTIFFS LACK ADMISSIBLE AND SUFFICIENT EVIDENCE OF SPECIFIC CAUSATION

After Plaintiffs' counsel acknowledged that no case can "survive[] summary judgment" under this Court's order in CMO 55 excluding Dr. Murphy's specific causation opinion, CMO 65 provided all Plaintiffs ample opportunity to come forward if any Plaintiff disagreed and believed she could survive summary judgment on specific causation.[5] No Plaintiff did so. By agreeing with Plaintiffs' lead counsel and by declining to file a notice in response to CMO 65, Plaintiffs have conceded that Defendants are entitled to summary judgment.

2d at 518 (citation omitted), "'there can be no specific causation'" in cases involving Plaintiffs who took Lipitor doses below 80 mg. CMO 49, 2015 WL 6941132, at *1 (quoting *Norris*, 397 F.3d at 881).

[5] Other MDL courts have employed a similar process of giving notice and an opportunity to all plaintiffs to advise the court if any plaintiff believes she should not be subject to a ruling that was issued with respect to one or certain cases but as to which the record and law support a finding that it applies more broadly to cases in the MDL. *See, e.g.*, *In re Fosamax (Alendronate Sodium) Prods. Liab. Litig.*, No. 3:08-cv-00008, Order to Show Cause Why the Claims of Plaintiffs Alleging Injury Prior to September 14, 2010 Should Not Be Dismissed [Dkt. 2895] (D.N.J. Aug. 15, 2013) (attached as Ex. 1); *In re Darvocet, Darvon & Propoxyphene Prods. Liab. Litig.*, No. 2:11-md-2226, Order Directing Plaintiffs to Show Cause Why Claims as to Generic Defendants Should Not Be Dismissed [Dkt. 1645] (E.D. Ky. Apr. 10, 2012) (attached as Ex. 2); *In re Viagra Prods. Liab. Litig.*, No. 06-md-1724, Order to Show Cause [Dkt. 623] (D. Minn. Aug. 25, 2010) (attached as Ex. 3).

Like general causation, specific causation is an essential element of all of Plaintiffs' claims. The Fourth Circuit and district courts within it have repeatedly held that summary judgment is warranted where a plaintiff cannot demonstrate specific causation through admissible expert testimony. *See, e.g.*, *Cooper*, 259 F.3d at 203; *Christian v. Cook Inc.*, 2015 WL 3557242, at *2 (S.D. W. Va. June 4, 2015); *McClure*, 2012 WL 952856, at *1-2; *Doe v. Ortho-Clinical Diagnostics, Inc.*, 440 F. Supp. 2d 465, 478 (M.D.N.C. 2006); *Jones v. Danek Med., Inc.*, 1999 WL 1133272, at *5 (D.S.C. Oct. 12, 1999) (Houck, J.). In *Cooper*, for example, plaintiff claimed a pedicle screw fixation device caused his back surgeries to fail and led to related side effects. *Cooper*, 259 F.3d at 196-98. The Fourth Circuit affirmed the exclusion of plaintiff's specific causation expert because (like Plaintiffs' specific causation experts here) his differential diagnosis was not reliable. *Id.* at 202-03. "And without [the expert's] testimony, [plaintiff] could not make the requisite showing of causation. The district court therefore properly granted [the manufacturer's] motion for summary judgment on all claims." *Id.* at 203 (footnotes omitted). Similarly, in *McClure*, plaintiff alleged that her ingestion of hormone therapy medication caused her breast cancer. 2012 WL 952856 at *1. Judge Herlong excluded plaintiff's specific causation experts as unreliable and then granted summary judgment because "expert testimony is necessary to establish causation for cases involving [] complex medical condition[s]." *Id.*

Federal appellate courts have repeatedly affirmed similar rulings. For example, in *Chapman v. Procter & Gamble Distributing, LLC*, in which plaintiff claimed

that her use of a denture adhesive caused her to develop a neurological disorder, the Eleventh Circuit affirmed summary judgment based on the exclusion of plaintiffs' causation experts. 766 F.3d at 1316-17. Plaintiffs "were *required* to have *Daubert*-qualified, general and specific-causation expert testimony that would be admissible at trial to avoid summary judgment." *Id.* at 1316; *see also*, *e.g.*, *Milward v. Rust-Oleum Corp.*, 2016 WL 1622620, at *5-6 (1st Cir. Apr. 25, 2016); *Nelson v. Matrixx Initiatives, Inc.*, 592 F. App'x 591, 592 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 76 (2016); *In re Aredia & Zometa Prods. Liab. Litig.*, 483 F. App'x 182, 191 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 576 (2012); *Guinn v. AstraZeneca Pharms. LP*, 602 F.3d 1245, 1257 (11th Cir. 2010) (per curiam); *In re Baycol Prods. Liab. Litig.*, 596 F.3d 884, 892 (8th Cir. 2010).

Consistent with these authorities, CMO 65 made clear that if, as Plaintiffs' lead counsel asserted, Plaintiffs lacked admissible expert testimony on specific causation under this Court's opinion in CMO 55, Plaintiffs' cases would be subject to "summary judgment on the issue of specific causation." CMO 65 at 1. In CMO 55, this Court identified a number of flaws in Dr. Murphy's specific causation methodology that rendered her opinion unreliable and inadmissible. The Court concluded:

> Dr. Murphy's opinion is based only on (1) her conclusion that Lipitor increases the risk of diabetes and (2) . . . the fact that Ms. Hempstead was diagnosed with diabetes after taking Lipitor. She failed to point to any evidence, other

> than a (belated) temporal relationship, that Lipitor contributed to the development of diabetes in Ms. Hempstead's case. She failed to offer any explanation as to why Ms. Hempstead's other risk factors for diabetes . . . , alone or in combination, are not solely responsible for Ms. Hempstead's diabetes.

CMO 55, 2015 WL 9165589, at *14; *accord* CMO 75, 2016 WL 2940782, at *1-2.

Under CMO 65, Plaintiffs had the opportunity to advise the Court that they disputed the position taken by Plaintiffs' lead counsel and that they would assert that their cases can survive summary judgment on specific causation even if the Court's ruling in CMO 55 is affirmed on appeal. The Court further made clear that it was prepared to set schedules for the disclosure of experts and for *Daubert* motions in such cases. No Plaintiff came forward purporting to distinguish her case from the Court's ruling on Dr. Murphy in CMO 55. As a result, Defendants are entitled to summary judgment in all cases.

CONCLUSION

For the foregoing reasons, this Court should grant Defendants' motion for summary judgment.

Dated: June 24, 2016

By: */s/ Mark S. Cheffo*
Mark S. Cheffo
Sheila L. Birnbaum
Bert L. Wolff
Rachel Passaretti-Wu
Mara Cusker Gonzalez
Quinn Emanuel Urquhart & Sullivan, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010-1601
Telephone: (212) 849-7000
Facsimile: (212) 849-7100
MarkCheffo@quinnemanuel.com
SheilaBirnbaum@quinnemanuel.com
BertWolff@quinnemanuel.com
RachelPassarettiWu@quinnemanuel.com
MaraCuskerGonzalez@quinnemanuel.com

Michael T. Cole
Nelson Mullins Riley & Scarborough LLP
151 Meeting Street/Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401
Telephone: (843) 853-5200
Facsimile: (843) 722-8700
mike.cole@nelsonmullins.com

David E. Dukes
J. Mark Jones
Amanda S. Kitts
Nelson Mullins Riley & Scarborough LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
Telephone: (803) 799-2000

Facsimile: (803) 256-7500
david.dukes@nelsonmullins.com
mark.jones@nelsonmullins.com
amanda.kitts@nelsonmullins.com

Attorneys for Defendants Pfizer Inc., Pfizer International LLC, and Greenstone LLC

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[*Certificate of Service Omitted in the Printing of this Appendix*]