APPENDIX

APPENDIX

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APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION FIVE

B296917
(Super. Ct. No. JCCP4761)
(Carolyn Kuhl, Judge)

[Filed May 13, 2019]

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

ORDER

The court has read and considered the petition for writ of mandate filed April 12, 2019, the preliminary opposition filed April 22, 2019, and reply filed May 2, 2019. The petition is denied. The respondent court did not err in denying the motion to quash service of summons for lack of personal jurisdiction, and the respondent court was within its discretion in denying the motion to dismiss the action on the ground of forum non conveniens.

/s/Moor	Kim
MOOR, J.	KIM, J.

I would issue an order to show cause.

/s/Baker
BAKER, Acting P.J.

APPENDIX B

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

CASE NO. JCCP 4761
BC 536940

Judge: Hon. Carolyn Kuhl
Dept.: 12 - SSC

[Filed March 15, 2019]

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

OPINION AND ORDER ON DEFENDANTS' MOTION TO QUASH SERVICE OF SUMMONS WITH REGARD TO THE CLAIMS OF NON-CALIFORNIA PLAINTIFFS FOR LACK OF PERSONAL JURISDICTION OR TO DISMISS THE CLAIMS OF NON-CALIFORNIA PLAINTIFFS ON GROUNDS OF *FORUM NON CONVENIENS*

Defendants Pfizer Inc. and Greenstone LLC (hereinafter collectively referred to as the Pfizer Defendants) move to quash service of summons with regard to the claims of Non-California Plaintiffs for lack of personal jurisdiction or, alternatively, to dismiss the claims of the Non-California Plaintiffs based on the doctrine of forum non conveniens. For the reasons set forth below, Defendants' motion to quash for lack of personal jurisdiction is denied and the court declines to dismiss under the equitable doctrine of forum non conveniens.

Brief Summary of Procedural Background

The group of cases comprising this coordinated proceeding were filed in various courts in California and were removed to federal district court. Thereafter, the cases were transferred to a federal multidistrict litigation proceeding, *In re: Lipitor (Atorvastatin Calcium Marketing, Sales Practices and Products Liability Litigation, MDL No. 2:14-mn-02502-RMG* (hereinafter referred to as the MDL proceeding.) Plaintiffs sought a remand on the ground that there was not complete diversity because McKesson Corporation, a California company, is named as a Defendant in the cases. The MDL transferee judge referred the subject matter jurisdiction issue to a federal magistrate judge who recommended that the California cases be remanded. The Pfizer Defendants took exception to that recommendation, appealing the issue to the MDL transferee judge. The transferee judge did not address the remand issue immediately, but rather continued to address matters of consequence to the entire range of cases before him.

With respect to personal jurisdiction, the Pfizer Defendants pleaded a defense of lack of personal jurisdiction in their answers in federal court, but they did not file a motion to dismiss for lack of personal jurisdiction. In state court, a failure to assert lack of personal jurisdiction by way of a threshold motion would preclude later assertion of that defense. However, as discussed below, this court must apply federal procedural law with respect to actions of the parties while in federal court, and federal law is more forgiving with respect to waiver or forfeiture of a defense of lack of personal jurisdiction.

In the MDL proceeding, the parties took discovery, but Pfizer did not take discovery specific to the Plaintiffs in the California cases that are the subject of this coordinated proceeding. Eventually, the MDL transferee judge ruled that Plaintiffs' specific causation experts were precluded from testifying under *Daubert v. Merrell Dow Pharms., Inc.* (1993) 509 U.S. 579. Thereafter, the judge issued a case management order requiring any individual Plaintiff in the MDL proceeding who wished to proceed to trial (despite the prior ruling precluding Plaintiffs' specific causation experts) to provide notice within 15 days and set forth how that Plaintiff's case was distinguishable. No Plaintiff gave such notice.

The Pfizer Defendants then filed an "Omnibus Motion for Summary Judgment," asserting that they were "entitled to summary judgment in all cases." (Decl. of Charles G. Orr, Ex. AA at p. 10.) The Pfizer Defendants acknowledged that Plaintiffs' counsel had taken the position in the California cases that "'they do

not intend to undertake any action in response to [the case management order allowing an omnibus summary judgment motion to be brought]' because [Plaintiffs' California cases] are subject to pending remand motions." *(Id.* at p. 2, fn. 1.) Nevertheless, the Pfizer Defendants made no exception from their Omnibus Motion for Summary Judgment as to the non-California Plaintiffs in the California cases who, according to the Pfizer Defendants' answer in the MDL proceeding, were required to be dismissed for lack of personal jurisdiction.

In response to the Omnibus Motion for Summary Judgment, counsel for the California cases requested that the transferee judge "reject any invitation from Pfizer to treat their cases as subject to the omnibus MSJ," maintaining the Plaintiffs' position that the court lacked subject matter jurisdiction over the California cases and that they should be remanded. (*Id.,* Ex. CC at p. 2.)

In "Defendants Reply in Further Support of Their Omnibus Motion for Summary Judgment," the Pfizer Defendants maintained their position that "[t]he record and the law . . . require entry of summary judgment in *all* cases." (*Id.,* Ex. DD at p. 2 (emphasis added).) The Pfizer Defendants again made no reference to their contention that the transferee court lacked personal jurisdiction over them as to non-California Plaintiffs in the California cases.

With respect to subject matter jurisdiction, in their Omnibus Reply Brief the Pfizer Defendants argued that the court had "subject matter jurisdiction over all cases in the MDL and the Court's expert rulings

warrant summary judgment in every case." *(Id.* at p. 19.) The Reply Brief asserted that, insofar as the MDL transferee judge decided to "defer[] ruling on summary judgment in cases where Plaintiffs have moved to remand," the Pfizer Defendants reserved their right to renew the summary judgment motion. (*Id.*) In a footnote, the Pfizer Defendants acknowledged that Plaintiffs with remand motions did not intend to be subject to the outcome of the Omnibus Motion for Summary Judgment. The Pfizer Defendants suggested that the court "issue a similar order [on summary judgment] after addressing the remand motions." (*Id.* at p. 19, fn. 9.) The Pfizer Defendants also argued that, in the California cases, Plaintiffs who did not move for remand until *after* the transferee court had issued its *Daubert* ru1ings should be subject to the Omnibus Motion for Summary Judgment ruling because "[c]ourts have rejected such forum shopping." (*Id.*)

Thus, in the briefing on the Omnibus Summary Judgment Motion in the MDL proceeding, Plaintiffs in the California cases acted to preserve their subject matter jurisdiction defense. By contrast, the Pfizer Defendants made no mention whatsoever of any intent to preserve a defense based on lack of personal jurisdiction as to the non-California Plaintiffs in the California cases.

The federal court granted the Pfizer Defendants' Omnibus Summary Judgment Motion, but, as to the California cases, the court adopted the magistrate judge's recommendation and remanded those cases based on lack of subject matter jurisdiction.

Personal Jurisdiction Forfeiture

The Pfizer Defendants now move to dismiss on the ground that this court lacks personal jurisdiction over them. Plaintiffs agree that under the principles of *Bristol-Myers Squibb Co. v. Superior Court* (2017) 137 S.Ct. 1773, a timely motion to dismiss for lack of personal jurisdiction would be meritorious. However, Plaintiffs argue that the Pfizer Defendants, by their actions in federal court, forfeited their right to assert lack of personal jurisdiction.

Once a case is removed to federal court, federal procedural law governs. (*Granny Goose Foods v. Bhd. of Teamsters & Auto Truck Drivers* (1974) 415 U.S. 423, 437; *see also* Fed. Rules Civ. Proc., rule 81 ("[t]hese rules apply to a civil action after it is removed from a state court").) It follows that this court must look to federal law to determine whether the Pfizer Defendants properly preserved their right to move to dismiss for lack of personal jurisdiction while these cases were pending in federal court. (*Hamilton v. Atlas Turner, Inc.* (2d Cir. 1999) 197 F .3d 58, 61 (*Hamilton*) ("whether forfeiture [of the defense of lack of personal jurisdiction] has occurred is a matter of federal procedural law").)

Defendants preserved the defense of lack of personal jurisdiction in their answers in federal court. (*See* Fed. Rules Civ. Proc., rule 12(h).) However, in federal court a defendant forfeits the defense of lack of personal jurisdiction, even though it has included the defense in its answer, if it has delayed in challenging personal jurisdiction by motion. (*See, e.g., Datskow v. Teledyne, Inc.* (2d Cir. 1990) 899 F.2d 1298, 1303.) "A

defendant does not waive a personal jurisdiction defense by participating in the initial proceedings for multi-district litigation as long as that defendant raises the defense in a timely motion to dismiss." (*In re Atrium Med. Corp. C-Qur Mesh Prods. Liab. Litig. Mdl No. 2753* (D.N.H. 2017) 299 F. Supp. 3d 324, 329.) As one treatise explains, "a party can be held to have waived a defense listed in Rule 12(h)(1) through conduct, such as extensive participation in the discovery process or other aspects of the litigation of the case even if the literal requirements of Rule 12(h)(1) have been met, although the cases are far from uniform on the subject; the result seems to turn on the particular circumstances of an individual case." (Wright et al., 5C Fed. Prac. & Proc. Civ. § 1391 (3d ed.).) "Although the passage of time alone is generally not sufficient to indicate forfeiture of a procedural right . . . the time period provides the context in which to assess the significance of the defendant's conduct, both the litigation activity that occurred and the opportunities to litigate the jurisdictional issue that were forgone." (*Hamilton, supra,* 197 F .3d at p. 61 (internal citations omitted).)

In *Hamilton,* the appellate court reversed the district court's dismissal of a complaint for lack of personal jurisdiction on the ground that the district court abused its discretion in hearing the defendant's motion to dismiss for lack of personal jurisdiction. The case was originally filed in the Southern District of New York, and the defendant preserved the defense of lack of personal jurisdiction by raising the defense in its answer. (*Id.* at p. 60.) Some four months later, the MDL panel transferred the case, along with others, to

the Eastern District of Pennsylvania for pretrial proceedings and defendant did not object to the MDL transfer. (*Id.*) Three years later, the transferee judge returned to case to the Southern District of New York. (*Id.*) Eight months later, the defendant moved to dismiss, arguing that the district court lacked personal jurisdiction. (*Id.*) The Second Circuit's opinion finds a forfeiture of the defense based on the defendant's failure to raise the personal jurisdiction defense by motion before transfer to the MDL proceeding, the defendant's acquiescence in transfer to the MDL, the defendant's failure to seek to file a motion during the MDL proceedings and defendant's delay in filing a motion after the MDL transferee judge returned the case to the Southern District of New York.[1] (*Id.* at pp. 61-62.) The court concluded: "In sum, Atlas participated in pretrial proceedings but never moved to dismiss for lack of personal jurisdiction despite several clear opportunities to do so during the four-year

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[1] In their Reply Brief, the Pfizer Defendants attempt to distinguish *Hamilton* purportedly on the ground that "defendant failed to renew [its] motion to dismiss [on grounds of personal jurisdiction] until after [the] $4,000,000 plaintiffs' verdict . . . . " (Reply Brief at p. 10, fn. 4.) This statement seriously mischaracterizes the rationale of *Hamilton.* The Second Circuit based its forfeiture analysis on events that occurred *before* the defendant filed a motion to dismiss in August 1998 *prior* to trial. (*Hamilton, supra,* 197 F.3d at p. 62 (Defendant's motion to dismiss "was not filed until August 1998 . . . ").) The trial on the merits in *Hamilton* took place in October 1998. (*Id.* at p. 60.) Thus the forfeiture occurred before the trial and verdict, and the defendant's renewal of its motion to dismiss after trial played no part in the Court's analysis of forfeiture because forfeiture had already occurred before defendant filed its pre-trial motion to dismiss.

interval after filing its answer. These circumstances establish a forfeiture." (*Id.* at p. 62.)

The facts of *Hamilton* are similar to those presented here. The Pfizer Defendants began removing these actions to federal courts in March 2014. Instead of filing a motion to dismiss all claims brought by out-of-state Plaintiffs, Defendants sought transfer of the cases to the MDL proceeding. In the MDL proceeding, although Plaintiffs in the California cases sought a stay of fact discovery, the Pfizer Defendants asked that counsel in the California cases be ordered to participate in depositions of witnesses common to all cases in the MDL proceeding and to provide narrowly tailored jurisdictional discovery that could be used to support Defendants' arguments in favor of maintaining subject matter jurisdiction in the MDL proceeding. Defendants argued that the transferee court had subject matter jurisdiction in the MDL proceeding over all cases, but never filed a motion to dismiss the out-of-state Plaintiffs' claims from the California cases. Although the Pfizer Defendants did not seek discovery specific to the individual Plaintiffs in the California cases, they continued to litigate in the MDL proceeding, persuading the transferee court that the bellwether plaintiffs had failed to proffer admissible expert testimony as to causation. On June 24, 2016, Defendants filed their "Omnibus Motion for Summary Judgment." The transferee court ultimately remanded the cases back to the federal court in California. Upon such transfer, having failed to convince the transferee court in the MDL proceeding that it had subject matter jurisdiction over the California cases, Defendants filed status reports for the California cases in December

2016 requesting dismissal of claims by non-residents for lack of personal jurisdiction.

During the close to three years between Pfizer's removal of the California cases and the remand from the MDL proceeding, the Pfizer Defendants had more than enough time to litigate their defense of lack of personal jurisdiction as to the non-California Plaintiffs in the California cases but did not do so. This conduct alone results in a forfeiture of the defense. (*See, e.g., Continental Bank, N.A. v. Meyer* (7th Cir. 1993) 10 F.3d 1293, 1296-1297 (holding that a defendant waived the defense of lack of personal jurisdiction where it participated fully in the merits of the litigation for over two years, and did not actively contest personal jurisdiction until responding to plaintiff's summary judgment motion; the trial court could properly conclude that defendants had manifested an intent to submit to the court's jurisdiction); *Cohain v. Klimley* (S.D.N.Y. Sep. 20, 2010) 2010 U.S.Dist.LEXIS 98870, at *52-53 ("[t]he eighteen months that passed between the filing of [the defendant's] answer and the instant motion is a 'considerable length of time'" for the purposes of finding forfeiture).)

Beyond delay, however, here the Pfizer Defendants acceded to the jurisdiction of the court by seeking a ruling on the merits of the California cases before the transferee court. The "actions of the defendant may amount to a legal submission to the jurisdiction of the court, *whether voluntary or not."* (*Insurance Corp. of Ir., Ltd., et al. v. Compagnie des Bauxites de Guinee,* (1982) 456 U.S. 694, 704-705 (emphasis added).) A party forfeits the defense of personal jurisdiction by

"manifest[ing] an intent to submit to the court's jurisdiction." (*Brokerwood Prods. Int'l, Inc. v. Cuisine Crotone, Inc.* (5th Cir. 2004) 104 F.App'x 376, 380 (internal quotations and citation omitted).)

In *Fid. & Cas. Co. v. Tex. E. Transmission Corp.* (3d Cir. 1994) 15 F.3d 1230, for example, the federal Court of Appeals held that a defendant "effectively waived the defense of lack of personal jurisdiction" where it failed to move to dismiss before litigating the opposing party's motions for summary judgment "and, in fact, moved for summary judgment on other grounds." (*Id.* at p. 1236 (lack of personal jurisdiction based on improper service).) Similarly, in *Wyrough & Loser, Inc. v. Pelmore Laboratories, Inc.* (3d Cir. 1967) 376 F.2d 543 (*Wyrough & Loser*), the Court of Appeals found that an application for a preliminary injunction by a plaintiff was a "vital proceeding," and that, "[e]ven though its conclusion is not determinative of the ultimate results of the litigation," the defendant was deemed to have waived the defense of lack of personal jurisdiction by participating in four days of hearings on plaintiff's motion, and hearing the trial court's determination to rule in plaintiffs favor, before moving to dismiss for lack of personal jurisdiction. (*Id.* at pp. 545, 547.)

Here, after prevailing on important motions excluding Plaintiffs' causation experts in the MDL proceeding, the Pfizer Defendants decided to capitalize on those rulings. The Pfizer Defendants unequivocally sought summary judgment in the California cases. Recognizing that Plaintiffs took the view that the federal court lacked subject matter jurisdiction over the California cases, the Pfizer Defendants nevertheless

urged the transferee judge to enter summary judgment in the Pfizer Defendants' favor after rejecting Plaintiffs' subject matter jurisdiction arguments. The Pfizer Defendants did not, even in a footnote, indicate that they continued to challenge the federal court's subject matter jurisdiction over non-California Plaintiffs in the California cases. Rather, the Pfizer Defendants asked the transferee court to enter judgment on their behalf against those Plaintiffs, thus acquiescing in the jurisdiction of the court.

As explained in the case law described above, federal courts do not allow a defendant to preserve its defense of lack of personal jurisdiction while litigating the ultimate merits of a case. There can be no doubt that, if the Pfizer Defendants had *lost* their "Omnibus Motion for Summary Judgment" before the transferee court, they would have been foreclosed from raising the issue of personal jurisdiction to attempt, after the fact, to avoid application of such adverse ruling as to the non-California Plaintiffs. "Because there 'exists a strong policy to conserve judicial time and resources,' we have held that 'preliminary matters such as . . . personal jurisdiction . . . should be raised and disposed of before the court considers the merits or quasi-merits of a controversy.'" (*Bel-Ray Co. v. Chemrite Ltd.* (1999) 181 F.3d 435, 443 (*quoting Wyrough & Loser, supra,* 376 F.2d at p. 547.) The Pfizer Defendants cite no authority that would support a different outcome with respect to forfeiture of a personal jurisdiction defense after remand to state court. The Pfizer Defendants forfeited their defense of lack of personal jurisdiction as to the non-California Plaintiffs when they submitted

the merits of the cases to the transferee court in the MDL proceeding.

Defendants' reliance on *Ruhrgas Ag v. Marathon Oil Co.* (*Ruhrgas*) (1999) 526 U.S. 574, is misplaced. The holding in *Ruhrgas* was that district courts, which normally first decide the issue of subject matter jurisdiction, may instead properly decide the issue of personal jurisdiction at the outset. (*Id.* at p. 578.) The case does not address the issue of when a defendant forfeits its defense of lack of personal jurisdiction. Quite the opposite, the case highlights the fact that Defendants here could have asked the federal courts to first decide the issue of personal jurisdiction *before* addressing the issue of subject matter jurisdiction raised by the Plaintiffs in the California cases.

Forum Non Conveniens

"The doctrine of forum non conveniens is rooted in equity. It allows a court to decline to exercise its jurisdiction over a case when it determines that the case may be more appropriately and justly tried elsewhere." (*Fox Factory, Inc. v. Superior Court* (2017) 11 Cal.App.5th 197, 203 (internal citations and quotations omitted).) "In determining whether to grant a motion based on forum non conveniens, a court must first determine whether the alternate forum is a 'suitable' place for trial. If it is, the next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California. The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of

obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation." (*Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 751 (internal citations omitted).) The Pfizer Defendants bear the burden of proof on their motion for forum non conveniens. (*Id.* at p. 751.)

Defendants have failed to show that there is a suitable forum for these cases. "An alternative forum is suitable if it has jurisdiction and the action in that forum will not be barred by the statute of limitations." (*Investors Equity Life Holding Co. v. Schmidt* (2011) 195 Cal.App.4th 1519, 1529.) The Pfizer Defendants have not stipulated that they would not raise a statute of limitations defense in the alternative forum; rather, they have proposed a conditional future agreement to toll the statute of limitations. The Pfizer Defendants state that they will agree to toll the statute of limitations only to the extent it had not already expired at the time the actions were filed, and only if out-of-state Plaintiffs refile in their respective home states as single-plaintiff actions within a "reasonable" time. (Defs.' Mot. Quash at p. 13.) The future stipulation does not account for the fact that California might have a different limitations period from certain other states; therefore, it is possible that Plaintiffs complying with California's limitations period would be shut out of other states' courts under the proposed stipulation. The

Pfizer Defendants have failed to show this would not be a potential result. Moreover, the ambiguity of the phrase "reasonable time" may lead to a similar result. This case involves thousands of Plaintiffs who have seen their cases stalled in the preliminary stages for years. It would no doubt take time to reorganize and decide how to go forward if this court dismissed out-of-state Plaintiffs for forum non conveniens. Many Plaintiffs might find that the "reasonable time" contemplated by the Pfizer Defendants had passed, and thus lose a suitable forum to have their case heard. The Pfizer Defendants have thus failed to make a sufficient showing on the first step of the forum non conveniens analysis.

Moreover, there are strong reasons in favor of litigating all of these similar cases in one place: namely, in the coordinated proceedings of a complex court. The Pfizer Defendants themselves repeatedly endorsed the benefits of litigating all of these claims together. The Pfizer Defendants twice removed this group of California cases under the Class Action Fairness Act of 2005 (CAFA) (28 U.S.C. §§ 1332, 1453, 1711-1715) without expressing concern that individual evidence (testimony from individual physicians) would not be able to be effectively presented. Indeed, in the recent history of this case, having removed the California cases under CAFA for the second time, the Pfizer Defendants expressed to the Hon. Cormac J. Camey that, if he kept the cases in federal court, the Pfizer Defendants would not assert a lack of personal jurisdiction as to the non-California Plaintiffs. Thus, the Pfizer Defendants have endorsed a procedural posture giving rise to the circumstances the Pfizer

Defendants now argue would create an inconvenient forum. Defendants have always, up until now, advocated for keeping these cases in one forum. Requiring the Pfizer Defendants to try all, instead of some, of the cases in California will not pose a great burden, as they now attempt to assert. Plaintiffs would greatly benefit from managing the cases in a coordinated fashion. Plaintiffs have waited years while their cases have been removed, transferred, and remanded. It would be inequitable at this time to require them to start the process over again in other states.

As for public factors, even if the court were to grant Defendants' motion, hundreds of California Plaintiffs would proceed with this case. The cases of the non-California Plaintiffs have significant overlap, especially in pretrial proceedings, with the cases of the California Plaintiffs that must remain in the coordinated proceeding here. Further, as the California Supreme Court has made clear, California has an interest in providing a forum for matters such as these: "To the extent that evidence of the injuries allegedly suffered by the nonresident plaintiffs may be relevant and admissible to prove that [the defendant's pharmaceutical drug] similarly injured the California plaintiffs, trying their cases together with those of nonresident plaintiffs could promote efficient adjudication of California residents' claims." (*Bristol-Myers Squibb Co. v. Superior Court* (2016) 1 Cal.5th 783, 810, *rev'd* 137 S.Ct. 1773.) "To be sure, a single court hearing the claims of hundreds of plaintiffs is a significant burden on that court. But the overall savings of time and effort to the judicial system, both

in California and interstate, far outweigh the burdens placed on the individual forum court." (*Id.* at p. 811.) California also has an interest in regulating the conduct of the co-defendant in this case, McKesson Corporation, which is headquartered in California. (*Id.* at p. 811.)

The California Supreme Court's decision in *Bristol-Myers Squibb Co.* was reversed by the United States Supreme Court, and its policy statements concerning the public interests of the California court system are irrelevant to a correct analysis of the constitutional issue of the proper scope of in personam jurisdiction, the issue litigated in that case. However, this court should not ignore those policy statements in analyzing the public interests of the California courts in the context of forum non conveniens. The California Supreme Court's articulation of the public interests of the California courts is plainly applicable to that analysis.

ORDER

The Pfizer Defendants' Motion to Quash for Lack of Personal Jurisdiction and Motion to Dismiss on Grounds of *Forum Non Conveniens* are denied.

Dated: March 15, 2019

/s/Carolyn B. Kuhl
CAROLYN B. KUHL
JUDGE OF THE SUPERIOR COURT

APPENDIX C

IN THE SUPREME COURT OF CALIFORNIA

S255942

Court of Appeal, Second Appellate District, Division Five - No. B296917

En Banc

[Filed July 31, 2019]

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

The petition for review is denied.

Chin, J., was recused and did not participate.

CANTIL-SAKAUYE
Chief Justice

APPENDIX D

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

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

This Document Relates to
All Actions

[Filed August 12, 2016]

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

DEFENDANTS' REPLY IN FURTHER SUPPORT OF THEIR OMNIBUS MOTION FOR SUMMARY JUDGMENT

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[*Table of Authorities Omitted in the Printing of this Appendix*]

PRELIMINARY STATEMENT

Plaintiffs disregard well-settled law and the entire litigation process to which this Court and the parties have devoted two and a half years. As this Court recently emphasized in CMO 81, "[t]he parties have, up to this point, litigated this MDL as if they agreed that whether Lipitor can and did cause diabetes, a complicated, progressive and multi-factor disease, is a complicated medical issue requiring expert testimony." [1599] at 3. Now, faced with summary judgment, Plaintiffs reverse course and argue – for the first time – that they should be able to prove general and specific causation "in the absence of any expert evidence." Opp. at 1; *id.* at 17. Their position has no support in the law or facts.

The law requires admissible expert testimony to establish causation in cases like these involving complex medical and scientific issues. The *Daubert* process would be meaningless if plaintiffs whose causation experts were excluded could nonetheless advance to trial and try to prove causation through attorney-selected documents characterized as company "admissions." As another MDL court recently held, "no court has held that admissions can substitute for required expert testimony …. Such a ruling would disregard the purpose of the requirement for expert testimony, leaving jurors to speculate, and would chill free and frank discussion by manufacturers of drugs or devices." *In re Mirena IUD Prods. Liab. Litig.*, 2016 WL 4059224, at *12 (S.D.N.Y. July 28, 2016). Moreover, none of the "non-expert evidence" that Plaintiffs point to as a stand-in for expert testimony is an admission of

general causation, and none creates an issue of material fact in the absence of admissible and sufficient expert testimony. *See id.* at *17; *In re Zoloft Prods. Liab. Litig.*, 2016 WL 1320799, at *9 (E.D. Pa. Apr. 5, 2016).

In the same way, as the Court observed in CMO 81, Plaintiffs also "assert for the first time that it may be possible that some unidentified Plaintiffs may be able to survive summary judgment based on some unidentified circumstantial, non-expert evidence of specific causation." CMO 81 at 1-2. Plaintiffs make no effort to explain how they can advance these arguments given their concession, by not responding to CMO 65, that no case can survive summary judgment on specific causation if the Court's ruling in CMO 55 is correct. Although the Court has agreed that "[t]hese plaintiffs should have come forward in response to CMO 65," CMO 81 "provide[s] any such Plaintiffs with an additional opportunity to present evidence in response to Defendant's motion for summary judgment." *Id.* at 3. Plaintiffs' deadline under CMO 81 has not yet passed, but the controlling standards are available and require expert testimony to establish general and specific causation in every case.

The record and the law thus require entry of summary judgment in all cases.

I. EXPERT TESTIMONY IS REQUIRED TO ESTABLISH CAUSATION

Courts repeatedly recognize that "personal injury cases involving pharmaceuticals, toxins or medical devices involve complex questions of medical causation

beyond the understanding of a lay person" and thus require expert causation testimony. *In re Baycol Prods. Litig.*, 321 F. Supp. 2d 1118, 1126 (D. Minn. 2004).[1] "[W]ithout it the jury is left to speculate." *Mirena*, 2016 WL 4059224, at *5. "[A]ll jurisdictions have a similar rule requiring expert testimony where a matter is outside the ken of an ordinary lay juror." *Id.* at *7. *See* Appendix, Ex. 4.

Plaintiffs cannot show that their cases present an exception to this ubiquitous rule. Until now, they never disputed the fact that their causation theories raise complex issues that require reliable and admissible expert opinions to avoid the risk of a jury being confused or misled. The Court and parties recognized from the start that the viability of Plaintiffs' claims hinged on whether they could proffer expert causation opinions that satisfy *Daubert*. Plaintiffs helped craft case management plans that called for the Court to

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[1] *Accord Lewis v. Johnson & Johnson*, 601 F. App'x 205, 210-11 (4th Cir. 2015); *Zellers v. NexTech Ne., L.L.C.*, 533 F. App'x 192, 200 (4th Cir. 2013) (per curiam), *cert. denied*, 134 S. Ct. 911 (2014); *Chapman v. Procter & Gamble Distrib., L.L.C.*, 766 F.3d 1296, 1316 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 2312 (2015); *Wells v. SmithKline Beecham Corp.*, 601 F.3d 375, 381 (5th Cir. 2010); *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 268 (2d Cir. 2002); *Mirena*, 2016 WL 4059224, at *4-5; *McClure v. Wyeth*, 2012 WL 952856, at *1 (D.S.C. Mar. 20, 2012) (Herlong, J.); *In re Bausch & Lomb Inc. Contacts Lens Solution Prods. Liab. Litig.*, 693 F. Supp. 2d 515, 518 (D.S.C. 2010) (Norton, J.), *aff'd sub nom Fernandez-Pineiro v. Baush & Lomb, Inc.*, 429 F. App'x 249 (4th Cir. 2011) (per curiam); *Meade v. Parsley*, 2010 WL 4909435, at *2 (S.D. W. Va. 2010); *Disher v. Synthes (U.S.A.)*, 371 F. Supp. 2d 764, 772 (D.S.C. 2005) (Norton, J.); *In re Viagra Prods. Liab. Litig.*, 658 F. Supp. 2d 950, 968 (D. Minn. 2009).

make threshold decisions on the admissibility of such opinions. Plaintiffs named experts from more than five disciplines who served lengthy reports opining on the issue of general causation, including how diabetes develops, progresses, and is diagnosed; the statistical and clinical interpretation of large bodies of epidemiological data; and proposed mechanisms of action. Even after Plaintiffs' report deadline passed and several experts had been deposed, Plaintiffs obtained leave to serve additional expert reports with new opinions that they claimed were "of critical importance to this MDL litigation." [865]; CMO 34 [869]. Plaintiffs also described an elaborate "jigsaw puzzle nature of the experts," with Prof. Jewell "offering the statistical basis on which the other experts can then build their causation opinion." 9/24/15 Hr'g Tr. [1170] at 35:5-36:12. Plaintiffs told the Court that "[t]he dismissal of [Prof. Jewell's] work will deny many of the plaintiffs their day in court." [1256]

Similarly, as to their specific causation experts, Plaintiffs' counsel told the Court:

> THE COURT: So your view is what – [Dr. Roberts, one of Plaintiffs' general causation expert] shows it's capable, then your entire case hangs on the specific causation expert?
>
> MS. BIERSTEIN: I think it always does, Your Honor. A particular case depends on the case-specific expert.

9/24/15 Hr'g Tr. at 236:20-24. Plaintiffs' counsel went on to say that in *Daniels* and *Hempstead*, the two trial cases, "in order for either of those plaintiffs to prove

that their diabetes was caused by Lipitor, those are the experts you are going to look to … the case specifics." *Id.* at 237:2-6.

After extensive briefing and two days of hearings, this Court held that Plaintiffs' general causation expert opinions did not satisfy *Daubert* because they were not dose-specific. *In re Lipitor* (*Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.*, 2015 WL 6941132, at *6 (D.S.C. Oct. 22, 2015) ("CMO 49"). The Court held that "Plaintiffs must have expert testimony that Lipitor causes, or is capable of causing, diabetes at particular dosages." *Id.* Although the Court recognized that granting summary judgment was an option, *see* 10/22/15 Hr'g Tr. [1206] at 16:24-17:20, it permitted Plaintiffs to supplement their experts' opinions to address causation by dose. CMO 49, 2015 WL 6941132, at *6. The Court emphasized that it is Plaintiffs' *experts*, not counsel, who must proffer reliable, dose-specific causation opinions. 10/22/15 Hr'g Tr. at 25:10-22, 46:5-17. Plaintiffs obtained a further extension of time to serve supplemental dose reports, and the Court and parties devoted several more months to discovery, briefing, and a hearing on the admissibility of Plaintiffs' experts' general causation opinions, which this Court addressed in CMO 68. *See In re Lipitor* (*Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.*, 2016 WL 1251828, at *5 (D.S.C. Mar. 30, 2016) ("CMO 68").

Throughout the process, Plaintiffs never asserted that they could proceed without admissible expert testimony on general or specific causation, and they have repeatedly acknowledged the dispositive impact

of the Court's exclusion of their experts' opinions. Plaintiffs' lead counsel told this Court that ***no case*** could survive summary judgment under the Court's decision excluding Dr. Murphy's specific causation opinion. Nor did any Plaintiff disagree when given a full and fair opportunity to do so under CMO 65. CMO 81 at 1. When Plaintiffs asked the Court to certify its expert rulings for interlocutory appeal, they likewise asserted that "whether [the Court's expert rulings] are ultimately upheld is effectively a threshold question for all of the cases in the MDL." [1535] at 4. They noted that if the Court's rulings are affirmed, cases involving Lipitor 10, 20, and 40 mg would be subject to dismissal and would not proceed to summary judgment on any other issue. *Id.* at 3-4; [1539] at 3.

Only now, faced with summary judgment, do Plaintiffs argue otherwise. But their arguments are not just late, they are wrong. The record confirms that the medical and scientific issues presented by Plaintiffs' claims are complex and not susceptible to being presented to a lay jury without expert testimony.

II. PLAINTIFFS CANNOT CREATE AN ISSUE OF FACT ON CAUSATION AT DOSES BELOW 80 MG BASED ON "NON-EXPERT EVIDENCE"

"[S]ummary judgment is appropriate where required expert testimony is absent from the record." *Mirena*, 2016 WL 4059224, at *6. Because Plaintiffs lack the required expert testimony on general causation as to Lipitor doses below 80 mg, this Court need not consider the attorney-selected "non-expert evidence" and purported "admissions" of general

causation on which Plaintiffs claim they can rely in place of the expert opinions this Court excluded. Without admissible expert testimony, none of this material – individually or collectively (even if it is admissible, which Defendants do not concede) – is sufficient to create a triable issue of fact on general causation, and summary judgment is warranted in all cases involving doses below 80 mg.

Mirena is instructive. As here, after the court there excluded plaintiffs' general causation experts, plaintiffs tried to "create a genuine issue of material fact[] on that issue through certain documents and testimony that they argue amount to admissions." *Mirena*, 2016 WL 4059224, at *4. Contrary to Plaintiffs' attempt to reframe the question as admissibility under FRE 801, Opp. at 7-9, "the issue here is not so much whether the alleged admissions are admissible ... but whether as a matter of substantive products liability law admissions can substitute for expert evidence of causation." *Mirena*, 2016 WL 4059224, at *8. In *Mirena*, none of the cases on which plaintiffs relied, a subset of which Plaintiffs cite here, supported such a standard, which is at odds with the "paramount importance of expert testimony on complex technical issues with which jurors are unfamiliar." *Id.* at *11. "The danger of a jury speculating on scientific issues means that, at least absent the clearest and most unambiguous admission that the product or device in question can cause the alleged injury, a jury exposed to admissions but not expert testimony will be without the grounding in science necessary to determine whether, as a scientific matter, the events the plaintiff posits can occur in real life." *Id.*; *see also id.* at *8.

A. So-Called Company "Admissions" Cannot Substitute for Expert Testimony

Plaintiffs contend that "at least four cases … support the use of admissions to prove general causation." Opp. at 9. None of the cases actually does so. After reviewing these and other cases, the court in *Mirena* held that "no court has held that admissions can substitute for required expert testimony, and this Court will not be the first." 2016 WL 405922, at *12.

Plaintiffs rely heavily on the *Meridia* decisions. *See In re Meridia Prods. Liab. Litig.*, 328 F. Supp. 2d 791 (N.D. Ohio 2004) ("*Meridia 1*"), *aff'd sub nom. Meridia Prods. Liab. Litig. v. Abbott Labs.*, 447 F.3d 861 (6th Cir. 2006) ("*Meridia 2*"). *Meridia* is inapposite. The warning in its labeling was explicit: "MERIDIA SUBSTANTIALLY INCREASES BLOOD PRESSURE IN SOME PATIENTS. REGULAR MONITORING OF BLOOD PRESSURE IS REQUIRED WHEN PRESCRIBING MERIDIA." *Meridia 1*, 328 F. Supp. 2d at 810. The district court held that these statements "constitute[d] admissions of Meridia's potential to cause substantial increases in blood pressure" sufficient to permit plaintiffs to "[meet] their burden of showing a genuine issue of material fact only with respect to Meridia's capacity to cause substantial increases in blood pressure." *Id.* But the district court "assumed for the sake of argument that *no states' laws required expert testimony on the issue of general causation*." *Mirena*, 2016 WL 4059224, at *9 (citing *Meridia 2*, 447 F.3d at 865) (emphasis added). By contrast, here, as in *Mirena*, "all jurisdictions have such a requirement": "Fatal to Plaintiffs' argument, the

district court in *Meridia 1* specifically noted that 'in cases originating from states that require expert testimony in mass tort cases, Plaintiffs' claims would fail if the Plaintiffs did not offer admissible expert testimony tending to establish general causation.' That is the case here." *Id.* (quoting *Meridia 1*, 328 F. Supp. 2d at 802). Because the causation issues here are "outside the realm of common knowledge and experience of a lay juror, which in all jurisdictions means that expert testimony is required, *Meridia 1* and *Meridia 2* are not applicable." *Id.*

Meridia is also an outlier in its treatment of labeling statements as admissions. Other courts have recognized that FDA-approved warnings are not admissions of general causation and are "no substitute for expert testimony that establishes causation in terms of reasonable probability." *Meade*, 2010 WL 4909435, at *7; *accord Mirena*, 2016 WL 4059224, at *14; *Nelson v. Am. Home Prods. Corp.*, 92 F. Supp. 2d 954, 968-69 (W.D. Mo. 2000). In addition, "the statements [in the label at issue here] that Plaintiffs argue are sufficient to raise a question of fact are so different from the statement on Meridia's label that they would not suffice as a substitute for expert testimony." *Mirena*, 2016 WL 4059224, at *9. The strength of the unequivocal statement that Meridia causes high blood pressure in some patients, along with deposition testimony that the labeling language was the product of a consensus reached through discussions with the FDA, was critical to the court's holding there. *See Meridia 2*, 447 F.3d at 866. The Sixth Circuit distinguished the Meridia label's statement from "milder warning language such as 'is associated with.'"

Id. Unlike the causation warning in the Meridia label, the language on which Plaintiffs rely in the Lipitor label does not state that Lipitor causes diabetes. Rather, it states: "Increases in HbA1c and fasting serum glucose levels *have been reported* with HMG-CoA reductase inhibitors, including LIPITOR." March 2015 Lipitor Label (emphasis added). Neither this nor any of the other purported "admissions" on which Plaintiffs rely is analogous to the bolded warning about causation in the product labeling in *Meridia*.

Likewise, neither Fourth Circuit decision on which Plaintiffs rely supports their contention that a company document can substitute for expert testimony here. *Westberry v. Gislaved Gummi AB*, 178 F.3d 257 (4th Cir. 1999), did not "find[] that [a] statement contained in defendant's [Material Safety Data Sheet (MSDS)] was admissible evidence of general causation." Opp. at 10. The court did not address whether, much less hold that, the warning in the MSDS that "inhalation of [talc] dust in high concentrations irritates mucous membranes" could substitute for expert testimony that plaintiff's workplace exposure to talc dust aggravated his sinus condition. *Westberry*, 178 F.3d at 264. It merely noted the statement in the MSDS "in the context of evaluating whether the plaintiffs' expert had a sufficient basis for his specific causation opinion." *Mirena*, 2016 WL 4059224, at *9. The court's discussion "shows no more than that an MSDS is properly considered by an expert." *Id.* Moreover, the unequivocal statement of causation in the MSDS bears no resemblance to the labeling and other purported "admissions" of causation on which Plaintiffs attempt to rely in place of expert testimony

here. This Court previously distinguished *Westberry* because it was undisputed that substantial exposure to talc, of which there was evidence, could cause injury. *See* CMO 49, 2015 WL 6941132, at *5. Even there, however, there was no question that expert testimony was required.

Similarly, *Lewis v. Johnson & Johnson*, 601 F. App'x 205 (4th Cir. 2015) (per curiam), a mesh device case, does not "accept[] that admissions by defendant's employees could prove general causation as a matter of law." Opp. at 10. The Fourth Circuit affirmed summary judgment on plaintiff's failure-to-warn claims, exclusion of certain expert medical causation testimony, and a directed verdict on plaintiff's design defect claim based on a lack of expert testimony. *Lewis*, 601 F.App'x at 209-12. The court "agree[d] with the district court that Texas law required [plaintiff] to present expert testimony establishing a causal link between [the] alleged defects in the [device] and her injuries." *Id.* at 211. Plaintiff's "failure to present such expert testimony doomed her design defect claims." *Id.* Plaintiffs ignore this holding and rely on dictum that follows, where the court observed that plaintiff had "not argue[d] that the remaining testimony – by, for instance, employees of the defendant – establishes causation." *Id.* at 212. *Mirena* rejected plaintiffs' reliance on the same sentence, noting that it "does not hold that, or even discuss whether, stray statements of employees are sufficient to raise an issue of fact on the causation element in cases where expert testimony is required to prevent a jury from speculating." *Mirena*, 2016 WL 4059224, at *9 n.19. This Court should do the same.

B. Plaintiffs Have Not Identified Any Sufficient Evidence of General Causation that Could Replace Expert Testimony

Plaintiffs contend that they should be permitted to establish general causation through attorney argument about cherry-picked statements, untethered to any scientific standard or method, much less the epidemiological method for demonstrating a causal relationship that the Court has recognized is necessary. CMO 68, 2016 WL 1251828, at *1-3. Plaintiffs' "non-expert evidence" cannot stand in for admissible expert testimony. None of the statements they cite creates a material fact as to general causation below 80 mg, and Plaintiffs' mischaracterization of them as admissions of causation underscores why the law requires reliable expert testimony here.

1. Emails and Deposition Testimony

In the place of expert testimony, Plaintiffs seek to substitute an informal email exchange between Pfizer employee David DeMicco and Dr. David Waters. *See* Pls.' Ex. 1. The 2009 emails concern post hoc statistical analyses of data from TNT and SPARCL, which were part of the peer-reviewed 2011 Waters study that was the subject of extensive expert discovery, briefing, hearings, and opinions by the Court. *See, e.g.*, CMO 68, 2016 WL 1251828, at *4, *7. Plaintiffs contend that DeMicco's informal response to preliminary observations is "an admission of general causation" at all doses of Lipitor. Opp. at 12. It is nothing of the sort. As this Court observed, these emails are not peer-reviewed, are not expert testimony, are not a sufficient

substitute for expert analysis, and do not amount to an admission or any evidence, much less scientifically reliable evidence, "that 10 mg of Lipitor can cause type 2 diabetes, no different than 80 mg," Opp. at 12. *See* 9/24/15 Hr'g Tr. at 85:14-15, 88:21-89:12; 10/22/15 Hr'g Tr. at 86:19-87:23. DeMicco testified that [redacted]. At most, the emails discuss "increased risk," or a potential association, not causation. It is "well established in case law that an association is insufficient to prove causation." CMO 68, 2016 WL 1251828, at *17 & n.23; *see also In re Accutane Prods. Liab.*, 511 F. Supp. 2d 1288, 1291 n.2, 1303 (M.D. Fla. 2007), *aff'd* 291 F. App'x 249 (11th Cir. 2008). Without bias, chance, and confounding adequately accounted for, and without a proper assessment of the Bradford Hill factors, the statement that an exposure "increases the risk of a particular injury" cannot substitute for the word "causation."[2] *See* CMO 68, 2016 WL 1251828, at *3; 9/24/15 Hr'g Tr. at 115:23-116:11; 218:8-19; 221:19-222:15.

Other courts have rejected similar attempts by plaintiffs and experts to rely on employee emails

[2] Neither of the cases Plaintiffs cite as "defining general causation" as increased risk, Opp. at 12, supports their position that they can proceed without admissible expert testimony on causation. Both cases addressed the admissibility of plaintiffs' *experts'* causation opinions and required that the expert identify a valid causal association using a reliable scientific method. *See Kuhn v. Wyeth, Inc.*, 686 F.3d 618, 633 (8th Cir. 2012); *Jenkins v. Slidella L.L.C.*, 2008 WL 2649510, at *4-6 (E.D. La. June 27, 2008), *aff'd*, 318 Fed. App'x 270 (5th Cir. 2009).

"raising questions about associations" as evidence of causation. *Zoloft*, 2016 WL 1320799, at *9; *see also Mirena*, 2016 WL 4059224, at *15-16; *In re Zoloft Prods. Liab. Litig.*, 2015 WL 7776911, at *12 (E.D. Pa. Dec. 2, 2015). "[S]tatements set forth in ... company documents ... are not typical of documents that experts would generally rely upon in a causation analysis, in part because '[t]he cited studies themselves are a better source of information regarding the methods used and the results of studies of the association of interest.'" *Zoloft*, 2016 WL 1320799, at *9 (citation omitted). "[I]n the absence of expert testimony, a jury would be required to speculate on the meaning of" employee statements pulled out of context "and on whether there is any scientific basis for believing that Plaintiffs' theory of general causation is sound." *Mirena*, 2016 WL 4059224, at *16. The policy concerns are also significant:

> [I]t might stifle free discussion of adverse event reports and potential label changes, and discourage pharmaceutical companies and other manufacturers from open discourse, if such discussion might later be held to concede the issue of general causation. This danger is without any compensating benefit, given that comments of corporate employees, unmoored from their context and created in the conduct of daily business rather than through the formal procedures applicable to expert witnesses, are so inherently unlikely to be clear and definite enough to prevent the jury from being left to

> speculate as to whether a product is capable of causing a particular injury.

Id. at *12; *see also id.* at *15.

Plaintiffs also try to rely on DeMicco's deposition testimony that [redacted]. Opp. at 12. Like the email, this testimony does not constitute an admission or other reliable evidence that Lipitor causes diabetes at 10 mg. *See* 10/22/15 Hr'g Tr. at 85:22-88:3. Under this Court's extensive analysis of Plaintiffs' experts' opinions and data sources at 10 mg, which included the Waters 2011 TNT analysis, it would be unreliable and misleading to proffer Waters 2011 as evidence of general causation at 10 mg. *See, e.g.*, CMO 68, 2016 WL 1251828, at *8-11. It would be even more unreliable and misleading to proffer DeMicco's testimony about it in place of expert testimony. "[A]bsent expert testimony, a lay jury could not reasonably evaluate the meaning or reliability of such statements. They thus cannot serve as a substitute for expert testimony." *Mirena*, 2016 WL 4059224, at *17.

2. Japanese and U.S. Labels

Pfizer has not "admitted that Lipitor causes diabetes on its own drug labels," Opp. at 13, and none of the labeling statements Plaintiffs cite provide evidence of general causation. This Court has already held that it would be unreliable for Plaintiffs' experts to draw scientific inferences about causation from the 2012 FDA label change because the FDA applies a different standard than the causation standard that

applies in a products liability action: "With regard to the FDA label, the decision by the FDA to require warnings on a drug label, standing alone, does not suffice to establish causation." CMO 68, 2016 WL 1251828, at *9. In addition, "allowing a label to substitute for expert testimony would discourage manufacturers from exercising caution, providing potential users with less information rather than more where the science is debatable, a result inimical to the public health." *Mirena*, 2016 WL 4059224, at*14; *see also supra* Part II.A. Moreover, as this Court has observed with respect to the 2012 FDA-required warning that "[i]ncreases in HbA1c and fasting serum glucose levels have been reported with HMG-Co-A reductase inhibitors, including Lipitor," "experiencing an increase in glucose levels is not synonymous with developing diabetes." CMO 68, 2016 WL 1251828, at *8 n.11.

For similar reasons, the Japanese Lipitor label does not provide evidence of general causation at doses below 80 mg. The labeling language that Japan required in 2003 based on an entirely different standard and regulatory system than the FDA applies states that "[h]yperglycemia and diabetes may occur" with the use of Lipitor.[3] This statement is neither

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[3] Courts have excluded evidence of foreign labels and actions as irrelevant and prejudicial. *See, e.g.*, *Hurt v. Coyne Cylinder Co.*, 956 F.2d 1319, 1327 (6th Cir. 1992); *Deviner v. Electrolux Motor, AB*, 844 F.2d 769, 773 (11th Cir. 1988); *In re Mirena IUD Prods. Liab. Litig.*, 2016 WL 890251, at *53, *60 (S.D.N.Y. Mar. 8, 2016); *In re Seroquel Prods. Liab. Litig.*, 601 F. Supp. 2d 1313, 1318 (M.D. Fla. 2009); *In re Viagra Prods. Liab. Litig.*, 658 F. Supp. 2d 950,

based on the causation standard that applies in litigation nor a statement that Lipitor causes diabetes. Although Plaintiffs now contend that the Japanese label "suffices to create a genuine factual dispute as to general causation," they previously asserted that "Plaintiffs do not suggest that the Japanese evidence, or the label change, is sufficient evidence to show that Lipitor elevates glucose or causes diabetes." [1159] at 17. They cannot avoid summary judgment by relying on a foreign label they characterized as marginal and insufficient evidence of causation.

3. NDA Glucose Data

Plaintiffs also contend that statements about NDA glucose data are "admissions that Lipitor can cause type 2 diabetes." Opp. at 15. Plaintiffs disregard the expert reports, discovery, briefing, hearings, and decisions addressing the NDA data, including this Court's exclusion of their experts' analyses of it. *See In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.*, 145 F. Supp. 3d 573, 577-588 (D.S.C. 2015) ("CMO 54"), *motion for reconsideration granted in part*, *amended by* 2016 WL 827067 (D.S.C. Feb. 29, 2016). For example, beyond excluding Prof. Jewell's analyses of the NDA data as misleading and unreliable, the Court excluded his opinion that the "[NDA] data should have alerted Parke-Davis and [Pfizer] to the possibility of increased risk of new-onset diabetes associated with atorvastatin treatment." *Id.* at 579. As the Court noted, the glucose data and NDA

965-66 (D. Minn. 2009); *In re Baycol Prods. Litig.*, 532 F. Supp. 2d 1029, 1054 (D. Minn. 2007).

statements that Plaintiffs now claim are "admissions" of causation do not provide evidence of general causation because, as Plaintiffs conceded, "a single elevated glucose measurement is insufficient to infer diabetes." *Id.* Plaintiffs provide no support for their position that notwithstanding the Court's ruling that the NDA glucose data cannot support an expert opinion that Lipitor causes diabetes, they can proffer the same data as evidence of general causation without expert testimony.

4. Website Statement About Adverse Event Reports

Finally, Plaintiffs contend that a statement on the Lipitor website – "Tell your doctor if you have diabetes. Elevated blood sugar levels have been reported with statins, including LIPITOR" – "constitutes yet a further admission of the general causation connection between Lipitor and diabetes." Opp. at 17. This statement, which is consistent with the FDA-approved Lipitor label, is not an admission of or evidence of general causation. *See supra* Parts II.A, B.2. The labeling and website language refer to adverse event reports of elevated blood sugar, not causation of diabetes. It is well established that "[c]ase reports are not reliable evidence of causation," *Mirena*, 2016 WL 4059224, at *16, and are "insufficient to create a material question of fact on general causation." *In re Zoloft*, 2016 WL 1320799, at *9; *accord McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1250 (11th Cir. 2005); *Accutane*, 511 F. Supp. 2d at 1296-97; *Soldo v. Sandoz Pharms. Corp.*, 244 F. Supp. 2d 434, 537, 541 (W.D. Pa. 2003).

In sum, this Court should reject Plaintiffs' "admissions" argument. The law does not permit Plaintiffs to defeat summary judgment through lawyer argument about "evidence" that the Court already held cannot provide a reliable basis for an expert's opinion on causation or that Plaintiffs' experts did not even consider scientifically reliable enough to support a causation opinion. Here, as in *Mirena*, "to the extent [the purported admissions] support Plaintiffs' thesis at all, they are so patently less reliable than admissible expert testimony that they cannot reasonably substitute for such testimony." *Mirena*, 2016 WL 4059224, at *12.

III. PLAINTIFFS CANNOT PROCEED BECAUSE THEY LACK ADMISSIBLE AND SUFFICIENT EVIDENCE OF SPECIFIC CAUSATION

A. Plaintiffs Waived Any Contention that these Cases Are Not Ripe for Summary Judgment on the Ground of Specific Causation

Plaintiffs previously conceded that their cases were subject to summary judgment on the issue of specific causation based on this Court's ruling in CMO 55 and the order-to-show-cause process the Court adopted, with Plaintiffs' consent, in CMO 65. Pursuant to that process, which was intended to streamline disposition of the cases and facilitate Plaintiffs' ability to pursue an appeal, Plaintiffs admitted that none of their cases could survive summary judgment if CMO 55 is correct. As a result, Pfizer did not need to separately demonstrate that summary judgment is warranted on

the issue of specific causation under the law of every state or under the individual factual circumstances of every case. But as the Court observed in CMO 81, in their opposition, Plaintiffs ignore this fact and assert novel arguments about various state laws and hypothetical factual scenarios as if CMO 65 never existed. CMO 81 at 1, 3.

In their single reference to it, Plaintiffs mischaracterize CMO 65. They describe it as an order directing "any plaintiff who believed she could adduce a differential diagnosis that could survive *Daubert* notwithstanding the exclusion of Dr. Murphy's expert testimony in *Hempstead* to come forward with such evidence." Opp. at 4. CMO 65 did no such thing. Instead, it required any Plaintiff who disputed lead counsel's position and who thought her case could survive summary judgment to state how her case is different. Such a case would thereafter be subject to a separate expert discovery schedule. In CMO 66, issued the same day, the Court vacated the trial schedule based in part on Plaintiffs' counsel's statement that "Plaintiffs have no pending case in the MDL that can survive summary judgment on specific causation under the standards set forth in the Court's order disallowing the testimony of Dr. Murphy under Rule 702 and *Daubert*." [1353] The Court advised that it would "proceed to address the outstanding motions in this case, including dispositive motions for summary judgment, and will not set any other case for a bellwether trial unless circumstances change." *Id.*

Aside from certain Plaintiffs with pending remand motions who filed a non-substantive response, no

Plaintiff responded to CMO 65 in any manner, including by advancing any of the arguments Plaintiffs now assert. Plaintiffs disregard the impact of that Order and the concession they made by not responding to it. Without seeking leave or providing any justification for their untimely arguments, they attempt to do now what the Order required them to do six months ago: "dispute[] the position taken by Plaintiffs' Lead Counsel and assert[] that … case[s] can survive summary judgment on specific causation even if the Court's ruling in CMO 55 is upheld on appeal." CMO 65. This Court need not consider Plaintiffs' untimely arguments, made only after the Court adopted a framework for deciding summary judgment based on a fully-developed record that includes CMO 65. In the Fourth Circuit, "[all] litigants are subject to the time requirements and respect for court orders without which effective judicial administration would be impossible." *Ballard v. Carlson*, 882 F.2d 93, 96 (4th Cir. 1989). Plaintiffs are bound by CMO 65 and their inaction under it and have waived the contrary arguments they seek to assert for the first time now. Courts routinely grant dispositive relief where parties fail to respond to orders to show cause. *See, e.g.*, *Blaesing v. Nat'l Transp. Safety Bd.*, 993 F.2d 881, at *2-3 (Table) (9th Cir. 1993); *Woolridge v. Potomac Coll. L.L.C.*, 919 F. Supp. 2d 7, 7 (D.D.C. 2013); *Garcia v. Spirit Airlines, Inc.*, 2011 WL 2312562, at *1-2 (S.D. Fla. June 8, 2011); *Crews v. Platolene 500, Inc.*, 2006 WL 1004908, at *1 (S.D. Ill. Apr. 13, 2006).

This Court has, nevertheless, provided Plaintiffs another opportunity to show whether they can survive summary judgment. CMO 81 at 3-4. Plaintiffs' deadline

to try to do so has not yet passed, but the state law standards confirm that an argument by any plaintiff in this MDL that she can proceed without expert testimony will fail on its merits.

B. Plaintiffs' Contention that They Can Prove Specific Causation Without Admissible Expert Testimony Fails on the Merits

Admissible and sufficient expert testimony is required to establish medical causation, including specific causation, in all jurisdictions in cases like these involving complex medical and scientific issues. Plaintiffs' cases do not show otherwise. The cases they cite for the generic notion that a plaintiff may rely on circumstantial evidence to establish causation do not support their contention that they can proceed without sufficient expert evidence in these cases. *See, e.g.*, *Carter Farms Co. v. Hoffman-Laroche, Inc.*, 492 P.2d 1000 (N.M. Ct. App. 1971). As this Court has observed, "the circumstances where [non-expert] evidence is sufficient to prove causation are generally limited to circumstances where 'general experience and common sense will enable a lay person to determine the causal relationship.'" CMO 81 at 2-3 (quoting *Byrd v. Delasancha*, 195 S.W.3d 834, 837 (Tex. Ct. App. 2006)). Plaintiffs rely on a number of accident cases like *Byrd*, *see also Pagett v. N. Elec. Supply Co.*, 167 N.W.2d 58, 64 (Minn. 1969); cases involving medical causation in animals, not humans, that nevertheless involved expert testimony and did not hold that causation could be established without it, *see, e.g.*, *Carter Farms*, 492 P.2d at 1002; *Reid v. Brown*, 240 P.2d 213, 215 (N.M. 1952);

and cases where medical causation was undisputed, *see, e.g.*, *Richards v. Upjohn Co.*, 625 P.2d 1192, 1195 (N.M. Ct. App. 1980). None permits Plaintiffs to proceed without expert testimony here.

Plaintiffs also cannot support their claim that Plaintiffs in "many states" need only proffer a specific-causation opinion that it is "possible" that Lipitor caused her diabetes. Opp. at 20. Plaintiffs do not cite a single case holding that a plaintiff in a drug product liability action can satisfy her burden of proof on medical causation "by a combination of expert evidence of possible causation and other non-expert evidence." *Id.* at 25. Instead, their cases confirm that "[i]n toxic tort cases, proof of causation generally requires reliable expert testimony which is based, at the least, on the determination that there was reasonable probability that the negligence caused the injury." *McCarney v. PA Lex Glen, L.L.C.*, 784 S.E.2d 438, 440 (Ga. Ct. App. 2016). Unlike in the cases on which Plaintiffs rely that involve alleged injuries from accidents,[4] acute

[4] *See, e.g.*, *Ex parte McInish*, 47 So.3d 767 (Ala. 2008); *Hills v. Ozark Border Elec. Co-op.*, 710 S.W.2d 338 (Mo. Ct. App. 1986); *Noblesville Casting Div. of TRW, Inc. v. Prince*, 438 N.E.2d 722 (Ind. 1982); *Pygman v. Helton*, 134 S.E.2d 717 (W. Va. 1964); *Kimmie v. Terminal R. R. Ass'n of St. Louis*, 66 S.W.2d 561 (1933).

exposure,[5] or medical implant or surgery,[6] claims that Lipitor caused diabetes, a common disease with multiple risk factors, are not subject to a combination of medical and "non-medical" evidence. Rather, they require "expert medical evidence standing alone, in which cases the evidence must naturally be based at least on reasonable probability." *Estate of Patterson v. Fulton-DeKalb Hosp. Auth.*, 505 S.E.2d 232, 234-35 (Ga. Ct. App. 1998) (internal quotation marks and citation omitted); *see also Nelson v. Matrixx Initiatives, Inc.*, 592 F. App'x 591, 592 (9th Cir. 2015). This Court's decisions addressing Plaintiffs' specific causation expert testimony in *Daniels* and *Hempstead* highlight the need for an expert employing a "reliable methodology to determine whether Lipitor is a substantial contributing factor in [a plaintiff's] development of diabetes." *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.*, 2016 WL 2851445, at *17 (D.S.C. May 11, 2016) ("CMO 76"); *In re Lipitor (Atorvastatin Calcium) Mktg., Sales*

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[5] *See, e.g.*, *McCarney*, 784 S.E.2d at 441; *Rodrigues v. Georgia-Pacific Corp.*, 661 S.E.2d 141 (Ga. Ct. App. 2008); *Estate of Patterson v. Fulton-DeKalb Hosp. Auth.*, 505 S.E.2d 232 (Ga. Ct. App. 1998); *Coca-Cola Bottling Co. of Tucson v. Fitzgerald*, 413 P.2d 869 (Ariz. Ct. App. 1966); *Winter v. Honeggers' & Co.*, 215 N.W.2d 316 (Iowa 1974); *Hagy v. Allied Chem. & Dye Corp.*, 265 P.2d 86 (Cal. Dist. Ct. App. 1953).

[6] *See, e.g.*, *Smith v. Hines*, 261 P.3d 1129 (Okla. 2011); *Mitzelfelt v. Kamrin*, 584 A.2d 888 (Penn. 1990); *Schwab v. Tolley*, 345 So.2d 747 (Fla. Dist. Ct. App. 1977).

Practices & Prods. Liab. Litig., 150 F. Supp. 3d 644, 661 (D.S.C. Dec. 11, 2015) ("CMO 55").[7]

The Fourth Circuit in *Bard* manifestly did not state that expert causation testimony framed in terms of a "possibility" is legally sufficient evidence. *See In re C.R. Bard, Inc., MDL No. 2187, Pelvic Repair Sys. Prods. Liab. Litig.*, 810 F.3d 913, 929-30 (4th Cir. 2016). To the contrary, it expressly rejected that notion. *Bard* addressed the Georgia Supreme Court's decision in *Zwiren* v. *Thompson*, 578 S.E.2d 862 (Ga. 2003), for the proposition that, in medical malpractice cases, the causation opinion need not be stated in terms of "reasonable medical certainty," but rather in terms of "reasonable medical probability." *Bard*, 810 F.3d at 930. "[E]ven in malpractice cases, 'Georgia case law requires only that an expert state an opinion regarding proximate causation in terms stronger than that of medical possibility.'" *Id.* That is, it must be at least a "reasonable medical probability." Possibility is not enough. Further, these are not "medical implant cases," where, according to *Bard*, "the need for exclusively

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[7] In CMO 55, this Court found Dr. Murphy's testimony inadmissible. Whether an opinion is admissible under FRE 702 and *Daubert* – and is, thus, relevant, reliable, and helpful to the trier of fact (*see* Opp. at 27) – is a question ultimately governed by federal law. *See Bryte v. Am. Household, Inc.*, 429 F.3d 469, 475-76 (4th Cir. 2005). To be sure, Plaintiffs' citation to the Ninth Circuit's decision on remand in *Daubert*, which states that the plaintiff's "traditional burden" of proof is that of being "the result of the accused cause and not some independent factor" to a standard of "more likely than not," *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1320 (9th Cir. 1995), is consistent with the "preponderance-of-evidence burden" cited by this Court. CMO 55, 150 F. Supp. 3d at 649.

medical evidence is abrogated." *Id.* (citing *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1320 (11th Cir. 1999)). Moreover, in *Allison*, which was a medical implant case, the Eleventh Circuit, applying Georgia law, held – in contrast to the injuries that can result from blunt force trauma in an automotive accident – "[t]hat breast implants can and did cause systemic disease in Allison is not a natural inference that a juror could make through human experience. Thus, medical expert testimony was essential to prove causation in this case." 184 F.3d at 1320 (citation omitted). So, too, expert testimony is essential to prove causation here.

Plaintiffs' hypotheticals only confirm that they cannot satisfy their burden under any state's law without admissible and sufficient expert testimony on specific causation. Plaintiffs contend, for example, that "the facts and data relied on by Dr. Murphy surely would have been sufficient to support a reliable conclusion that specific causation was *possible*," and that such an opinion "would be sufficient to survive summary judgment if plaintiffs could adduce circumstantial or other non-expert evidence to permit a reasonable jury 'to make the leap from a possibility to a probability.'" Opp. at 28 (citing CMO 55 at 27). They also suggest that an 80 mg plaintiff with two risk factors could proceed based on SPARCL and rely on "non-expert evidence to bridge the gap between 40% and 50% probability" of specific causation. *Id.*; *id.* at 31. Both scenarios would invite exactly the kind of jury speculation about scientific issues based on "non-expert evidence" that forecloses Plaintiffs' general causation "admissions" argument.

C. Summary Judgment Can and Should Be Granted by This Court

Lastly, Plaintiffs contend – for the first time – that this Court should leave summary judgment to be resolved by the transferor courts. Plaintiffs have not identified a single plaintiff who can meet her burden on specific causation,[8] and they provide no reason for this Court to discard the summary judgment process it adopted, beginning with an order-to-show-cause procedure to which they consented. With full notice and knowledge, Plaintiffs conceded that their cases were subject to summary judgment in this Court because no plaintiff could proffer specific causation testimony that would satisfy *Daubert* under this Court's rulings. This Court has afforded Plaintiffs another opportunity to try to show that individual cases can survive summary judgment. Defendants reserve the right to respond to any Plaintiff who comes forward under CMO 81, but because Plaintiffs cannot overcome their inability to proffer admissible expert testimony on specific causation, summary judgment should be granted as a matter of law.

It is well settled that MDL courts "have the clear power" to "dispose[] of entire cases" on "motions for summary judgment under Rule 56." David F. Herr, *Multidistrict Lit. Man.* § 9:21 (2016); *see also In re*

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[8] Plaintiffs purport to summarily characterize certain individual cases and attach eight Plaintiff Fact Sheets to their opposition. Pls.' Exs. 10-17. None of these Plaintiffs responded to CMO 65, and none can avoid summary judgment through untimely attorney argument that contradicts their prior concession about the record in these cases under CMO 65.

Donald J. Trump Casino Secs. Litig.-Taj Mahal Litig., 7 F.3d 357, 367-68 (3d Cir. 1993). The Federal Judicial Center's guidebook states that transferee courts should "[u]se *Daubert* hearings to assess the validity of the general scientific principles at issue, as well as the testimony of the proffered experts, and ***enter summary judgment*** if the underlying scientific principles are not properly established." Fed. Judicial Ctr., *Managing Multidistrict Litigation in Products Liability Cases*, at 37 (2011) (emphasis added). The guidebook recognizes that MDL courts "may terminate … all actions in the MDL docket by ruling on motions … for summary judgment." *Id.* at 4; *see also, e.g.*, *In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 97 F.3d 1050, 1055 (8th Cir. 1996); *Mirena*, 2016 WL 4059224, at *17-18; *Zoloft*, 2016 WL 1320799, at *11; *In re Nexium (Esomeprazole) Prods. Liab. Litig.*, 2014 WL 5313871 (C.D. Cal. Sept. 30, 2014). "In practice … the vast majority of transferred cases are disposed of completely in the transferee court, either through pretrial dispositions such as summary judgment, or by trial." *In re Food Lion Inc., Fair Labor Standards Act Litig.*, 73 F.3d 528, 532 (4th Cir. 1996). Simply put, an MDL court has the same responsibility as any other court to dismiss cases on summary judgment where, as here, plaintiffs lack admissible and sufficient evidence to establish an essential element of their claims.

IV. THIS COURT HAS SUBJECT MATTER JURISDICTION IN ALL CASES

This Court has subject matter jurisdiction over all cases in the MDL and the Court's expert rulings

warrant summary judgment in every case.[9] Certain Plaintiffs contend that their cases should not be subject to Defendants' motion because they moved to remand. [1583, 1584] Pfizer incorporates its oppositions to Plaintiffs' remand motions and its objections to recommendations by the Magistrate Judge. To the extent the Court defers ruling on summary judgment in cases where Plaintiffs have moved to remand, Defendants reserve the right to renew their motion and seek other relief at an appropriate time.

CONCLUSION

For the foregoing reasons and those set forth in Defendants' opening brief, the answer to the question of "whether any plaintiff in this MDL can survive summary judgment without expert testimony on causation," CMO 81, is no. Thus, this Court should grant Defendants' motion for summary judgment.

Dated: August 12, 2016

By : */s/ Mark S. Cheffo*
Mark S. Cheffo
Sheila L. Birnbaum
Bert L. Wolff
Rachel Passaretti-Wu

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[9] As to Plaintiffs with remand motions who asserted that they did not intend to act under CMO 65, the Court can issue a similar order after addressing the remand motions. In addition, the Plaintiffs who did not respond to CMO 65 include hundreds who only later moved for remand. They did so after this Court issued its expert rulings and after having participated in the MDL for months to years. *See* [1390, 1505, 1593]. Courts have rejected such forum shopping.

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* * *

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

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION
HONORABLE CORMAC J. CARNEY, U.S. DISTRICT JUDGE

Certified

Case No. 8:17-mc-00005-CJC-JPR

[Dated February 1, 2017]

IN RE: PFIZER)
)
)

REPORTER'S TRANSCRIPT OF
STATUS CONFERENCE
WEDNESDAY, FEBRUARY 1, 2017
9:12 A.M.
SANTA ANA, CALIFORNIA

DEBBIE HINO-SPAAN, CSR 7953, CRR
FEDERAL OFFICIAL COURT REPORTER
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[p.2]

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Matthew R. Lopez, Esq.
Thomas Sims, Esq.

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SANTA ANA, CALIFORNIA;
WEDNESDAY, FEBRUARY 1, 2017
9:12 A.M.
- - -

THE COURT: Good morning. All right. Well, I want to thank all of you for being here. I thought it would be productive if we had a brief chat and I gave you some of my thoughts about how I think we should proceed, and then I'd like to hear from any of you. There's not that many people here. I was preparing for over 30 lawyers, I guess.

How many do we have right now on the docket, Melissa?

THE COURTROOM DEPUTY: I don't know. 30, 40, maybe.

THE COURT: Looks like about 30 or 40 lawyers, but looks like we only have about eight or nine on the plaintiff's side. What I thought needs to be done is I have to decide the jurisdictional issue, whether I have jurisdiction over any of these cases. And I think the total now is up to about 130 cases. And so what I want to do is focus on that issue. If I have jurisdiction, I have jurisdiction. And then we can talk about case management of the case. If I don't have jurisdiction

over any of these cases, they're going back to State Court.

So I guess maybe my question is more for the plaintiffs' group, is how best can we tee up the jurisdictional issue? Can we have one consolidated motion, or do we have to have a few motions because depending on the case, the jurisdictional

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analysis is different? And I don't profess to say I know the plaintiffs' cases very well, and so I'll be looking for guidance. And what I thought I would do is just tee that issue up to you and then give you a few moments to chat among yourselves, and then you can let me know how best to proceed.

I assume, based on the status report submitted by Pfizer, that the simpler, the fewer motions, the better, that you would prefer to do consolidated opposition. But I need to know on the plaintiff's side are we talking about one motion, two motions, three motions, four motions?

MR. ROBINS: May I address the Court, Your Honor?

THE COURT: Please. If you could just say who you are and who you represent.

MR. ROBINS: Thank you, Your Honor. I'm Bill Robins, Santa Monica. And by way of background, I was appointed by Judge Johnson as one of the members of the executive committee in the JCCP when these cases were first -- early on when these cases were

filed. The reason you don't have 30 lawyers here is because we've organized ourselves. And I'm here speaking on behalf of all the plaintiffs that have made their way here so far.

THE COURT: Oh, great.

MR. ROBINS: And we will suggest to Your Honor that the orderly way to handle this is through consolidated, and I'm going to say most likely two motions.

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THE COURT: Okay.

MR. ROBINS: And the reason for that is there is a distinction between those plaintiffs who originally moved for the JCCP and then sort of everybody else who did nothing more than file the lawsuit and got removed. And there is a distinction, we think, in that, and there's also some distinctions concerning waiver that we think apply to the first group that don't apply to the second. And so when we originally filed our motions way back when and they were -- most of the cases Your Honor knows are here in front of you, but there were cases in the Eastern District. There's some cases up in the Northern District.

The way that it was teed up in most of the districts was with three groups because of some distinctions that no longer exist because of Judge Gergel's order. We're now down, I think, to two groups from the way I can tell in looking at his order and what's left for Your Honor to decide on the question of subject matter jurisdiction. So our suggestion would be that it is a

consolidated briefing, that we will file -- and I think we'll be able to get to a point of having an agreement on every single plaintiff that is coming here.

One comment I would make is that we've been watching closely the orders that have been coming out of Judge Gergel and getting back to the JPML and making their way back here to Your Honor. There are a few cases that, you know, have not

[p.6]

quite landed at LAX, made their way -- I guess here would be John Wayne, but they haven't made it here yet. They'll be here soon.

Judge Gergel just signed another remand order, I'm told, this morning on a case of somebody that was still up there. And there are a few lawyers that are in that group that were not part of the original JCCP leadership, were not part of the steering committee that we formed. I have every expectation that we'll get control over those cases as well and those lawyers will be willing to allow leadership team to, you know, bring them in under the tent. But I would ask the Court within your consideration as we're setting the briefing schedule to give us a little bit of time to let those cases come in here.

There may be a few left that for whatever reason still end up in front of Judge Gergel and don't get completely looped in, but just in terms of the efficiency of things, we think that it would be best if we can get all of the cats herded in sort of one or two motions as I'm saying. We're not looking for a lot of time. I was going to suggest to Your Honor 45 days from today for

us to file opening briefs. The defense and I have already conferred about this. I think we're in agreement on this. They would file a response 30 days after that; we would file a reply two weeks later. You know, they asked me about a surreply, and I know those are generally discouraged in the Central District. It's up to Your Honor as to how you want to

[p.7]

handle that, but this is a schedule that we were going to suggest to you.

THE COURT: Sounds great. I'm delighted that you're on top of this and it's coordinated and organized. I really want to proceed as efficiently as possible, and it sounds like you got a head start. So I'm very comfortable with that.

What I would ask, then, is if you could submit a proposed briefing and hearing schedule in an order that I can sign, and then that will be the order of the Court. One question I need a moment to talk to the clerk of this courthouse as well as my own clerk is whether we should set up a new case where these are filed in as opposed to filing the motions in 130 cases, if you follow me. That's more an internal. I want to make it as simple for you as possible. So I imagine it would be easier -- it's a question, not an argument -- if you just had to file in one case the two motions or do you see it differently?

MR. ROBINS: Your Honor, we conferred. I conferred with Mr. Cheffo's colleague about that exact issue yesterday, and we completely agree with that. That would be the most logical way to do it, you know,

with, you know, an exhibit that picks up all the case numbers that apply. That -- you know, that makes the most sense. And we would certainly ask Your Honor if we can do that feasibly here, that would be the best approach. Because otherwise, we're just -- we have 140 filings and all that and it doesn't really make any logical sense to

[p.8]

have to do that, Your Honor. It's going to be a me too motion on everything behind it.

And frankly, it may confuse things a little bit because of the fact that we have -- what I said before, you know, some distinctions in terms of just which buckets each one goes in. So if we could sort of handle it exactly the way you're suggesting, I think it's going to make it a lot easier at the end of the day for everyone.

THE COURT: Okay. So then I guess the question that I have for you to follow up, should we have one case that you file it on or two cases that you file it on?

MR. ROBINS: I think if we can file it in one case, that would make the most sense and we cross-reference the cases by case number that it would apply to. I don't see the necessity. Maybe Mr. Cheffo will disagree. Yeah, I think that's easiest for us.

THE COURT: Okay. Could you give me a moment and I'll talk to Terri and Melissa here.

(A discussion was held off the record.)

THE COURT: All right. I think the proposal is going to work. What I think I'll have to do is issue a minute order indicating what the new case number is and indicating in each individual case all 130, or if that's going to be 140 that all filings need to be in this new case number. So if you see that type of minute order, now you know why.

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So I guess the ball, then, is in your court; right? You're going to submit a stipulation and Proposed Order about the briefing and hearing schedule?

MR. ROBINS: Yes, Your Honor.

THE COURT: And I'll get an order -- minute order out with a new case number. And all filings should be in this new case number.

Okay. Tell me, is there anything else you'd like to talk about?

MR. ROBINS: Your Honor, Bill Robins, again, for the plaintiff. Just as a clarification, you know, I don't -- I can't imagine, as I'm sitting here, anything that would get filed as, you know, the next filing other than the motion, other than you may get CTOs coming back from the JPML for these individual cases. And so I think -- you know, I'd just make one caveat to what you're saying about this whole organization of one case number. You know, in a sense, we need to treat this as a mini MDL in that you don't want 140 cases filing -- I don't think you do anyway, because later it would be a problem for things that are unrelated to a common issue.

THE COURT: Right.

MR. ROBINS: And so my suggestion on the minute order would be that it, you know, addresses that it is for matters that are -- you know, have common issues applicable to the entire, you know, cases or something like that so that as

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there may be other case-specific things that theoretically could come up, you know, I would leave it to you obviously on how you want to handle pro hac for this, maybe it makes sense to put that in the general.

But for things coming from the JPML initially or perhaps -- I don't know what, but there may be something that a lawyer in an individual case or for some reason, you know, Pfizer needs to file an individual case, I would just leave that possibility open.

THE COURT: You're right.

MR. ROBINS: Rather than put everything in one number.

THE COURT: You are right. You are right. And plus I wouldn't want to -- we're trying to streamline and have this new case number have the important stuff. And I don't want to bog it down with pro hac vice or conditional transfer orders. I don't want that. So I agree.

MR. ROBINS: Okay.

THE COURT: I'll work with the wording and hopefully it's going to be acceptable. And if anybody has a problem with it, you can just let me know.

MR. ROBINS: Certainly, Your Honor.

THE COURT: Okay.

MR. CHEFFO: Good morning, Your Honor. Mark Cheffo for Pfizer. I'm going to be brief. I think you'll also hear

[p.11]

what I have to say is that, you know, we're in kind of violent agreement, I think, on most of these issues. We are fortunate to have good lawyers on the plaintiff's side at least, and we've been coordinating well on what makes sense.

So I think what you've heard is something that we second in terms of an orderly process that's kind of most efficient for the Court and for the parties. And thank you for that, and thank you for granting my pro hac.

So with that, I think the only thing -- and I should, just as a housekeeping matter, maybe say it once and get it out of the way, we have a personal jurisdiction affirmative defense that it's not something -- we think it will be moot frankly to the extent that we're here before Your Honor in this Court, as we think we should be under CAFA. But to the extent we're not in State Court, I don't want there to be any confusion that we have waived that issue. But that's not something I think this Court is going to need to take up.

THE COURT: And I saw that in the briefing, and I don't mean to suggest that you've waived any of your other defenses or arguments or issues that might be there, but all I'm saying is I don't want to do anything about the case until I've decided this CAFA is a jurisdictional issue.

MR. CHEFFO: And we couldn't agree more. The jurisdictional issue goes away to the extent that Your Honor determines that there's CAFA jurisdiction.

[p.12]

So with that, I think that we are prepared to -- you know, I think the one or the two briefs makes some sense. We've talked about that. We will do that within 30 days. I think we had just talked about, you know, a surreply frankly. That's something we'll wait and see whether you think we need it, you need it, but we'll take that as it comes, Your Honor.

THE COURT: I appreciate it. I'm not trying to curry anybody's favor, but I appreciate the civility and professionalism. I haven't had that in a while. It's been very contentious lately for whatever reason, and it's not productive. So I appreciate everybody trying to be coordinated and efficient, and I think we have a game plan on how to proceed. And it sounds like I'll be resolving this jurisdictional issue, it sounds like, in the next 90 days if you're going to be filing in 45 days and with that briefing schedule you talked about.

MR. CHEFFO: Thank you, Your Honor.

THE COURT: Okay. Thank you.

THE COURTROOM DEPUTY: All rise.

(Proceedings concluded at 9:32 a.m.)

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CERTIFICATE OF OFFICIAL REPORTER

COUNTY OF LOS ANGELES)
)
STATE OF CALIFORNIA)

I, DEBBIE HINO-SPAAN, FEDERAL OFFICIAL REALTIME COURT REPORTER, in and for the United States District Court for the Central District of California, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Date: February 16, 2017

/S/ DEBBIE HINO-SPAAN
Debbie Hino-Spaan, CSR No. 7953
Federal Official Court Reporter

APPENDIX F

**IN THE
COURT OF APPEAL OF THE STATE OF
CALIFORNIA
SECOND APPELLATE DISTRICT,
DIVISION ___**

Court of Appeals No. B _____

[Filed April 12, 2019]

PFIZER INC. AND GREENSTONE LLC, *Petitioners*,	)
v.	)
THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, *Respondent*,	)
PLAINTIFFS IN LIPITOR CASES *Real Parties in Interest.*[1]	)

Superior Court, Los Angeles County,
No. JCCP 4761, Hon. Carolyn Kuhl, Judge

[1] The Real Parties in Interest are listed in the Appendixes attached as **Exhibits DD and EE**.

PETITION FOR WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES

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APP-008

TO BE FILED IN THE COURT OF APPEAL

COURT OF APPEAL Second **APPELLATE DISTRICT, DIVISION**

COURT OF APPEAL CASE NUMBER:

SUPERIOR COURT CASE NUMBER: JCCP 4761

STATE BAR NUMBER: 281327

ATTORNEY OR PARTY WITHOUT ATTORNEY:

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ATTORNEY FOR (*name*): Pfizer Inc.

APPELLANT/
PETITIONER: Pfizer Inc. and Greenstone LLC

RESPONDENT/
REAL PARTY IN INTEREST: Superior Court of California, Los Angeles County/ Plaintiffs in Lipitor cases, see Exhibits DD-EE to Petition

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party *(name*): Greenstone LLC

2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	**Nature of interest *(Explain):***
(1) Pfizer	Corporate Parent
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: April 12, 2019

Anna Do
(TYPE OR PRINT NAME)

/s/
(SIGNATURE OF APPELLANT OR ATTORNEY)

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2017]

Cal. Rules of Court, rules 8.208, 8.488
www.courts.ca.gov

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APP-008

TO BE FILED IN THE COURT OF APPEAL

COURT OF APPEAL Second **APPELLATE DISTRICT, DIVISION**

COURT OF APPEAL CASE NUMBER:

SUPERIOR COURT CASE NUMBER: JCCP 4761

STATE BAR NUMBER: 281327

ATTORNEY OR PARTY WITHOUT ATTORNEY:

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ATTORNEY FOR (*name*): Pfizer Inc.

APPELLANT/
PETITIONER: Pfizer Inc. and Greenstone LLC

RESPONDENT/
REAL PARTY IN INTEREST: Superior Court of California, Los Angeles County/ Plaintiffs in Lipitor cases, see Exhibits DD-EE to Petition

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party *(name*): Pfizer Inc.

2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	**Nature of interest *(Explain):***
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: April 12, 2019

Anna Do
(TYPE OR PRINT NAME)

/s/
(SIGNATURE OF APPELLANT OR ATTORNEY)

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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[*Table of Authorities Omitted in the Printing of this Appendix*]

Petitioners Pfizer Inc. and Greenstone LLC (hereinafter "Pfizer") respectfully petition this Court for a Writ of Mandate ordering the Los Angeles Superior Court to vacate its Order and Opinion of March 15, 2019 (attached as **Exhibit A**), and directing it to enter an order granting Pfizer's Motion to Quash Service of Summons with regard to the claims of non-California Plaintiffs for lack of personal jurisdiction or Dismiss the claims of non-California Plaintiffs on grounds of *forum non conveniens*.

INTRODUCTION

This Petition concerns the claims of some 3,721 non-resident Plaintiffs in a coordinated proceeding in the Superior Court involving the prescription medication Lipitor, manufactured by Pfizer. There is no dispute that the Due Process Clause precludes personal jurisdiction over the claims of those non-resident Plaintiffs under the controlling decision of the Supreme Court of the United States in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017). Likewise, the Parties do not dispute that, for similar and related reasons, the claims of these non-resident Plaintiffs were subject to dismissal in favor of litigation in their home states under the doctrine of *forum non conveniens*. Nonetheless, the Superior Court ruled that Pfizer had forfeited its constitutional personal jurisdiction defenses by failing to assert them at the same time that Pfizer was litigating the issue of subject matter jurisdiction in the Lipitor multidistrict litigation (MDL) in federal court. Moreover, although the issue was not disputed by the Parties, the Superior Court determined that *forum non conveniens* dismissal

was improper. Both of these rulings were error and a writ should issue.

I. PFIZER DID NOT FORFEIT PERSONAL JURISDICTION

The Superior Court erred in ruling that litigation federal subject matter jurisdiction could effect a forfeiture of a personal jurisdiction defense. There is no dispute that Pfizer preserved its personal jurisdiction defenses by asserting them in its answers in federal court immediately upon removal. Yet, the Superior Court ruled that because Pfizer "had more than enough time to litigate [its] defense of personal jurisdiction" while it was litigating subject matter jurisdiction in the Lipitor MDL, it thereby forfeited its right to assert personal jurisdiction at all. This ruling erred as a matter of law. Forfeiture occurs when a party litigates on the merits, not, as here, when it litigates only subject matter jurisdiction. No case cited by Plaintiffs or the Superior Court supports the Court's ruling.

The Superior Court's forfeiture ruling (decided under federal law) is also contrary to controlling decisions of the United States Supreme Court. It is well settled that, because subject matter jurisdiction and personal jurisdiction are distinct jurisdictional doctrines, it is proper to sequence their litigation in the interest of judicial efficiency. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999). Here, Pfizer followed the ordinary procedure under *Ruhrgas* by litigating subject matter jurisdiction before personal jurisdiction. This was not only proper, but also necessary: because Pfizer's personal jurisdiction defenses would not dispose of the entire action, the MDL court would not

be able to rule on personal jurisdiction unless it first determined that it had subject matter jurisdiction. Thus, the fact that Pfizer deferred its personal jurisdiction motion until after subject matter jurisdiction cannot have reasonably suggested acquiescence to the court's jurisdiction, nor can Pfizer be penalized with forfeiture for having done so.

Finally, there is no merit to the Superior Court's alternate basis for forfeiture—that Pfizer showed intent to litigate the merits by referring to these cases in a single footnote of its Reply brief in support of its Omnibus Summary Judgment Motion in the MDL. That footnote specifically stated that any forthcoming summary judgment motion as to the non-resident Plaintiffs was contingent on the MDL court finding subject matter jurisdiction proper, which it did not.

II. *FORUM NON CONVENIENS* DISMISSAL WAS PROPER

The Superior Court also erred in ignoring the undisputed conclusion of the Parties that the non-resident Plaintiffs' claims should be dismissed for *forum non conveniens* in favor of litigating those claims in Plaintiffs' home states. Although the Superior Court found that Pfizer had not forfeited this defense, it nevertheless concluded, contrary to the Parties' agreement, that dismissal for *forum non conveniens* was improper. Pfizer and its codefendants have stipulated that they will toll the statutes of limitations in Plaintiffs' home states to accord with the date that Plaintiffs filed their actions here. Moreover, the Superior Court offered little explanation of how it weighed the public and private interests associated

with litigating in another forum, and the explanation it gave is contrary to well-established precedent. The Parties, witnesses, evidence, and *situs* all are located outside California. California thus has no connection to these actions, and litigating them here will impose substantial burdens on the Parties, witnesses, and Court.

Because the Superior Court erred in denying Pfizer's Motions to Quash and Dismiss, the Court should issue a Writ of Mandate directing the Superior Court to vacate its Opinion and Order and to grant Pfizer's Motions.

PETITION FOR WRIT OF MANDATE

By this verified Petition, Petitioners allege:

I. WHY RELIEF BY WRIT IS PROPER

Relief by Writ of Mandate is proper pursuant to California Code of Civil Procedure § 418.10.

II. TIMELINESS OF PETITION

This Petition is timely filed pursuant to an Order of the Superior Court under California Code of Civil Procedure § 418.10(c), extending by twenty days Pfizer's time to file this Petition.[2]

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[2] Pfizer has not yet received the Superior Court's Order extending the time to file, but was informed by the Court's judicial assistant that the Court signed a copy of the Order on March 22, 2019. Pfizer will file a copy of the Order with this Court promptly upon receipt.

III. AUTHENTICITY OF EXHIBITS

The exhibits accompanying this Petition are true copies of documents on file with Respondent Superior Court or a transcript of the hearing on Pfizer's Motion in the Superior Court, except Exhibits F, K, Q, and BB, each of which is a true copy of a public record that this Court should consider in the first instance.[3] The exhibits are incorporated herein by reference as though fully set forth in this Petition.

IV. FACTUAL BACKGROUND

A. Background on Lipitor MDL and Pfizer's Removals

1. These cases are part of a nationwide litigation in which Plaintiffs allege they developed type 2 diabetes as a result of their use of Lipitor, a prescription medication manufactured by Pfizer.

2. In 2014, an MDL proceeding was established in the United States District Court for the District of South Carolina for federal Lipitor actions. The MDL judge (Hon. Richard M. Gergel) ultimately granted summary judgment as to all claims in the MDL because Plaintiffs lacked admissible expert testimony on causation, and that ruling was affirmed on appeal. *In re Lipitor (Atorvastatin Calcium) Marketing, Sales*

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[3] The Court may consider new materials on a Petition for Writ of Mandate. *See McCarthy v. Superior Ct.*, 191 Cal. App. 3d 1023, 1030 n.3 (1987). To the extent that the Court declines to consider Exhibits F, K, Q, and BB, however, Pfizer requests that the Court nonetheless consider the remainder of its Petition because those exhibits are not essential to Pfizer's right to relief.

Practices and Prods. Liab. Litig., 892 F.3d 624 (4th Cir. 2018).

3. Parallel to the Lipitor MDL, similar Lipitor actions were filed in various other state-court fora, including these actions filed in California in 2013 and 2014 against Pfizer and a California distributor, McKesson Corp.

4. To take advantage of the efficiencies provided by the MDL, Pfizer removed all the state-court actions to the extent it believed it had available grounds to do so.

5. Here, Pfizer removed the California actions on the grounds that: (1) Plaintiffs' efforts to join a California coordinated proceeding established jurisdiction under the Class Action Fairness Act (CAFA); and (2) but for Plaintiffs' fraudulent joinder of McKesson, there was complete diversity of citizenship.

6. In some multi-plaintiff Lipitor actions, such as those filed in Missouri, Pfizer filed with its notice of removal a motion to dismiss the claims of the non-resident plaintiffs for lack of personal jurisdiction. (*See, e.g.*, Notice of Removal ¶¶ 4–11, *Lofton v. Pfizer Inc.*, No. 16-cv-604 (E.D. Mo. Apr. 29, 2016) (No. 1), attached as **Exhibit F**.)

7. In those cases, Pfizer requested that the issue of personal jurisdiction be decided first because the dismissal of non-resident Plaintiffs for lack of personal jurisdiction would leave the remaining Parties completely diverse, and thereby perfect the federal courts' subject matter jurisdiction. (*See id.*)

8. Pfizer did not file personal jurisdiction motions in the California cases, however, because, unlike in the Missouri cases, the presence of California Defendant McKesson meant that the remaining Parties would not be completely diverse even after dismissal of non-resident Plaintiffs.

B. Upon Removal, Pfizer Preserved Personal Jurisdiction and *Forum Non Conveniens* In Its Federal Answers

9. Although Pfizer did not move on personal jurisdiction in connection with its removals here, it took the required steps to preserve the defense under federal law by asserting it in its answer. *See* FED. R. CIV. P. 12(h).

10. Pfizer filed answers in federal court simultaneous with or shortly after its removals, explicitly raising both personal jurisdiction and *forum non conveniens*:

> THIRTY-FOURTH DEFENSE
>
> To the extent that this venue and/or forum is, or later becomes, inconvenient or otherwise improper, Pfizer reserves the right to challenge its propriety pursuant to California Code of Civil Procedure sections 410.30 and 418.10(a)(2), California Civil Code sections 392-402, 28 U.S.C. sections 1404 or 1406, *forum non conveniens*, or any other applicable statute or common-law doctrine relating to venue and/or forum in California or any other applicable state or federal jurisdiction.

> THIRTY-FIFTH DEFENSE
>
> All claims in the Complaint against Pfizer must be dismissed due to lack of personal jurisdiction under the Due Process clause, as well as California law and any other potentially applicable state law.

(Def.'s Answer at 44–45, *Banks v. Pfizer, Inc.*, No. 14-1908 (C.D. Cal. Mar. 17, 2014) (No. 22), attached as **Exhibit G**.)

11. Both Plaintiffs and the Superior Court agree that this was sufficient to preserve Pfizer's personal jurisdiction challenge under federal law. (Ex. A at 5); *see also* FED. R. CIV. P. 12(h).

C. Pfizer Agreed to Stay Fact Discovery in the MDL While the Parties Litigated Subject Matter Jurisdiction

12. Following removal, Pfizer moved to stay proceedings in federal court so that any determination of federal subject matter jurisdiction could be decided on a coordinated basis following transfer to the MDL. (*See, e.g.*, Mot. Stay, *Little v. Pfizer Inc.*, 3:14-1177 (N.D. Cal. Mar. 20, 2014) (No. 18), attached as **Exhibit H**.)

13. Once in the MDL, Plaintiffs filed consolidated briefing in support of their motions to remand and in turn sought to stay fact discovery while their motions to remand were pending. (*See* Mot. Stay, *In re Lipitor,* MDL No. 14-2502 (D.S.C. June 19, 2014) (No. 257), attached as **Exhibit I**.)

14. Pfizer agreed to the proposed stay, but asked that Plaintiffs be ordered: (1) to participate in the ongoing depositions of witnesses common to all MDL actions, to avoid "multiple depositions of those witnesses and possibly alter[ing] the [Court's] schedule"; and (2) to provide "very limited and narrowly tailored jurisdictional discovery concerning the fraudulent joinder of McKesson, which Defendants have asserted as a basis for federal jurisdiction." (Defs.' Resp. to Pls.' Mot. Stay at 1, *In re: Lipitor*, MDL No. 14-2502 (D.S.C. June 25, 2014) (No. 283), attached as **Exhibit J**.)[4]

15. The MDL court stayed all general discovery except the common depositions (CMO 10 at 1, *In re Lipitor,* MDL 2502 (D.S.C. June 27, 2014), attached as **Exhibit L**), and denied Pfizer's request for jurisdictional discovery without prejudice. (CMO 11 at 4, *In re Lipitor,* MDL 2502 (D.S.C. July 8, 2014), attached as **Exhibit M**.)

D. Through a Series of Orders, Federal District Courts Found No Subject Matter Jurisdiction

16. In January 2015, the magistrate judge recommended that the MDL court reject Pfizer's diversity jurisdiction arguments and send the

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[4] Pfizer's request for participation in common depositions was a case-management measure to avoid duplication of common discovery, consistent with the MDL court's order on state-court coordination, and the Superior Court did not hold otherwise. (CMO 4 at 15–16, *In re Lipitor,* MDL 2502 (D.S.C. Apr. 25, 2014), attached as **Exhibit K**.)

California actions back to the transferor district courts in California to decide the propriety of CAFA removal.

17. While Pfizer's objections to that report and recommendation were pending, it also moved for summary judgment in all other cases in the MDL based on the lack of admissible general causation and specific causation expert testimony. (*See* Defs.' Mot. Summ. J., *In re Lipitor*, MDL No. 14-2502 (D.S.C. June 24, 2016) (No. 1564), attached as **Exhibit N**.)

18. In a footnote to the Reply in support of that omnibus motion, Pfizer stated that the Court could grant summary judgment in these cases for the same reasons if and when it determined it had subject matter jurisdiction over them. (*See* Defs.' Reply at 19 n.9, *In re: Lipitor*, MDL No. 14-2502 (D.S.C. Aug. 12, 2016) (No. 1608), attached as **Exhibit O**.)

19. In October 2016, the MDL court conducted a hearing on subject matter jurisdiction issues including, *inter alia*, a motion to remand filed by plaintiffs in a related Lipitor case from Missouri.

20. In the Missouri cases, unlike here, resolving personal jurisdiction objections first would create complete diversity between the remaining parties and dispense with the need to consider subject matter jurisdiction at all. (Oct. 21, 2016 Hrg. Tr. at 51–52, attached as **Exhibit P**; *see also* Part A, *supra*.)

21. Judge Gergel, however, nevertheless rejected Pfizer's invitation to exercise his discretion under *Ruhrgas* to resolve personal jurisdiction before subject matter jurisdiction. *(Id.* at 51–52.)

22. Thereafter, the MDL judge adopted the magistrate judge's report and recommendation in these cases and suggested that the MDL panel remand these cases back to the California federal courts to decide the existence of subject matter jurisdiction under CAFA. (CMO 87 at 12–15, *In re Lipitor*, MDL 2502 (D.S.C. Nov. 7, 2016), attached as **Exhibit Q**.)

23. Upon remand to the California federal courts, Pfizer again noted the personal jurisdiction and *forum non conveniens* challenges asserted and preserved in its answers. (*See, e.g.*, Def.'s Status Report at 2, *Johnson v. Pfizer, Inc.*, 14-1836 (C.D. Cal. Dec. 30, 2016) (No. 32), attached as **Exhibit R**.)[5]

24. At a subsequent status conference, Judge Carney acknowledged that Pfizer had not "waived . . . any defense or arguments or issues," but explained that he wanted first to decide whether there was subject matter jurisdiction under CAFA before addressing Pfizer's personal jurisdiction and *forum non conveniens* challenges. (Hr'g Tr. at 11:18–22, *In re Pfizer,* No. 17-0005 (C.D. Cal. Feb. 1, 2017), attached as **Exhibit S**.)

25. On May 23, 2017, Judge Carney ruled that he lacked subject matter jurisdiction under CAFA and remanded the California actions to state court. (*See* Order, *In re Pfizer*, No. 17-0005 (C.D. Cal. May 23, 2017) (No. 20), attached as **Exhibit T**.)

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[5] Pfizer's *forum non conveniens* challenges were invoked under the federal analog to *forum non conveniens*, which, as set forth in Pfizer's answers quoted above, is 28 U.S.C. § 1404(a).

E. Following Resolution of Subject Matter Jurisdiction, Pfizer Promptly Asserted Its Intent to Move on Personal Jurisdiction and *Forum Non Conveniens* Defenses

26. As soon as the issue of subject matter jurisdiction was adjudicated, upon remand to the state court, Pfizer promptly raised its personal jurisdiction and *forum non conveniens* defenses in the JCCP.

27. Neither Plaintiffs nor the Superior Court have contended at any time that Pfizer's actions following remand to state court effected a waiver or forfeiture of its personal jurisdiction and *forum non conveniens* defenses:

> a) In the first filing following remand, the parties expressly stated that "no party waives or compromises any of its rights, arguments, defenses or positions concerning the issues subject to any putative appeal of Judge Carney's Remand Order." (Joint Status Report at 2 (May 30, 2017), attached as **Exhibit U**.)
>
> b) In Plaintiffs' first motion following remand, they acknowledged that Pfizer had "reserved a personal jurisdiction defense that it planned to raise at the state court level." (Pls.' Proposed Am. Order re Add-On Procedures at 5 (June 27, 2017), attached as **Exhibit V**.) Plaintiffs further recognized that "Pfizer rightfully wants to have the personal jurisdiction issue resolved once, by this JCCP court" and "agree[d] that this is precisely the sort of global pretrial issue that ought to be

resolved by this JCCP court[.]" (*Id.* at 5.) Pfizer's response again expressly stated that Pfizer did "not waive its defense of lack of personal jurisdiction with respect to any non-California Plaintiffs." (Defs.' Opp'n to Pls.' Proposed Am. Order Re Add-On Procedures at 2 (July 7, 2017), attached as **Exhibit W**.) The parties agreed to a briefing schedule for those objections. (Joint Status Report at 2 (July 31, 2017), attached as **Exhibit X**.)

c) Following this Court's approval of a stipulated protective order regarding discovery, Pfizer promptly objected to jurisdictional discovery and once again reserved its personal jurisdiction challenge. (Joint Status Report at 5 (Oct. 12, 2017), attached as **Exhibit Y**.) Pfizer further "reserve[d] its rights to brief this issue when it becomes ripe" and explained that it had not yet filed any jurisdictional briefing because it was "waiting for Plaintiffs to pick a path forward regarding coordination." (*Id.*)

d) In opposing Plaintiffs' application to transfer these cases as related cases, Pfizer reiterated that it "intend[ed] to challenge personal jurisdiction with respect to the claims of any non-California Plaintiffs." (Defs.' Opp'n to Pls.' Mot. to Act on Pend. Notices of Related Case at 2 n.1 (Nov. 10, 2017), attached as **Exhibit Z**.) Pfizer emphasized that, in "an abundance of caution prior to filing the instant opposition, Pfizer conferred with Plaintiffs' leadership in this proceeding and reached

agreement that this response will not in any way be construed as a waiver of its personal jurisdiction objections." (*Id.*)

F. Pfizer Preserved Its Defenses in Its Second Removal and Filed Dispositive Motions After Second Remand

28. The same is true of Pfizer's second removal of these actions based on the Superior Court's *sua sponte* coordination of these cases. In its briefing on subject matter jurisdiction, Pfizer again raised its personal jurisdiction defense, arguing that post-removal disposition of these cases could be accomplished through "discretionary transfer under section 1404 . . . and/or dismissal for lack of personal jurisdiction." (Defs.' Mem. Opp'n Pls.' Mot. Remand at 3, *In re Lipitor,* No. 18-1725 (C.D. Cal. Apr. 30, 2018) (No. 58), attached as **Exhibit AA**.)

29. After Judge Carney again remanded to the Superior Court,[6] the Parties agreed to a briefing schedule for Pfizer's personal jurisdiction challenge. (Joint Status Report at 2 (July 17, 2018), attached as **Exhibit CC**.)

30. On August 7, 2018, Pfizer moved to quash service of summons as to the non-California Plaintiffs' claims and alternatively sought dismissal of those

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[6] The Ninth Circuit Court of Appeals denied Pfizer's leave to appeal and a Petition for Rehearing *En Banc*. (*See Adamyan v. Pfizer Inc.*, No. 18-80059 (9th Cir. Jan. 22, 2019), attached as **Exhibit BB**.) The Supreme Court of the United States has granted Pfizer an extension up to June 21, 2019, to file a petition for certiorari from that order (No. 18A980).

claims on *forum non conveniens* grounds, pursuant to California Code of Civil Procedure § 418.10(a).

31. Plaintiffs conceded that the California courts lack personal jurisdiction over Pfizer pursuant to *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), and that the claims of non-California Plaintiffs' claims should be dismissed for *forum non conveniens*, but argued that Pfizer's personal jurisdiction and *forum non conveniens* challenges had been forfeited by Pfizer's conduct in federal court.

G. The Superior Court Rejected Pfizer's Defenses

32. The Superior Court denied Pfizer's Motions. First, the Court held that Pfizer had forfeited its personal jurisdiction challenge based solely on: (1) the passage of time between Pfizer's Answers and Motion to Quash; and (2) the footnote at the end of the MDL Defendants' Reply brief in support of their Omnibus Motion for Summary Judgment.

33. Next, the Court held that although Pfizer had not forfeited its *forum non conveniens* challenge, it would not dismiss because: (1) there were no suitable alternative forums because the Court believed that the Parties stipulation to toll the limitations periods in Plaintiffs' home states was somehow deficient; and (2) in any event, California is not an inconvenient forum, despite Plaintiffs conceding that it is inconvenient.

34. Pursuant to a twenty-day extension granted by the Superior Court under California Code of Civil Procedure § 418.10(c), this timely Petition followed.

V. BASES FOR RELIEF

A. Pfizer Did Not Forfeit Personal Jurisdiction

As explained above, the Superior Court erred in ruling that litigation in favor of federal subject matter jurisdiction could effect a forfeiture of personal jurisdiction. Forfeiture occurs when a party litigates on the merits, not, as here, when it litigates only subject matter jurisdiction.

Moreover, the Superior Court's forfeiture ruling (decided under federal law) is also contrary to controlling decisions of the United States Supreme Court, including *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999). And the fact that Pfizer deferred its personal jurisdiction motion until after subject matter jurisdiction cannot have reasonably suggested acquiescence to the court's jurisdiction; nor can Pfizer be penalized with forfeiture for having done so.

Finally, Pfizer did not show any intent to litigate the merits by stating—in a single footnote of its Reply brief in support of its Omnibus Summary Judgment Motion in the MDL—that any forthcoming summary judgment motion as to the non-resident Plaintiffs was contingent on the MDL court finding subject matter jurisdiction proper, which it did not.

B. *Forum Non Conveniens* Dismissal Was Proper

The Superior Court also erred in ignoring the undisputed conclusion of the Parties that non-resident Plaintiffs should be dismissed under *forum non conveniens* in favor of litigating their claims in their home states. Pfizer and its codefendants have

stipulated that they will toll the statutes of limitations in Plaintiffs' home states to accord with the date that Plaintiffs filed their actions here. Moreover, the Parties, witnesses, evidence, and *situs* all are located outside California. California thus has no connection to these actions, and litigating them here will impose substantial burdens on the Parties, witnesses, and Court.

PRAYER

Petitioners pray that this Court:

1. Issue a Writ of Mandate directing Respondent Superior Court to vacate its Order of March 15, 2019, and directing it to enter an order granting Pfizer's Motion to Quash Service of Summons with regard to the claims of non-California Plaintiffs for lack of personal jurisdiction or Dismiss the claims of non-California Plaintiffs on grounds of *forum non conveniens*; and

2. Grant such other relief as may be just and proper.

VERIFICATION

I am the attorney for Pfizer in this case. I have read the forgoing Petition and know its contents. The facts alleged in the Petition are within my own knowledge and I know these facts to be true.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on this 12th day of April, 2019, at Los Angeles, California.

By: */s/ Anna Do*

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MEMORANDUM OF POINTS AND AUTHORITIES
STATEMENT OF THE CASE

1. Does a defendant forfeit a properly preserved personal jurisdiction defense by deferring a dispositive motion on that defense until after a ruling on its assertion of federal subject matter jurisdiction?

Defendant-Petitioner's Answer: No.

Plaintiff-Respondents Answer: Yes.

The Superior Court's Answer: Yes.

2. Should a California court dismiss, on *forum non conveniens* grounds, pharmaceutical product liability claims of non-resident plaintiffs against a non-resident defendant where the plaintiffs were not prescribed the medication in California and did not take the medication in California, most of the evidence is located outside California, and the defendant has stipulated that it will toll the limitations period in other jurisdictions?

Defendant-Petitioner's Answer: Yes.

Plaintiff-Respondents Answer: Yes.

The Superior Court's Answer: No.

STANDARD OF REVIEW

The Superior Court's forfeiture determination is reviewed for abuse of discretion. *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 60 (2d Cir. 1999). Where the Superior Court applies an incorrect legal standard in reaching that determination, it necessarily abuses its discretion. *See Miyamoto v. Dep't of Motor Vehicles*, 176

Cal. App. 4th 1210, 1218–19 (2009). The Superior Court's determination of whether a suitable alternative forum exists is reviewed *de novo*, and its determination of whether California is inconvenient is reviewed for abuse of discretion. *Hahn v. Diaz-Barba*, 194 Cal. App. 4th 1177, 1187 (2011).

ARGUMENT

I. LITIGATING SUBJECT MATTER JURISDICTION BEFORE PERSONAL JURISDICTION DOES NOT FORFEIT PERSONAL JURISDICTION

The essence of the Superior Court's finding of forfeiture was that Pfizer forfeited personal jurisdiction by deferring a dispositive motion until the federal courts resolved the issue of subject matter jurisdiction. Under the Superior Court's view, Pfizer was required to file a personal jurisdiction motion while its subject matter jurisdiction briefing was pending, because it "had more than enough time to" do so. (Ex. A at 7.) Likewise, the Superior Court held that when Pfizer suggested that it would conditionally waive personal jurisdiction if the MDL court found subject matter jurisdiction, Pfizer thereby forfeited personal jurisdiction even though the MDL court did not find subject matter jurisdiction. (*Id.* at 8–9.)

Both of these rulings were legal error. Because the Superior Court found a forfeiture based solely on Pfizer's conduct in federal court, federal law governs the question of whether a forfeiture occurred. *See* FED R. CIV. P. 81(c). Plaintiffs had the burden of showing that Pfizer forfeited its personal jurisdiction challenge.

See Lazar v. Kroncke, 862 F.3d 1186, 1200–01 (9th Cir. 2017). Under federal law, a defendant may forfeit its right to contest personal jurisdiction through its conduct in only two ways. First, the defendant forfeits personal jurisdiction if its conduct "manifests an intent to submit to the court's jurisdiction." *Brokerwood Int'l (U.S.), Inc. v. Cuisine Crotone, Inc.*, 104 F. App'x 376, 380 (5th Cir. 2004) (quoting *Yeldell v. Tutt*, 913 F.2d 533 (8th Cir. 1990)). Second, a defendant may forfeit personal jurisdiction if it "cause[s] the court to go to some effort that would be wasted if personal jurisdiction is later found lacking." *Mobile Anesthesiologists Chicago, LLC v. Anesthesia Assocs. of Houston Metroplex, P.A.*, 623 F.3d 440, 443 (7th Cir. 2010).

Here, unlike the defendants in any of the cases cited by the Superior Court, Pfizer litigated only the issue of the federal courts' subject matter jurisdiction. Because Pfizer was both entitled and, in these circumstances, required to litigate subject matter jurisdiction before personal jurisdiction, Pfizer's decision to do so cannot reasonably have suggested to Plaintiffs or the courts that it intended to acquiesce to personal jurisdiction. Nor did Pfizer forfeit its defense by conditionally suggesting that it would *waive* its meritorious personal jurisdiction defense if the district court found that it had subject matter jurisdiction—that condition was unmet, and, in any event, a wavier is not a forfeiture. The Superior Court's ruling was error and a writ therefore should issue.

A. Pfizer's Personal Jurisdiction Defense Is Undisputedly Meritorious Under *Bristol-Myers Squibb*

Grounded in the Fourteenth Amendment's Due Process Clause, personal jurisdiction is a defense of constitutional magnitude. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). Accordingly, under the federal law that controls here, any question of the inadvertent forfeiture of that defense—rather than a knowing and intentional waiver—is subject to stringent review. *See, e.g.*, *Prospect Funding Holdings, LLC v. Vinson*, 256 F. Supp. 3d 318, 326 (S.D.N.Y. 2017) (courts should be "slower to find waiver by a defendant wishing to contest whether it was obliged to defend in a distant court" (quoting *Datskow v. Teledyne, Inc.*, 899 F.2d 1298 (2d Cir. 1990))); *Nedgam Productions, LLC v. Bizparentz Foundation*, 2010 WL 3257909, at *2 (D. Conn. Apr. 29, 2010). Personal jurisdiction not only protects a defendant's fair notice interest in being free from "inconvenient or distant litigation," but also "encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question." *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1780 (2017). In this regard, it is "'a consequence of territorial limitations on the power of the respective States.'" *Id.* (quoting *Hanson v. Denckla,* 357 U.S. 235, 251 (1958)). Thus, even apart from concerns of convenience and the forum state's established interests in applying its law, "'the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid

judgment.'" *Id.* at 1781 (quoting *World-Wide Volkswagen*, 444 U.S. at 293).

These concerns are plainly dispositive here. When confronted with a situation nearly identical to the procedural posture of these cases, the Supreme Court in *Bristol-Myers* held that the California courts lacked personal jurisdiction over the claims of non-resident plaintiffs. *Id.* at 1784. There, as here, the Court reviewed multi-plaintiff pharmaceutical products liability actions, consisting primarily of non-resident plaintiffs, to which McKesson had been joined as an in-state defendant. *Id.* at 1783. There, as here, the primary defendant was neither incorporated nor headquartered in California, and the non-resident plaintiffs lacked any link from the defendant's California contacts to their claims. *Id.* at 1782. The Supreme Court held that, under "settled principles regarding specific jurisdiction," there was no personal jurisdiction over the non-residents' claims due to the lack of "a connection between the forum and the specific claims at issue." *Id.* at 1781. Here, the same result is inescapable.

The landmark *Bristol-Myers Squibb* decision and the litigation that preceded it were widely reported and closely watched during the pendency of this litigation. The due process and federalism limitations on personal jurisdiction that were dispositive in *Bristol-Myers Squibb* require the same result on the facts before the Court here. Neither Plaintiffs nor the Superior Court have contended otherwise. Accordingly, the suggestion that Pfizer, through a single footnote in a brief, forfeited these undisputedly meritorious and properly

preserved personal jurisdictional defenses warrants exceedingly close scrutiny.

B. Personal and Subject Matter Jurisdiction Are Distinct, Co-Equal, and Non-Exclusive Bases of Jurisdiction

Personal jurisdiction and subject matter jurisdiction are coequal yet distinct prerequisites to the exercise of judicial power. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999). Both are "'essential element[s] to the jurisdiction of a district . . . court,' without which the court is 'powerless to proceed to an adjudication.'" *Id.* at 584 (quoting *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374 (1937)). "The character of the two jurisdictional bedrocks," however, "unquestionably differs." *Id.* at 583. Specifically, subject matter jurisdiction limits the court's "authority over the category of claim in suit," whereas personal jurisdiction limits the court's "authority over the parties." *Id.* at 577. Additionally, subject matter jurisdiction "is nonwaivable and delimits federal-court power, while restrictions on a court's jurisdiction over the person are waivable and protect individual rights." *Id.* at 583.

Because of the distinctness of these two doctrines, a court may find the one and reject the other—as in *Ruhrgas*, where the Supreme Court approved a decision that dismissed claims for lack of personal jurisdiction as a means of shoring up its subject matter jurisdiction. *See id.* at 588. The law is clear that a defendant does not forfeit a personal jurisdiction challenge by invoking federal subject matter jurisdiction, *see Morris & Co. v. Skandinavia Ins. Co.*, 279 U.S. 405, 409 (1929); *LandWatch San Luis Cty v.*

Cambria Cmty Servs. Dist., 2009 WL 10675983, at *2 (C.D. Cal. Apr. 29, 2009), or transferring a case to an MDL proceeding. *See In re Mobile Telecomms. Techs., LLC*, 243 F. Supp. 3d 545, 552 (D. Del. 2017); *In re Atrium Medical Corp. C–Qur Mesh Products Liability Litigation (MDL No. 2753)*, 299 F. Supp. 3d 324, 329 (D.N.H. 2017). Thus, by arguing that this proceeding was within the subject matter jurisdiction of the federal courts, Pfizer made no statements, explicit or implicit, with regard to its willingness to submit to personal jurisdiction in California for all or any of Plaintiffs' claims.

Moreover, the constitutional architecture of these two doctrines "does not dictate a sequencing of jurisdictional issues," since "[i]t is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits." *Ruhrgas*, 526 U.S. at 584–85. In most cases, if "subject-matter jurisdiction is resolved as easily as personal jurisdiction, a district court" may conclude, as the MDL court did here, "that federalism concerns tip the scales in favor" of deciding subject matter jurisdiction first. *Id.* at 586 (quotation omitted). At the same time, "[t]he federal design allows leeway" for a district court to determine "that concerns of judicial economy and restraint are overriding," and thereby to resolve a straightforward question of personal jurisdiction before deciding subject matter jurisdiction. *Id.* at 586–87. Courts thus frequently do so in situations where, unlike these cases, the resolution of personal jurisdiction before subject matter jurisdiction will

simplify or obviate the subject matter jurisdiction inquiry.[7]

C. Pfizer Was Not Required to Move on Personal Jurisdiction While Subject Matter Jurisdiction Was Being Litigated

Under *Ruhrgas*, there was nothing whatsoever improper with Pfizer following the ordinary procedure by sequencing its litigation of subject matter jurisdiction before personal jurisdiction. Because, as explained below, dismissal of the non-resident Plaintiffs for lack of personal jurisdiction would not create complete diversity between the remaining Parties in these cases, litigating subject matter jurisdiction first was mandatory. Yet, the Superior Court held that Pfizer's adherence to this default procedure effected a forfeiture of its personal jurisdiction defenses. Although the Superior Court acknowledged that "the passage of time alone is generally not sufficient to indicate forfeiture" (Ex. A at 5 (quoting *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 61 (2d Cir. 1999))), it found a forfeiture two pages later because Pfizer "had more than enough time" to file a dispositive motion while it was litigating subject matter jurisdiction in the MDL. (*Id.* at 7.)

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[7] *See, e.g.*, *Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208 (5th Cir. 2000); *accord In re Testosterone Replacement Therapy Prods. Liab. Litig.*, 2016 WL 640520 (N.D. Ill. Feb. 18, 2016); *Kraft v. Johnson & Johnson*, 97 F. Supp. 3d 846, 851 (S.D. W. Va. 2015); *Locke v. Ethicon Inc.*, 58 F. Supp. 3d 757 (S.D. Tex. 2014); *Foslip Pharm., Inc. v. Metabolife Int'l, Inc.*, 92 F. Supp. 2d 891 (N.D. Iowa 2000).

There is no authority supporting that ruling. To the best of Pfizer's knowledge, no court, other than the Superior Court here, has ever held that a removing defendant forfeits a personal jurisdiction challenge by litigating subject matter jurisdiction before moving to dismiss. Nor did the Superior Court cite any such decisions in its Order. To the contrary, every one of the forfeiture cases cited by the Superior Court involved a defendant litigating on the merits or disregarding explicit personal jurisdiction filing deadlines—not, as here, the litigating subject matter jurisdiction only.[8] The notion that litigation of subject matter jurisdiction alone forfeits personal jurisdiction is, as far as the record of these proceedings shows, completely unprecedented. For this reason alone, a writ should issue.

Fundamentally, the rationale of the Superior Court's decision is contrary to *Ruhrgas*. Under *Ruhrgas*, personal jurisdiction and subject matter jurisdiction need not go hand in hand. For example, the

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[8] *See Hamilton*, 197 F.3d at 61 (finding forfeiture where the defendant filed a motion to dismiss just two months before trial, after the parties had completed merits discovery and participated in settlement conferences); *Continental Bank, N.A. v. Meyer*, 10 F.3d 1293, 1297 (7th Cir. 1993) (finding forfeiture where the defendants "participated in lengthy discovery, filed various motions and opposed a number of motions filed by the bank"); *Cohain v. Klimley*, No. 09-4527, 2010 WL 3701362, at *18–19 (S.D.N.Y. Sept. 20, 2010) (finding forfeiture where the defendant "appeared for a pretrial conference at which a discovery and motion schedule was set," filed a motion to transfer that "did not relieve him of his obligation to comply with the Ohio court's motion schedule," and "ignore[d] [that schedule's] deadline for filing a motion challenging personal jurisdiction.").

Ruhrgas Court itself found the presence of subject matter jurisdiction but the lack of personal jurisdiction. Because subject matter jurisdiction and personal jurisdiction are distinct and co-equal, then, contrary to the Superior Court's ruling, there is nothing about Pfizer's litigation of the former that suggests its assent to the latter. In addition, *Ruhrgas* held that "[t]he federal design" affords courts discretion to sequence their resolution of jurisdictional issues. 526 U.S. at 586–87. If that is so, then it would be a truly draconian result to penalize with forfeiture a litigant's invocation of the court's discretion to decide one jurisdictional basis before another.

Thus, despite preserving this issue in its answers, the Superior Court effectively required Pfizer to move on all jurisdictional grounds simultaneously to avoid a forfeiture. By requiring Pfizer to have litigated the issue of personal jurisdiction first or lose its right to do so, the Superior Court rejected *Ruhrgas*'s flexible jurisdictional sequencing in favor of a rigid hierarchy. The Superior Court effectively placed itself in the shoes of the MDL court to compel the retroactive exercise of its *Ruhrgas* discretion. That hindsight judgment is particularly troubling because the MDL court specifically declined a *Ruhrgas* invitation to litigate the issue of personal jurisdiction before subject matter jurisdiction in related cases. (Ex. P at 51–52.)[9]

[9] The Central District of California likewise determined that it was necessary to resolve subject matter jurisdiction before personal jurisdiction. (Ex. S at 11:11–25.)

The Superior Court ruled that *Ruhrgas* was inapposite because it "does not address" forfeiture and purportedly shows that Pfizer "could have asked the federal courts to first decide the issue of subject matter jurisdiction." (Ex. A at 9.) That ruling is incorrect on both points. First, unlike the decisions cited by the Superior Court, *Ruhrgas* does address the interaction of the litigation of subject matter and personal jurisdiction, and is thus relevant to the Superior Court's forfeiture analysis under federal law. Second, and more importantly, *Ruhrgas* would have actually precluded any attempt by Pfizer to litigate personal jurisdiction before subject matter jurisdiction. (Ex. A at 9.) Here, unlike in *Ruhrgas*, resolution of personal jurisdiction would neither dispose of the entire action nor simplify the inquiry with regard to subject matter jurisdiction. As a result, the district court was required to resolve first the extent of the federal courts' power to adjudicate these actions as a whole (subject matter jurisdiction) before the more narrow question of the courts' power with respect to the non-resident Plaintiffs' claims against Pfizer (personal jurisdiction). The court would first have to decide, among other things, whether the cases were removable under CAFA. Without that predicate power over these entire actions, the MDL court would have no authority to dismiss a subset of claims by non-resident Plaintiffs for lack of personal jurisdiction.

Because of this unique procedural posture—in contrast to the posture of the Missouri cases—Pfizer did not move to dismiss for lack of personal jurisdiction in the MDL with regard to the non-resident Plaintiffs. The MDL court could not decide any such motion before

determining its subject matter jurisdiction. Pfizer's deferral of litigation of personal jurisdiction pending resolution of subject matter jurisdiction was thus fully in accord with the "judicial economy" rationale of *Ruhrgas*. *See Ruhrgas* 526 U.S. at 586–87. There is no point in punishing Pfizer for failing to file a motion that the MDL court would have been powerless to decide and, in fact, later stated in related cases that it would not decide.

Finally, deferral of a dispositive motion on personal jurisdiction was also consonant with the "fairness" concerns that underlie the personal jurisdiction doctrine. If Pfizer must determine whether and when to raise a right designed to protect it from "the burdens of litigating in a distant or inconvenient forum," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980), it must first know what forum that will be. It matters greatly to a defendant haled into court whether that court is state or federal, and whether it is a multi-district litigation court with pre-trial powers only, *see* 28 U.S.C. § 1407(a), or a local federal court vested with the power to try the cases to judgment.

Acquiescing to the jurisdiction of the Los Angeles Superior Court involves vastly different litigation burdens than the Central District of California. In federal court, Pfizer would have the benefit of pretrial coordination in the MDL in South Carolina, which is much closer than California to New York, Pfizer's principal place of business. Moreover, the MDL would employ federal procedures and evidentiary rules with which Pfizer would already have to familiarize itself in litigating the other MDL plaintiffs' claims. Because

Plaintiffs knew that Pfizer lacked information critical to determining whether a motion to dismiss would be appropriate or desirable, Plaintiffs could not have had a "reasonable expectation" that Pfizer would not raise the personal jurisdiction defenses that it stated and properly preserved in its answers. *Mobile Anesthesiologists Chicago, LLC v. Anesthesia Assocs. of Houston Metroplex, P.A.*, 623 F.3d 440, 443 (7th Cir. 2010).[10]

D. A Conditional Waiver Is Ineffective If the Condition Is Unmet

The only other basis for the district court's finding of forfeiture was a single footnote on the last page of its Reply brief in support of Pfizer's Omnibus Motion for Summary Judgment in the MDL proceedings. (Ex. A at 8–9.) Although the MDL court granted summary judgment in all cases due to lack of admissible evidence on causation, *see In re Lipitor*, 227 F. Supp. 3d 452, 485 (D.S.C. 2017); *In re Lipitor*, 226 F. Supp. 3d 557, 584 (D.S.C. 2017), Pfizer did not and could not move for summary judgment in these cases, where the MDL court had not yet determined its subject matter jurisdiction. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93–94 (1998). Instead, Pfizer filed its Summary Judgment Motion in relation to the other cases in the MDL and, in a footnote at the end of its Reply brief, stated that ***if*** the MDL court

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[10] *Cf. American Patriot Ins. Agency, Inc. v. Mutual Risk Mgnt., Ltd.*, 364 F.3d 884, 888 (7th Cir. 2004) (although defendants participated in discovery and settlement discussions, "the plaintiff would have been unreasonable to infer from this that the defendants would not plead improper venue").

determined that it had subject matter jurisdiction, ***then*** it could enter judgment against the Plaintiffs in these actions. (*See* Defs.' Reply at 19 n.9, *In re: Lipitor*, MDL No. 14-2502 (D.S.C. Aug. 12, 2016) (No. 1608).) Because the MDL court ultimately held that it lacked subject matter jurisdiction, that condition was never fulfilled. Yet, the Superior Court still concluded that this ruling showed Pfizer was "seeking a ruling on the merits of the California cases before the transferee court" and therefore forfeited its jurisdictional defenses in the California courts. (Ex. A at 8.)

This ruling was error. At most, Pfizer's footnote indicated only that it was willing formally to ***waive*** (not forfeit) its personal jurisdiction rights (as it is entitled to do) ***if*** these actions proceeded in federal court. "Defendants are entitled to waive any shortcomings in venue or jurisdiction over the person." *Moore v. Olson*, 368 F.3d 757, 759 (7th Cir. 2004). Parties frequently make such conditional waivers of personal jurisdiction. As here, conditional waivers often are made contingent on litigation in a particular forum—for example, through a requested *forum non conveniens* dismissal or a transfer to another forum.[11] And in other cases, conditional waivers also occur in *ex ante* contract negotiations, *see, e.g.*, *Jutalia Recycling, Inc. v. CAN Metals Ltd.*, 542 S.W.3d 90, 94–95 (Tex. Ct.

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[11] *See, e.g.*, *Paper Operations Consultants Int'l, Ltd. v. S.S. Hong Kong Amber*, 513 F.2d 667, 672–73 (9th Cir. 1975); *Robert Bell Helicopter Textron, Inc.*, 2002 WL 1268030, at *1 n.3 (N.D. Tex. May 31, 2002); *Anglo Eastern Bulkships Ltd. v. Ameron, Inc.*, 1979 A.M.C. 459. 466 (S.D.N.Y. 1978); *Anandan v. Singapore Airlines Ltd.*, No. B175069, 2005WL 758444, at *8 (Cal. Ct. App. Apr. 5, 2005) (not precedential).

App. 2017), where they may be specifically contingent on a determination that a given court has proper subject matter jurisdiction.[12]

Here, the condition of Pfizer's waiver of personal jurisdiction—a finding of subject matter jurisdiction in the MDL—was unmet. As a result, no waiver occurred. Nor could that conditional waiver give Plaintiffs or the Court any reason to expect that Pfizer would relinquish its personal jurisdiction defenses in state court.

Notably, Pfizer offered a similar conditional waiver in proceedings in the Central District of California. After these actions were remanded from the MDL court, Pfizer repeated this conditional waiver to Judge Carney, who specifically disclaimed any suggestion that Pfizer's statements effected a waiver:

> MR. CHEFFO: … [W]e have a personal jurisdiction affirmative defense that … we think

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[12] *See, e.g.*, *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710, 718 (D.C. Cir. 1986) ("It is agreed that in the event of the failure of the Insurer(s) hereon to pay any amount claimed to be due hereunder, Insurer(s) hereon, at the request of the Insured, will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court."); *Panama Processes, S.A. v. Cities Serv. Co.*, 1985 WL 487, at *1 (S.D.N.Y. Apr. 1985) (defendant "[c]onsents to personal jurisdiction over it by any court located in the Republic of Brazil which has appropriate subject matter jurisdiction with respect to the claims raised by plaintiff Panama Processes, S.A., against defendant Cities Service Company in the complaint filed in the within action and agrees to contest on their merits any such claims raised by plaintiff in any such court").

> it will be moot frankly to the extent that we're here before Your Honor in this Court, as we think we should be under CAFA. But to the extent we're not in State Court, ***I don't want there to be any confusion that we have waived that issue***. But that's not something I think this Court is going to need to take up.
>
> THE COURT: And I saw that in the briefing, and ***I don't mean to suggest that you've waived any of your other defenses or arguments or issues that might be there***, but all I'm saying is I don't want to do anything about the case until I've decided this CAFA is a jurisdictional issue.
>
> MR. CHEFFO: And we couldn't agree more. The jurisdictional issue goes away ***to the extent that Your Honor determines that there's CAFA jurisdiction***.

(Ex. S at 11:11–25 (emphases added).)[13]

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[13] The Superior Court further stated that "if the Pfizer Defendants had *lost* their 'Omnibus Motion for Summary Judgment' before the transferee court, they would have been foreclosed from raising the issue of personal jurisdiction to attempt, after the fact, to avoid application of such adverse ruling as to the non-California Plaintiffs." (Ex. A at 9.) This is circular reasoning that assumes a forfeiture and sandbagging where none has been shown. There is no reason to think Pfizer would not have been permitted to raise this challenge if it had lost summary judgment. More important, if Pfizer had lost summary judgment, Pfizer still would have been willing to waive personal jurisdiction if this matter were proceeding in federal court. Accordingly, the Court's suggestion that Pfizer engaged in sandbagging is both logically and factually incorrect.

Finally, if the MDL court had found subject matter jurisdiction, filing a dispositive motion on personal jurisdiction would have been a purely futile procedural exercise because it would have ended with the exact same result. If the non-resident Plaintiffs' claims had been dismissed on personal jurisdiction grounds in favor of litigation in their home jurisdictions, they would have been removable to federal court upon refiling, since McKesson would no longer be a forum defendant. *See* 28 U.S.C. §§ 1332(a), 1441(b). Upon removal, they would be properly transferred back to the MDL and, at that time, would meet the same result as the other cases: summary judgment due to lack of admissible expert testimony on causation. Because Pfizer reasonably believes—then and now—that federal subject matter jurisdiction exists, it cannot now be accused of sandbagging or wasting judicial resources when in fact it took what appeared, *ex ante*, to be the more efficient route.

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In sum, after promptly alerting Plaintiffs to its personal jurisdiction challenge in its answers, there was nothing improper about litigating subject matter jurisdiction before moving to dismiss for lack of personal jurisdiction. Pfizer's conduct in federal court cannot reasonably be interpreted as "manifest[ing] an intent to submit" to the jurisdiction of the California courts. *Continental Bank, N.A. v. Meyer*, 10 F.3d 1293 (7th Cir. 1993). Rather, the Superior Court's Order was contrary to the Supreme Court's decision in *Ruhrgas* and misconstrued Pfizer's conditional waiver as a matter of law. Accordingly, this Court should direct the

Superior Court to vacate its Opinion and Order and grant Pfizer's Motion to Quash.

II. THE SUPERIOR COURT SHOULD HAVE DISMISSED ON *FORUM NON CONVENIENS* GROUNDS

The Superior Court also improperly declined to dismiss for *forum non conveniens*. In their Response to Pfizer's Motion to Dismiss, Plaintiffs did not argue that dismissal was improper; rather, they argued that Pfizer had forfeited the issue. Although the Superior Court did not find a forfeiture of this issue, it nonetheless decided *sua sponte* that California was an appropriate forum to litigate these claims.

A court should dismiss for *forum non conveniens* where there is a suitable alternative forum and the private and public interest factors weigh in favor of litigating the action in that alternative forum. *Stangvik v. Shiley Inc.*, 819 P.2d 14, 17 (Cal. 1991). "The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses." *Id.* In contrast, "[t]he public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation." *Id.*

A. Plaintiffs' Home States Are Suitable Alternative Fora

Whether there is a suitable alternative forum is not a high bar. "A forum is suitable where an action 'can be brought,' although not necessarily won." *Hahn v. Diaz-Barba*, 194 Cal. App. 4th 1177, 1187 (2011) (citation and internal quotation marks omitted). "An alternative forum is suitable if it has jurisdiction and the action in that forum will not be barred by the statute of limitations." *Inv's Equity Life Holding Co. v. Schmidt*, 195 Cal. App. 4th 1519, 1529 (2011). Here, Pfizer and McKesson stipulated (and continue to stipulate) that they will not to raise a statute of limitations defense against any Plaintiff who refiles in their home state unless the limitations period had already expired when they filed in California. The Superior Court determined that there was no suitable alternative forum, however, because "it is possible that Plaintiffs complying with California's limitations period would be shut out of other states' courts" if those states have a shorter limitations period. (Ex. A at 11.) The Superior Court was incorrect for several reasons:

- First, if Plaintiffs' home-state fora were inadequate, Plaintiffs could have been expected to say so. They did not. Nor did they dispute the propriety of Pfizer's request in its meritorious personal jurisdiction motion that their claims be dismissed in favor of litigation in their home states.

- Second, no one—not Pfizer, not Plaintiffs, not the Court—pointed to a single jurisdiction with

a shorter limitations period that would actually result in a Plaintiff's claims being barred.

- ➢ Third, the Superior Court will almost certainly have to apply the other forum's statute of limitations under California's conflict of laws rules.[14] It therefore does not matter whether California's limitations period is longer because California's limitation period will not apply regardless of where these cases proceed.

- ➢ Finally, the Court denied Pfizer's Motion without giving Pfizer any opportunity to respond to its concerns about the Parties' stipulation. Although the stipulation is sufficient to ensure an alternative forum (to the same extent California is available), Pfizer would have gladly amended the language of the stipulation to allay any concerns the Court might have had.

Accordingly, Plaintiffs' home states are suitable alternative fora.

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[14] *See Deirmenjian v. Deutsche Bank, A.G.*, No. 06-00774, 2010 WL 3034060, at *14 (C.D. Cal. July 30, 2010); *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 534 (Cal. 2010) (applying Oklahoma's statute of repose where underlying conduct and injury occurred in Oklahoma); *see also Deutsch v. Turner Corp.*, 324 F.3d 692, 716–17 (9th Cir.2003) ("California's interest in applying its own law is strongest when its statute of limitations is shorter than that of the foreign state, because a state has a substantial interest in preventing the prosecution in its courts of claims which it deems to be 'stale.'" (quotation marks omitted)).

B. The Private and Public Interest Factors Favor Dismissal

The private and public interest factors weigh overwhelmingly in favor of dismissal.

Pfizer and Plaintiffs reside out of state. Plaintiffs were prescribed Lipitor in their home states, allegedly injured in their home states, and treated in their home states. *See Hansen v. Owens-Corning Fiberglas Corp.*, 51 Cal. App. 4th 753 (1996) ("California courts . . . have little or no interest in litigation involving injuries incurred outside of California by nonresidents.").

The Superior Court cannot compel Plaintiffs' treating physicians, family, friends, or work supervisors and colleagues to testify at trial in California. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511 (1947) ("[T]o fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to [the] court, jury or most litigants."); *Morris v. AFGA Corp.*, 144 Cal. App. 4th 1452, 1455, 1466 (2006). Even if these witnesses willingly come to California, some of them will have to travel thousands of miles, and the physician-witnesses' other patients would lose the services of their doctors during that time. *See Bridgeman v. Bradshaw*, 405 F. Supp. 1004, 1007 (D.S.C. 1975) (observing that the convenience of physicians is "important to the community and to their attention at a hospital where their services are of great value and moment" and transferring the case to doctors' district). Similarly, other evidence, such as Plaintiffs' medical and pharmacy records, are located out of state. *See, e.g.*,

Stangvik v. Shiley Inc., 819 P.2d 14, 21 (Cal. 1991) ("[B]ecause virtually all witnesses and documents relating to the decedents' medical care and treatment, medical histories, loss of earnings, and all the witnesses to the familial impacts of their deaths are located in Scandinavia, it is more convenient to try the actions there."); *In re Crestor*, No. JCCP 4713, 2014 WL 12708774, at *4 (Cal. Super. Ct. Oct. 14, 2014) (trial court decision) (dismissing 558 out-of-state plaintiffs' claims where "'virtually all witnesses and documents relating to [their] medical care and treatment, medical histories, loss of earnings, and all the witnesses to the familial impacts of their [illnesses] are located in' Plaintiffs' home states."); *Hoover v. Hoffman-La Roche, Inc.*, Nos. 4740, BC487606, BC502598, 2014 WL 3579826, at *3 (Cal. Super. Ct. July 21, 2014) (trial court decision).

The only discernable interest California or its jurors might have in these claims is that they are based on allegations similar to those of the California Plaintiffs—an interest which can be vindicated by litigating the California Plaintiffs' claims here and litigating the non-California Plaintiffs' claims in other forums. *See Stangvik*, 819 P.2d at 26 ("California's interest in deterring future improper conduct by defendants would be amply vindicated if the actions filed by California resident plaintiffs resulted in judgments in their favor."). In a similar case involving alleged injuries due to a prescription medication, the Second District Court of Appeal explained that such suits have no place in California:

> [T]he most important reason for affirming the forum non conveniens decision of the trial court is that the torts alleged in this case have ***nothing to do with California***. They were not committed here; none of the affected appellants received her injury in this state; and none resides here. ***California was chosen for no other reason than it was believed to be hospitable to the theories appellants want to advance.*** Appellants could just as well have brought their action in Washington, West Virginia or Wyoming. Assuming that the national drug company respondents have a general presence there, the courts of those jurisdictions have as much, or as little, to do with the merits of the case as the courts of this state. ***We find no justification for California courts and juries to bear the burden of this litigation.***

Boaz v. Boyle &Co., 40 Cal. App. 4th 700, 713–14 (1995) (emphases added).

Nor does Plaintiffs' joinder of McKesson—a California-based distributor—as a Defendant change this result. The mere fact that a defendant is a California resident does not control the *forum non conveniens* analysis: the moving defendant in *Stangvik* was a California manufacturer, but the Court nonetheless held that, on balance, California was an inconvenient forum in a case brought by plaintiffs from

Sweden and Norway who were injured in those countries. *Stangvik*, 819 P.2d at 16, 26–27.[15]

The Superior Court did not address the private interest factors at all. Rather, it stated only that Pfizer had previously sought coordination under CAFA. *See Rinauro v. Honda Motor Co.*, 31 Cal. App. 4th 506, 510 (1995) ("No one factor should determine the outcome of a forum non conveniens motion."). Yet, as explained above, participating in coordinated MDL proceedings in South Carolina involves substantially different (and fewer) burdens for Pfizer than this JCCP. Moreover, Pfizer's willingness to engage in those proceedings does not mean that Pfizer believed that the MDL or the

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[15] Moreover, other courts have dismissed cases on *forum non conveniens* grounds where, as here, plaintiffs also named McKesson as a defendant. For instance, in the *Crestor* litigation, Judge Hogue reasoned that to the extent that "McKesson produced any fraudulent or misleading statements in California 'they were received and relied on in [Plaintiffs' home states], and the [home state] doctors have knowledge of decedents' preexisting medical conditions, the factors relevant to a risk-benefit analysis,' and the factors they considered prior to prescribing Crestor." *In re Crestor*, 2014 WL 12708774, at *4 (quoting *Stangvik*, 819 P.2d at 21) (alterations in original). Similarly, in *Hoover*, Judge Freeman noted that although the parties disputed the degree of McKesson's involvement in the out-of-state Plaintiffs' claims—defendants characterized it as a distributor, whereas plaintiffs claimed it did more, including marketing the medications—"the manufacture and testing of Accutane apparently occurred outside of California," so most of the relevant witnesses and evidence would be located there, regardless of the degree of McKesson's involvement. *Hoover*, 2014 WL 3579826, at *3. Although these decisions are not binding on this Court, Pfizer brings them to the Court's attention only because they are well-reasoned opinions dealing with the exact same co-defendant at issue here.

Central District of California would be convenient for the witnesses or that Pfizer would not be burdened by the lack of compulsory process: Pfizer does not represent the witnesses, and the availability of compulsory process is only one factor Pfizer must consider in determining whether to argue that coordination in a particular venue is inconvenient.

The Superior Court further stated that coordination in the JCCP will reduce the workload of the interstate judicial system as a whole. (Ex. A at 12.) This is not so. As explained above, (*see* Part I.D, *supra*), after the non-California Plaintiffs' claims are refiled and re-removed to federal court, the courts will apply the same standard for expert admissibility applied by the MDL and summarily dismiss the claims unless Plaintiffs can produce new experts that they said they could not produce in the MDL proceedings. *See Stangvik*, 819 P.2d at 19 n.5 ("[T]he fact that an alternative jurisdiction's law is less favorable to a litigant than the law of the forum should not be accorded any weight in deciding a motion for forum non conveniens provided, however, that some remedy is afforded."). In other words, if the non-California Plaintiffs refile elsewhere, the proceedings will come to an abrupt and efficient end.

Because the private and public interest factors overwhelmingly favor dismissal, the Superior Court abused its discretion. Accordingly, this Court should direct the Superior Court to vacate its Opinion and Order and grant Pfizer's Motion to Dismiss.

CONCLUSION

Because the Superior Court erred in denying Pfizer's Motions to Quash and Dismiss, the Court should issue a Writ of Mandate directing the Superior Court to vacate its Opinion and Order and grant Pfizer's Motions.

Dated: April 12, 2019

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