No. ______

In the Supreme Court of the United States

RP HEALTHCARE, INC., *et al.*,
Petitioners,
v.

RANBAXY PHARMACEUTICALS INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court permit the Third Circuit's "proper basis" exception to the "time-of-filing" rule to substantially extend this Court's decision in *Caterpillar, Inc., v. Lewis*, 519 U.S. 61 (1996)?

2. Do *Caterpillar's* "considerations of finality, efficiency, and economy…." override removal defects when a judgment of dismissal is entered at an early, preliminary stage of the litigation rather than after trial?

3. May a party assert a new jurisdictional basis for removal that was not raised until more than one year after removal?

4. Is the legality of an agreement between a brand name drug company and a generic drug company to divide markets and stabilize prices, after the controlling patent of the brand name company expires, to be subject to this Court's decision in *F.T.C. v. Actavis*, 570 U.S. ___, 2013 WL 2922122 (2013), and therefore, a rule of reason analysis, as the district court and the Third Circuit held; or rather, is such an agreement subject to this Court's decision in *Palmer v. BRG of GA*, 498 U.S. 46 (1990), holding such agreements to be *per se* illegal?

5. Does the admitted agreement and the admission by the Chief Executive Officer and Chairman of the Board of the Defendant state a plausible claim under the antitrust laws of the State of California?

PARTIES TO THE PROCEEDINGS

Petitioners in this Court, Plaintiffs-Appellants below are: RP Healthcare, Inc., Chimes Pharmacy, Inc., James Clayworth, R.Ph., d/b/a Clayworth Pharmacy, Marin Apothecaries, Inc., d/b/a Ross Valley Pharmacy, Golden Gate Pharmacy Services, Inc., d/b/a Golden Gate Pharmacy, Pediatric Care Pharmacy, Inc., Meyers Pharmacy, Inc., Tony Mavrantonis R. Ph., d/b/a Jack's Drugs, Tilley Apothecaries Inc, d/b/a Zwebers Apothecary.

Respondents in this Court, Defendants-Appellees below, are: Pfizer, Inc., Pfizer Ireland Pharmaceuticals, Warner-Lambert Company, LLC, Warner-Lambert Export, Ltd., Ranbaxy Laboratories Limited, Ranbaxy Pharmaceuticals, Inc., Ranbaxy, Inc., Daiichi Sankyo, Ltd., and Daiichi Sankyo, Inc.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, no petitioner has a parent company and no publicly held company owns 10% or more of any petitioner's stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

RULE 29.6 CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES vi

REQUESTED RELIEF 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION . . . 10

I. THE THIRD CIRCUIT'S NEW "PROPER BASIS" EXCEPTION TO THE TIME-OF-FILING RULE CONFLICTS WITH THIS COURT'S DECISION IN *CATERPILLAR* . 11

II. THE THIRD CIRCUIT'S NEW "PROPER BASIS" APPROACH CONFLICTS WITH THE FIFTH, ELEVENTH, AND SEVENTH CIRCUITS 15

III. THERE IS A SPLIT AMONG THE CIRCUITS AS TO WHETHER A PARTY CAN ASSERT NEW JURISDICTIONAL GROUNDS WHICH WERE NOT INVOKED IN THE NOTICE OF REMOVAL 19

IV. PLAINTIFFS' ALLEGATIONS OF PRICE FIXING AND MARKET ALLOCATION ARE *PER SE* ILLEGAL BECAUSE THE ANTICOMPETITIVE ACTIVITY WAS ALLEGED TO HAVE OCCURRED BEYOND THE SCOPE (AFTER THE TERMINATION) OF THE PATENT 22

CONCLUSION 25

APPENDIX

Appendix A Opinion and Judgment in the United States Court of Appeals for the Third Circuit (January 3, 2018) . . . . App. 1

Appendix B Opinion and Order in the United States District Court for the District of New Jersey (September 29, 2017) . . . . App. 16

Appendix C Opinion and Order in the United States Court of Appeals for the Third Circuit (April 13, 2017) . . . . App. 37

Appendix D Order Amending Opinion in the United States Court of Appeals for the Third Circuit (April 19, 2017) . . . . App. 94

Appendix E Order in the United States District Court for the District of New Jersey (November 5, 2014) . . . . App. 100

Appendix F Memorandum in the United States District Court for the District of New Jersey (September 12, 2014) . . . . App. 103

Appendix G Order in the United States District Court for the District of New Jersey (February 6, 2014) . . . . App. 160

Appendix H Memorandum and Order in the United States District Court for the District of New Jersey (October 25, 2012) . . . . App. 162

Appendix I Order Denying Petition for Rehearing with Suggestion for Rehearing En Banc in the United States Court of Appeals for the Third Circuit (January 30, 2018) . . . . App. 166

TABLE OF AUTHORITIES

CASES

Araya v. JP Morgan Chase Bank., N.A.,
775 F.3d 409 (D.C. Cir. 2014) 20, 21

Buchner v. FDIC,
981 F.2d 816 (5th Cir. 1993) 21

Camsoft Data Systems, Inc., v. Southern Electronics Supply, Inc.,
756 F.3d 327 (5th Cir. 2014) 15, 16, 17, 18

Caterpillar, Inc., v. Lewis,
519 U.S. 61 (1996) . . . . *passim*

Christianson v. Colt Industries,
486 U.S. 800 (1988) 6

Ervast v. Flexible Products Co.,
346 F.3d 1007 (11th Cir. 2003) 20, 21

F.T.C. v. Actavis,
570 U.S. ___, 2013 WL 2922122 (2013) . . . . . . i, 5

GE Betz, Inc., v. Zee Co., Inc.,
718 F.3d 615 (7th Cir. 2013) 17, 18

Grupo Dataflux v. Atlas Global Group, L.P.,
541 U.S. 567 (2004) 11, 13, 14

Henok v. JPMorgan Chase,
106 F. Supp. 3d 1 (D.D.C. 2015) 20, 21

Huffman v. Saul Holdings, Ltd., Partnership,
194 F.3d 1072 (10th Cir. 1999) 18

Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach,
523 U.S. 26 (1998) 14

In re Lipitor Antitrust Litigation,
855 F.3d 126 (3d Cir. 2017) 4, 5, 8

In re Lipitor Antitrust Litigation,
____ Fed. Appx. ____, 2018 WL 266751
(3d Cir. January 3, 2018) . . . . *passim*

Loughlin v. United States,
393 F.3d 155 (D.C. Cir. 2004) 20

McAteer v. Silverleaf Resorts, Inc.,
514 F.3d 411 (5th Cir. 2008) 18

Mollan v. Torrance,
9 Wheat. 537 (1824) 11

Palmer v. BRG of GA,
498 U.S. 46 (1990) . . . . i, 24

Robinson v. Union Pac. R.R.,
245 F.3d 1188 (10th Cir. 2001) 19

Thermoset Corporation v. Building Materials Corp. of America,
849 F.3d 1313 (11th Cir. 2017) 18

Waste Control Specialists, L.L.C. v. Envirocare of Tex., Inc.,
199 F.3d 781 (5th Cir. 2000), opinion withdrawn and superseded in part, 207 F.3d 225 (5th Cir. 2000) 17, 18

Williams v. Costco Wholesale Corp.,
471 F.3d 975 (9th Cir. 2006) 21

Wood v. Crane Co.,
764 F.3d 316 (4th Cir. 2014) 21

STATUTES AND RULES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 4

28 U.S.C. § 1338(a) 4

28 U.S.C. § 1441 2

28 U.S.C. § 1441(a) 4

28 U.S.C. § 1441(b)(2) 17

28 U.S.C. § 1446 . . . . 2, 19

Fed. R. Civ. P. 12(b)(6) . . . . *passim*

Cartwright Antitrust Act, Cal. Bus. & Prof.
§ 16700, *et seq*. 4

OTHER AUTHORITIES

Jeannette Cox, *Removed Cases and Uninvoked Jurisdictional Grounds*, 86 N.C. L. REV. 937 (2008) 19

REQUESTED RELIEF

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The January 3, 2018, opinion of the Court of Appeals is unreported. (Appendix to Petition for Writ of Certiorari "App." 1-15). The April 13, 2017, opinion of the Court of Appeals is reported. (App. 37-99). The opinions of the district court (App. 16-36; App. 100-102; App. 103-159; App. 160-161; App. 162-165) are unreported.

JURISDICTION

The Court of Appeals rendered its decisions on April 13, 2017 (App. 37-99), and January 3, 2018. (App. 1-15). The court denied a timely Petition for Rehearing with a Suggestion for Rehearing *En Banc* on January 30, 2018. (App. 166-167). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Petitioners now file this Petition for Writ of Certiorari on April 30, 2018.

STATUTORY PROVISIONS INVOLVED

Removal statutes 28 U.S.C. § 1441 and 28 U.S.C. § 1446 are implicated by this Petition and are, in pertinent part, as follows:

28 U.S.C. § 1441—REMOVAL OF CIVIL ACTIONS

(a) GENERALLY.—

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1446 –PROCEDURE FOR REMOVAL OF CIVIL ACTIONS

(a) GENERALLY.—

> A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) REQUIREMENTS; GENERALLY.—

(1) The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

***

(3) Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) REQUIREMENTS; REMOVAL BASED ON DIVERSITY OF CITIZENSHIP.—

(1) A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement

> of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari ("Petition") arises out of a complaint filed on January 30, 2012, by nine retail pharmacists ("RP Healthcare" or "Petitioners" or "Plaintiffs") in the Superior Court of California, County of Sonoma, to recover damages they sustained by reason of having paid supra-competitive prices for the anti-cholesterol medication, Lipitor, and its generic equivalents, as a result of the illegal agreement between Defendants Pfizer and Ranbaxy to allocate territories and fix and stabilize the price of their brand name and generic anti-cholesterol medicines. Plaintiffs' complaint alleged that Defendants' agreement violated California state law, the Cartwright Antitrust Act, Cal. Bus. & Prof. § 16700, *et seq*. (R.P.A. 42-61).

On March 2, 2012, Pfizer removed Plaintiffs' complaint to federal district court, citing federal-question jurisdiction under 28 U.S.C. § 1331 and patent-law jurisdiction under § 1338(a). *RP Healthcare* J.A. 26-27; *see* 28 U.S.C. § 1441(a). *In re Lipitor Antitrust Litigation*, 855 F.3d 126, 148-149 (3d Cir. 2017). On March 15, 2012, and again after transfer by the JPML to the District of New Jersey, Plaintiffs promptly moved for remand on the grounds there was no federal question or issue of patent law raised by Plaintiffs' complaint sufficient to confer jurisdiction on the federal courts. (Dkt. No. 31 Case No. 12-cv-5129 and Dkt. No. 111, Case No. 12-cv-2389).

On October 25, 2012, the district court denied remand. In denying *RP Healthcare's* remand motion, the district court erroneously reasoned that "there may be patent issues raised as defenses in this case which would engender jurisdiction." *In re Lipitor Antitrust Litigation,* 855 F.3d at 148-149.

On May 8, 2013, after a settlement between RP Healthcare and Blue Shield, one California Defendant, Blue Shield of California, was dismissed from the case. (Dkt. No. 386).

On July 11, 2013, Plaintiffs again moved for remand following this Court's decision in *F.T.C. v. Actavis*, 570 U.S. ___, 2013 WL 2922122 (2013). (Dkt. No. 411).

For the first time, on July 22, 2013, <u>over one year after removal</u>, Defendants suggested diversity as grounds for jurisdiction in their brief in opposition to Plaintiffs' motion to remand. No amendment to the notice of removal was ever sought to add new jurisdictional grounds. (Dkt. No. 427 at p. 26-28).

On August 21, 2013, after a settlement between CVS and RP Healthcare, the last non-diverse Defendant, CVS, was dismissed. (Dkt. No. 449).

On February 6, 2014, Plaintiffs' second motion to remand was denied, "for the reasons set forth on the record." However, no reasons were ever set forth on the record by the lower court, which then informed the parties that, "Well, I'm still deliberating on the issues, so I'll render a decision as soon as I'm able." (J.A. at 66 and 3779:12-13).

On March 15, 2014, Plaintiffs promptly moved for a certificate of appealability to certify the following question for review: "Whether on the face of the RP Healthcare Plaintiffs' Complaint, which alleges violations of the California Cartwright Act, 'there are … reasons completely unrelated to the provisions and purposes of the [patent laws] why the [Plaintiffs] may be entitled to the relief it seeks.' *Christianson v. Colt Industries*, 486 U.S. 800, 810 (1988). If so, then the RP Healthcare Plaintiffs' Complaint does not raise a substantial question of patent law over which the federal court had subject matter jurisdiction at the time this case was removed from the California Superior Court." (Dkt. No. 539). The district court never decided this motion.

Instead, ultimately, on November 5, 2014, the district court dismissed Plaintiffs' complaint for violations of the California Cartwright Act under Fed. R. Civ. P. 12(b)(6) and judgment was entered. (J.A. 67-110 and J.A. 137-138).

On appeal to the Third Circuit, Plaintiffs filed a preliminary appellate motion for summary adjudication on the issue of remand for lack of subject matter jurisdiction. That motion was referred to the merits panel.

On April 13, 2017, in its first decision, the Third Circuit disagreed with the district court's ruling on Plaintiffs' motion for remand, ruling that:

> The *RP Healthcare* plaintiffs do not challenge the Pfizer–Ranbaxy settlement as an unlawful reverse payment. Rather, they allege that the settlement constitutes a *per se* unlawful market

allocation agreement in violation of California's Cartwright Act. Two years after *Actavis*, the California Supreme Court held that reverse-payment settlements can be challenged under that Act and are to be analyzed under a structured rule-of-reason. *In re Cipro Cases I & II*, 61 Cal.4th 116, 187 Cal.Rptr.3d 632, 348 P.3d 845 (2015). <u>But the California court has yet to recognize the kind of *per se* market allocation claim proposed by the *RP Healthcare* plaintiffs</u>.

To the extent their claim exists under California law (a question we do not decide), as pled by the *RP Healthcare* plaintiffs that claim would not "arise under" federal patent law…

While the District Court did not possess jurisdiction over the *RP Healthcare* case under § 1338(a), the possibility exists that the court had diversity jurisdiction by the time it entered final judgment…In calling for diversity jurisdiction Pfizer and Ranbaxy made no effort before this Court or the District Court to demonstrate that complete diversity was in fact present before final judgment. That is especially puzzling, since an unincorporated association "is in the best position to ascertain its own membership," *Lincoln Benefit Life Co. v. AEI Life, LLC*, 800 F.3d 99, 108 (3d Cir. 2015), and the entities in question are Pfizer subsidiaries…We therefore consider it premature to direct that the *RP Healthcare* case be sent back to California state court. Rather, we will remand the matter to the District Court to give the parties the opportunity to clarify the

> record with regard to diversity of citizenship. The District Court should also ensure that the amount in controversy alleged in the *RP Healthcare* plaintiffs' state-court complaint exceeds $75,000. *See* 28 U.S.C. § 1332(a); *Angus v. Shiley*, 989 F.2d 142, 145–46 (3d Cir. 1993).

In re Lipitor Antitrust Litigation, 855 F.3d at 150-151. [emphasis added].

On limited remand, the district court decided there was diversity jurisdiction when it entered judgment dismissing RP Healthcare's complaint under Rule 12(b)(6).[1] (Dkt. No. 108 and 109, Case No. 12-cv-5129).

Then, after the case returned to the Third Circuit, the court ruled on the merits of the jurisdictional issue as follows:

> Back in the District Court, the parties stipulated that at the time of final judgment all of the Plaintiffs were citizens of California and none of the Defendants were citizens of California. Complete diversity being established, the District Court held that it had jurisdiction under 28 U.S.C. § 1332. We agree. As discussed in *Lipitor III*, a District Court may exercise jurisdiction if, at the time of final judgment, there is a proper basis. This is the case even if, at an earlier point in the proceedings, there was no basis for federal jurisdiction. RP Healthcare's

[1] In this decision, the district court repeatedly referred to judgment being entered in this case on September 12, 2014. But that is erroneous. This case was dismissed on November 5, 2014. (J.A. at 137-138).

> original remand motion should have been granted for lack of jurisdiction, but, by the time of final judgment, there was complete diversity between the parties. Therefore, the District Court's jurisdiction was ultimately proper, notwithstanding the prior erroneous decision.

In re Lipitor Antitrust Litigation, ____ Fed. Appx. ____, 2018 WL 266751, at *2 (3d Cir. January 3, 2018).

In addition, after determining that it had jurisdiction to hear the case, the Third Circuit also affirmed the lower court's dismissal under Rule 12(b)(6), and in doing so, ruled on a previously undecided issue of <u>*California*</u> antitrust law:

> The District Court previously dismissed the RP Healthcare complaint under Rule 12(b)(6) for the same reason it dismissed those of the other Plaintiffs: its failure to calculate the reasonable value of the alleged "reverse payment" between Pfizer and Ranbaxy. As to those other Plaintiffs, we reversed this dismissal in *Lipitor IV*, concluding that in reverse settlement cases "[t]he Supreme Court did not require the advanced valuations ... required by the District Court." <u>Throughout this litigation, however, RP Healthcare has been at pains to stress that it is alleging a per se antitrust violation, not a reverse settlement claim</u> under *FTC v. Actavis*, so the same reasoning ought not to apply. We agree, and this distinction is fatal to its claim. Under California antitrust law, a reverse settlement may not be attacked on a per se basis, so the District Court's dismissal was proper.

In re Lipitor Antitrust Litigation, --- Fed. Appx. ----2018 WL 266751, at *2-3. [emphasis added].

Plaintiffs now seek review of these decisions by the Third Circuit Court of Appeals.

REASONS FOR GRANTING THE PETITION

RP Healthcare's Petition for Writ of Certiorari should be granted because the Third Circuit's decision in this case: (1) expanded the limited exception to the time-of-filing rule for removal of cases in conflict with the precedent of this Court in *Caterpillar*, 519 U.S. 61; (2) creates a split with other Circuits' interpretation of *Caterpillar*; (3) conflicts with other Circuits as to whether jurisdictional grounds not invoked or alleged in a notice of removal can be raised, for the first time, more than one year after removal; (4) creates a split among the Circuits as to whether "considerations of finality, efficiency, and economy…." applicable to judgments entered after trial supersede removal defects when a case is dismissed under Rule 12(b)(6); and (5) undermines important public policy interests favoring certainty regarding diversity jurisdiction in removed cases and minimizing litigation over jurisdiction. In addition, the Third Circuit's ruling on the 12(b)(6) motion should be reversed because it conflicts with fundamental and longstanding California precedent regarding price fixing and market allocation.

I. THE THIRD CIRCUIT'S NEW "PROPER BASIS" EXCEPTION TO THE TIME-OF-FILING RULE CONFLICTS WITH THIS COURT'S DECISION IN *CATERPILLAR*

This Petition presents the Court with an opportunity to decide whether the limited exception to the time-of-filing rule in *Caterpillar* should be expanded to adopt the new "proper basis" approach used by the Third Circuit in this case. Petitioners respectfully submit that this Court should decline the invitation to broaden the exception and leave time-honored removal procedures intact.

This Court has long recognized that "jurisdiction of the court depends upon the state of things at the time of the action brought." *Mollan v. Torrance*, 9 Wheat. 537 539 (1824). The time-of-filing rule, as it is known, "measures all challenges to subject-matter jurisdiction premised upon diversity of citizenship against the state of facts that existed at the time of filing—whether the challenge be brought shortly after filing, after trial, or even for the first time on appeal…" *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570-571 (2004). This Court has "adhered to the time-of-filing rule regardless of the costs it imposes." *Id*.

Caterpillar recognized a very limited exception to the time-of-filing rule in in diversity cases. In *Caterpillar*, the district court erroneously denied the plaintiff's motion to remand the case back to state court, and the case remained in federal court through the trial. *Caterpillar*, 519 U.S. at 65-67 and 70. The plaintiff correctly argued that the parties lacked complete diversity at the time-of-filing. However, before trial, the plaintiffs settled with the diversitydestroying defendant. *Id*. at 66-67. The case proceeded to trial and judgment was entered for the defendant. *Id*. Plaintiff appealed on the ground the court lacked subject matter jurisdiction when judgment was entered because there was not complete diversity at the "time-of-filing" for removal. *Id*. at 67. This Court disagreed, reasoning that after a trial on the merits, "considerations of finality, efficiency, and economy [were] overwhelming," once the jurisdictional defect had been cured. *Id*. at 74-76.

The Third Circuit in this case construed the exception to the time-of-filing rule in *Caterpillar* as follows: "As discussed in *Lipitor III*, a District Court may exercise jurisdiction if, at the time of final judgment, there is a proper basis. This is the case even if, at an earlier point in the proceedings, there was no basis for federal jurisdiction." *In re Lipitor Antitrust Litigation*, ___ Fed. Appx. ___, 2018 WL 266751, at *1. [emphasis added]. Under the Third Circuit's new "proper basis" approach, a federal district court, in its discretion, may exercise jurisdiction, without regard to the initial jurisdictional grounds for removal, without regard to the impropriety of the removal, without regard to any existing statutory defects, and without regard to "considerations of finality, efficiency, and economy…" if at a minimum, any "proper basis" for exercising federal jurisdiction exists when judgment is entered. This approach is not sanctioned by *Caterpillar*. The Third Circuit discarded the core analysis and rationale that led this Court to *Caterpillar's* ultimate holding and raced to an erroneous conclusion.

The error in the Third Circuit's approach is evident from this Court's analysis in *Grupo Dataflux*. This Court explained in *Grupo Dataflux* that, "*Caterpillar* broke no new ground, because the jurisdictional defect it addressed had been cured by the dismissal of the party that had destroyed diversity. That method of curing a jurisdictional defect has long been an exception to the time-of-filing rule. '[T]he question always is, or should be, when objection is taken to the jurisdiction of the court by reason of the citizenship of some of the parties, whether…they are indispensable parties, for if their interests are severable and a decree without prejudice to their rights may be made, the jurisdiction of the court should be retained and the suit dismissed as to them.'" *Grupo Dataflux*, 541 U.S. at 572-573. Affirming its commitment to the time-of-filing rule in *Grupo Dataflux*, this Court concluded:

> We decline to endorse a new exception to a time-of-filing rule that has a pedigree of almost two centuries. Uncertainty regarding the question of jurisdiction is particularly undesirable, and collateral litigation on the point particularly wasteful. The stability provided by our time-tested rule weighs heavily against the approval of any new deviation.

Id. at 582.

The negative impact undermining *Caterpillar* by the Third Circuit's new "proper basis" approach is established by the facts in this Petition. As explained in *Grupo Dataflux*, the unremarkable application of the longstanding exception in *Caterpillar* applies when "objection is taken to the jurisdiction of the court by reason of the citizenship of the parties." *Grupo*

Dataflux, 541 U.S. at 572-573. Here, the defendants removed on the supposed basis of federal question and patent-law jurisdiction, not diversity. And that known removal defect was never cured. There was not federal question or patent-law jurisdiction at removal nor at the entry of judgment. The objection to the jurisdiction of the court was based upon the erroneous grounds in the notice of removal—federal question and patent-law jurisdiction—not "by reason of the citizenship of the parties." Stated another way, there was never a removal filing by defendants based upon diversity jurisdiction to which the time-of-filing rule exception in *Caterpillar* could be applied. The Third Circuit's decision impermissibly broadens and conflicts with *Caterpillar* by applying an exception to the "time-of-filing" rule, without the prerequisite of a "filing."

Interpreting *Caterpillar* in order to limit the exception to the time-of-filing rule to the jurisdictional grounds raised by the defendant at the time-of-filing the notice of removal is consistent with this Court's decision in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). In that case, this Court explained that in *Caterpillar*, "there was no continuing defiance of the congressional condition in *Caterpillar*, but merely an untimely compliance. It was on this understanding that we held that considerations of 'finality, efficiency and economy' trumped the error, *id.*, at 75, 117 S.Ct., at 476. After *Caterpillar*, therefore, since removal is permissible only where original jurisdiction exists at the time of removal or at the time of entry of final judgment, the condition contained in the removal statute retains significance." *Id*. at 43. Here, there never was federal question or patent law jurisdiction either at the time of removal or upon the entry of final judgment. The original defect that existed at removal was never cured. For this reason, "considerations of finality, efficiency, and economy" could not "trump the error."

The respondent in *Caterpillar* warned this Court that if the final judgment against him was permitted to stand, "all of the various procedural requirements for removal will become unenforceable." *Caterpillar*, 519 U.S. at 77. This Court dismissed those concerns, positing that the likely outcome for any defendant seeking premature removal would be a "swift and nonreviewable remand order." *Id*. The Third Circuit's new approach, which eschews any and all removal defects if there is any "proper basis" for the federal court to exercise jurisdiction when judgment is entered, shows that the *Caterpillar* respondent's fears were both justified and now realized.

II. THE THIRD CIRCUIT'S NEW "PROPER BASIS" APPROACH CONFLICTS WITH THE FIFTH, ELEVENTH, AND SEVENTH CIRCUITS

The Third Circuit's new "proper basis" exception to the time-of-filing rule conflicts with the Fifth Circuit's interpretation of *Caterpillar*. In *Camsoft Data Systems, Inc., v. Southern Electronics Supply, Inc*., 756 F.3d 327, 337 (5th Cir. 2014), the Fifth Circuit interpreted *Caterpillar* to require "three considerations" before application of the exception:

> First, whether a meritorious removal challenge has been preserved; second, whether a post-removal development cured the defect that existed at removal; and third, whether the case

was tried on the merits such that finality and economy preclude remand.

The *Camsoft* case was removed on federal question jurisdiction grounds. 756 F.3d at 321. The plaintiffs preserved their removal objections by moving to remand. *Id*. But after their motion for remand was denied, the plaintiffs amended the complaint to allege new federal antitrust and racketeering claims. *Id*. The case moved forward, and the district court ultimately dismissed the case under Fed. R. Civ. P. 12(b)(6). *Id*. The court determined that removal jurisdiction was lacking because inventorship served as the only possible basis for removal and the complaint did not allege that a patent had issued. *Id*. at 334. The Fifth Circuit remanded the case to state court because there had not been a "trial on the merits." *Id*. at 337-338.

The differences between the Third Circuit's approach and the Fifth Circuit's are substantial. Under Fifth Circuit precedent, three factors must be met before the exception to the time-of-filing rule is applied. The first is that a meritorious removal challenge must be preserved. The Third Circuit's "proper basis" exception controls whether or not a meritorious removal challenge has been preserved. The second prong of the Fifth Circuit's approach requires "a post-removal development to cure the defect that existed at removal." By contrast, the Third Circuit's approach does not require analysis of the defect that existed *at removal* nor does it require that the defect be cured. If a federal court has any "proper basis" to exercise jurisdiction any time a judgment is entered, it "may" do so.

Indisputably, applying the Fifth Circuit's interpretation of *Caterpillar* would have ended in the swift remand of this case to state court. Plaintiffs' three motions for remand and their undecided motion for a certificate of appealability preserved their challenge to the improper removal. The second prong -- whether a post-removal development cured the defect that existed at removal -- was not satisfied. This is so because the defect that existed at the time-of-filing (the absence of both patent-law and federal question jurisdiction) was never cured. The last prong -- whether the case was "tried on the merits," -- also favors Petitioners because a Rule 12(b)(6) dismissal is not the "functional equivalent of a trial on the merits." *Camsoft*, 756 F.3d at 338-339, citing *Waste Control Specialists, L.L.C. v. Envirocare of Tex., Inc.*, 199 F.3d 781 (5th Cir. 2000), opinion withdrawn and superseded in part, 207 F.3d 225 (5th Cir. 2000) (superseding allocation of attorney's fees). Instead, what followed from the Third Circuit's newly minted "proper basis" approach, was to assume jurisdiction and proceed to decide a novel, previously undecided issue of state antitrust law under California's Cartwright Act.

The Third Circuit's interpretation of *Caterpillar* also conflicts with the Seventh Circuit. In *GE Betz, Inc., v. Zee Co., Inc.*, 718 F.3d 615, 632-633 (7th Cir. 2013), the case was sufficiently removable on diversity jurisdiction grounds but the removal violated the statutory forum-defendant rule in 28 U.S.C. § 1441(b)(2). The plaintiffs in *GE Betz* preserved their removal objections. *Id.* The case was later dismissed and judgment entered in favor of the defendants. *Id*. at 632. On appeal, the defendants in *GE Betz* urged the court to hold that, "considerations of finality, efficiency, and economy…" overwhelmed the district court's incorrect decision on the motion to remand. *Id*. at 632-633. The Seventh Circuit rejected the defendants' reliance on *Caterpillar*, holding that, "Zee and BMO Harris (the defendants) ask us to extend the holding of *Caterpillar* to find that a federal court may overlook a statutory defect at the time of removal that has *not* been subsequently cured. We decline to make such an extension in the case at hand." *Id*. at 633.

The Circuits are also split as to whether "considerations of finality, efficiency, and economy" trump removal defects if a case is dismissed at the Rule 12(b)(6) stage of proceedings. The Third and Tenth Circuits are in agreement. *Huffman v. Saul Holdings, Ltd., Partnership*, 194 F.3d 1072, 1980 (10th Cir. 1999) (holding that "a defect in removal procedure does not warrant a remand to state court if subject matter jurisdiction existed at the time the district court entered judgment…whether judgment is based on the outcome of a trial or a district court's ruling on a dispositive motion.")

As noted above, the Fifth Circuit's approach conflicts with the Third Circuit's, ruling that *Caterpillar's* reach, "'stops short of a Rule 12(b)(6) dismissal.'" *Camsoft Data Systems,* 756 F.3d at 338, quoting *Waste Control Specialists*, 199 F.3d at 786; *see also McAteer v. Silverleaf Resorts, Inc*., 514 F.3d 411, 416 (5th Cir. 2008).

The Third Circuit's approach also conflicts with the Eleventh Circuit's. In *Thermoset Corporation v. Building Materials Corp. of America*, 849 F.3d 1313, 1320 (11th Cir. 2017), the Eleventh Circuit remanded a case which had been erroneously removed on diversity grounds after summary judgment on the basis that, "unlike in *Caterpillar*, this case has not yet gone to trial, so 'considerations of finality, efficiency, and economy' are not yet 'overwhelming.'"

This Court should grant review to reconcile the split among the Circuits in interpreting this Court's ruling in *Caterpillar*.

III. THERE IS A SPLIT AMONG THE CIRCUITS AS TO WHETHER A PARTY CAN ASSERT NEW JURISDICTIONAL GROUNDS WHICH WERE NOT INVOKED IN THE NOTICE OF REMOVAL

Federal courts are "courts of limited jurisdiction," that must "presume no jurisdiction exists absent an adequate showing by the party invoking federal jurisdiction." *Robinson v. Union Pac. R.R.*, 245 F.3d 1188, 1191 (10th Cir. 2001). The Third Circuit's decision not only turns that principle on its head, but it illustrates a split among the Circuits as to whether grounds for jurisdiction which were not in invoked in the notice of removal can be switched later in the proceedings in order to avoid remand. The Third Circuit's decision permits removing parties to trigger new grounds for jurisdiction well beyond the 30-day limit in 28 U.S.C. § 1446. Typically, "the mere fact that a case falls within a congressional grant of federal subject matter jurisdiction does not give a federal court authority to hear a case; a party must also affirmatively invoke the applicable ground or grounds of congressionally authorized jurisdiction." Jeannette Cox, *Removed Cases and Uninvoked Jurisdictional Grounds*, 86 N.C. L. REV. 937, 953-57 (2008). Jurisdiction must be pleaded by the party claiming it.

Loughlin v. United States, 393 F.3d 155, 172 (D.C. Cir. 2004); *see Ervast v. Flexible Products Co.*, 346 F.3d 1007, 1012, n.4 (11th Cir. 2003) (court did not exercise diversity jurisdiction because the removing party "had the burden to plead the basis in its notice of removal, and it did not.") Here, subject matter jurisdiction was never properly invoked.

This Circuit split was explained by the court in *Henok v. JPMorgan Chase*, 106 F. Supp. 3d 1 (D.D.C. 2015). The *Henok* case was removed on federal question grounds because Fannie Mae was named as a defendant. *Id*. at 3. Once Fannie Mae was dismissed from the case, "the basis of federal question jurisdiction had vanished." *Araya v. JP Morgan Chase Bank., N.A.*, 775 F.3d 409, 416 (D.C. Cir. 2014). The DC Circuit concluded that the district court in a related case had abused its discretion by retaining jurisdiction over those claims because they implicated "novel issues of state law." *Id.* at 417. The defendants in *Henok*, using *Caterpillar* as their justification, urged the court to keep the case in federal court because diversity jurisdiction existed, even though diversity jurisdiction was not alleged in the notice of removal. *Id*. at 5. The *Henok* court rejected defendants' argument, noting that, "This Court is aware of no authority in which the exception applied in *Caterpillar* has been understood to allow a case initiated or removed on federal question grounds to remain in federal court on diversity grounds after the basis for federal question jurisdiction disappears but diversity emerges." *Id.* at 6. The *Henok* court continued: "<u>Indeed, to so hold would be inconsistent with the D.C. Circuit's decision in Araya's third case, where diversity plainly existed after Dorothy Ihuoma and Fannie Mae had been</u>

<u>dismissed…the court of appeals declined to even address whether diversity could support the Court's continued exercise of jurisdiction over the case</u>." *Id*. [emphasis added].

But even more fundamentally, the Third Circuit's decision deepens the split among the Circuits as to whether a removing party can switch jurisdictional bases not invoked in the notice of removal. The Circuits that permit the practice are the Ninth Circuit, *Williams v. Costco Wholesale Corp*., 471 F.3d 975, 976, 977 (9th Cir. 2006) (per curiam); the Fifth Circuit, *Buchner v. FDIC*, 981 F.2d 816, 821 (5th Cir. 1993); and now, the Third Circuit here, *In re Lipitor Antitrust Litigation*, ___ Fed. Appx. ___, 2018 WL 266751. The Circuits prohibiting the practice are the Eleventh Circuit in *Ervast,* 346 F.3d at 1012, n.4; the Fourth Circuit, *Wood v. Crane Co*., 764 F.3d 316, 326 (4th Cir. 2014); and the D.C. Circuit, in *Araya*, 775 F.3d at 417-419.

Permitting parties and federal courts to exercise jurisdiction at any time on the basis of previously uninvoked and unpled subject matter jurisdiction, as the Ninth, Fifth, (and now) Third Circuits do, creates uncertainty for litigants and the trial courts concerning proper removal procedures and the invocation of federal subject matter jurisdiction, and, contrary to public policy, invites <u>more</u> litigation, delay, cost and the unnecessary expenditure of judicial resources over threshold jurisdictional issues. Review should be granted to resolve this conflict and to advance important public policy interests.

IV. PLAINTIFFS' ALLEGATIONS OF PRICE FIXING AND MARKET ALLOCATION ARE *PER SE* ILLEGAL BECAUSE THE ANTICOMPETITIVE ACTIVITY WAS ALLEGED TO HAVE OCCURRED BEYOND THE SCOPE (AFTER THE TERMINATION) OF THE PATENT

Pfizer is the largest pharmaceutical company in the world. (Dkt. No. 262, ¶ 1). It is the largest bio-pharmaceutical company in the four global markets, the United States, the European Union, Japan, and Latin America. *Id.* While under patent protection, Pfizer's Lipitor was the highest selling drug of all time, with approximately 16 million Americans taking the anti-cholesterol medication daily. (Dkt. No. 262, ¶¶ 5, 8). Lipitor is the best-selling drug in the history of the pharmaceutical industry. *Id*. Lipitor sales under Pfizer's regime were and are over $13 billion per year worldwide, more than $1 billion per month. (*Id.* at ¶ 6).

The expiration of the Lipitor patents in June of 2011 and the generics' entry into the market threatened to impact 30% of Pfizer's business and substantially decrease Pfizer's revenue. (Dkt. No. 262, ¶ 18).

Facing such a dramatic reduction in future revenue with the loss of the exclusivity of Lipitor, Pfizer entered into a written agreement with Ranbaxy to eliminate competition from generic versions of Lipitor in the United States and the California markets after its patents had expired. (Dkt. No. 262, ¶ 19).

The fundamental terms of this agreement were that Ranbaxy would not enter the United States market with its Lipitor generic until November 2011 which would provide Lipitor with approximately six months of exclusivity as a generic to Lipitor. Ranbaxy agreed with Pfizer that it would price the generic at or slightly lower than the price charged by Pfizer for Lipitor, so that Pfizer did not have to substantially lower its price for Lipitor. In return for Ranbaxy's agreement not to introduce, sell or distribute its generic in the United States and California markets, Pfizer authorized Ranbaxy to sell generic Lipitor in seven other countries -- Australia, Canada, Belgium, Germany, Italy, the Netherlands and Sweden before the Lipitor-related patents' expiration. Pfizer also agreed to drop its challenge to Ranbaxy's current sale of a generic Lipitor in Brunei, Malaysia, Peru and Vietnam. (Dkt. No. 262, ¶¶ 20, 21, 22, 23).

Pfizer's operative '995 patent that covered its formulation of the Lipitor molecule expired on June 28, 2011. The written agreement between Pfizer and Ranbaxy is an agreement to divide markets in that Ranbaxy agreed that it would not sell its generic in the United States and California markets until November 2011 in exchange for being able to sell in other countries. (Dkt. No. 262, ¶¶ 66, 75, 86).

The agreement is also an agreement to fix prices in that Pfizer would be able to charge 1200% or 12 times more for Lipitor than it otherwise would be able to charge in the absence of the unlawful arrangement. (Dkt. No. 262, ¶ 93).

The FAC alleged that the Defendants' agreement to divide markets and customers was *per se* unlawful under the California's Cartwright Act because it occurred after the termination of Pfizer's applicable patent. (Dkt. No. 262, ¶¶ 66, 75, 85, 86, 101, 109, 112); and *see Palmer v. BRG of GA*, 498 U.S. 46 (1990). Plaintiffs' Complaint alleged that the agreement did not take effect until the main Lipitor patent had expired, as admitted by the-then Pfizer CEO:

> There are dozens of generic drug manufacturing companies with a red circle around June 28, 2011. That's the day the patent for our anti-cholesterol medication Lipitor expires.
>
> Pfizer can expect in the following year to lose 90% of revenue from that drug as the market switches [to] generic versions.

(Dkt. No. 262, ¶¶ 71, 73). The Third Circuit, nevertheless, affirming dismissal under Fed. R. Civ. P. 12(b)(6), construed Plaintiffs' claims, instead, as a "reverse patent settlement" agreement, and announced that, "Under California antitrust law, a reverse settlement may not be attacked on a *per se* basis, so the District Court's dismissal was proper." *In re Lipitor Antitrust Litigation*, ____ Fed. Appx. ____, 2018 WL 266751, at *2. Since the agreement to fix prices, allocate customers, and divide markets was alleged in the complaint to have occurred after the expiration of the operative Lipitor patent, there is no basis for the Third Circuit to conclude that the anticompetitive conduct is to be measured by the broader rule of reason analysis.

CONCLUSION

The Third Circuit's "proper basis" approach illustrates the confusion that now surrounds the application of *Caterpillar's* time-of-filing exception and the resulting uncertainty affecting the exercise of federal court jurisdiction caused by removal defects. In addition, the Third Circuit's decision distorts the application of California law for anticompetitive conduct that occurs outside the four corners of a patentee's reverse settlement agreement.

Accordingly, and in light of the foregoing, Petitioners respectfully request that this Court grant this Petition for a Writ of Certiorari and settle this important issue which has now devolved into a fundamental split among the Circuits and injected uncertainty into the proper exercise of subject matter jurisdiction among the lower courts to which cases are removed, and, in addition, review the Third Circuit's decision regarding the applicability of a rule of reason analysis in the context of anticompetitive conduct taking place outside the scope of the patent.

Respectfully submitted,

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