No. 17-___

IN THE

Supreme Court of the United States

MICHAEL NORDYKE,

Petitioner,

v.

HOWMEDICA OSTEONICS CORP,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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January 8, 2017

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QUESTION PRESENTED

1. Whether this Court's decision in *Atlantic Marine Construction Corp. v. United States District Court*, 134 S. Ct. 568 (2013), supplants the traditional transfer of venue analysis under 28 U.S.C. § 1404(a) where some, but not all, parties to a litigation have agreed to a forum-selection contract.

PARTIES TO THE PROCEEDINGS

1. Michael Nordyke, petitioner on review, was a defendant-appellee below.

2. Howmedica Osteonics Corp., respondent on review, was plaintiff-appellant below.

3. Other parties to this action, but not to this petition, are Brett Sarkasian, Keegan Freeman, Taylor Smith, Bryan Wyatt, DePuy Orthopaedics, Inc., and Golden State Orthopaedics, Inc., all of whom were defendants-appellees below.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Michael Nordyke is an individual who is not subject to the corporate disclosure requirements of S. Ct. Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Michael Nordyke respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Third Circuit's decision is reported at 867 F.3d 390 (3d Cir. 2017). The District Court's decisions granting the defendants' motions to transfer venue are not published in the *Federal Supplement*, but are available at 2015 U.S. Dist. LEXIS 51420 (D.N.J. Apr.

20, 2015) and 2016 U.S. Dist. LEXIS 114644 (D.N.J. Aug. 26, 2016).[1]

JURISDICTION

The Third Circuit entered its judgment on August 15, 2017. Nordyke and co-defendant DePuy Orthopaedics, Inc. timely petitioned for panel and en banc rehearing on August 29, 2017; the Third Circuit denied those petitions on October 10, 2017. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the foundational requirements of Federal Rule of Civil Procedure 1, and the federal statute regarding changes of venue, 28 U.S.C. 1404(a).

Fed. R. Civ. P. 1 states, in relevant part, that the federal rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

28 U.S.C. § 1404(a) provides:

> For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.

See 28 U.S.C. § 1404(a).

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[1] Because a motion to transfer venue is non-dispositive, the District Court assigned the motion to a Magistrate Judge. The Magistrate Judge granted transfer and the District Judge affirmed through a separate opinion following plaintiff-respondent Howmedica's Fed. R. Civ. P. 72(a) objections to the Magistrate Judge's decision.

STATEMENT OF THE CASE

This case presents an important issue regarding transfer and forum selection that has confounded the federal courts following this Court's decision in *Atlantic Marine Construction Co. v. District Court*, 134 S. Ct. 568 (2013). It is well-recognized that courts faced with a motion to transfer venue under 28 U.S.C. § 1404(a) must apply a balancing test that "evaluate[s] both the convenience of the parties and various public-interest considerations" to determine whether transfer is appropriate. *Atlantic Marine*, 134 S. Ct. at 581. *See also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981). In *Atlantic Marine*, this Court held that where all parties "have contracted in advance to litigate disputes in a particular forum," the contract supplants the traditional § 1404(a) analysis because "courts should not unnecessarily disrupt the parties' settled expectations." *Atlantic Marine*, 134 S. Ct. at 583. If all parties have agreed to litigate in one forum, "a district court may consider arguments about public-interest factors only" in deciding a motion to transfer venue to a different forum. *Id.* at 582.

The question presented here arises in a different context where *some*, but not *all*, parties to a multi-party litigation have contracted to litigate in a specific forum. It asks whether *Atlantic Marine* also supplants the traditional § 1404(a) analysis under this scenario, where the plaintiff has voluntarily chosen to not only sue defendants with forum selection contracts, but to *also* sue defendants without forum selection contracts.

In the four years since this Court decided *Atlantic Marine*, the federal courts have become sharply divided on this important and recurring question. Two federal courts of appeals (the Third and Fifth Circuits) have adopted different and inconsistent tests to deter-

mine the proper forum, or forums, for such an action. The federal district courts have considered this issue in hundreds of cases and are themselves divided – some courts have held that *Atlantic Marine* does not apply and have followed the traditional § 1404(a) analysis, other courts have extended *Atlantic Marine* to the non-contracting parties, and still other courts have developed separate tests in an effort to balance both *Atlantic Marine* and the traditional § 1404(a) analysis. Thus, the outcome of a motion to transfer venue in a case with multiple defendants that have and have not agreed to forum selection contracts will depend on the Circuit and District where the litigation was originally filed. This split in authority renders the outcome of motions to transfer venue, and the ultimate forum for such a litigation, unpredictable, to the detriment of both plaintiffs and defendants.

The question presented has been considered by numerous federal courts, and those courts are deeply divided. This Court's intervention is needed to both resolve the split in authority and to correct the Third Circuit's clear misapplication of *Atlantic Marine* and § 1404(a) to parties to this case. The petition should be granted.

STATEMENT

1. This litigation arises from a claim by plaintiff-respondent Howmedica Osteonics Corporation (Howmedica) that five former employees (the Individual defendants) breached restrictive covenants in their employment agreements by allegedly soliciting customers for the benefit of two competitors, Golden State Orthopaedics, Inc. (Golden State) and DePuy Orthopaedics, Inc. (DePuy). C.A. App. 49-51. The Individual defendants are all residents of California who worked in California at all times during their

employment with Howmedica. *Id*. at 157-58; 180-81; 203-04; 233-35.

The employment agreements executed by the Individual defendants contain differing forum selection provisions. Petitioner Michael Nordyke's agreement designates Michigan as the exclusive forum for all disputes between Howmedica and Nordyke. Pet. App. 81a. The agreements signed by the other Individual defendants – Brett Sarkasian, Keegan Freeman, Taylor Smith, and Bryan Wyatt – designate New Jersey as the exclusive forum. *Id.* at C.A. App. 83; 95; 108; 115. The forum selection provision in each agreement was mandatory and could not be unilaterally waived by Howmedica or an Individual defendant. *Id.*

Co-defendant Golden State is a California corporation. C.A. App. 52. Co-defendant DePuy is an Indiana corporation. *Id*. Neither Golden State nor DePuy entered into any forum selection contract with Howmedica.

2. Howmedica initiated this litigation on May 30, 2014 and filed an amended complaint on October 16, 2014. C.A. App. 48-71. The amended complaint alleges claims against the Individual defendants for breach of contract, breach of fiduciary duty, and unfair competition. *Id.* at 62-64; 68-69. The amended complaint also alleges claims against Golden State and DePuy for aiding and abetting breach of fiduciary duty, tortious interference with contract, tortious interference with prospective economic advantage, unfair competition, and corporate raiding. *Id.* at 64-70. The claims against the Individual defendants, Golden State, and DePuy all arise from the same common facts – the Individual defendants' resignation from employment with Howmedica, acceptance of employment with Golden State (a competitor in the

medical device industry), and alleged solicitation of customers for Golden State and DePuy (another competitor to Howmedica).

3. The Individual defendants, Golden State, and DePuy each moved to dismiss the amended complaint and, in the alternative, sought to transfer the litigation to the Northern District of California pursuant to 28 U.S.C. § 1404(a). C.A. App. 42. The District Court granted the motions to transfer. Pet. App. 34-35a. The District Court recognized that *Atlantic Marine* "did not . . . address the effect of conflicting, valid forum-selection clauses in separate contracts between the parties" and "did not consider a situation where some parties entered into forum-selection agreements while others did not." Because the District Court found that transfer was appropriate under both *Atlantic Marine* and the traditional § 1404(a) balancing test, the District Court did not address whether *Atlantic Marine* altered the traditional change of venue analysis. *Id.* at 40a.

Under *Atlantic Marine*, the District Court found that public interests strongly supported transferring the entire litigation to the Northern District of California notwithstanding the Individual defendants' forum-selection contracts. *Id.* at 43a. The District Court explained that transfer advanced "the public interest in promoting judicial economy" by avoiding "wasteful parallel litigation." *Id.* at 42a. The District Court explained further that transfer also furthered the public interest in enforceability of judgements and convenience to parties and witnesses. *Id.* at 41-42a.

Under the traditional § 1404(a) analysis, the District Court found that private interest factors also weighed in favor of transfer to California. *Id.* at 43a. With respect to these factors, the District Court

explained that the Individual defendants worked for Howmedica in California, the claims brought by Howmedica arose entirely from actions allegedly performed by all of the defendants in California, and the likely non-party witnesses were located primarily in California. *Id.* at 45-46a.

The District Court transferred the case from New Jersey to the Northern District of California on September 2, 2016. C.A. App. 47.

4. On September 26, 2016 – nearly three weeks after the case was transferred – Howmedica petitioned the Third Circuit for a writ of mandamus. The Third Circuit granted the writ, vacated the transfer order, and ordered the District Court to sever Howmedica's claims against Golden State and DePuy and transfer only those claims to the Northern District of California. Pet. App. 33a. The Third Circuit further ordered the District Court to reassume jurisdiction over Howmedica's claims against Nordyke and the other Individual defendants. *Id.*

The Third Circuit recognized that *Atlantic Marine* did not address the "quandary" presented "where non-contracting parties are present" and "there are other complications such as competing forum-selection clauses." *Id.* at 13-14a. But the court also held that it was "clear and indisputable" error for the District Court to use the traditional and well-established § 1404(a) balancing test. *Id.* at 22-24a. The court instead created a "separate framework to determine how forum-selection clauses affect the § 1404(a) transfer analysis where both contracting and non-contracting parties are found in the same case." *Id.* at 17a.

Despite recognizing that *Atlantic Marine* did not control, the Third Circuit nonetheless sought to

"apply[] *Atlantic Marine* to cases involving both contracting and non-contracting parties." *Id.* at 14a. The court therefore "assume[d] that *Atlantic Marine* applie[d] to [the] parties who agreed to forum-selection clauses." *Id.* at 18-19a. For parties who had not agreed to forum-selection contracts, the court applied the traditional balancing of private and public interests relevant to the transfer request. *Id.* at 19a.

Applying this newly-crafted framework, the Third Circuit held that the private interests of the parties without forum-selection contracts – Golden State and DePuy – supported transfer of Howmedica's claims against them, but that the public interest did not support transfer of Howmedica's claims against the Individual defendants. *Id.* at 29-32a. Even though Nordyke's employment agreement included a Michigan forum selection clause (and therefore, under *Atlantic Marine*, would be presumptively transferred), the Third Circuit declined to allow the transfer of Howmedica's claims against Nordyke from New Jersey "as Howmedica accuses Nordyke of the same misconduct as it does the other [Individual defendants]." *Id.* at 30a.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THE THIRD CIRCUIT'S DECISION PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN ADDRESSED BY THIS COURT.

This case presents a question of critical importance that has not been addressed by this Court and has divided the federal courts. *Atlantic Marine* established that where *all* parties to a litigation have contracted to have their claims heard in one forum, the "forum-selection clause should be given controlling

weight in all but the most exceptional cases." *Atlantic Marine*, 134 S. Ct. at 581 (quotation omitted). *See also Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring) (enforcement of forum-selection contracts is necessary to "support private parties *who negotiate such clauses*") (emphasis added). However, *Atlantic Marine* did not consider, and did not resolve, the effect of a forum-selection contract that applies to only *some* parties (or *some* claims) in a litigation.

A. The Federal Courts Are Split on the Application of *Atlantic Marine* Where Only Some Parties or Claims are Subject to a Forum-Selection Contract.

Since this Court decided *Atlantic Marine*, the federal courts have struggled to define a standard for addressing motions to transfer venue where only some, and not all, parties or claims are subject to a forum-selection contract. Two courts of appeals have developed different tests that seek to incorporate both *Atlantic Marine* and traditional § 1404(a) analysis into a single inquiry. Some district courts (like the Third Circuit in this case) have interpreted *Atlantic Marine* to foreclose consideration of private interest factors with respect to those parties or claims that are subject to forum-selection contracts. Other district courts have found that *Atlantic Marine* does not supplant the traditional consideration of both public and private interest factors pertinent to transfer under § 1404(a).

1. The court of appeals in this case created a new four-step test. *See* Pet. App. 18a. First, a court must "assume[] that *Atlantic Marine* applies to parties who agreed to forum-selection clauses." *Id.* at 18-19a. Second, a court must apply the traditional § 1404(a) analysis of public and private interest factors, but *only*

as "relevant to non-contracting parties." *Id.* at 19a. Third, "if the Step One and Step Two analysis point different ways," a court must consider if severance of parties or claims into separate forums is "clearly warranted" or "clearly disallowed." *Id.* at 20-21a. If "severance is neither clearly warranted nor clearly disallowed," a court must go to the fourth step, which requires the court to make a decision on transfer and severance based on "efficiency" and the private interests of *only* "the non-contracting parties." *Id.* at 21-22a.

The Third Circuit recognized that this test would often lead to duplicitous and piecemeal litigation – claims against non-contracting parties would be severed and transferred, while identical claims against parties with forum-selection contracts would remain in the contracted forum. *See id*. at 30a. However, the Third Circuit swept this concern aside, reasoning that this inefficiency "can be reduced or eliminated with procedural mechanisms." *Id.* (quotation omitted).

2. The Fifth Circuit has developed a different, three-part test. *See In re Rolls-Royce Corp.*, 775 F.3d 671 (5th Cir. 2014). While the first two parts of the Fifth Circuit's test mirror the test created by the Third Circuit in this case, the third part is different – a court may transfer an entire litigation, notwithstanding the terms of any forum-selection contracts, where "judicial economy considerations" relevant to the entire litigation support such a transfer. *See id.* at 681. *See also id.* at 680 ("The petitioner's answer is that *Atlantic Marine* vitiates the traditional severance analysis in multiparty cases. This is not so clear.").

3. More than 1,500 federal district courts have cited *Atlantic Marine*, including hundreds of citations in decisions addressing § 1404(a) motions. Those courts

have issued vastly disparate decisions on whether to extend *Atlantic Marine* to cases where only some parties have forum-selection contracts.

On the one hand, many courts have followed the plain language of *Atlantic* Marine and applied the traditional § 1404(a) balancing analysis and declined to enforce forum-selection contracts where it would contravene judicial economy. *See*, *e.g.*, *Ashley Furniture Indus. v. Packaging Corp. of Am.*, No. 16-cv-469, 2017 U.S. Dist. LEXIS 118323, at *14-18 (W.D. Wisc. July 28, 2017) ("[T]he interests of the contracting parties may be outweighed by the private interests of any defendants who did *not* similarly waive a challenge to an inconvenient forum."); *Bronstein v. U.S. Customs & Border Protection*, No. 15-2399, 2016 U.S. Dist. LEXIS 28998, at *14-15 (N.D. Cal. Mar. 7, 2016) (finding that enforcement of forum-selection contract "would be needlessly inconvenient and burdensome [and] plainly contrary to the policy of the federal judiciary of promoting the consistent and complete adjudication of disputes"); *Aquila v. Fleetwood, R.V., Inc.*, No. 12-3281, 2013 U.S. Dist. LEXIS 187064, at *11-12 (E.D.N.Y. Dec. 16, 2013) ("To have two cases – which would involve similar, if not identical, facts and allegations – proceed simultaneously at taxpayer expense would constitute extravagantly wasteful duplication of time and effort by the federal and state courts.") (quotation omitted).

On the other hand, some courts have extended *Atlantic Marine* to these cases and severed and transferred claims notwithstanding the non-contracting parties' interests (and the parallel public interest) in efficient dispute resolution. *See*, *e.g.*, *SSAB Ala., Inc. v. Kem-Bonds, Inc.*, No. 17-175, 2017 U.S. Dist. LEXIS 204021, at *13 (S.D. Ala. Dec. 12, 2017)

("Certainly, [a non-contracting party] may lament the possibility of litigating parallel suits in separate fora. But courts in analogous circumstances have routinely found that *Atlantic Marine* calls for enforcement of the forum-selection clause, notwithstanding objections grounded in fears of duplicative litigation or judicial economy."); *Valspar Corp. v. E.I. DuPont de Nemours & Co.*, 15 F. Supp. 3d 928, 934-35 (D. Minn. 2014) ("It is always more expeditious to try related claims in one forum rather than several, but allowing efficiency and economy to rule the day would effectively swallow *Atlantic Marine*'s holding in every case with multiple defendants.").

4. The widely differing approaches adopted by the Third Circuit, Fifth Circuit, and the federal district courts mean that the legal standard applied to resolve of a § 1404(a) motion in a case where some, but not all, parties have forum-selection contracts will depend entirely on the Circuit and District where a litigation is initiated. This uncertainly unduly prejudices *both* defendants who have signed forum-selection contracts *and* defendants who have not signed such agreements – depending on the plaintiff's choice of forum, either may be subject to duplicative and piecemeal litigation based on that court's interpretation of the scope of *Atlantic Marine*. This Court's intervention is necessary to create a single, uniform rule on whether *Atlantic Marine* supplants the traditional § 1404(a) transfer analysis where only some parties to a litigation have agreed to a forum-selection contract.

B. The Third Circuit's Decision Conflicts Directly With *Atlantic Marine* and is Incorrect.

This Court's intervention is also needed because the Third Circuit was mistaken on the merits of the

important question presented. By its plain language, *Atlantic Marine* supplanted the traditional § 1404(a) transfer analysis *only* where *all* of the parties to a case "have contracted in advance to litigate disputes in a particular forum." *See* 134 S. Ct. at 583. In fashioning a rule that requires the severance and transfer only of claims against defendants who have not signed forum-selection contracts (and, absent extraordinary considerations, the non-transfer of the remaining claims against defendants with forum-selection contracts), the Third Circuit misapplied both this Court's precedents on the transfer and splitting of parties and claims and the Federal Rules of Civil Procedure.

This Court has long recognized that "the idea behind § 1404(a)" is allow the transfer of a "whole action" to a convenient forum:

> The idea behind § 1404 (a) is that where a 'civil action' to vindicate a wrong – however brought in a court – presents issues and requires witnesses that make one District Court more convenient than another, the trial judge can, after findings, transfer the whole action to the more convenient court.

Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 26 (1960). This Court has also recognized that the Federal Rules of Civil Procedure express a strong preference "toward entertaining the broadest possible scope of action consistent with fairness to the parties." *United Mine Workers v. Gibbs*, 383 U.S. 715, 724 (1966). Federal Rule of Civil Procedure 1 states further that the federal rules " "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

Consistent with these rules and precedents, *Atlantic Marine* held only that, in a case where all parties have agreed by contract to a forum, the action should be litigated in that forum unless the public interest requires transfer to another forum. *See* 134 S. Ct. at 581-83. By extending *Atlantic Marine* to cases where not all parties have agreed to a forum, the Third Circuit created a test that cannot be reconciled with Fed. R. Civ. P. 1 or with this Court's repeated endorsement of a strong public interest in efficient litigation and the joinder of related claims and parties. *See also generally Fed. Res. Corp. v. Shoni Uranium Corp.*, 408 F.2d 875, 878 (10th Cir. 1969) ("Legal controversies should be settled, when possible, in the whole and not through multiple litigation."); *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 824 (5th Cir. 1967) (recognizing a "great public interest . . . of having a disposition at a single time of as much of the controversy to as many of the parties as is fairly possible consistent with due process").

But even if *Atlantic Marine* could be read to extend to cases where only some parties have agreed to a forum, the Third Circuit's decision would still conflict with this Court's precedent. The Third Circuit held that *Atlantic Marine* required the Individual defendants who had agreements with a New Jersey forum selection clause to litigate their claims in New Jersey. *See* Pet. App. 33a. However, the Third Circuit then disregarded Nordyke's own agreement, which required Howmedica to litigate claims against him in Michigan, and not in New Jersey. *Id.* at 32a. In other words, the Third Circuit inexplicably held that *Atlantic Marine* must apply as between some parties with forum-selection contracts, but does not apply as to other parties with contracts that select a different forum. Had the Third Circuit applied *Atlantic Marine* consist-

ently, the result would have been the same as if *Atlantic Marine* did not apply – Howmedica's claims against Nordyke would be transferred from New Jersey to a different forum.

The Third Circuit's basis for avoiding Nordyke's agreement also cannot be reconciled with any precedent. The Third Circuit held that the forum-selection clause in Nordyke's agreement was "waivable," *see id.* at 25a, but the same is true for *any* forum-selection contract. *See generally Auto Mechs. Local 701 Welfare & Pension Funds v. Vanguard Card Rental USA, Inc.*, 502 F.3d 740, 746 (7th Cir. 2007). Regardless, it is axiomatic that the mere possibility that a *private* litigant *could* waive a forum-selection contract cannot provide the necessary *public* interest required to avoid a forum-selection contract. *See Atlantic Marine*, 134 S. Ct. at 581.[2]

For these additional reasons, this Court should also grant the petition.

II. THIS CASE IS THE IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED.

This case is the proper vehicle to resolve the question presented. There are no pertinent factual disputes. There is no dispute that some of the

[2] The Third Circuit did not hold, and could not have held, that Nordyke actually waived enforcement of his forum-selection clause. *See* Pet. App. 25a. *See also*, *e.g.*, *Spectracom, Inc. v. Tyco Int'l, Inc.*, 124 Fed. Appx. 75, 77 (3d Cir. 2004) (holding that a motion to transfer to a forum other than that specified in a forum-selection contract – *i.e.* Nordyke's motion to transfer this case to the Northern District of California – does not waive the right to seek transfer to the selected forum). Nordyke's employment agreement also did not authorize Howmedica to unilaterally waive the Michigan forum selection). *See* Pet. App. 82a.

defendants (including Nordyke) have forum-selection contracts and that some of the defendants do not have such contracts. There is no dispute that the forum-selection contracts select different forums for litigation – Nordyke's contract provides that litigation shall be in Michigan, while the other Individual defendants' contracts provide that litigation shall be in New Jersey. There is also no dispute that Howmedica chose voluntarily to bring this case against defendants who had and did not have forum-selection contracts.

This case is also an ideal candidate for review because it comes to this Court in the same posture as *Atlantic Marine.* The *only* issue in dispute is the purely legal question of whether *Atlantic Marine* supplants the traditional § 1404(a) analysis where only some parties have forum-selection contracts. The decision below (and the prior decisions of the district court) contains a fully developed analysis of this legal issue. This Court should therefore grant the petition and decide this undisputedly important and recurring question that has divided the federal courts.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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January 8, 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-3682

IN RE: HOWMEDICA OSTEONICS CORP, a New Jersey corporation and subsidiary of STRYKER CORPORATION,

Petitioner

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2-14-cv-03449)
District Judge: Honorable Claire C. Cecchi

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, McKEE, CHAGARES, JORDAN, HARDIMAN, VANASKIE, KRAUSE, RESTREPO, SCIRICA, and FUENTES,[1] *Circuit Judges*

The petition for rehearing filed by respondents in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for

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[1] Judge Scirica and Judge Fuentes's votes are limited to panel rehearing only.

rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Cheryl Ann Krause
Circuit Judge

Dated: October 10, 2017

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APPENDIX B

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 16-3682

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IN RE: HOWMEDICA OSTEONICS CORP,
a New Jersey corporation and subsidiary
of STRYKER CORPORATION,

Petitioner

———

On Petition for Writ of Mandamus from the
United States District Court for the
District of New Jersey
(D.N.J. No. 2:14-cv-03449)
Honorable Claire C. Cecchi, U.S. District Judge

———

Argued: January 25, 2017

(Opinion Filed: August 15, 2017)

———

Before: KRAUSE, SCIRICA, and
FUENTES, *Circuit Judges*

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OPINION OF THE COURT

KRAUSE, *Circuit Judge*.

In the absence of a forum-selection clause, a defendant in federal court may move under 28 U.S.C. § 1404(a) for a transfer to another district for "convenience" and "in the interest of justice." But where contracting parties have specified the forum in which they will litigate disputes arising from their contract, federal courts must honor the forum-selection clause "[i]n all but the most unusual cases," following the Supreme Court's instructions in *Atlantic Marine Construction Co. v. U.S. District Court*, 134 S. Ct. 568, 583 (2013). This mandamus proceeding requires us to determine how district courts should apply *Atlantic Marine* where all defendants seek a transfer to one district under § 1404(a) and where some, but not all, of those defendants are parties to forum-selection clauses that designate different districts. Because we conclude the District Court erred in its application of *Atlantic Marine* by declining to honor the forum-selection clauses applicable to some of the litigants and by transferring the action in its entirety, we will issue a writ of mandamus and, applying the test we announce today, direct the District Court to transfer

claims against only the two corporate defendants who did not agree to any forum-selection clause.

I. Background

California natives Keegan Freeman, Michael Nordyke, Brett Sarkisian, Taylor Smith, and Bryan Wyatt (collectively, "Sales Representatives") are former California sales representatives for Howmedica Osteonics Corp., a New Jersey corporation, and its parent company, Stryker Corp. (collectively, "Howmedica")[1] The Sales Representatives began their employment with Howmedica when they signed employment agreements with confidentiality and non-compete clauses. The agreements also contained forum-selection clauses, which designated New Jersey (or, in Nordyke's case, Michigan) as the forum for any litigation arising out of the agreements.

After clashes with Howmedica over its management and their compensation, the Sales Representatives resigned and became independent contractors representing Howmedica's competitor, DePuy Orthopaedics, Inc., and DePuy's regional distributor, Golden State Orthopaedics, Inc. Some of Howmedica's customers,

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[1] Any distinctions between the two companies are immaterial to this mandamus action, as "Howmedica Osteonics Corp." was a party to all of the Sales Representatives' employment agreements, whether by name in some agreements or as a subsidiary included within the definition of "Stryker," where that entity was the party, in others. And although the Sales Representatives previously contended that Howmedica Osteonics Corp. lacked standing to enforce Stryker's contracts, they have not renewed—and hence have waived—that contention here. *See Gonzalez v. AMR*, 549 F.3d 219, 225 (3d Cir. 2008); *see also United States v. Menendez*, 831 F.3d 155, 175 (3d Cir. 2016) (applying traditional appellate waiver rules in a mandamus proceeding), *cert. denied sub nom. Menendez v. United States*, 137 S. Ct. 1332 (2017).

who were previously assigned to the Sales Representatives, followed them, leading Howmedica to suspect that the Sales Representatives, DePuy, and Golden State had conspired to convert those customers even in advance of the Sales Representatives' resignation dates. Howmedica therefore brought suit in the District of New Jersey, charging DePuy and the Sales Representatives with breach of contract and related claims under state law, and joining Golden State to the suit as a "necessary party."

Emphasizing the convenience to themselves and to the witnesses in California, the defendants promptly moved to transfer the case to the Northern District of California pursuant to 28 U.S.C. § 1404(a), which, for "the convenience of parties and witnesses" and "in the interest of justice," allows transfer to a district where the case "might have been brought." *See Howmedica Osteonics Corp. v. Sarkisian (Howmedica I)*, No. 14-3449, 2015 WL 1780941, at *2 (D.N.J. Apr. 20, 2015). After balancing the relevant public and private interests, the District Court agreed and ordered the transfer. *See Howmedica Osteonics Corp. v. Sarkisian (Howmedica II)*, No. 14-3449, 2016 WL 8677214, at *2-6 (D.N.J. Aug. 26, 2016).[2] The District Court did not

[2] In so doing, the District Court affirmed the order of the Magistrate Judge, who had granted the transfer motions pursuant to his authority under 28 U.S.C. § 636 and Federal Rule of Civil Procedure 72(a), and who had held, in the alternative, that the District Court lacked personal jurisdiction over Golden State. *See Howmedica I*, 2015 WL 1780941, at *1 n.2, *7-9 & n.11. The Magistrate Judge declined to address Golden State's and the Sales Representatives' alternative contention that, because venue in New Jersey was improper under the federal venue statute, 28 U.S.C. § 1391, transfer was required under 28 U.S.C. § 1406, which authorizes transfer for the purpose of curing venue defects. *See Howmedica I*, 2015 WL 1780941, at *2. No defendant

address Golden State's separate argument asserting that the District of New Jersey lacked personal jurisdiction as to that defendant. *See Howmedica II*, 2016 WL 8677214, at *2-6.[3]

While those New Jersey proceedings were pending, Golden State filed its own suit for declaratory relief against Howmedica in the Northern District of California, alleging that the non-compete clauses in Howmedica's employment agreements violated California law. That district court issued an order deeming Golden State's suit related to the transferred New Jersey case and also issued two preliminary scheduling orders in the transferred case, but it then stayed both cases after Howmedica petitioned this Court for a writ of mandamus. Howmedica now asks us to vacate the District Court's transfer order on the ground that it contravenes the Supreme Court's decision in *Atlantic Marine Construction Co. v. U.S. District Court*, which held that, except in "the most unusual cases," a district court should give effect to

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has renewed these venue objections before this Court, and they are therefore waived. *See Gonzalez*, 549 F.3d at 225.

[3] Golden State preserved its personal jurisdiction challenge by raising it before both the District Court and this Court. The other defendants, however, did not. Although the Sales Representatives also asserted to the Magistrate Judge and to the District Court that New Jersey lacked personal jurisdiction over them, personal jurisdiction is "a waivable right," *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985); *see, e.g.*, Fed. R. Civ. P. 12(h)(1), and the Sales Representatives waived any personal jurisdiction challenge by failing to raise it here, *see Gonzalez*, 549 F.3d at 225. Moreover, all of the Sales Representatives but one consented to jurisdiction in New Jersey within their employment agreements. *See Burger King*, 471 U.S. at 472 n.14. For its part, DePuy has never raised a personal jurisdiction objection.

a valid forum-selection clause. 134 S. Ct. 568, 583 (2013).[4]

Below, we first confirm our jurisdiction to entertain Howmedica's mandamus petition. Second, we consider the applicable standard of review. Third, we address the crux of this case: how district courts should apply *Atlantic Marine* when all defendants seek a transfer to one district under § 1404(a), but only some of those defendants agreed to forum-selection clauses that designate a different district.

II. Discussion

A. Jurisdiction[5]

The defendants have challenged our jurisdiction, contending that review of a § 1404(a) transfer order is permissible only to remedy a procedural defect and that, regardless, the Northern District of California's post-transfer orders in this case preclude our review. We, however, perceive no jurisdictional defect.

The All Writs Act, 28 U.S.C. § 1651, grants us jurisdiction to adjudicate a mandamus petition challenging an interlocutory order over which, pursuant to another jurisdictional statute, we could exercise

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[4] In *Atlantic Marine*, the Supreme Court "presuppose[d] a contractually valid forum-selection clause."134 S. Ct. at 581 n.5. We will do the same, because no defendant has challenged the validity of the forum-selection clauses in the Sales Representatives' employment agreements, thus waiving any such challenge, *see Gonzalez*, 549 F.3d at 225, and because, regardless of the treatment of the agreements' non-compete clauses under California law, *see generally Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 290-91 (Cal. 2008), the non-compete clauses are severable from the agreements' forum-selection clauses.

[5] The District Court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1332.

jurisdiction at a later point. *See United States v. Wright*, 776 F.3d 134, 145 (3d Cir. 2015); *Council Tree Commc'ns, Inc. v. FCC*, 503 F.3d 284, 292-93 (3d Cir. 2007). Here, because 28 U.S.C. § 1291 affords us jurisdiction to review district courts' § 1404(a) transfer orders after entry of final judgment, those transfer orders are reviewable on a mandamus petition. *See In re United States*, 273 F.3d 380, 382-85 & n.4 (3d Cir. 2001); *Nascone v. Spudnuts, Inc.*, 735 F.2d 763, 772-74 (3d Cir. 1984). Moreover, under our case law, our mandamus jurisdiction over transfer orders encompasses both procedural and legal issues. *See In re United States*, 273 F.3d at 384 (procedural issues); *id.* at 389-90 (legal issue). The District Court's § 1404 transfer order therefore falls within a class of orders reviewable on mandamus.

But that does not end our jurisdictional inquiry, for we do not "indefinitely" possess mandamus jurisdiction, and, "once the transferee court proceeds with the transferred case, the decision as to the propriety of transfer is to be made in the transferee court," whether by appeal or by mandamus petition to the court of appeals for the transferee circuit. *Id.* at 384. The question, then, is at what point the transferee court "proceeds" with a transferred case, and whether the transferee court in this case, by issuing two scheduling orders and an order deeming the case related to Golden State's previously filed case, has crossed that threshold.

We conclude this case has not proceeded in the Northern District of California in a manner that would deprive us of jurisdiction. In *In re United States*, even after the transferee court had received the record from the Eastern District of Pennsylvania and had "scheduled the case for prompt trial," we held that we

retained mandamus jurisdiction over the Eastern District of Pennsylvania's transfer order. *Id.* at 382-84. And although we declined to indicate "the specific length of time needed to allow the party resisting transfer to seek review" before our Court, we held that the Government, contesting the transfer order by mandamus petition, had "acted with sufficient dispatch"—even though the Government had filed its mandamus petition thirty-three days after the Eastern District of Pennsylvania had denied the Government's request for reconsideration of the transfer order and twelve days after the transferee court had issued a trial scheduling order. *See id.* at 382, 384; Order, *United States v. Streeval*, No. 01-0084-1 (M.D. Tenn. June 6, 2001), ECF No. 12.

We reach the same conclusion here. Howmedica filed its mandamus petition only twenty-seven days after the District Court's transfer order, as compared to the thirty-three day delay in *In re United States*. And although the transferee court in the Northern District of California issued two case management scheduling orders and an order relating the transferred case to Golden State's previously filed case, those orders do not show that the transferee court here proceeded any further with the case than the transferee court did in *In re United States* by issuing a trial scheduling order. Because we have held that case management orders in the transferee court are not sufficient to divest us of jurisdiction, we conclude that the Northern District of California did not proceed with this case and that Howmedica acted with "sufficient dispatch" in filing its mandamus petition, which

we have jurisdiction to consider. *In re United States*, 273 F.3d at 382-84.[6]

B. Standard of Review

A writ of mandamus is, of course, an "extraordinary" remedy. *United States v. Wright*, 776 F.3d 134, 145-46 (3d Cir. 2015). It may issue only if the petitioner shows (1) a clear and indisputable "abuse of discretion or . . . error of law," (2) "a lack of an alternate avenue for adequate relief," and (3) "a likelihood of irreparable injury." *Id.*; *see also Cheney v. U.S. Dist. Court*, 542 U.S. 367, 381 (2004); *Sunbelt Corp. v. Noble, Denton & Assocs., Inc.*, 5 F.3d 28, 30 (3d Cir. 1993). Even when these requirements are met, we may, in the exercise of our discretion, decline to issue a writ of mandamus

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[6] In *In re United States*, we did not identify at what point the transferee court definitively "proceeds" with the case so as to divest us of mandamus jurisdiction, 273 F.3d at 384, whether it occurs at the moment the transferee court issues a discovery ruling, *see* Fed. R. Civ. P. 26(b), (c); Fed. R. Civ. P. 37, at the moment it issues a legally binding ruling that would become the law of the case, *see Musacchio v. United States*, 136 S. Ct. 709, 716 (2016); *Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 168-69 (3d Cir. 1982), or at the moment some other threshold is crossed. We likewise do not resolve that question today, given that our ruling in *In re United States* controls the jurisdictional analysis here.

DePuy's counsel raised the concern at argument that, if the transferor Circuit can retain jurisdiction notwithstanding a transfer order, then the resulting jurisdictional regime will prompt extensive discovery requests in future cases, reaching even merits discovery under the guise of determining § 1404(a) transfer motions. We believe that concern is unfounded, for our longstanding precedent provides that discovery on the merits "is irrelevant to the determination of the preliminary question of transfer." *McDonnell Douglas Corp. v. Polin*, 429 F.2d 30, 30-31 (3d Cir. 1970) (per curiam); *accord Wood v. Zapata Corp.*, 482 F.2d 350, 357 (3d Cir. 1973).

when it is not "appropriate under the circumstances." *Cheney*, 542 U.S. at 381.

Appropriate circumstances are more readily present where, as here, a petitioner challenges a transfer order. Transfer orders as a class meet the second requirement for a writ of mandamus, "a lack of an alternate avenue for adequate relief," *Wright*, 776 F.3d at 146, because "the possibility of an appeal in the transferee forum following a final judgment there is not an adequate alternative to obtain the relief sought," *Sunbelt Corp.*, 5 F.3d at 30. Transfer orders likewise meet the third requirement, "a likelihood of irreparable injury," *Wright*, 776 F.3d at 146, because an erroneous transfer may result in "judicially sanctioned irreparable procedural injury," *Chi., R.I. & P.R. Co. v. Igoe*, 212 F.2d 378, 381 (7th Cir. 1954); *accord In re United States*, 273 F.3d at 385. Thus, our inquiry here collapses to the first requirement: Was the District Court's transfer order a clear and indisputable "abuse of discretion or . . . error of law" for which mandamus relief is appropriate? *Wright*, 776 F.3d at 146; *see In re United States*, 273 F.3d at 385-90; *Carteret Sav. Bank, FA v. Shushan*, 919 F.2d 225, 230-33 (3d Cir. 1990). We will apply this standard of review, turning now to the merits of the parties' dispute.

C. Application of *Atlantic Marine*

The Supreme Court made clear in *Atlantic Marine* that, in most cases, district courts must enforce valid forum-selection clauses when adjudicating § 1404(a) transfer motions, but the Court did not have occasion to address how that general rule should apply where non-contracting parties are present, much less how it should apply where, as here, there are other complica-

tions such as competing forum-selection clauses, personal jurisdiction challenges, and allegations of necessary party status. That is the quandary we confront today, and we resolve it by (1) reviewing the legal principles relevant both in the absence of a forum-selection clause and where one is present; (2) developing from those principles a framework for applying *Atlantic Marine* to cases involving both contracting and non-contracting parties; and (3) applying that framework to the facts of this case.

1. Governing Legal Principles

To understand *Atlantic Marine*'s significance and its instructions regarding § 1404(a) transfers when a forum-selection clause is present, we begin with a review of the legal principles governing the § 1404(a) transfer analysis in the absence of a forum-selection clause. In such cases, courts decide whether to grant a § 1404(a) transfer by evaluating various private and public interests. *See Atl. Marine*, 134 S. Ct. at 581 & n.6; *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir. 1995). The balancing of those interests is in the district courts' discretion, *see Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970), but we have prescribed an "enumeration of factors to be balanced" in each case, *Jumara*, 55 F.3d at 879-80.

Private interests to be balanced relate to "the convenience of the parties and witnesses."28 U.S.C. § 1404(a). They therefore include the "plaintiff's forum preference as manifested in the original choice"; "the defendant's preference"; "whether the claim arose elsewhere"; "the convenience of the parties as indicated by their relative physical and financial condition"; "the convenience of the witnesses"; and "the location of books and records," *Jumara*, 55 F.3d at 879, as well as "all other practical problems that

make trial of a case easy, expeditious and inexpensive," *Atl. Marine*, 134 S. Ct. at 581 & n.6.

By contrast, public interests to be balanced are not necessarily tied to the parties, but instead derive from "the interest of justice." 28 U.S.C. § 1404(a). These interests include "the enforceability of the judgment"; "the relative administrative difficulty in the two fora resulting from court congestion"; "the local interest in deciding local controversies at home"; "the public policies of the fora"; and "the familiarity of the trial judge with the applicable state law in diversity cases." *Jumara*, 55 F.3d at 879-80. We regard these public interests to include judicial economy considerations, which support "having the two actions in the same district (through transfer)" when the two cases are in different courts but involve "the same or similar issues and parties."[7] 1 James Moore et al., *Moore's Manual: Federal Practice and Procedure*, § 7.81[3][c] (2017). In other instances, judicial economy considerations weigh against transfer when a separate case involving

[7] To the extent we recognized the "practical considerations that could make the trial easy, expeditious, or inexpensive" as a public interest in *Jumara*, 55 F.3d at 879, we did so with judicial economy considerations in mind, as those particular practical considerations constitute a public interest, while practical considerations that might burden the parties constitute a private interest. Today, we clarify that "practical problems that make trial of a case easy, expeditious, and inexpensive" represent a private interest, as the Supreme Court stated in *Atlantic Marine*, 134 S. Ct. at581 n.6, and as we have often stated in the forum non conveniens context, *see, e.g.*, *Kisano Trade & Invest Ltd. v. Lemster*, 737 F.3d 869, 873 (3d Cir. 2013); *Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 161 (3d Cir. 2010), and we acknowledge judicial economy considerations to be a distinct, cognizable public interest.

"the same or similar legal and factual issues" is pending in the originating district. *Id.*

The weighing of private and public interests under § 1404(a) changes, however, if a forum-selection clause enters the picture. When that happens, as the Supreme Court clarified in *Atlantic Marine*, "district courts [must] adjust their usual § 1404(a) analysis in three ways."134 S. Ct. at 581. Specifically, district courts (1) must give no weight to the forum preferred by "the party defying the forum-selection clause"; (2) must deem the private interests to "weigh entirely in favor of the preselected forum" because the parties agreed to the preselected forum and thereby waived the right to challenge it as inconvenient; and (3) must proceed to analyze only public interests. *Id.* at 581-82. The Supreme Court explained that, with these modifications to the typical § 1404(a) analysis, district courts should enforce valid forum-selection clauses "[i]n all but the most unusual cases." *Id.* at 583.

While the Court in *Atlantic Marine* modified the § 1404(a) transfer inquiry for contracting parties who affirmatively agreed to litigate in a particular forum as an express term of their agreements, *see id.* at 581-82, it did not disturb in any way the customary § 1404(a) analysis that applies where parties are not bound by a forum-selection clause, *see id.* at 581-84. Those modifications, in other words, are inapplicable where a case involves only non-contracting parties. And for good reason. Where *Atlantic Marine* establishes what amounts to a strong presumption in favor of enforcing forum-selection clauses, *see id.* at 581, 583, the private and public interests that inform a § 1404(a) transfer inquiry do not bespeak a presumption one way or another and require a district court to conduct a wide-ranging inquiry specific to the

circumstances of that case, *see Jumara*, 55 F.3d at 879-80. Similarly, where the *Atlantic Marine* framework would wholly deprive non-contracting parties of their right to seek transfer on the basis of their private interests, the customary § 1404(a) analysis guarantees them that right. *See id.*

For these reasons, we have need of a separate framework to determine how forum-selection clauses affect the § 1404(a) transfer analysis where both contracting and non-contracting parties are found in the same case and where the non-contracting parties' private interests run headlong into the presumption of *Atlantic Marine*—hence, the problem we confront today.

2. Four-Step Framework

Fortunately, in taking on this challenge, we do not write on a blank slate. Our colleagues in the Fifth Circuit have forged an approach that we consider a helpful starting point for our own.

In *In re Rolls Royce Corp.*, where a helicopter owner brought suit against various entities involved in its aircraft's design and manufacture, and where the forum-selection clause applied to only one of the defending parties (Rolls Royce), the Fifth Circuit prescribed a three-step framework. 775 F.3d 671, 674, 681 (5th Cir. 2014). First, the Fifth Circuit confirmed that, owing to the Supreme Court's guidance in *Atlantic Marine*, contracting parties' private interests support transferring any claims involving those parties to their agreed-upon forum, a result which may be accomplished after first severing those claims pursuant to Federal Rule of Civil Procedure 21. *Id.* at 681. Second, the court recognized that, just as non-contracting parties' private interests are routinely

considered in a traditional § 1404(a) analysis, those interests must still be considered even when a forum-selection clause is present in the case. *Id.* Lastly, the Fifth Circuit directed district courts to "ask whether this preliminary weighing is outweighed by the judicial economy considerations of having all claims determined in a single lawsuit," taking into account "procedural mechanisms . . . , such as common pretrial procedures, video depositions, stipulations, etc." that could alleviate any inefficiencies resulting from severance. *Id.* Applying this framework, the court concluded that it would enforce the forum-selection clause in that case by severing and transferring claims against Rolls Royce, but also observed that non-contracting parties' interests and considerations of judicial economy at times "can trump a forum-selection clause." *Id.* at 679-83.

We embrace much of our Sister Circuit's approach, but, prompted by the challenges raised in this case—for example, the contention that a forum specified in some of the parties' contracts lacks personal jurisdiction over Golden State and the assertion that Golden State is a "necessary party"—we deem some modifications warranted. Building on *Rolls Royce*, we prescribe a four-step inquiry in which the reviewing court, whether the District Court in the first instance, or this Court on appeal, will consider in sequence: (1) the forum-selection clauses, (2) the private and public interests relevant to non-contracting parties, (3) threshold issues related to severance, and (4) which transfer decision most promotes efficiency while minimizing prejudice to non-contracting parties' private interests.

Step One: Forum-Selection Clauses. At the first step, the court assumes that *Atlantic Marine* applies

to parties who agreed to forum-selection clauses and that, "[i]n all but the most unusual cases," claims concerning those parties should be litigated in the fora designated by the clauses. *Atl. Marine*, 134 S. Ct. at 583. This step mirrors the first step of the Fifth Circuit's framework, which provides that "the private factors of the parties who have signed a forum agreement . . . cut in favor of severance and transfer to the contracted[-]for forum." *Rolls Royce*, 775 F.3d at 681.

Step Two: Private and Public Interests Relevant to Non-Contracting Parties. Second, the court performs an independent analysis of private and public interests relevant to non-contracting parties, just as when adjudicating a § 1404(a) transfer motion involving those parties in the absence of any forum-selection clauses.[8] *See Jumara*, 55_F.3d at 879-80. This step, like the first, tracks the Fifth Circuit's approach: courts at Step Two should consider the private and public interests "of the parties who have *not* signed a forum-selection agreement." *Rolls Royce*, 775 F.3d at 681. If, at this juncture, the Step One and Step Two analyses point to the same forum, then the court should allow the case to proceed in that forum, whether by transfer or by retaining jurisdiction over the entire case, and the transfer inquiry ends there.

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[8] At this step, assuming that the court intends to handle the § 1404(a) transfer issues first, the court should suspend concerns about other threshold issues such as subject-matter jurisdiction, personal jurisdiction, improper venue, or misjoinder, as it has discretion to address convenience-based venue issues first under *Sinochem International Co. v. Malaysia International Shipping Corp.*, 549 U.S. 422, 425, 432 (2007). Under our four-step framework, any other threshold issues are reserved for Steps Three and Four of the transfer inquiry.

Step Three: Threshold Issues Related to Severance. Third, if the Step One and Step Two analyses point different ways, then the court considers severance. *See* Fed. R. Civ. P. 21. In some cases, severance clearly will be warranted to preserve federal diversity jurisdiction; to cure personal jurisdiction, venue, or joinder defects; or to allow for subsequent impleader under Federal Rule of Civil Procedure 14.[9] In such cases, the court should sever and transfer claims as appropriate to remedy jurisdictional and procedural defects. If only one severance and transfer outcome satisfies the constraints identified at this step, then the court adopts that outcome and the transfer inquiry ends. But if more than one outcome satisfies the threshold severance constraints, then the court continues to Step Four.

In other cases, severance is clearly disallowed, such as when a party is indispensable under Federal Rule of Civil Procedure 19(b). *See Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 572-73 (2004); *Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 421-22 (3d Cir. 2010). In these cases, the court cannot sever, *see Publicker Indus., Inc. v. Roman Ceramics Corp.*, 603 F.2d 1065, 1069 (3d Cir. 1979), and the case must continue with all parties present in a forum where jurisdiction and venue are proper as to the indispensable party, which could be either the originating district court or the court to which transfer

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[9] *See Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 572-73 (2004) (diversity jurisdiction); *DirecTV, Inc. v. Leto*, 467 F.3d 842, 844-45 (3d Cir. 2006) (joinder); *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1544-45 (10th Cir. 1996) (personal jurisdiction); *Cottman Transmission Sys., Inc. v. Martino*, 36 F.3d 291, 296 (3d Cir. 1994) (venue); *Stahl v. Ohio River Co.*, 424 F.2d 52, 55 & n.3 (3d Cir. 1970) (impleader).

is sought. If jurisdiction and venue are proper as to the indispensable party in only one of those courts, then the transfer inquiry ends there and the case must continue in that court. If, however, jurisdiction and venue are proper as to the indispensable party in both the originating court and the proposed transferee court, then, in deciding where the whole case should proceed, the court proceeds to Step Four.

Likewise, in cases where severance is neither clearly warranted nor clearly disallowed and is therefore committed to the court's discretion (such as when there are no indispensable parties or defects in jurisdiction, venue, or joinder), the court goes on to select the appropriate fora based on a combination of interests addressed at the next step.

Step Four: Efficiency and Non-Contracting Parties' Private Interests. Fourth, and akin to the final step in the Fifth Circuit's framework, *see Rolls Royce*, 775 F.3d at 681, a district court exercises its discretion (which we will review for abuse of discretion) in choosing the most appropriate course of action, *see DirecTV*, 467 F.3d at 844; *Shutte*, 431 F.2d at 25, but it measures its decision against two key sets of interests. On the one hand, the court considers efficiency interests in avoiding duplicative litigation, *see D'Jamoos v. Pilatus Aircraft Ltd.*, 566 F.3d 94, 111 (3d Cir. 2009), taking into account case management techniques that can reduce inefficiencies accompanying severance, *Rolls Royce*, 775 F.3d at 681, as well as any other public interests that may weigh against enforcing a forum-selection clause, *see Atl. Marine*, 134 S. Ct. at 582; *Jumara*, 55 F.3d at 879-80. On the other hand, the court also considers the non-contracting parties' private interests and any prejudice that a particular transfer decision would cause with respect to those

interests. *See Rolls Royce*, 775 F.3d at 681; *DirecTV*, 467 F.3d at 846-47; *Jumara*, 55 F.3d at 879.

In exercising its discretion to determine whether it should retain the case in its entirety, transfer the case in its entirety, or sever certain parties or claims in favor of another forum, the court considers the nature of any interests weighing against enforcement of any forum-selection clause; the relative number of non-contracting parties to contracting parties; and the non-contacting parties' relative resources, keeping in mind any jurisdiction, venue, or joinder defects that the court must resolve. Only if it determines that the strong public interest in upholding the contracting parties' settled expectations is "overwhelmingly" outweighed by the countervailing interests can the court, at this fourth step, decline to enforce a valid forum-selection clause. *Atl. Marine*, 134 S. Ct. at 581, 583.

3. Analysis

Applying this framework to the record of this case, we hold that a writ of mandamus is warranted. Although we acknowledge the novelty and difficulty of the task set before the District Court, we conclude that court's transfer decision and its reasoning for the decision misapplied *Atlantic Marine* in ways that constitute clear and indisputable errors. Below, we address those errors and then analyze the appropriate fora using the four-step framework we announce today.

a. The District Court's Errors

The District Court misapplied *Atlantic Marine* in two ways. First, although the District Court acknowledged *Atlantic Marine*'s applicability to the contracting parties in this case (Howmedica and the Sales Representatives), it did not apply *Atlantic Marine*'s precepts correctly to those parties. Specifically, the District

Court bypassed the initial step where a district court "must deem the [contracting parties'] private-interest factors to weigh entirely in favor of the preselected forum." *Atl. Marine*, 134 S. Ct. at 582; *see Howmedica II*, 2016 WL 8677214, at *3-4. And, even when it professed to address only "public-interest considerations," the District Court conflated public interests with private ones by considering the parties' and witnesses' convenience, which are not public interests, but private ones. *See Howmedica II*, 2016 WL 8677214, at *3; *cf. Atl. Marine*, 134 S. Ct. at 581 n.6; *Jumara*, 55 F.3d at 879.[10]

Second, the District Court did not acknowledge or address the fact that *Atlantic Marine* applies only to parties who agreed to a forum-selection clause—not, as the District Court's opinion implies, either to the whole case or not at all. *See Howmedica II*, 2016 WL 8677214, at *3-6. The District Court's "all or nothing" approach contravenes *Atlantic Marine*'s language, which specifies that a forum-selection clause "represents the parties' agreement as to the most proper forum" and was "bargained for by the parties." *Atl. Marine*, 134 S. Ct. at 581. In light of how the Supreme Court limited *Atlantic Marine*'s holding to

[10] For example, the District Court purported to consider the enforceability of the judgment as a public-interest factor and concluded that that factor favored transfer notwithstanding any forum-selection clauses, reasoning that "it will be easier to obtain judgment over [the defendants] in California because [the majority of the defendants] reside in that state." *Howmedica II*, 2016 WL 8677214, at *3 (brackets omitted). But the public interest in the enforceability of the judgment is not concerned with the *convenience* with which the parties may obtain a judgment; rather, this factor concerns whether a judgment is *capable* of being enforced at all. *See generally, e.g.*, *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1225 n.3 (3d Cir. 1995).

contracting parties, the District Court erred in creating a false dichotomy between, on the one hand, applying *Atlantic Marine* to all parties in the case and, on the other hand, applying it to none. *See Howmedica II*, 2016 WL 8677214, at *3-6.

Given the District Court's clear and indisputable errors, mandamus is warranted, so we turn next to the scope of that mandamus. While we could remand and direct the District Court to apply the four-step framework we prescribe today, we have discretion to apply it ourselves where no additional record development is needed, the outcome is clear as a matter of law, and our application best serves the interests of judicial efficiency. *See Wallach v. Eaton Corp.*, 837 F.3d 356, 374-75 (3d Cir. 2016). Those criteria are met here, so we proceed to address the question of where the claims in this case should proceed. We conclude that the proper disposition of the defendants' § 1404(a) transfer motions is severance of Howmedica's claims against DePuy and Golden State, transfer of the severed claims to the Northern District of California pursuant to § 1404(a), and denial of the motion to transfer the claims against the Sales Representatives. We reach this conclusion applying today's four-step framework.

b. The Proper Fora Under the Applied Framework

i. Step One: Forum-Selection Clauses

At Step One, we presume that valid forum-selection clauses should be enforced against the relevant contracting parties. Given the number of defendants and their different positions in this case, at Step One we address them in two groups.

Freeman, Sarkisian, Smith, and Wyatt. These Sales Representatives agreed to New Jersey forum-selection

clauses, and Howmedica seeks to enforce those clauses, so we presume that Howmedica's claims against these Sales Representatives should be litigated in the District of New Jersey.

DePuy, Golden State, and Nordyke. None of the other defendants agreed to New Jersey forum-selection clauses, though Nordyke's employment agreement had a Michigan forum-selection clause. Because neither Nordyke nor Howmedica now seeks to enforce the Michigan forum-selection clause, and because venue objections are waivable, even when premised on a forum-selection clause, *see* 28 U.S.C. § 1406(b); *Auto. Mechs. Local 701 Welfare & Pension Funds v. Vanguard Car Rental USA, Inc.*, 502 F.3d 740, 746 (7th Cir. 2007), we do not consider Michigan as a possible venue for Howmedica's claims against Nordyke. Accordingly, DePuy, Golden State, and Nordyke all are not subject to the presumption that the claims against them should be litigated in a contractually agreed-upon forum. *Cf. Atlantic Marine*, 134 S. Ct. at 581, 583.

Instead, we consider Howmedica's argument that these three defendants are bound by the other Sales Representatives' New Jersey forum-selection clauses under the "closely related parties" doctrine and that, therefore, we must apply *Atlantic Marine*'s presumption in favor of a New Jersey forum. *See generally Magi XXI, Inc. v. Stato della Citta del Vaticano*, 714 F.3d 714, 722 & n.8 (2d Cir. 2013).[11]

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[11] In this case, we analyze the "closely related parties" doctrine as a matter of federal common law, because "federal law, specifically 28 U.S.C. § 1404(a)" and federal common law interpreting that statute, "governs the District Court's decision whether to give effect to the parties' forum-selection clause and

We have held, however, that a forum-selection clause "can be enforced only by the signator[y] to [the] agreement[]," *Dayhoff, Inc. v. H.J.Heinz Co.*, 86 F.3d 1287, 1293-97 (3d Cir. 1996), which DePuy, Golden State, [12] and Nordyke were not. There is thus no presumption that Howmedica's claims against these three defendants should be litigated in New Jersey, and we will proceed to address Howmedica's claims against them at Step Two of the transfer inquiry.[13]

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transfer the case." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988).

[12] Although the Northern District of California held, in the context of Golden State's suit for a declaratory judgment against Howmedica, that Golden State was closely related to Howmedica's employment agreements with the Sales Representatives, that court's conclusion is not binding here for two reasons. First, issue preclusion is inapplicable because the Northern District of California stayed Golden State's suit pending our disposition of this one, so the court's holding was not essential to any judgment. *See B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303 (2015); *Golden State Orthopaedics, Inc. v. Howmedica Osteonics Corp.*, No. 14-3073, 2016 WL 4698931, at *1 (N.D. Cal. Sept. 8, 2016). Second, the Northern District of California based its holding on Ninth Circuit case law we explicitly rejected in *Dayhoff*. *See Dayhoff*, 86 F.3d at 1296; *cf. Golden State Orthopaedics, Inc. v. Howmedica Osteonics Corp.*, No. 14-3073, 2014 WL 12691050, at *4-5 (N.D. Cal. Oct. 31, 2014).

[13] While some courts have held that a non-signatory may enforce or be bound by a forum-selection clause, even those courts do not apply the "closely related parties" doctrine if doing so would have been unforeseeable for the party against whom the clause would be enforced. *See, e.g.*, *Magi XXI*, 714 F.3d at 717-20, 722-24; *Lipcon v. Underwriters at Lloyd's London*, 148 F.3d 1285, 1299 (11th Cir. 1998); *Hugel v. Corp. of Lloyd's*, 999 F.2d 206, 209 (7th Cir. 1993). Hence, Howmedica's "closely related parties" argument would not prevail even under those courts' case law, for DePuy, Golden State, and Nordyke could not have foreseen that

ii. Step Two: Private and Public Interests Relevant to Non-Contracting Parties

We perform at Step Two an independent § 1404(a) analysis of private and public interests relevant to DePuy, Golden State, and Nordyke. Here, to the extent the District Court discussed interests relevant to those three defendants, we agree with the District Court's analysis of private and public interests. *See Howmedica II*, 2016 WL 8677214, at *3-6. After all, the claims against these defendants arise from their alleged actions in California; it is far easier for Nordyke, who has fewer financial resources than Howmedica, to litigate in California; surgeons and former Howmedica employees who may serve as witnesses are located in California; and trial would therefore be easier and less expensive in California. *See Jumara*, 55 F.3d at 879-80.

Because our Step Two analysis weighs in favor of transferring Howmedica's claims against DePuy, Golden State, and Nordyke to the Northern District of California, and because that result is in conflict with the Step One presumption that Howmedica's claims against the remaining defendants should proceed in

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the other Sales Representatives' forum-selection clauses could later be enforced against them. That is because there is no evidence that DePuy or Golden State were aware of or participated in the other Sales Representatives' contractual negotiations with Howmedica, Nordyke's employment agreement with Howmedica had its own (different) forum-selection clause, and, even if Nordyke could have known about the forum-selection clauses in the other Sales Representatives' employment agreements, that knowledge would have rendered a New Jersey forum foreseeable only for a dispute over another Sales Representative's conduct, not for a dispute over Nordyke's own conduct.

New Jersey, we next assess whether severance is warranted.

iii. Step Three: Threshold Issues Related to Severance

At Step Three, we consider threshold issues such as the presence of indispensable parties and defects in subject-matter jurisdiction, personal jurisdiction, venue, or joinder, all of which may direct our severance analysis. Here, we must consider two such issues.

First, although Howmedica justified its decision to join Golden State as a defendant by asserting Golden State is a "necessary party," Golden State, in fact, does not meet the relevant criteria under Federal Rule of Civil Procedure 19(b). To be an indispensable party under Federal Rule of Civil Procedure Rule 19(b), a party must also be a "required" party under Rule 19(a). That the parties are allegedly joint tortfeasors or that the judgment might set "a persuasive precedent" against the alleged required party is not sufficient. *Huber v. Taylor*, 532 F.3d 237, 250 (3d Cir. 2008); *see Temple v. Synthes. Corp.*, 498 U.S. 5, 7 (1990); *Lomando v. United States*, 667 F.3d 363, 384 (3d Cir. 2011). Yet that is all we have here: Golden State is no more than an alleged joint tortfeasor, and any judgment without Golden State's presence in this case would relate only to the other defendants, would not have preclusive effect against Golden State, *see B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303 (2015), and at most would be "persuasive precedent," *Huber*, 532 F.3d at 250. Golden State, then, is neither a "required" party under Rule 19(a) nor an indispensable party under Rule 19(b), and it is permissible to sever claims against this defendant. *See Grupo Dataflux*, 541 U.S. at 572-73.

Second, New Jersey's lack of personal jurisdiction over Golden State, which Howmedica has never challenged except by means of its unsuccessful "closely related parties" argument, requires dismissal or transfer of at least the claims against Golden State. *See Howmedica I*, 2015 WL 1780941, at *7-8 & n.11. Nothing in the record indicates that Golden State deliberately engaged in "significant activities" within New Jersey or created "continuing obligations" between itself and New Jersey residents, and the absence of those prerequisites means that Golden State lacks the constitutionally required "minimum contacts" sufficient to allow New Jersey to exercise personal jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-76 (1985). Accordingly, the District of New Jersey cannot retain jurisdiction over Howmedica's claims against Golden State, *see* Fed. R. Civ. P. 4(k), and at least those claims should be transferred to the Northern District of California, where personal jurisdiction over Golden State is proper.

The Step Three analysis, in sum, indicates that Howmedica's claims against Golden State may be severed and, indeed, that dismissal or transfer of those claims to another forum is mandatory.

iv. Step Four: Efficiency and Non-Contracting Parties' Private Interests

To recap, the first three steps of our analysis present us with three options: severance and transfer of only the claims against Golden State; severance and transfer of other claims in the case along with the claims against Golden State; or transfer of the entire case, including the claims against Freeman, Sarkisian, Smith, and Wyatt, who all agreed to New Jersey forum-selection clauses. To select among these options

at Step Four, we are guided by considerations of efficiency, the non-contracting parties' private interests, and *Atlantic Marine*'s directive that "courts should not . . . disrupt the parties' settled expectations" embodied in forum-selection clauses except when other factors "overwhelmingly" weigh against enforcing the clauses, 134 S. Ct. at 583.

The interests of efficiency clearly favor the severance and transfer of Howmedica's claims against DePuy along with its claims against Golden State, because Howmedica charges these two corporate defendants with the same wrongdoing—aiding and abetting the breach of the duty of loyalty, tortious interference with contract and with prospective economic advantage, unfair competition, and corporate raiding—and because "the same issues" should be litigated in the same forum, *Sunbelt Corp.*, 5 F.3d at 33-34.[14] And to the extent such severance and transfer to California create a risk of duplicative litigation if the claims against the Sales Representatives are litigated in New Jersey, that risk can be reduced or eliminated with "procedural mechanisms . . . , such as common pre-trial procedures, video depositions, stipulations, etc.," which can "echo those used by judges in cases managed pursuant to multidistrict litigation statutes," and which can encompass joint oral argument and bellwether trials if necessary and appropriate. *Rolls Royce*, 775 F.3d at 681; *see, e.g.*, *Excentus Corp.*

[14] For this reason, severance and transfer of only the claims against Golden State would be inefficient and inappropriate. Also inappropriate is severance and transfer of the claims against Nordyke without transferring the claims against the other Sales Representatives, as Howmedica accuses Nordyke of the same misconduct as it does the other Sales Representatives: breach of contract, breach of the duty of loyalty, and unfair competition.

v. Giant Eagle, Inc., 2014 WL 923520, at *10-11 (W.D. Pa. Mar. 10, 2014).[15] Although there may be some overlap in legal issues, we are confident that each court can become "familiar[] . . . with the applicable state law" (turning on the outcome of the courts' choice-of-law analyses and whether they choose to apply the choice-of-law provisions in the Sales Representatives' employment agreements). *Jumara*, 55 F.3d at 879-80. Moreover, notwithstanding Howmedica's purported concerns about "court congestion," the caseloads in both courts are comparable. *Jumara*, 55 F.3d at 879-80.[16]

"The enforceability of the judgment" and the "public policies of the fora," *Jumara*, 55 F.3d at 879, likewise support both courts' jurisdiction, for "it is unlikely that there would be any significant difference in the difficulty of enforcing a judgment rendered by one federal forum or the other," 1 Moore, *supra*, § 7.81[3][b], and both California and New Jersey lack any public policy against enforcing forum-selection clauses, *see Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148, 1150 (Cal. 1992) (en banc); *McMahon v. City of Newark*, 951 A.2d 185, 187, 196-97 (N.J. 2008).[17] To the extent the "local

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[15] *See generally* Fed. Judicial Ctr., *Manual for Complex Litigation* 227 (2004); Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 Vand. L. Rev. 1053, 1134-35 (2013); Alexandra D. Lahav, *Bellwether Trials*, 76 Geo. Wash. L. Rev. 576, 581 (2008).

[16] *See* Admin. Office of the U.S. Courts, *United States District Courts—National Judicial Caseload Profile* 15, 66 (2016), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile1231.2016.pdf.

[17] To be sure, California has a public policy against non-compete agreements. *See Advanced Bionics Corp. v. Medtronic, Inc.*, 59 P.3d 231, 236 (Cal. 2002). But that public policy is distinct from any public policy regarding where a non-compete dispute should be litigated, which California does not have. *See id.* at 237.

interest in deciding local controversies at home" weighs against retaining in New Jersey any claims about the Sales Representatives, who all live in California and worked for Howmedica in California, *Jumara*, 55 F.3d at 879, California's interest is offset by New Jersey's countervailing interest in deciding claims concerning the employment agreements at issue, which Howmedica, a New Jersey corporation, prepared and executed in New Jersey, *see generally Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 47 (2d Cir. 1996).

The non-contracting parties' private interests also are not unduly prejudiced by severance and transfer of only the claims against the two corporate defendants. Golden State is a California corporation, Howmedica's claims against DePuy and Golden State pertain to these entities' California operations, and, as a matter of law, the two corporate defendants will not be subject to issue preclusion. *See B & B Hardware*, 135 S. Ct. at 1303; *supra* Part II.C.3.b.iii. While retaining the claims against Nordyke in New Jersey cuts against Nordyke's private interests given his relatively meager financial resources, *see supra* Part II.C.3.b.ii, Nordyke himself agreed to a forum-selection clause that designated a similarly inconvenient Michigan forum, and, particularly given that Nordyke is represented by the same counsel as the other Sales Representatives, the minimal additional burden to him of litigating in New Jersey does not "overwhelmingly" outweigh the interests in upholding the other parties' "settled expectations," *Atl. Marine*, 134 S. Ct. at 583, and the efficiency of retaining Howmedica's identical claims against all five Sales Representatives in one court, *see supra* note 12.

III. Conclusion

The correct outcome of our four-step transfer inquiry in this case is clear, as severance and transfer of only the claims against DePuy and Golden State satisfies *Atlantic Marine*'s prescription that forum-selection clauses should be enforced "[i]n all but the most unusual cases," *Atl. Marine*, 134 S. Ct. at 583, accounts for private and public interests relevant to non-contracting parties, *see Jumara*, 55 F.3d at 879-80, resolves the personal jurisdiction defect as to Golden State in New Jersey, *see Howmedica I*, 2015 WL 1780941, at *7-8 & n.11, and promotes efficient resolution of Howmedica's claims without unduly prejudicing non-contracting parties' private interests, *see supra* Part II.C.3.b.iv. This outcome is therefore optimal for "the convenience of the parties and witnesses" and "in the interest of justice." 28 U.S.C. § 1404(a). Because the District Court clearly and indisputably erred in transferring this case in its entirety to the Northern District of California, we will issue a writ of mandamus vacating the transfer order and instructing the District Court on remand to sever Howmedica's claims against DePuy and Golden State under Federal Rule of Civil Procedure 21, to transfer those claims to the Northern District of California under 28 U.S.C. § 1404(a), and to retain jurisdiction over Howmedica's claims against the five Sales Representatives.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No.: 14-3449 (CCC)

HOWMEDICA OSTEONICS CORP., A NEW JERSEY Corporation and Subsidiary of STRYKER CORP.,

Plaintiff,

v.

BRETT SARKISIAN, *et al.*,

Defendants.

OPINION

CECCHI, District Judge.

Before the Court is Plaintiff Howmedica Osteonics Corporation's ("Plaintiff" or "Howmedica") appeal, pursuant to Federal Rule of Civil Procedure 72(a) and Local Civil Rule 72.1(c), of Magistrate Judge Falk's April 20, 2015 Order granting the motions of Defendants Brett Sarkisian, Keegan Freeman, Michael Nordyke, Taylor Smith, Bryan Wyatt, Depuy Orthopaedics, Inc., and Golden State Orthopaedics, Inc. (collectively, "Defendants") to transfer venue. ECF No. 77. Defendants oppose this appeal. ECF Nos. 78-80. In addition, on February 10, 2016, Depuy Orthopaedics, Inc. submitted to the Court supplemental authority, ECF No. 90, to which Plaintiff responded, ECF No. 91. The Court decides the motion without oral argument pursuant to Federal Rule of

Civil Procedure 78.[1] For the reasons set forth below, Judge Falk's Order is affirmed.

I. FACTUAL AND PROCEDURAL BACKGROUND

This action arises out of Howmedica's allegation that five of its former employees breached restrictive covenants in their employment agreements with Howmedica[2] by soliciting its clients in Northern California for the benefit of its competitors, Defendants DePuy Orthopaedics, Inc. ("DePuy") and Golden State Orthopaedics, Inc. ("GSO"). Am. Compl. ¶¶ 1, 60, 74-91, 92-130.

Howmedica is a New Jersey corporation engaged in the business of designing, manufacturing, and marketing orthopedic implants used in the reconstruction of various joints. *Id.* ¶ 22. It is a subsidiary of Stryker, a Michigan corporation. *See id.* at 1; Stryker Corporation, *Form 8-K Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934* (Jan. 22, 2016). Defendant DePuy is an Indiana corporation, *id.* ¶ 19, and Defendant GSO is a California corporation, *id.* ¶ 20. DePuy and GSO compete directly with Howmedica in the orthopedic implant industry. *Id.* ¶ 64.

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[1] The Court considers any arguments not presented on appeal by the parties to be waived. *See Brenner v. Local 514, United Bhd. of Carpenters & Joiners*, 927 F.2d 1283, 1298 (3d Cir. 1991) ("It is well established that failure to raise an issue in the district court constitutes a waiver of the argument.").

[2] Throughout its Amended Complaint, Plaintiff Howmedica consistently refers not to "Howmedica" but to "Stryker." *See* Am. Compl. As discussed above, Stryker is the name of Howmedica's parent company, which is not a party to this action. *Id.* at 1. Plaintiff explains in its objection to Judge Falk's Order that "Stryker" is also Howmedica's trade name. *See* ECF No. 77-1, at 25.

Defendants Brett Sarkisian, Keegan Freeman, Michael Nordyke, Taylor Smith, and Bryan Wyatt (collectively, the "California Individuals") are citizens of California. *Id.* ¶¶ 14-18. The California Individuals worked as sales representatives for Howmedica in and around Bakersfield, California and Fresno, California. *Id.* ¶ 1.

All of the California Individuals signed employment agreements with Howmedica and Stryker.[3] *Id.* ¶ 39. All of those employment agreements contain confidentiality, non-solicitation, and forum-selection clauses. *Id.* ¶¶ 22, 45, 48. However, not all of those agreements select the same forum. The agreements signed by Sarkisian, Freeman, Smith, and Wyatt select New Jersey as the forum for disputes arising out of the agreements. *Id.* ¶ 22. Nordyke's agreement, however, selects Michigan as the forum. *Id*. ¶ 41; Ex. B. Defendants DePuy and GSO did not enter into any agreement with Plaintiff.

Plaintiff alleges that in April 2014, the California Individuals resigned from Howmedica in California and took employment in California with "DePuy and/or GSO," Howmedica's direct competitors. *Id.* ¶ 4. Plaintiff further alleges the California Individuals breached their employment agreements and their duties of loyalty to Howmedica by soliciting a number of its California-based customers for the benefit of DePuy and GSO. *Id.* ¶ 60.

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[3] The California Individuals also argue that because Nordyke, Smith, and Wyatt signed agreements with "Stryker," not Howmedica, Howmedica lacks standing to enforce those agreements. As this Court affirms Judge Falk's decision granting Defendants' motion to transfer, it need not address that argument.

Plaintiff commenced this action on May 30, 2014, ECF No. 1, and filed an Amended Complaint on October 16, 2014, ECF No. 29. Defendants moved to dismiss Plaintiffs Amended Complaint and, in the alternative, to transfer venue to the U.S. District Court for the Northern District of California. ECF Nos. 52, 54, 55. Plaintiff opposed all motions. ECF Nos. 61-63. Judge Falk granted Defendants' motions to transfer venue on April 20, 2015. ECF No 76. Plaintiff appealed that decision on May 4, 2015. ECF No. 77.

II. LEGAL STANDARD

A. Appeal of a Magistrate Judge's Decision

A motion to transfer venue pursuant to 28 U.S.C. § 1404(a) is a non-dispositive motion. *See*, *e.g.*, *Siemens Fin. Servs., Inc. v. Open Advantage MRI II*, No. 07-1229, 2008 WL 564707, at *2 (D.N.J. Feb. 29, 2008) (internal citations omitted). A magistrate judge may hear and determine any non-dispositive pretrial motion pending before the district court. 28 U.S.C. § 636(b)(1)(A). A district court will only reverse a magistrate judge's decision on such motions if the decision is "clearly erroneous or contrary to law." *Id.*; Fed. R. Civ. P. 72(a); L. Civ. R. 72.1(c)(1)(A).

A magistrate judge's decision is clearly erroneous where the reviewing court, after considering the entirety of the evidence, "is left with the definite and firm conviction that a mistake has been committed." *Romero v. Ahsan*, No. CIV. 13-7695 FLW, 2015 WL 5455838, at *3 (D.N.J. Sept. 16, 2015) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)). "A district judge's simple disagreement with the magistrate judge's findings is insufficient to meet the clearly erroneous standard of review." *Id.* (quoting *Andrews v. Goodyear Tire & Rubber Co., Inc.*, 191

F.R.D. 59, 68 (D.N.J. 2000)). A magistrate judge's decision is "contrary to law if the magistrate judge has misinterpreted or misapplied applicable law." *Kounelis v. Sherrer*, 529 F. Supp. 2d 503, 518 (D.N.J. 2008) (citing *Gunter v. Ridgewood Energy Corp.*, 32 F. Supp. 2d 162, 164 (D.N.J. 1998)). The burden of showing that the magistrate judge's decision is contrary to law and clearly erroneous rests with the appealing party. *Id.* (internal citation omitted).

B. Transfer of Venue

Federal courts may transfer a case to another district "where it may have been brought,"[4] to serve

[4] A case may have been brought in a transferee district if "the transferee district has personal jurisdiction over all of the Defendants and . . . venue would be proper in the transferee district." *Samuels v. Medytox Solutions, Inc.*, No. CIV. 13-7212 SDW, 2014 WL 4441943, at *6 (D.N.J. Sept. 8, 2014). The parties do not dispute that this case could have been brought in the Northern District of California. Moreover, the Court finds this action may have been brought in the Northern District of California for the following reasons. First, California courts have personal jurisdiction over Defendants because the California Individuals and GSO are domiciled in California and DePuy concedes that it is subject to personal jurisdiction in California. *See* DePuy's Br. in Support, ECF No. 54, at 22, 25; Calif. Individuals' Br. in Support, ECF No. 52-2, at 30. Second, venue is proper in the Northern District of California because a substantial part of the events or omissions giving rise to the claim occurred there. 28 U.S.C. § 1391(b)(2). Specifically, it was in the Northern District of California that the California Individuals performed their services for Plaintiff, the California Individuals terminated their employment with Plaintiff, and all Defendants allegedly solicited Plaintiff's customers. *See* Am. Compl. ¶¶ 1, 4, 6-8, 60-62; ECF No. 76 at 16. Further, although Plaintiff argues the New Jersey forum-selection clauses in the contracts Sarkisian, Freeman, Smith, and Wyatt signed require the parties to litigate in New Jersey, it does not argue that venue is otherwise improper in the Northern District of California.

"the interests of justice," or for "the convenience of parties and witnesses." 28 U.S.C. § 1404(a). "There is no definitive formula or list of the factors to consider when deciding a motion to transfer." *Landmark Fin. Corp. v. Fresenus Med. Care Holdings, Inc.*, 2010 WL 715454, at *2 (D.N.J. Mar. 1, 2010) (citing *Jumara v. State Farm Ins. Co.*, 55 F.3d. 873, 879 (3d. Cir. 1995)). The Third Circuit has nevertheless explained that § 1404(a) implicates certain "public" and "private" interests. The public interests include: (1) enforceability of the Court's judgment; (2) practical considerations that could make the trial easy, expeditious, or inexpensive; (3) the level of congestion in the respective forums; (4) the local interest in deciding local controversies at home; (5) the public policies of the forum; and (6) the familiarity of the trial judge with the applicable state law in diversity cases. *Jumara*, 55 F.3d. at 879. The private interests include: (1) the plaintiff's preferred forum as expressed by the original forum choice; (2) the defendant's preference; (3) where the claim arose; (4) the convenience of the parties; (5) the convenience and availability of witnesses; and (6) the location of books and records. *Id.*

Recently, the U.S. Supreme Court held that a court may consider only the public-interest factors in its § 1404(a) analysis where the parties have agreed to a valid, mandatory forum-selection clause. *See Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568, 581 (2013) (internal citation and quotation omitted). The Court noted that "because [the public-interest] factors will rarely defeat a transfer motion, the practical result is that forum-selection clauses should control except in unusual cases." *See id.* at 582.

The *Atlantic Marine* Court did not, however, address the effect of conflicting, valid forum-selection clauses in separate contracts between the parties. Federal courts are generally hesitant to enforce conflicting forum-selection clauses "out of concern for wasting judicial and party resources." *Samuels v. Medytox Solutions, Inc.*, No. CIV.A. 13-7212 SDW, 2014 WL 4441943, at *4 (D.N.J. Sept. 8, 2014) (citing *Jones v. Custom Truck & Equip., LLC*, No. 10-611, 2011 WL 250997, at *4 (E.D. Va. Jan. 25, 2011)). The *Atlantic Marine* Court also did not consider a situation where some parties entered into forum-selection agreements while others did not. *See In re Rolls Royce Corp.*, 775 F.3d 671, 679 (5th Cir. 2014). Accordingly, since the decision in *Atlantic Marine*, courts have found consideration of the private-interest factors is appropriate where (I) there are competing, mandatory forum-selection clauses, see *Samuels*, 2014 WL 4441943, at *8, or (2) some parties have not agreed to adjudicate disputes in a particular forum, see *In re Rolls Royce Corp.*, 775 F.3d at 681.

III. DISCUSSION

Judge Falk's Opinion noted the facts of the instant case were distinguishable from *Atlantic Marine* but found that transfer to the Northern District of California was appropriate under both the *Atlantic Marine* framework and the traditional transfer analysis. For the reasons set forth below, this Court finds Judge Falk's decision was neither clearly erroneous nor contrary to law.

A. Under *Atlantic Marine*, the Public-Interest Factors Support Transfer

Applying *Atlantic Marine*, Judge Falk identified a number of exceptional public-interest considerations

supporting transfer to the Northern District of California. This Court agrees.

The Court finds the following factors weigh in favor of transfer. Regarding the first factor—enforceability of the court's judgment—the Court finds that, if Plaintiff prevails, "it will be easier to obtain judgment over [Defendants] in California because [the majority of Defendants] reside[] in that state." *PNY Techs., Inc. v. Miller*, *Kaplan, Arase & Co., LLP*, No. CIV.A. 14-4150 ES, 2015 WL 1399199, at *9 (D.N.J. Mar. 24, 2015) (citing *United States ex rel Groundwater Tech., Inc. v. Sevenson Envtl. Servs., Inc.*, No. 00-311, 2000 WL 33256658, at *5 (D.N.J. 2000)).

Concerning the second factor, the Court finds that, as most of the parties and key non-party witnesses are located in California, see ECF No. 76 at 17, a transfer to California will promote "easier, more expeditious, and less expensive litigation," *PNY Technologies*, 2015 WL 1399199, at *9. Thus, that factor also militates in favor of transfer.

Next, because California's interest in the instant dispute outweighs New Jersey's, the fourth factor also supports a transfer to California. As Judge Falk noted, this case primarily involves the rights of California citizens and the cause of action arose in California. ECF No. 76 at 18. "Because . . . the alleged culpable conduct occurred in [California], not New Jersey, [California] has a stronger public interest in adjudicating this dispute." *Liggett Grp. Inc. v. R.J. Reynolds Tobacco Co.*, 102 F. Supp. 2d 518, 536 (D.N.J. 2000) (citations omitted). In addition, this Court agrees with Judge Falk that California has "an overriding public interest in minimizing the interruption to the schedules of the [seven to ten] non-party surgeons" who practice trauma and reconstructive medicine in

California and are indispensable witnesses in the case.[5] ECF No. 76 at 17 (citing Calif. Individuals' Br. in Support at 33-34). In light of these considerations, the fact that the allegedly injured Plaintiff is a New Jersey corporation is not dispositive. *See PNY Technologies, Inc. v. Miller, Kaplan, Arase & Co., LLP*, No. CIV.A. 14-4150 ES, 2015 WL 1399199, at *9 (D.N.J. Mar. 24, 2015) (finding California's public interest in the dispute outweighed New Jersey's even though the plaintiff was a New Jersey corporation).

Regarding the fifth factor—public policy—the Court finds the public interest in promoting judicial economy also strongly supports a transfer. Declining to transfer and enforcing the New Jersey forum-selection clauses could require this Court to create wasteful parallel litigation for two reasons. First, because Nordyke's employment contract selected Michigan and not New Jersey, this Court could find Nordyke must be dismissed from the litigation, potentially creating "two separate lawsuits which concern the same underlying events." *Blissfield Mfg. Co. v. Blue H20 Solutions, LLC*, No. 12-15610, 2013 WL 5450289, at *5 (E.D. Mich. Sept. 30, 2013) (declining to enforce competing forum-selection clauses to avoid creating duplicative litigation in two forums); *see also Lawrence v. Xerox Corp.*, 56 F. Supp. 2d 442, 455 (D.N.J. 1999) (transferring venue where "the interests of justice, judicial economy and the avoidance of the possibility of incon-

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[5] Although the *Atlantic Marine* Court suggested "[w]hen parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses," the nonparty surgeons' profession renders their participation in the instant action a matter of public, not merely private, concern because of California's public interest in the surgeons' potentially life-saving work. *Atlantic Marine*, 134 S. Ct. at 582.

sistent results require one District Court preside over these cases"). Second, because the California Individuals entered into forum-selection agreements but GSO and DePuy did not, "the section 1404 [transfer] analysis, modified by *Atlantic Marine*, might point in the direction of one judicial district for the forum-selection clause parties, and in another direction for the parties without a preexisting agreement." *In re Rolls Royce Corp.*, 775 F.3d at 679. The Fifth Circuit has found this scenario "suggests that the need—rooted in the valued public interest in judicial economy—to pursue the same claims in a single action in a single court can trump a forum-selection clause." *Id.*

The third and sixth factors are neutral in this Court's analysis. The third factor—the relative level of congestion in the available forums—is neutral because the caseloads in this District and in the Northern District of California are comparable. The sixth factor is also neutral because this Court is confident in the ability of a federal judge in the Northern District of California to apply the appropriate state's law.

Accordingly, the public-interest factors do not support keeping this case in New Jersey. Therefore, this Court agrees with Judge Falk that the public-interest factors weigh in favor of transfer to the Northern District of California and that transfer is appropriate under the *Atlantic Marine* framework.

B. The Private-Interest Factors Also Weigh in Favor of Transfer

To the extent this case is factually distinguishable from *Atlantic Marine*, this Court finds the private-interest factors also weigh in favor of transfer. Since *Atlantic Marine*, courts have held consideration of private-interest factors is appropriate where: (1) the

parties have agreed to conflicting, mandatory forum-selection clauses, see *Samuels*, 2014 WL 4441943, at *8, or (2) where some of the parties have not entered into any forum-selection agreement, see *In re Rolls Royce Corp.*, 775 F.3d at 681.

Both scenarios are present here. First, regarding the existence of conflicting, mandatory forum-selection clauses, the forum-selection clauses in Sarkisian's, Smith's, Freeman's, and Wyatt's employment agreements name New Jersey, but the forum-selection clause in Nordyke's agreement names Michigan. *See* Am. Compl. Ex. A ¶ 6(h), Ex. B ¶ 6(h), Ex. C ¶ 8.2, Ex. D ¶ 8.2, Ex. E ¶ 8.2. And, because each of those clauses states all litigation between the parties arising from the agreement either "shall" or "will" take place in the designated forum, *id.*, it appears those clauses are mandatory.[6] *See*, *e.g.*, *Asphalt Paving Sys., Inc. v. Gen. Combustion Corp.*, No. CIV.A. 13-7318 JBS, 2015 WL 167378, at *5 (D.N.J. Jan. 13, 2015) (finding "the inclusion of the word "shall" sufficiently evinces a forum selection clause's mandatory nature" (citing *Wall St. Aubrey Golf, LLC v. Aubrey*, 189 Fed. App'x 82, 85 (3d Cir. 2006))); *Suhre Assocs., Inc. v. Interroll Corp.*, No. CIV.A. 05-4332(MLC), 2006 WL 231675, at *2 (D.N.J. Jan. 31, 2006) (finding a forum-selection clause stating "that litigation concerning the Contract 'will' be instituted in [North Carolina] . . . is mandatory"). Thus, "the parties have not unambiguously

[6] Although the California Individuals' contend the forum-selection clauses in Nordyke's, Smith's, and Freeman's employment agreements are permissive, see Calif. Individuals' Br. in Support, ECF No. 52-2 at 21, the Court notes those clauses state "any and all litigation . . . relating to this Agreement will take place exclusively" in the designated forum, Am. Compl. Ex. C ¶ 8.2, Ex. D ¶ 8.2, Ex. E ¶ 8.2.

agreed to litigate in a particular forum as the parties did in *Atlantic Marine*." *Samuels*, 2014 WL 4441943, at *8.

Second, concerning a situation where not all parties entered into a forum-selection agreement, GSO and DePuy did not enter into any forum-selection contract with Plaintiff. Although the Third Circuit has not explicitly considered such a situation, the Fifth Circuit has noted:

> [T]he [transfer] analysis differs when there are parties who have not entered into any forum-selection contract. First, *Atlantic Marine* was premised on the fact that the parties had agreed in advance where their private litigation interests lie, and the reviewing court had no cause to disturb those expectations. A litigant not party to such a contract did not, of course, make any such advance agreements and *their* private interests must still be considered by the district court.

In re Rolls Royce Corp., 775 F.3d at 679. Having found the instant case may be distinguished from the facts of *Atlantic Marine*, this Court may consider the private-interest factors in its transfer analysis.

Judge Falk correctly found that, on balance, the six private-interest factors also weigh in favor of a transfer to the Northern District of California. The second, third, fourth, and fifth factors clearly support transfer. The second factor, Defendants' choice of forum, favors a transfer because Defendants have moved to transfer this litigation to the Northern District of California. The third factor—the locus of events giving rise to Plaintiff's claims—also points clearly toward a transfer to California: the California Individuals performed their services for Plaintiff in

California, the California Individuals terminated their employment with Plaintiff in California, and Defendants allegedly solicited Plaintiff's customers in California. *See* Am. Compl. ¶¶ 1, 4, 6-8, 60-62; ECF No. 76 at 16. Accordingly, California is "the center of gravity of the accused activity." *See NCR Credit Corp. v. Ye Seekers Horizon, Inc.*, 17 F. Supp. 2d 317, 321 (D.N.J. 1998) (citations omitted).

Next, the fourth and fifth factors—convenience of the parties and witnesses—likewise weigh heavily in favor of a transfer. Here, six of the seven Defendants are located in California and only Plaintiff is located in New Jersey. *See* Am, Compl. ¶¶ 13-20. Defendants have also identified fifteen nonparty witnesses who live in California and would testify about events surrounding Plaintiff's claims. See Calif. Individuals' Br. in Support, ECF No. 52-2, at 33-34. In contrast, Plaintiff does not appear to identify any nonparty witnesses located in New Jersey. In evaluating the convenience of witnesses, courts have held the location of nonparty witnesses is entitled to particular consideration. *See LG Elecs., Inc. v. First Int'l Computer, Inc.*, 138 F. Supp. 2d 574, 591 (D.N.J. 2001); *Teleconference Sys. v. Proctor & Gamble Pharm., Inc.*, 676 F. Supp. 2d 321, 333 (D. Del. 2009).

Although the first factor—Plaintiff's preferred forum—weighs against a transfer, Plaintiff's choice "is not conclusive; if it were, then courts would have no need to perform a multi-factor analysis." *Samuels*, 2014 WL 4441943, at *8 (citing *Jumara*, 55 F.3d at 879) *Tischio v. Bontex, Inc.*, 16 F. Supp. 2d 511, 515 (D.N.J. 1998) (A plaintiff's choice of forum "is simply a preference; it is not a right."). Indeed, on balance, the interest of the seven Defendants in litigating this

matter in California would seem to outweigh one Plaintiff's interest in remaining in New Jersey.

Finally, the sixth factor—the location of relevant books and records—does not appear to favor either venue. Plaintiff argues that relevant financial statements, personnel files, and other documents are in New Jersey. *See*, *e.g.*, Pl. Br. on Appeal, ECF No. 77-1, at 29. Defendants, however, contend that most, if not all, relevant documents are located in California. *See* Calif. Individuals' Br. in Support at 21; GSO's Br. in Support at 34 n.34. As nothing indicates relevant documents could not be made available in either this District or the Northern District of California, the Court finds the sixth factor is neutral.

In light of the foregoing considerations, the Court finds the totality of the private-interest and public-interest factors weighs in favor of granting Defendants' motions to transfer. Therefore, even under a traditional § 1404 transfer analysis, transfer to the Northern District of California is appropriate.

IV. CONCLUSION

For the reasons set forth above, this Court concludes Judge Falk's decision is neither clearly erroneous nor contrary to law and transfer of venue to the Northern District of California is proper. The April 20, 2015 Order will be affirmed. An appropriate Order accompanies this Opinion.

DATED: August 26, 2016

/s/ Claire C. Cecchi
CLAIRE C. CECCHI, U.S.D.J.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No.: 14-3449 (CCC)

HOWMEDICA OSTEONICS CORP., a New Jersey Corporation and subsidiary of STRYKER CORPORATION,

Plaintiff,

v.

BRETT SARKISIAN; KEEGAN FREEMAN; MICHAEL NORDYKE; TAYLOR SMITH; BRYAN WYATT; DEPUY ORTHOPAEDICS, INC.; AND GOLDEN STATE ORTHOPAEDICS, INC.,

Defendants.

OPINION

Falk, U.S.M.J.

This case centers on Plaintiff Howmedica's allegation that five former California employees of Howmedica, or its non-party parent Stryker Corporation, breached restrictive covenants in their employment agreements by soliciting clients in California for the benefit of competitors Depuy Orthopaedics, Inc. and Golden State Orthopaedics, Inc.

Before the Court are three motions seeking dismissal for, *inter alia*, lack of personal jurisdiction, pursuant to Rule 12(b)(2), improper venue, pursuant to Rule 12(b)(3), and for failure to state a claim,

pursuant to Rule 12(b)(6). [ECF Nos. 52, 54-55.][1] Alternatively, Defendants all request a transfer of this case, pursuant to 28 U.S.C. § 1404(a), to the United States District Court for the Northern District of California. [*Id.*] Plaintiff opposes the motions, which were referred to the Undersigned. Having carefully considered the papers submitted, no oral argument is necessary. Fed. R. Civ. P. 78(b). For the reasons stated below, the motions to transfer are GRANTED, and the case is transferred to the United States District Court for the Northern District of California.[2]

BACKGROUND

Plaintiff Howmedica Osteonics Corporation is a New Jersey based, wholly-owned subsidiary of non-party Stryker Corporation, which is located in Michigan. (Amended Compl. ("AC"), ¶ 13; Declaration of Jed Marcus, Esq. ("Marcus Decl.") ¶ 6.)[3] Howmedica is in

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[1] Defendant DePuy moved pursuant to Rule 12(b)(6) and for failure to join necessary parties pursuant to Rules 12(b)(7) and 19. It did not address jurisdiction or venue.

[2] The Undersigned does not need to conclusively resolve Defendants' Rule 12 arguments, which if necessary would be accomplished by way of a Report and Recommendation. *See* 28 U.S.C. § 636(b)(1)(B). Because a request to transfer pursuant to 28 U.S.C. § 1404(a) is a non-dispositive motion, *see*, *e.g.*, *Siemens Financial Servs., Inc. v. Open Advantage MRI II*, 2008 WL 564707, at *2 (D.N.J. Feb. 29, 2008), the Court issues an Opinion subject to the clearly erroneous standard of review.

[3] The Amended Complaint and employment agreements, which are important to the issues on this motion, are confusing as to the identity of the Individuals' employers and contracting parties. Howmedica is the only named Plaintiff, and the caption describes it as subsidiary of Stryker Corporation. However, throughout the Amended Complaint, Plaintiff Howmedica refers to itself as "Stryker." Although obviously related, Howmedica and Stryker are different corporations with different corporate

the business of designing, manufacturing, and marketing orthopaedic implants used in reconstructing various joints, including hip, knee and shoulder implants. (AC ¶ 24.) Howmedica's business in this industry is focused on two primary areas. One area is referred to as "Recon," which involves reconstructive total joint repair such as hip replacement surgery. (AC ¶¶ 1, 4.) The second area is referred to as "Trauma," which involves emergent traumatic fracture repair surgeries. (AC ¶¶ 1, 4.) Both areas are generally treated by the same orthopaedic surgeons, although product-makers sometimes treat the areas as different product lines. (*Id.*)

Defendant DePuy Orthopaedics, Inc. ("DePuy") is an Indiana Corporation with its principal place of business in Warsaw, Indiana. (AC ¶ 19.) Defendant Golden State Orthopaedics, Inc. ("GSO") is California corporation with its principal place of business in San Francisco, California. (AC ¶ 20.) DePuy and GSO are direct competitors of Howmedica /Stryker in the Recon and Tramua fields of orthopaedic sales. (AC ¶ 64.)

Defendants Brett Sarkisian, Keegan Freeman, Michael Nordyke, Taylor Smith, and Bryan Watt were apparently former Howmedica or Stryker sales employees (collectively, the "California Individuals"). All five individuals are citizens of, and reside in, California. (AC ¶¶ 14-18.) Sarkisian, Freeman, Smith, and Watt were employed as Recon Sales Representatives; Nordyke was a Trauma Sales Representative. All five individuals executed employment agreements

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citizenship. Howmedica is a New Jersey corporation located in Mahwah, New Jersey. (AC ¶ 13.) Stryker Corporation a separate corporation and legal entity based in Michigan. (Compl., p. 1.)

with Stryker Corporation (a non-party) or Howmedica.[4] The employment agreements contain confidentiality and non-solicitation provisions. (AC ¶¶ 45, 48.) The agreements also contain forum selection clauses. (AC ¶ 22.) Although discussed more herein, the forum selection provisions in the agreements signed by Sarkisian, Freeman, Smith, and Watt purport to set New Jersey as the forum for any dispute arising out of the agreements. (AC ¶ 22.) However, Nordyke's agreement, which is also described as a "California" agreement, designates Michigan—not New Jersey—as the appropriate forum. (AC ¶¶ 22-23; Declaration of Michael Nordyke ("Nordyke Decl.") ¶ 26; Exhibit 3, ¶ 8.2.)

In April 2014, Howmedica alleges that, without notice, the California Individuals simultaneously resigned and took employment with "DePuy and/or GSO," its direct competitors. (AC ¶¶ 4, 55.) Howmedica claims that Defendants then went on to breach their

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[4] Sarkisian and Wyatt signed employment agreements with Plaintiff Howmedica. (AC ¶¶ 30-31.) However, these agreements are titled "Stryker Orthopaedics" employee agreement at the top. In the top right corner of the Howmedica agreements, the word "California" appears in bold capital letters. Although the agreements purport to be between Howmedica and the individual employees, Howmedica is referred to as "Styrker" in the body of the agreements. Nordyke, Smith and Freeman signed employment agreements with Stryker Corporation, not Howmedica. (Nordyke Decl., ¶ 26; Freeman Decl., ¶ 19; Smith Decl., ¶ 2.) These individuals contend, *inter alia*, that Howmedica lacks standing to sue them for breach of the agreements. Howmedica counters that it has standing because the employment agreements were entered into with Stryker *and* any of its "existing and future subsidiaries" (i.e., Howmedica). (Pl.'s Br. 11.) Regardless of whether the Plaintiff has standing, the unexplained, interchangeable description of the Plaintiff, the employer, and the contracting parties as Howmedica and Stryker is quite confusing.

employment agreements and duty of loyalty to Stryker, and that "DePuy . . . engaged in tortious conduct in connection with the misdeeds" of the California Individuals. (AC ¶ 5.) Specifically, Howmedica contends that, prior to resigning, the California Individuals, in concert with and "at GSO and DePuy's request," solicited numerous California-based Stryker customers in favor of DePuy. (AC ¶ 6.) These former Stryker customers are all orthopaedic surgeons who live in California. *(Id.)* Not surprisingly, Defendants have a different story.

On May 30, 2014, Howmedica filed its original complaint. The operative complaint, Howmedica's Amended Complaint, was filed on October 16, 2014, and contains the following counts: (1) Breach of Contract (against the California Individuals); (2) Breach of Duty of Loyalty (against the California Individuals); (3) Aiding and Abetting Breach of Duty of Loyalty (against DePuy and GSO); (4) Tortious Interference with Contract (against DePuy and GSO); (5) Tortious Interference with Prospective Economic Advantage: Stryker's Workforce (against DePuy and GSO); (6) Tortious Interference with Prospective Economic Advantage: Stryker's Customers (against DePuy and GSO); (7) Unfair Competition (against all Defendants); and (8) Corporate Raiding (against DePuy and GSO).

On November 26, 2014, all Defendants moved to dismiss the case for a multitude of reasons, including lack of personal jurisdiction (Rule 12(b)(2)), improper venue (Rule 12(b)(3)), and failure to state a claim (Rule 12(b)(6)). [ECF Nos. 52, 54, 55.] In addition, all Defendants request transfer of this case to the United States District Court for the Northern District of

California, pursuant to 28 U.S.C. § 1404.[5] Plaintiff has opposed all three motions separately. Extensive briefing has been submitted, including overlength briefs and sur-replies.[6]

* * *

As is explained in detail below, this is a California-centric dispute that belongs in California. The only conceivable reason this case is in New Jersey is the forum selection provision contained in some—but not all—of the California Individuals' Employment Agreements. Howmedica has also stretched to argue that GSO—a party with no contract with Plaintiff and virtually no connection at all to this forum—should also be bound by the forum selection agreements in *some* of the California Individuals' contracts and brought to New Jersey.[7] Similarly, ignoring the forum

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[5] On July 7, 2014, GSO filed a related lawsuit in the United States District Court for the Northern District of California against Howmedica, alleging that Howmedica's actions in seeking to prevent the California Individuals from working for GSO violates California law. *See Golden State Orthopaedics Inc. v. Howmedica Osteonics Corp.*, N.D. Cal., 14-3073 (PJH). The Honorable Phyllis J. Hamilton, U.S.D.J. has stayed that case pending the outcome of GSO's motion in this Court. *See* N.D. Cal., 14-3703, ECF No. 43.

[6] The parties' papers contain fact disputes relating to almost every issue, including the negotiation and entry of the California Individuals' Employment Agreements; who employed the California Individuals and who employs them now; and whether Howmedica is even the party with standing to bring this lawsuit. The legal validity of the employment agreements and the forum selection clauses is also hotly disputed. These disputes are not resolved in this Opinion (nor could they be on the record submitted) because their resolution is unnecessary for the Court to determine that this case belongs in California.

[7] It relies on the "closely-related parties" doctrine, which provides, in some circumstances, that a forum selection clause

selection provision in Nordyke's agreement setting venue in Michigan, Plaintiff argues Nordyke too is "closely-related" to the other California Individuals such that he should be bound by the terms of their contracts (the validity of which are genuinely disputed). In other words, Plaintiff would have this entire dispute heard in New Jersey even though GSO has no connection to this forum and even though one of the California Individual Defendants has a forum selection clause setting litigation in the courts of Michigan. Even if it is assumed the employment agreements are valid, the Court would likely recommend dismissal of this matter for both lack of personal jurisdiction and improper venue (as to most, if not all, parties). However, there is no need to do so under the few undisputed facts present here. The fairest, most efficient, and commonsense decision is to transfer this case where it belongs—California.

SUMMARY

Everything about this contentious case is in California—all the parties are there; the causes of action arose there; the evidence is there; the important witnesses are there—including at least 7 truly essential non-party witnesses not subject to compulsory process in New Jersey (orthopaedic surgeons, whose availability is difficult even where they live).

The California connections to this case are obvious beyond dispute. If this was a standard transfer

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can be enforced against a non-signatory when the party is so "closely related to the contractual relationship or dispute such that it is foreseeable that the party will be bound." *D'Elia v. Grand Carribean Co.*, 2010 U.S. Dist. LEXIS 32230, at *11 (D.N.J. Mar. 30, 2010) (citing *Coastal Steel Corp. v. Tilghman Wheelabrator*, 709 F.2d 190, 203 (3d Cir. 1983)).

analysis, it would be simple; transfer to California would be reflexive. But there is an obstacle here, which causes pause but ultimately is not insurmountable. The barrier to automatic transfer is that 4 out of the 7 defendants apparently signed forum selection clauses purportedly consenting to venue in New Jersey. As stated, one of the other defendants signed a forum selection clause naming Michigan as the exclusive forum for any action. The remaining two defendants did not sign any forum selection clause and one argues convincingly that there is no personal jurisdiction over it in New Jersey. The obstacle is a line of precedent reinforced by a recent Supreme Court case that instructs that in a transfer analysis valid forum selection clauses are entitled to special considerations and are generally to be enforced. The Court fully acknowledges and respects that precedent. However, enforcing the purported (New Jersey) forum selection clauses (whose validity is vigorously disputed) doesn't make sense and would lead to palpable inconvenience, ineconomy, and injustice that refutes the intent of the transfer statute.

This is because enforcing the few New Jersey clauses would likely divide the case (which is really one case and must be tried as one case) into three separate cases, in three different venues—two on the opposite coasts of the Country and one in the middle. That makes no sense for anyone.

Conversely trying to squeeze the whole case in New Jersey is untenable. It would require the Court to disregard the law of jurisdiction and venue and then make a series of factual findings where there is no obvious basis to do so. For example, keeping the case in New Jersey would require the Court to disregard the Michigan forum selection clause for no reason

other than Plaintiff wants it that way. Also, it would require finding venue was proper in New Jersey in the first place, which is disputed and highly questionable. It would require finding that the New Jersey forum selection clauses are valid, though Defendants claim they were procured by misrepresentations and are unenforceable contacts of adhesion. It would require finding that Plaintiff has standing to enforce the forum selection clauses even though it is not clear who the clauses were entered into with. It would require finding that there is personal jurisdiction in New Jersey over certain Defendants when it seems clear that there is not. It would require finding the "closely related" doctrine somehow overrides the jurisdiction and venue problems.

Deciding this multitude of fact disputes would likely require jurisdictional and validity discovery and likely necessitate hearings with the Court making credibility findings. And all of this before even talking about the merits. And after all that, there are still the California surgeons with *no* connection to New Jersey who may be the most important fact witnesses in the case. Respectfully, it is this Court's opinion that the Supreme Court's endorsement of the enforceability of valid forum selection clauses does not require this convoluted exercise in this particular case.

Yes, forum selection clauses are entitled to deference. But they're not automatic and absolute. The Court concludes that circumstances here constitute the type of exceptional circumstances in which transfer may be appropriate, even assuming a valid forum selection clause. Justice and reason dictate that this case proceed in California, and therefore, for the reasons set forth below, Defendants' alternative motions to transfer will be granted.

DISCUSSION

A. Transfer Pursuant to Section 1404(a)

28 U.S.C. § 1404(a) provides federal courts with authority to transfer a case to another district "where it may have been brought," when doing so is "[f]or the convenience of parties and witnesses," or in "the interests of justice." 28 U.S.C. §1404(a). The purpose of transfer is to "prevent the waste of 'time, energy, and money' and to protect litigants, witnesses, and the public against unnecessary inconvenience and expense.'" *Ricoh Co., Ltd. v. Honeywell, Inc.*, 817 F. Supp. 473, 479 (D.N.J. 1993) (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964)). The decision to transfer is a highly discretionary one. *See*, *e.g.*, *Lafferty v. St. Riel*, 495 F.3d 72, 76 (3d Cir. 2007); *Superior Oil v. Andrus*, 656 F.2d 33, 42 (3d Cir. 1981) ("[A] district court has broad discretionary power under [§ 1404(a)] to transfer any civil action to any other district where it might have been brought.").[8]

"There is no definitive formula or list of the factors to consider when deciding a motion to transfer." *Landmark Fin. Corp. v. Fresenus Med. Care Holdings, Inc.*, 2010 WL 715454, at *2 (D.N.J. Mar. 1, 2010). However, the Third Circuit has articulated certain "public" and "private" interests implicated by § 1404(a). The private interests include: (1) the plaintiff's preferred forum as expressed by the original forum

[8] The transfer statute limits the ability to transfer to a district or division where the case "might have been brought." 28 U.S.C. § 1404(a). Another district is proper if that district would be a proper venue for the action and that forum is capable of asserting subject matter jurisdiction over the claim and personal jurisdiction over the defendants. *See Yang v. Odom*, 409 F. Supp. 2d 599, 604 (D.N.J. 2006). There is no dispute that this case could have been brought in the Northern District of California.

choice; (2) the defendant's preference (3) where the claim arose; (4) the convenience of the parties; (5) the convenience and availability of witnesses; and 6) the location of books and records. *See Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir. 1995). The public interests include: (1) enforceability of the Court's judgment; (2) practical considerations that could make the trial easy, expeditious, or inexpensive; (3) the level of congestion in the respective forums, (4) the local interest in deciding local controversies at home; (5) the public policies of the forum; and (6) the familiarity of the trial judge with the applicable state law in diversity cases. *Id.*

B. Some clear thinking on the Supreme Court's Opinion in *Atlantic Marine Constr. Co. v. U.S. District Court for the Western District of Texas*, *134 S. Ct. 568 (2013)*

The parties' briefs debate the impact of the Supreme Court's Opinion in *Atlantic Marine* on this case. Therefore, it is appropriate to discuss that decision.

In *Atlantic Marine*, the plaintiff was a Virginia-based construction contractor that entered into a subcontract with a Texas corporation for work on a project. *Id.* The parties' contract contained a forum selection clause stating that all disputes between the parties "shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia . . . ." *Id.* at 575. The parties had a dispute over payment, and the Texas subcontractor commenced an action in the United States District Court for the Western District of Texas. *Id.* In response, the Virginia contractor filed a motion to dismiss the suit, arguing that the forum selection clause placing litigation in Virginia rendered venue in the Western District of Texas "wrong" under

28 U.S.C. § 1406 or "improper" under Federal Rule of Civil Procedure 12(b)(3). In the alternative, the Virginia contractor moved to transfer to the Eastern District of Virginia. *Id.* After a series of lower court decisions, the issue presented to the Supreme Court was "the procedure that is available to a defendant in a civil case who seeks to enforce a forum selection clause." *Id.* at 575.

The Supreme Court held that a determination of whether venue is "wrong" or "improper" is determined solely by reference to the federal venue statute—28 U.S.C. § 1391—and "whether the parties entered into a contract containing a forum-selection provision has no bearing on whether a case falls into one of the categories of cases listed in § 1391(b)." *Id.* The Supreme Court further held that the proper way for a defendant to enforce a forum selection clause is not through a motion to dismiss for improper venue, but rather through a motion to transfer pursuant to 28 U.S.C. § 1404(a). *Id.* Finally, the Supreme Court stated that if is a valid forum selection clause, a district court should ordinarily transfer a case to the forum stated in the clause absent "extraordinary circumstances unrelated to the convenience of the parties." *Id.* at 581.

In sum, *Atlantic Marine* stands for the following:

* Whether venue is "proper" is determined solely by referring to 28 U.S.C. § 1391, *id.* at 577;

* When the parties' contract contains a valid forum selection provision, and a lawsuit is filed in a venue other than the forum in the parties' contract, a defendant should respond with a motion to transfer pursuant to 28 U.S.C. § 1404(a), *id*, at 579;

* A valid forum selection clause is an important consideration in a Section 1404(a) analysis. A case should usually be transferred to the district specified in the clause, absent unusual circumstances, *id.* at 581; and

* When there is a valid forum selection clause, and a case is filed in a district other than the one specified in the clause, the court's Section 1404(a) transfer considerations change in three ways: (1) the plaintiff's choice of forum becomes immaterial; (2) the parties' private interests—traditional transfer considerations—should not be considered, and should be deemed to weigh entirely in favor the selected forum; and (3) the original venue's choice of law rules do not apply, *id*, at 581-82.

This case is not *Atlantic Marine.* Indeed, there are many distinctions between *Atlantic Marine* and what is presented here, including:

* Defendants are not seeking to enforce a forum selection provision. Rather, the Plaintiff—Howmedica—filed suit in this District suggesting that some of the purported forum selection clauses made jurisdiction and venue proper here, arguably contrary to *Atlantic Marine.* (AC ¶ 22.)

* *Atlantic Marine* was based on the presumption that the forum selection clause was valid, *id.* at 581 n.5. Here, the validity of the forum selection provisions are contested.[9]

[9] Defendants do not simply say that the forum selection clauses are invalid. Some submit sworn declarations with specific facts

* Unlike *Atlantic Marine*, there are extensive disputes about the propriety of venue and jurisdiction, especially as to Defendant GSO, which has no contractual relationship with Plaintiff and is being sued here based on a strained theory of "closely-related" parties.

* * *

Atlantic Marine does not compel a specific result in this case. It simply requires that, if valid, and venue in the chosen forum is independently correct, then the forum selection clause be given due weight in the transfer analysis. The case does not overrule case law that recognizes that a district court has wide discretion to transfer venue, including a transfer contrary to a forum selection provision. *See*, *e.g.*, *Siemens Financial Servs., Inc. v. Open Advantage MRI II*, 2008 WL 564707, at *2 (D.N.J. Feb. 29, 2008) ("The existence of a private agreement does not prevent the court from ordering transfer under section 1404(a)." (quoting *Plum Tree, Inc.v. Stockment*, 488 F.2d 754, 758 (3d Cir. 1973))); *De Lage Landen Fin. Servs. v. Cardservice Int'l Inc.*, 2000 U.S. Dist LEXIS 15505, at *6 & n.3 (E.D. Pa. Oct. 26, 2009) ("Neither Plaintiff's choice of forum nor a forum selection clause is dispositive, however, or there would be no need to consider any other factor and § 1404(a) would be meaningless."). Nor does it overrule case law Defendants rely on in support of transfer, like *Ikon Office Solutions, Inc. v. Rezente*, 2010 U.S. Dist. LEXIS 10096 (E.D. Pa. Feb. 3, 2010).

In *Ikon*, the employer was an Ohio corporation with its principal place of business in Pennsylvania. *Id.* at

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supporting their disputed claim that the clauses were the result of misrepresentations and are classic contacts of adhesion.

*2. It sought to enforce restrictive covenants against two former employees who lived and worked in California. *Id*, at *2-3. The agreements the employer sought to enforce contained forum selection clauses, which authorized the employer to bring suit in the Eastern District of Pennsylvania, which it did. *Id.* Defendants moved to dismiss for lack of personal jurisdiction, or in the alternative to transfer venue. *Id.* The court did not reach the issue of personal jurisdiction, finding instead venue was improper in Pennsylvania and that venue could not be made proper simply by inserting a forum selection clause in a contract making it so. *Id.* at *4-5. Because venue was improper in Pennsylvania., the Court transferred the case to the Eastern District of California, despite the forum selection clause.

Ikon is on point. And its logic survives *Atlantic Marine* and supports transfer of this case to California. Like *Ikon*, this case is, if anything, is the "unusual" case identified in *Atlantic Marine* that should be transferred despite a purported forum selection clause.

C. Section 1404(a) Transfer Appropriate in this Case

This case is so California based that a traditional factor by factor transfer analysis is unnecessary. The only New Jersey connection is that Plaintiff (which may not even be the real party in interest) is located here and some of the California Individuals have New Jersey forum selection clauses whose validity is disputed. Everything else is in California. Still, the Court will briefly address some of the Section 1404 transfer factors.

1. Private Factors

(i) Plaintiff's Choice of Forum

A plaintiff's initial choice of venue is entitled to some consideration. *Shutte v. Armco Stell Co.*, 431 F.2d 22, 24 (3d Cir. 1970). This is particularly true when the plaintiff selects its home forum. *Sandvik, Inc. v. Continental Ins. Co.*, 724 F. Supp. 303, 307 (D.N.J. 1987). Here, it is not clear that New Jersey is really the true plaintiff's home forum. Indeed, the forum selection clauses mostly refer to Stryker Corporation from Michigan. The problems with the forum selection clauses has been discussed herein and will be repeated below. Suffice it to say, Plaintiff's choice of forum is entitled to no deference on the facts presented.

First, there are serious questions regarding the enforceability of the clauses. The California Individuals claim the clauses were procured through misrepresentations and are unconscionable and invalid because they are adhesion contracts that were presented by an employer to an employee on a "take-it-or-leave it basis." [California Defendants' Brief at 25-26; ECF No. 52-2.]

Second, Nordyke's *Michigan* forum selection provision raises a conundrum. Why should the Court enforce the New Jersey clauses but *ignore* Nordyke's forum selection provision selecting *Michigan?* Plaintiff claims that the "closely-related" doctrine should pull Nordyke into New Jersey—but why not the other individuals to Michigan? Assuming the clauses were deemed valid, Plaintiff offers no persuasive reason why the Court should favor the New Jersey provision over the Michigan provision. Moreover, if the forum selection clauses are exclusive as Plaintiff claims,

there is no avoiding dismissal of Nordyke from this action.[10]

Three, were it necessary to decide (it is not), the Court would find that Plaintiff lacks personal jurisdiction over GSO. GSO is a California company that does business almost exclusively in California. (Declaration of Bradford LaPoint ("LaPoint Decl."), ¶ 2.) GSO has never done business in New Jersey, does not advertise in New Jersey, does not employ the California Individuals, and has no offices or assets in New Jersey. (LaPoint Decl., ¶ 4.)

Plaintiff does not seem to dispute any of these facts, but nevertheless claims that GSO can be sued in New Jersey based on the forum selection clauses in four of the individual defendants' employment agreements. It strains reason to bind a company to the contractual forum selection clauses of individuals that they do not even employ. Moreover, reliance on the forum selection agreements to establish a basis for suit over GSO in New Jersey likely runs afoul of *Atlantic Marine*. GSO does not belong in New Jersey and it is not a close call. The Court could easily issue a Report & Recommendation to this effect if necessary. However, for present purposes, the Court simply notes

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[10] As discussed previously, the Michigan provision raises questions about who the true plaintiff in interest is. Nordyke's agreement sets Michigan as the forum, presumably because Stryker is a Michigan-based company. Howmedica also refers to itself interchangeably as "Stryker" throughout the Amended Complaint. The pleading strategy, whether intentional or not, underscores that it is not clear that Plaintiff has truly selected its home forum.

that, as to GSO, there is *no connection* to Plaintiff's choice of forum and its claims against that company. [11]

(ii) Where the Claim Arose

"As a general rule, the preferred forum is that which is the center of gravity of the accused activity." *NCR Credit Corp. v. Ye Seekers Horizon, Inc.*, 17 F. Supp. 2d 317, 321 (D.N.J. 1998). Here, nearly all of the relevant facts point to California. The terms of the agreements were discussed in California; the agreements were executed in California; the Individuals reside in California and were hired to perform as sales associates in California; the alleged contractual breaches occurred in California; the clients allegedly stolen are California surgeons; and the restriction on employment impacts California citizens attempting to

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[11] If the Court did not transfer the case, it would be recommended that Plaintiff's Complaint against GSO be dismissed for lack of personal jurisdiction. That would effectively end the proceedings in this Court. GSO is a necessary and indispensable party to this action, which cannot proceed in New Jersey without it. Plaintiff's Complaint alleges a conspiracy between all defendants, which requires that all of the supposed participants be present. It also alleges that GSO is the corporate Defendant that (directly or indirectly) employs the California-based Individual Defendants. Finally, Plaintiff effectively *conceded* that GSO is a necessary party to this case when it moved to amend its Complaint to add them to the litigation in July of 2014. *See* Plaintiff's Br. in Support of Mot. to Amend; ECF No. 13-3 at p.3 ("[Howmedica's] proposed Amended Complaint . . . seeks to add as an additional defendant Golden State . . . a necessary party to this action."). Therefore, even if the Court were to find jurisdiction and venue proper as to all other defendants, under Rules 12(b)(7) and 19, this entire case would be dismissed. *In effect, this means that transfer of this case to California is actually to Plaintiff's benefit, as it will save it the inconvenience (and filing fee) of re-filing this action in California where it belongs.*

work in California. Almost nothing related to the claim is connected to New Jersey.

(iii) Convenience of the Witnesses & Compulsory Process

Convenience of witnesses and access to sources of proof are important considerations in a Section 1404(a) analysis. *See Teleconference Sys. v. Proctor & Gamble Pharm., Inc.*, 676 F. Supp. 2d 321, 331 (D. Del. 2009). In deciding a motion to transfer, courts often distinguish between party and non-party witnesses. *See Nat'l Prop. Investors VIII v. Shell Oil Co.*, 917 F. Supp. 324, 329 (D.N.J. 1995) (citations omitted). Party witnesses carry less weight because they are presumed as willing to testify in either forum, even if it may be inconvenient. *See Liggett Group Inc. v. R.J. Reynolds Tobacco Co.*, 102 F. Supp. 2d 518, 534 n.19 (D.N.J. 2000). Non-party witnesses, on the other hand, may be compelled to attend only by the subpoena power of federal courts. *See* Fed. R. Civ. P. 45(b)(2) (limiting the federal subpoena power to within 100 miles of the courthouse). Compulsory process over non-party witnesses has been referred to as the single most important factor in a 1404(a) analysis. *See Teleconference Sys.*, 676 F. Supp. 2d at 333 (citing *In re Genentech. Inc.*, 566 F.3d 1338 (Fed. Cir. 2009)); *In re Consolidated Parlodel Litig.*, 22 F. Supp. 2d 320, 324 (D.N.J. 1998). A forum's inability to reach non-party witnesses outside of this radius is therefore an important factor weighing in favor of transfer. *See LG Elecs., Inc. v. First Int'l Computer, Inc.*, 138 F. Supp. 2d 574, 590-591 (D.N.J. 2001).

Defendants have demonstrated that California is *clearly* the more convenient forum. Six of seven named defendants are located in California, including all of the individuals. Moreover, Defendants explain that

nearly all the witnesses—both party and non-party—reside in California. Specifically, Defendants identify four former Howmedica employees who all reside in California as necessary witnesses in the case.[12] More important, Defendants explain that 7 to 10 non-party surgeons will be necessary witnesses, all of whom live in California and none of whom are subject to jurisdiction in New Jersey. There is also an overriding public interest in minimizing the interruption to the schedules of non-party surgeons in California. In contrast, Plaintiff does not identify a single witness in New Jersey with information relevant to this case. The ability to compel the attendance of witnesses in California weighs strongly in favor of transfer. The potential inability of this Court to compel the attendance of these California witnesses is a factor that weighs *heavily* in favor of transfer.

Public Factors

The public factors also weigh in favor of transfer. California has a strong public interest in this case. The dispute essentially involves the rights of California citizens ability to work in California and decisions made by orthopaedic surgeons in California. *See*, *e.g.*, *Delta Air Lines, Inc. v. Chimet*, 619 F.3d 288, 300 (3d Cir. 2010) ("In evaluating the public interest factors the district court must consider the locus of the alleged culpable conduct, often a disputed issue, and the connection of that conduct to plaintiff's chosen forum."). New Jersey's interest in this dispute is a creature of contract and does not involve any New Jersey citizens.

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[12] These witnesses are identified as: Darryl Sonnesnstein, Bijan Himayounfar, David Bowen, Craig Pritsky, and Michael McMillian. (California Individuals' Br. at 33-34.)

Furthermore, jury duty should not be imposed on citizens of New Jersey absent an identified public interest in this forum. *See Ferens v. John Deere Co.*, 494 U.S. 516, 529-30 (1990) ("Jury duty is a burden that ought not to be imposed upon the people of the community with no connection to the litigation."). Finally, because most of the parties, witnesses and evidence to this action are located in California, it would be more cost effective and economically judicious to proceed with the case there.

California has an overwhelming connection to this case. So much so that this case is the "unusual" one that would require transfer even if there were valid forum selection clause. This matter should be litigated in forum where the unlawful acts allegedly occurred and where all Defendants can be properly joined in one single suit. That is *not* New Jersey. It *is* California.

CONCLUSION

For the reasons stated above, Defendants' motions to transfer venue are GRANTED. The case is hereby transferred to the United States District Court for the Northern District of California.

s/Mark Falk
MARK FALK
United States Magistrate Judge

DATED: April 20, 2015

APPENDIX E

STRYKER CONFIDENTIALITY,
INTELLECTUAL PROPERTY AND
NON-SOLICITATION AGREEMENT
(California)

Employee: Michael Nordyke

Employer: Stryker

In consideration of the receipt or use of Confidential Information (as hereinafter defined), the offer of employment from Stryker (as hereinafter defined), the continuation of my employment by Stryker, and other compensation and benefits being provided to me in connection with my employment by Stryker and by this Agreement, I agree as follows:

ACKNOWLEDGEMENTS

I acknowledge and agree that;

1.1 During my employment with Stryker I have received and will receive and have access to materials and information regarding Stryker's medical device technologies, know-how, products, services and sales that are proprietary and confidential to Stryker. I recognize that these materials and information are an important and valuable asset to Stryker and that Stryker has a legitimate interest in protecting the confidential and proprietary nature of these materials and information

1.2 Stryker has spent and will continue to spend substantial time and money developing its medical device technologies, products and services and training its employees on its technologies, products and services. I recognize that these technologies, products and services are an important and valuable asset to Stryker and that Stryker has a legitimate interest in

protecting these technologies, products and services. Stryker has provided and will be providing me with information, materials, property, training and Confidential Information during my employment and may also be providing me with the opportunity to contribute to the creation of Confidential Information, I recognize that these materials and Confidential Information are an important and valuable asset to Stryker and that Stryker has a legitimate interest in protecting the confidential and proprietary nature of these materials and information and that Stryker has spent and will continue to spend substantial time and money developing the Confidential Information.

1.3 Stryker also has dedicated its time and resources developing and maintaining relationships with existing and potential customers, clients, referral sources, vendors, agents, distributors and employees. During my employment with Stryker, I understand that Stryker expects me to continue to develop and maintain these relationships on its behalf. I recognize that these relationships are an important and valuable asset to Stryker and that Stryker has a legitimate interest in protecting these relationships.

DEFINITIONS

As used in this Agreement:

2.1 The "Company" or "Stryker" means collectively, Stryker Corporation, the Employer identified above, their respective successors, assigns, purchasers and acquirers, and their existing and future subsidiaries, divisions and affiliates, including any such subsidiary, division or affiliate of Stryker Corporation to which I may be transferred or by which I may be employed in the future, wherever located. "Affiliates" of Stryker

means any corporation, entity or organization at least 50% owned directly or indirectly by Stryker.

2.2 "Confidential Information" means know-how, trade secrets, and technical, business and financial information and any other non-public information in any way learned by me during my employment with Stryker, including, but not limited to (a) prices, renewal dates and other detailed terms of customer or supplier contracts and proposals; (b) information concerning Stryker's customers, clients, referral sources and vendors, and potential customers, clients, referral sources and vendors, including, but not limited to, names of these entities or their employees or representatives, preferences, needs or requirements, purchasing or sales histories, or other customer or client-specific information; (c) supplier and distributor lists; (d) pricing policies, methods of delivering services and products, and marketing and sales plans or strategies; (e) products, product know-how, product technology and product development strategies and plans; (1) employees, personnel or payroll records or information; (g) forecasts, budgets and other non-public financial information; (h) expansion plans, management policies and other business strategies; (i) inventions, research, development, manufacturing, purchasing, finance processes, technologies, machines, computer software, computer hardware, automated systems, engineering, marketing, merchandising, and selling. Confidential Information shall not include information that is or becomes part of the public domain, such that it is readily available to the public, through no fault of me.

2.3 "Copyrightable Works" means all works that I prepare within the scope of my employment with Stryker, including, but not limited to, reports, computer

programs, drawings, designs, documentation and publications.

2.4 "Employer" means the Employer identified in the introduction to this Agreement or any other entity defined as "Stryker" above to which I may be transferred or by which I may be employed in the future.

2.5 "Inventions" means all intellectual property, inventions, designs, discoveries, innovations, ideas, know-how and/or improvements, whether patentable or not and whether made by me alone or jointly with others, which (a) relates to the existing or foreseeable business interests of Stryker, (b) relates to Stryker's actual or anticipated research or development or (c) is suggested by, is related to or results from any task assigned to me or work performed by me for, or on behalf of, Stryker.

PERFORMANCE FOR STRYKER

3.1 Best Efforts. During my employment with Stryker, I will devote my best efforts, attention and energies to the performance of my duties as an employee of Stryker.

3.2 Sale of Stryker Property. I will not sell, give away or trade for my own benefit or for or on behalf of any person or entity other than Stryker, any items that are the property of Stryker. Stryker property includes, but is not limited to, samples, inventory, customer trade-ins (which includes trade-ins of Stryker and non-Stryker Products), training materials, promotional materials, handbooks, correspondence files, business card files, customer and prospect lists, price lists, product lists, software manuals, technical data, forecasts, budgets, notes, customer information, employee information, employee names, phone lists, organizational charts, product information and/or

Confidential Information acquired by me in the course of my employment by Stryker. The requirements of this Section 3.2 apply to Stryker property even if the property is obsolete or has been fully amortized, depreciated or expensed by Stryker.

3.3 Conflicts of Interest. I agree to abide by the provisions of Stryker Corporation's Code of Conduct, including, but not limited to, the provisions regarding Conflicts of Interest. As such, I will not engage in any activity or have any outside interest that might deprive Stryker of my loyalty, interfere with the satisfactory performance of my duties, or be harmful or detrimental to Stryker.

INVENTIONS

4.1 Disclosure of Inventions. I agree that during and subsequent to my employment with Stryker, I will promptly disclose and furnish complete information to Stryker relating to the Inventions conceived or made by me.

4.2 Inventions are Stryker Property. I agree that all Inventions are and will remain the sole and exclusive property of Stryker. I assign and agree to assign my entire right, title and interest in the Inventions to Stryker. Notwithstanding the foregoing, this Section 4.2 shall not apply to any Invention that I have developed entirely on my own time without using Stryker's equipment, supplies, facilities, or trade secret information, except for those Inventions that either: (a) relate at the time of conception or reduction to practice of the Invention to Stryker's business, or actual or demonstrably anticipated research or development of Stryker; or (b) result from any work performed by me for Stryker.

4.3 Copyrightable Works. I recognize that all Copyrightable Works shall to the fullest extent permissible be considered "works made for hire" in the United States as defined in the U.S. Copyright Laws and in any other country adhering to the "works made for hire" or similar notion. All such Copyrightable Works shall from the time of creation be owned solely and exclusively by Stryker throughout the world. If any Copyrightable Work or portion thereof shall not be legally qualified as a work made for hire in the United States or elsewhere, or shall subsequently be held to not be a work made for hire, I agree to assign and do hereby assign to Stryker all of my right, title and interest to the Copyrightable Works and all registered and applied for copyrights therein.

4.4 Employee Cooperation. When requested to do so by Stryker, either during or subsequent to my employment with. Stryker, [will (a) execute all documents requested by Stryker for the vesting in Stryker of the entire right, title and interest in and to the Inventions, Confidential Information and Copyrightable Works, and all patent applications filed and issuing on the Inventions; (b) execute all documents requested by Stryker for filing and obtaining of patents or copyrights; and (c) provide assistance that Stryker reasonably requires to protect its right, title and interest in the Inventions, Confidential Information and Copyrightable Works, including, but not limited to, providing declarations and testifying in administrative and legal proceedings with regarding to Inventions, Confidential Information, and Copyrightable Works. Whenever requested to do so by Stryker, I shall execute any applications, assignments or other instruments which Stryker shall consider necessary to apply for and obtain Letters Patent, trademark and/or copyright registrations in the

United States, or any foreign country, or to otherwise protect Stryker's interests. These obligations shall continue beyond the termination of my employment with Stryker with respect to Inventions, trademarks and Copyrightable Works conceived, authored or made by me during my period of employment, and shall be binding upon my executors, administrators, or other legal representatives.

4.5 Prior Inventions. I will not assert any rights under or to any Inventions as having been made or acquired by me prior to my being employed by Stryker unless such Inventions are identified on a sheet attached hereto and signed by me and Stryker as of the date of this Agreement.

CONFIDENTIAL INFORMATION AND PROPERTY

5.1 Non-disclosure of Confidential Information. I recognize that Confidential Information is of great value to Stryker, that Stryker has legitimate business interests in protecting its Confidential Information, and that the disclosure to anyone not authorized to receive such information, including any entity that competes with Stryker, will cause immediate irreparable injury to Stryker. Unless I first secure Stryker's written consent, I will not disclose, use, disseminate, identify by topic or subject, lecture upon or publish Confidential Information. I understand and agree that my obligations not to disclose, use, disseminate, identify by subject or topic, lecture upon or publish Confidential Information shall continue after the termination of my employment for any reason.

5.2 Return of Information and Materials. Upon termination of my employment with Stryker for any reason whatsoever, I will immediately return to Stryker any and all Confidential Information and any

and all information and material relating to Stryker's business, products, personnel, suppliers or customers, whether or not such material is deemed to be confidential or proprietary. Thereafter, any continued possession will be deemed to be unauthorized. I shall not retain any copies of correspondence, memoranda, reports, notebooks, drawings, photographs, or other documents in any form whatsoever (including information contained in computer memory or on any computer disk) relating in any way to the affairs of Stryker and which were entrusted to me or obtained by me at any time during my employment with Stryker.

5.3 Return of Stryker Property. Upon termination of my employment with Stryker for any reason whatsoever, I will return to Stryker any and all property in my possession which belongs to Stryker, including the following: all keys and security and credit cards; all equipment, products, samples, inventory, tools, computers, software, cell phones and other electronic devices; all customer files, account files, price lists, product information, training manuals, promotional materials and handbooks; and all other documents relating to Stryker's business, products, personnel, suppliers and customers.

NON-SOLICITATION

6.1 Employee Acknowledgement. I recognize that Stryker's relations with its accounts, customers and clients represent an important business asset that results from Stryker's significant investment of its time and resources. I further acknowledge that my position with Stryker exposes me to Confidential Information and more generally to a segment of business with respect to which I may have had no prior exposure before joining Stryker, I further recognize

that by virtue of my employment by Stryker, I have gained relationships with the accounts, customers and clients of Stryker, and because of such relationships, I will cause Stryker great loss, damage, and immediate irreparable harm, if, during my employment by Stryker or subsequent to the termination of such employment for any reason, I should for myself or on behalf of any other person, entity, firm or corporation, sell, offer for sale, or solicit or assist in the sale of a Conflicting Product or Service. A "Conflicting Product or Service" means any product, process, technology, machine, invention or service of any person or organization other than Stryker in existence or under development which resembles, competes with or is intended to resemble or compete with a product, process, technology, machine, invention or service upon which I have worked or about which I was knowledgeable during the last twenty-four (24) months of my employment with Stryker.

6.2 Non-Solicitation of Customers. To ensure that I will not compromise the confidentiality of Stryker's Confidential Information, and/or unfairly compete with Stryker by using Confidential Information obtained by me by virtue of my employment with Stryker, I agree that during my employment with Stryker and for twelve (12) months after the termination of my employment for any reason, I will not solicit business from, contact or sell any Conflicting Product or Service to, or directly or indirectly help others to solicit business from, contact or sell any Conflicting Product or Service to, any of the accounts, customers or clients, or prospective accounts, customers or clients, with whom I have had contact during the last twenty-four (24) months of my employment with Stryker, for any purpose related to the sale of any Conflicting Product or Service. The terms "accounts, customers or clients,

or prospective accounts, customers or clients" shall include, but not be limited to: (a) any customer that purchased Stryker products or services at any time during the last three years of my employment with Stryker, (b) any prospect that received or requested a proposal to purchase Stryker products or services at any time during the last three years of my employment with Stryker, (c) any affiliate of any such customer or prospect, or (d) any of the individual customer or prospect contacts that I established during my employment with Stryker.

6.3 Non-Solicitation of Employees. I agree that for a period of twelve (12) months after the termination of my employment with Stryker for any reason, I will not solicit, induce or influence, or attempt to solicit, induce or influence, any person engaged as an employee, independent contractor or agent of Stryker to terminate his, her or its employment and/or business relationship with Stryker or do any act which may result in the impairment of the relationship between Stryker and its employees, independent contractors or agents.

6.4 Employee Obligation to Notify Stryker of Work for New Employer. To enable Stryker to monitor my compliance with the obligations imposed by this Agreement, I agree to notify Stryker in writing, at the time my employment with Stryker is terminated for any reason, of the identity of my new employer (if any) and of my job title and responsibilities, and will continue to so inform Stryker, in writing, any time I accept or change employment during the twelve (12) months following termination of my employment with Stryker for any reason.

6.5 Modification of Non-Solicitation Provisions. If a court determines that the length of time or other

provisions of this Section 6 are unreasonable and thus unenforceable, I encourage the court to define that which it deems acceptable given the employment and compensation relationship between Stryker and me, and then to limit and enforce these parameters accordingly,

REPRESENTATIONS; ACKNOWLEDGEMENTS

7.1 Code of Conduct, I acknowledge receipt of Stryker Corporation's Code of Conduct and confirm that I have read and understand the Code of Conduct. I further agree to abide by and support the policies set forth in the Code of Conduct and understand that compliance with the Code of Conduct, as it may be amended by Stryker from time to time, is a condition of my continued employment.

7.2 No Violation of Agreements with Prior Employers. I have not signed any non-competition or other agreement that I have not disclosed to Stryker that prohibits me from being employed by Stryker or assigning works and Ideas to Stryker ("Non-Compete Agreement"), I agree that I will not disclose to Stryker or use for Stryker's benefit any information that to my knowledge is proprietary or confidential to any of my prior employers, without proper consent from the prior employer, If I have signed a Non-Compete Agreement with a prior employer, I have provided a copy of that agreement to Stryker's Human Resources Department under separate cover.

7.3 Medicare, Medicaid Participation; Fraud and Abuse. I (a) have not been excluded or debarred from participation in any Federal or State Health Care Program (including Medicare, Medicaid, or CHAMPUS) or other state or federal governmental program, and (b) have not committed any acts which are cause for

exclusion or debarment from participation in any such program. In addition, no entity in which I serve as a managing employee or officer, or currently have a direct or indirect ownership or control interest (c) has been excluded or debarred from participation in any Federal or State Health Care Program (including Medicare, Medicaid, or CHAMPUS), or (d) has committed any acts which are cause for exclusion or debarment from participation in any such program.

7.4 At-Will Employment. I understand that this Agreement does not obligate me to remain employed by Stryker nor does it confer upon me the right to continued employment by Stryker. Stryker and I each have the right to terminate the employment relationship at any time, for any or no reason, with or without notice and with or without cause.

7.5 Provisions are Reasonable. I acknowledge and agree that it is reasonable and necessary for the protection of the goodwill and continued business of Stryker that I abide by the covenants and agreements contained in this Agreement during and following my employment with Stryker and that Stryker will suffer irreparable injury, loss, harm and damage if I engage in conduct prohibited in this Agreement. My experience and abilities are such that compliance with this Agreement will not cause any undue hardship or unreasonable restriction on my ability to earn a livelihood and that the restrictions on my activities during and after employment do not prevent me from using skills in any business or activity that is not in violation of this Agreement.

7.6 Duty of Loyalty. Nothing herein shall limit or reduce my common law duties to Stryker, including but not limited to my duty of loyalty.

MISCELLANEOUS

8.1 Remedies. I recognize that any breach by me of Sections 4, 5 or 6 of this Agreement will cause Stryker irreparable harm that cannot be compensated adequately by an award of monetary damages. I agree (a) that Stryker may seek and obtain injunctive relief in addition to damages Stryker may recover at law. (b) that the period during which Sections 6.2 or 6.3 apply to me will be deemed to be extended by one (1) day for each day that I am in breach of Section 6.2 or 6.3 of this Agreement, and (c) that Stryker will be entitled to recover from me its reasonable attorneys' fees and costs of any action that it successfully brings for my breach or threatened breach of this Agreement. All remedies for enforcement of this Agreement shall be cumulative and not exclusive.

8.2 Governing Law and Venue, I agree and consent that any and all litigation between Stryker and me relating to this Agreement will take place exclusively in the State of Michigan, and I consent to the jurisdiction of the federal and/or state courts in Michigan, In order to maintain uniformity In the interpretation of this Agreement, the parties have expressly agreed that this Agreement, the parties' performance hereunder and the relationship between them shall be governed by, construed and enforced in accordance with the laws of the State of Michigan without regard to the conflict of law rules thereof. I agree that any action relating to or arising out of this Agreement may be brought in the courts of the State of Michigan or, if subject matter jurisdiction exists, in the United States District Court for the Western District of Michigan (collectively, the "Courts"). I consent to personal jurisdiction and venue in both such Courts and to service of process by United

States Mail or express courier service in any such action.

8.3 Validity of Entire Agreement. I expressly agree that the provisions contained herein are fair and reasonable limitations as to time, geographical area and scope of activity, and such restrictions do not impose a greater restraint than is necessary to protect the goodwill and other business interests of Stryker. To the extent any portion of this Agreement, or any portion of any provision of this Agreement, is held to be invalid or unenforceable, it shall be construed by limiting and reducing it so as to contain the maximum restrictions permitted by applicable law. All remaining provisions of this Agreement, and/or portions thereof, shall remain in full force and effect.

8.4 Waiver or Modification. Neither this Agreement, nor any term or provision hereof, may be waived or modified in whole or in part by Stryker except by a written instrument, signed by me and the Vice President of Human. Resources for Stryker Corporation expressly stating that it is intended to operate as a waiver or modification of this Agreement.

8.5 Transfer or Renewal of Employment. This Agreement will be deemed to continue during any periods of renewal of my employment, including, but not limited to, periods of employment following promotions or transfers, or during any subsequent re-employment by Stryker,

8.6 Binding Effect and Assignability. My obligations under this Agreement will continue beyond the termination of my employment and are binding upon my assigns, executors, administrators, and other legal representatives. Stryker Corporation, its subsidiaries, Affiliates and divisions are intended beneficiaries

of this Agreement. I agree that this Agreement is assignable by Stryker. I hereby consent and agree to assignment by Stryker of this Agreement and all rights and obligations hereunder, including, but not limited to, an assignment in connection with any merger, sale, transfer or acquisition consummated by Stryker or any of its subsidiaries, Affiliates or divisions, or relating to all or part of its assets or the assets of its

8.7 Trial by Court. I agree that any legal action relating to this Agreement and/or my obligations under this Agreement shall be tried by the Court (as defined herein), and I waive my right to a trial by jury.

8.8 Notice. Any notice or other communication required or permitted to be given hereunder shall be in writing and shall be mailed by pre-paid certified mail, return receipt requested, or by Federal Express or other similar overnight delivery service providing proof of delivery, to Stryker at your division's headquarters to the attention of your division's HR leader, and to me at my last known address. All notices shall be effective on the date sent in accordance with this provision.

8.9 Prior Agreements. Except as may be stated herein, I agree and acknowledge that this Agreement supersedes prior agreements between me and Stryker with respect to the subject matter addressed in this Agreement.

EMPLOYEE:

/s/ Michael Nordyke
Employee Signature

Michael Nordyke
Print Name

1780 Creekside Dr., Apt 2818
Address

Folsom, CA 95630
City/State

Date: 5-1-11

STRYKER _____:

By: /s/ Tara Derivan
Name: Tara Derivan
Title: HR Manager

Date: 5/12/11