1 HON. THOMAS S. ZILLY
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9 UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE

11 CITY OF SEATTLE,

12 Plaintiff,

13 v.

14 PURDUE PHARMA L.P.; PURDUE PHARMA, INC.; THE PURDUE FREDERICK COMPANY, INC.; TEVA PHARMACEUTICAL INDUSTRIES, LTD.; TEVA PHARMACEUTICALS USA, INC.; CEPHALON, INC.; JOHNSON & JOHNSON; JANSSEN PHARMACEUTICALS, INC.; ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC. n/k/a JANSSEN PHARMACEUTICALS, INC.; JANSSEN PHARMACEUTICA INC. n/k/a JANSSEN PHARMACEUTICALS, INC.; ENDO HEALTH SOLUTIONS INC.; ENDO PHARMACEUTICALS, INC.; ALLERGAN PLC f/k/a ACTAVIS PLC; WATSON PHARMACEUTICALS, INC. n/k/a ACTAVIS, INC.; WATSON LABORATORIES, INC.; ACTAVIS LLC; ACTAVIS PHARMA, INC. f/k/a WATSON PHARMA, INC.; SEATTLE PAIN CENTER MEDICAL CORPORATION d/b/a SEATTLE PAIN CENTER; FRANK D. LI; AND DOES 1 THROUGH 100, INCLUSIVE,

Defendants.

Case No. 2:17-cv-1577 (TSZ)

CITY OF SEATTLE'S OPPOSITION TO MANUFACTURER DEFENDANTS' MOTION TO STAY AND FOR RELIEF FROM DEADLINES

NOTE ON MOTION CALENDAR:
November 17, 2017

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I. PRELIMINARY STATEMENT

Manufacturing Defendants[1] removed this case from King County Superior Court on the basis of a legal doctrine—so-called "fraudulent misjoinder"—that courts across this circuit have consistently rejected for nearly a decade. Plaintiff the City of Seattle ("Seattle") promptly responded with a motion to remand which has been noted for November 24, 2017. Hoping to forestall that motion's consideration, Manufacturing Defendants now seek to stay all proceedings in supposed deference to an MDL panel that will be convening to consider the consolidation of a number of opioid-related cases (including, potentially, this one). *See In re: National Prescription Opiate Litigation,* MDL 2804 ("Putative Opioids MDL").

A stay should not issue. To begin with, the practice in this district is to evaluate motions to remand *before* entertaining a competing motion to stay. This approach, which recognizes the primacy of jurisdictional issues, was recently followed by the only court to have adjudicated dueling motions to remand and stay in a case subject to the Putative Opioids MDL. *See State of New Hampshire v. Purdue Pharma L.P. et al.*, 17-cv-427 (PB), Nov. 6, 2017 Minute Entry (D.N.H.) (denying motion to stay and expediting consideration of motion to remand). Because there is not even a whiff of federal jurisdiction here, this case can simply be remanded without any need to consider the propriety of a stay. *See* Point III(A).

Even if this Court were to address the stay motion first, it should be denied. There is no case within the MDL's orbit that involves the same or similar issues as Seattle's remand motion. Thus, deferring the motion cannot possibly conserve judicial resources. It can only add to an MDL court's burdens. *See* Point III(B)(1).

More glaringly, Manufacturing Defendants would suffer no cognizable prejudice if Seattle's remand motion were decided now. If the motion is granted, the parties will return to King County Superior Court where a second opioid case, *State of Washington v. Purdue, et al.*, Cause No. 17-2-25505-0 SEA, is already pending. If not, this case will remain in federal court

[1] Manufacturing Defendants are all defendants named in this action except Defendants Seattle Pain Center Medical Corporation d/b/a Seattle Pain Center and Frank D. Li.

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1 and Manufacturing Defendants can continue their efforts to fold it into the MDL. It should not
2 matter to Manufacturer Defendants *who* decides the remand motion or *when*—unless, of course,
3 the objective is delay.

4 Seattle, on the other hand, would suffer extraordinary prejudice if a stay were granted.
5 The King County Superior Court set this case for trial on September 24, 2018, approximately ten
6 months from now. Contrast that schedule to the realities of MDL practice, where remand
7 motions are often treated as satellite matters and sidelined for many years. Most cases never
8 make it out. Research shows that in fifty years of MDL practice only 2.6% of the cases
9 transferred to an MDL court have been remanded. *See* Point III(B)(2).

10 The delays associated with MDL proceedings might be more tolerable if Seattle were
11 seeking only money damages for past harms. But the opioid epidemic Seattle confronts is in full
12 bloom and Seattle is pursuing both injunctive relief to eliminate the practices that led to the
13 crisis, as well as money damages to fund the programs needed to ameliorate its effects. With
14 opioid abuse ravaging Seattle communities, a delay in Seattle's ability to obtain relief will result
15 in devastating prejudice.

16 ## II. BACKGROUND

17 ### A. Seattle joined the chief contributors to the region's opioid epidemic in a Complaint
18 filed in King County Superior Court.

19 On September 28, 2017, Seattle filed a Complaint in King County Superior Court against
20 Manufacturing Defendants and the Seattle Pain Center (together with Frank D. Li, its principal
21 and also a Defendant, "SPC"). As alleged in the Complaint, Manufacturing Defendants
22 deceptively marketed their drugs in a manner that has led to widespread opioid addiction and
23 abuse. Compl. ¶¶ 4-7. SPC, in turn, operated so-called "pill mills" in Seattle and throughout the
24 region to "serve" this addicted population. *Id.* ¶ 8. Not only did Manufacturing Defendants
25 know that their marketing scheme would lead to pill mills like SPC, they knew that SPC was
26 overprescribing opioids and that its patients were dying at arresting rates. *Id.* ¶¶ 11, 161-69.
27 Legally, Manufacturing Defendants were required to alert authorities. *Id.* ¶ 161. Instead, they
28 did nothing or, in the case of certain Manufacturing Defendants, deployed sales representatives

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to SPC, and treated SPC staff to complimentary meals, in hopes that their drugs would be the ones SPC patients abused. *Id.* ¶ 171.

The interconnected misconduct of Manufacturing Defendants and SPC has contributed to a deadly public health crisis in Seattle. Statewide, 435 people fatally overdosed on opioids just last year, and roughly a quarter of these deaths occurred in King County. *Id.* ¶¶ 182-83. SPC patients are disproportionately represented in these tragic statistics. Between 2010 and 2015, *60* SPC patients died. *Id.* ¶ 156. So far, public health officials have scrutinized medical records for 18 of these patients and have concluded that 16 overdosed on opioids within days or weeks of filling a prescription issued by an SPC provider. *Id.*

Under Washington law, all who contribute to a public nuisance can be held liable for their role. *See Wilson v. Key Tronic Corp.*, 40 Wash. App. 802, 812 (1985). Seattle's Complaint thus joins Manufacturing Defendants and SPC—the primary contributors to Seattle's opioid crisis—on two nuisance counts.[2]

B. Manufacturing Defendants improperly removed this case.

The removal statute extends only to actions over which federal courts "have original jurisdiction," 28 U.S.C. § 1441(a), and there is no federal jurisdiction on the face of Seattle's complaint. Seattle asserts only state-law claims and complete diversity is absent because Seattle and SPC are both Washington citizens.

Undeterred, Manufacturing Defendants filed a notice of removal on October 24, 2017, contending that SPC should be ignored because it supposedly was "fraudulently misjoined" on Seattle's nuisance claims. Fraudulent misjoinder, however, is a doctrine that courts across this circuit have "repeatedly and consistently declined" to embrace. *See Thee Sombrero, Inc. v. Murphy*, 2015 WL 4399631, at *4 (C.D. Cal. July 17, 2015). Seattle thus promptly moved to remand, recounting the many reasons why fraudulent misjoinder has been found faulty.

[2] The Complaint also contains three state-law causes of action that concern only Manufacturing Defendants' marketing scheme—specifically, claims for civil conspiracy and violations of Washington's Consumer Protection Act, RCW 19.86.020, and Criminal Profiteering Act, RCW 9A.82. These claims properly are pleaded solely against the Manufacturing Defendants.

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To summarize, the doctrine is incoherent because it requires the severance of a party, a judicial act that presumes jurisdiction, *before* jurisdiction exists. *Id.*; *see also Ramirez v. Our Lady of Lourdes Hosp.*, 2013 WL 5373213, at *3 (W.D. Wash. Sept. 25, 2013). In addition, removal statutes are supposed to be "narrowly construed," but "[f]raudulent misjoinder flips this maxim on its head by making cases removable that by § 1441's plain terms should not be." *Early v. Northrop Grumman Corp.*, 2013 WL 3872218, at *3 (C.D. Cal. July 24, 2013). Fraudulent misjoinder also has caused massive confusion where adopted, prompting courts in this circuit (and prominent commentators) to conclude that joinder issues should be raised in state court *before* removal. *See Osborn v. Metro. Life Ins. Co.*, 341 F. Supp. 2d 1123, 1127 (E.D. Cal. 2004); Wright, Miller & Cooper, 7 Fed. P. and Proc. § 3723 (3d ed. 2017).

Seattle showed, moreover, that even if this Court were to reject these considerations and apply fraudulent misjoinder doctrine, there would be no basis to deem SPC misjoined. Most courts hold that joinder is proper where, as here, claims are asserted against "successive tortfeasors who each contributed to the same injury." *Gonzales v. Wal-Mart Stores, Inc.*, 2014 WL 2591690, at *4 (D. Nev. May 22, 2014), report and recommendation adopted, 2014 WL 2591499 (D. Nev. June 10, 2014); *see* Wright, Miller & Cooper, 7 Fed. P. and Proc. § 1653 (3d ed. 2017).

Beyond that, the facts underlying Seattle's claims against SPC and the Manufacturing Defendants are inexorably intertwined. Manufacturing Defendants enabled SPC by creating a population of opioid abusers, knew that SPC providers were overprescribing opioids, and, in some cases, even encouraged them to do so. Seattle is entitled to present this entire story to a factfinder without atomizing its claims against individual defendants. *See Ramirez*, 2013 WL 5373213, at *3 (joinder appropriate where factual allegations were "intertwined"); *Ferger v. C.H. Robinson Worldwide, Inc.*, 2006 WL 2091015, at *1 (W.D. Wash. July 25, 2006) (Courts must '"entertain[ ] the broadest scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."' (quoting *United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 724 (1966)).

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C. Manufacturing Defendants have taken tactical steps to transfer this action to an MDL before threshold jurisdictional issues are resolved.

The day after Manufacturing Defendants removed this case on debunked legal grounds, they named it in a Notice of Related action submitted to a MDL panel currently evaluating a motion to consolidate opioid-related cases pending across the country. *See In re: National Prescription Opiate Litigation,* MDL 2804. As a result, if an MDL is created this case can be conditionally transferred to the chosen MDL venue. *See* JPML Rule 7.1.

Predictably, Manufacturing Defendants now ask this court to stay all proceedings—including Seattle's remand motion—until the MDL panel's decision, which is anticipated to issue shortly after the panel convenes November 30, 2017. In moving to stay, Manufacturing Defendants never address the propriety of this action's removal. Instead, they characterize this case as a "federal action[]," Defs. Br. at 2, and presume that a stay should enter reflexively simply because an MDL has been contemplated. The goal, transparently, is to delay any consideration of jurisdictional issues and freeze this case in a lumbering MDL where it has no business. The tactic should be rejected, if not condemned.[3]

III. ARGUMENT

A. Before evaluating whether there is a basis to stay this action, this Court should first resolve Seattle's pending Motion to Remand.

There is no dispute that until an MDL is actually created and this case is transferred to it, this Court retains plenary authority to resolve all pretrial matters. *See* JPML Rule 2.1(d) (pending motion under "28 U.S.C. § 1407 does not affect or suspend orders and pretrial

[3] Manufacturing Defendants noted their motion for November 17, styling it in part as one for "relief from deadlines." *See* Local Rule 7(d)(2) (placing motion for relief from deadlines on two-week schedule). But Manufacturing Defendants do not identify any deadline from which they seek relief. What they request, rather, is an order "stay[ing] all proceedings." Defs. Br. at 11. Under Local Rule 7(d)(3), motions to stay are subject to a three-week briefing schedule, meaning this motion should have been noted for no earlier than November 24. It is unclear whether Manufacturing Defendants misnoted their motion in error or strategically. Either way, Seattle respectfully requests that any ruling on the stay motion be deferred until Seattle's competing remand motion is considered, as is the common practice. *See* Local Rule 7(k).

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proceedings in any pending federal district court action"). As shown in Seattle's motion to remand, because the right to litigate in an MDL is predicated on federal subject matter jurisdiction, motions to remand are "particularly appropriate for resolution *before* the Panel acts." Manual for Complex Litigation § 20.131 (4th ed. 2004) (emphasis added); *see also State of New Hampshire*, 17-cv-427 (PB), Nov. 6, 2017 Minute Entry (granting motion to expedite consideration of remand motion in advance of decision by Putative Opioids MDL panel); *Staubus v. Purdue Pharma, L.P.*, 2017 WL 4767688, at *8 & n.4 (E.D. Tenn. Oct. 20, 2017) (remanding improperly removed action subject to Putative Opioids MDL transfer order before creation of MDL).

Nothing changes when, as here, defendants interpose a motion to stay. To the contrary, most courts in this district, and many more across the circuit, conclude that a motion to remand should be evaluated *before* any stay is entertained. *See, e.g., Ramirez*, 2013 WL 5373213, at *2.[4] This ordering of proceedings honors the bedrock precept that "federal courts normally must resolve questions of subject matter jurisdiction before reaching other threshold issues." *Potter v. Hughes*, 546 F.3d 1051, 1061 (9th Cir. 2008); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without jurisdiction . . . the only function remaining to the court is that of announcing the fact and dismissing the cause." (internal quotation marks omitted)).

A particularly common approach is to give a remand motion "preliminary scrutiny" and

---

[4] *Nauheim v. Volkswagen Grp. of Am., Inc.*, 2016 WL 6273256, at *2 (W.D. Wash. Mar. 15, 2016) (addressing remand motion first because "[t]he question at the heart of both motions is whether this Court has jurisdiction over Plaintiffs' claims"); *Burr v. Volkswagen Grp. of Am., Inc.*, 2016 WL 6075575, at *1 (W.D. Wash. Mar. 8, 2016) (same); *Call v. Volkswagen Grp. of Am., Inc.*, 2016 WL 9224045, at *2 (W.D. Wash. Mar. 31, 2016) (same); *Waitt v. Merck & Co.*, 2005 WL 1799740, at *1 (W.D. Wash. July 27, 2005) ("[T]he Court will first address plaintiff's motion to remand for lack of subject matter jurisdiction and then turn to Merck's motion to stay."); *Colvin v. Conagra Foods, Inc.*, 2007 WL 3306746, at *1 (W.D. Wash. Nov. 5, 2007) (considering remand motion first and denying motion to stay as moot); *Perry v. Luu*, 2013 WL 3354446, at *3 (E.D. Cal. July 3, 2013) (considering remand motion initially because a court must "first consider[] whether it has jurisdiction"); *Tortola Restaurants, L.P. v. Kimberly-Clark Corp.*, 987 F. Supp. 1186, 1189 (N.D. Cal. 1997) (appropriate to first determine "the appropriate forum in which to litigate this matter").

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"[i]f this preliminary assessment suggests that removal was improper, the court should promptly complete its consideration and remand the case." *Conroy v. Fresh Del Monte Produce, Inc.*, 325 F. Supp. 2d 1049, 1053 (N.D. Cal. 2004).[5] Under this framework, a stay can be considered only if jurisdictional issues are "factually or legally difficult" and arise in "other cases that have been or may be transferred to the MDL proceeding." *Conroy*, 325 F. Supp. 2d at 1053.

The prioritization of remand motions is illustrated in *State of New Hampshire,* 17-cv-427 (D.N.H.), an analogous case subject to the Putative Opioids MDL. There, New Hampshire filed claims in state court comparable to Seattle's, alleging that Purdue entities ("Purdue") deceptively marketed opioids in ways that caused, among other things, a public nuisance. In response, Purdue followed the playbook it is executing here. It removed the case on dubious grounds[6] and, when New Hampshire moved to remand, Purdue sought a stay in light of the pending MDL. *See* Dkt. No. 22. At a hearing conducted three days before Manufacturing Defendants moved to stay here, the Honorable Paul J. Barbadoro, who previously served on the MDL panel, orally denied Purdue's motion to stay and granted New Hampshire's request to expedite consideration of its remand motion. *See* Declaration of Ben M. Harrington ("Harrington Decl.") Ex. 1 at 14:16-18.

In doing so, Judge Barbadoro forcefully articulated the reasons for resolving remand motions before MDL consolidation occurs:

> THE COURT: So you alluded to the fact that I served on the panel, so I am very familiar with the way the panel functions.
>
> MR. CHEFFO: Yes, your Honor.
>
> THE COURT: This is the way I see it. If I've got it wrong, you can tell me. ***The panel does not in any way discourage potential transferor judges from deciding motions to remand. Indeed, motions to remand are the kind of motions that the panel thinks oftentimes can and should be decided by the transferor judge.*** They don't—there are certain kinds of—like a dispositive motion

[5] *Goodwin v. Kojian,* 2013 WL 1528966, at *2 (C.D. Cal. Apr. 12, 2013); *Snyder v. Davol, Inc.*, 2008 WL 113902, at *3 (D. Or. Jan. 7, 2008); *Ortiz v. Menu Foods, Inc.*, 525 F. Supp. 2d 1220, 1232 (D. Haw. 2007); *Martin v. Merck & Co.*, 2005 WL 1984483, at *2 (E.D. Cal. Aug. 15, 2005); *Meyers v. Bayer AG*, 143 F. Supp. 2d 1044, 1049 (E.D. Wis. 2001); *Betts v. Eli Lilly & Co.*, 435 F. Supp. 2d 1180, 1182 (S.D. Ala. 2006).

[6] There, the argument was that *parens patriae* actions by a state are class actions removable under the Class Action Fairness Act. *See State of New Hampshire,* 17-cv-427 (D.N.H.), Dkt. No. 26 at 3 (noting that this argument has been rejected by all circuit courts to have addressed it).

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> for failure to state a claim or something like that is an issue that might better be addressed centrally, depending upon the nature of the claim. They usually can be quite complex and present issues that are common across the entire group. ***Remand motions are oftentimes very case-specific and what happens is they tend to linger in the MDL once there's a certification and the case can be—stay in the MDL for a year or more before the judge has time to get around to addressing them.***

Id. at 6:6-7:15 (emphasis added).[7]

Passing over the New Hampshire litigation, Manufacturing Defendants instead list 24 cases subject to the Putative Opioids MDL in which stays have been entered. *See* Defs. Br. at 6 and n.4. That is an impressive statistic at first blush. What Manufacturing Defendants neglect to mention, however, is that in 22 of these 24 cases the plaintiffs *agreed* to the stay—indeed, these were the very plaintiffs who moved the MDL panel for consolidation in the first place. *See* Defs. Br. n.4 (collecting cases). One of the remaining cases, *Lewis v. Purdue Pharma* L.P., 17-cv-5118 (W.D. Ark.), also was filed in federal court and involved no motion to remand. The stay in the last case, *Lorain v. Purdue Pharma L.P., et al.*, 17-cv-1639 (N.D. Ohio), is hardly precedent for anything given that it issued without argument or supporting analysis.[8]

Equally misleading is Manufacturing Defendants' contention that "'a majority of courts'" in this circuit enter stays in deference to MDL proceedings. *See* Defs. Br. at 5 (quoting *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1362 (C.D. Cal. 1997)). Here again, Manufacturing Defendants rely almost entirely on cases in which no remand motion was pending. *See* Defs. Br. at n.3 (collecting cases).[9] For our purposes, it is irrelevant if most courts stay ordinary pretrial proceedings (motions to dismiss, discovery, etc.) in deference to MDLs. The question is how to handle a stay motion when federal jurisdiction itself has been called into question. In this

---

[7] Purdue's counsel did not appear to disagree with this characterization of the MDL panel's preferred approach. *See id.* 7:16-17 ("So if I've got that wrong, just tell me." Mr. Cheffo: "No certainly you do not.").

[8] It could be, for example, that the *Lorain* court conducted a preliminary analysis of the remand motion and concluded it was of questionable merit. There simply is no way to know from the record the court has left.

[9] Manufacturing Defendants also cite *Call v. Volkswagen Grp. of Am., Inc.*, which recognized that remand issues, because jurisdictional, present a "key question" that must be resolved before a stay can issue. *See* 2016 WL 9224045, at *2.

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1918 EIGHTH AVENUE, SUITE 3300 • SEATTLE, WA 98101
(206) 623-7292 • FAX (206) 623-0594

entirely distinguishable context, as just discussed, the practice in this jurisdiction is to give any pending remand motion preliminary scrutiny. Manufacturing Defendants supply no reason to depart from that approach here. They simply deny its existence.

B. A stay would be counterproductive in any case.

The decision to grant or deny a temporary stay of proceedings lies within this Court's discretion. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936); *Good v. Prudential Ins. Co. of Am.*, 5 F. Supp. 2d 804, 809 (N.D. Cal. 1998). The "party seeking a discretionary stay bears the burden of proving that a stay is warranted." *Nw. Coal. for Alternatives to Pesticides v. U.S. E.P.A.*, 2012 WL 2343279, at *3 (W.D. Wash. June 20, 2012). In considering whether that burden has been carried, "the district court should consider three factors: (1) potential prejudice to the non-moving party; (2) hardship and inequity to the moving party if the action is not stayed; and (3) the judicial resources that would be saved by avoiding duplicative litigation." *ACLU of Washington v. United States Dep't of Homeland Sec.*, 2017 WL 2437607, at *1 (W.D. Wash. June 6, 2017) (internal quotation marks omitted).

1. A stay would not serve judicial economy because this case involves jurisdictional issues that do not arise in any potential MDL case.

In evaluating competing motions to remand and stay, considerations of judicial economy pivot on whether the remand motion raises issues "likely to arise in other actions pending in the MDL transferee court." *Wickens v. Blue Cross of Cal., Inc.*, 2015 WL 3796272, at *3 (S.D. Cal. June 18, 2015) (internal quotation marks omitted). If the remand motion turns on unique questions, a stay will only saddle "the MDL with a new jurisdictional issue." *Hermosillo v. McKesson Corp.*, 2013 WL 4427828, at *1 (N.D. Cal. Aug. 14, 2013). The burden is on the movant to identify overlapping issues and, where that burden is not sustained, courts across the country routinely deny motions to stay. *See Wickens,* 2015 WL 3796272, at *4.[10]

[10] *See Marble v. Organon USA, Inc.*, 2012 WL 2237271, at *3 (N.D. Cal. June 15, 2012); *In re Mass. Diet Drug Litig.*, 338 F. Supp. 2d 198 (D. Mass. 2004); *Weese v. Union Carbide Corp.*, 2007 WL 2908014, at *1 (S.D. Ill. Oct. 3, 2007); *Pennsylvania v. Tap Pharm. Prod., Inc.*, 415 F. Supp. 2d 516, 521 (E.D. Pa. 2005).

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Here, Manufacturing Defendants have not shown even a tangential connection between the issues posed by Seattle's remand motion and any issue to be litigated in the MDL. This is no accident. There is no connection. SPC is not a defendant in any MDL case, and thus an MDL court will not be passing on whether claims against SPC can properly be joined with claims against opioid manufacturers. *See Marble*, 2012 WL 2237271, at *3 (because no other MDL remand motion involved joinder of the same local defendant, "there [was] no economy in sending [the] action to the MDL for resolution"). Remand here also turns entirely on whether fraudulent misjoinder is even a viable basis to exercise removal jurisdiction under the law of *this circuit*. Seattle is aware of no MDL case in which this question is destined to be adjudicated. This Court is best positioned to address unique issues arising under Ninth Circuit law. *See Guardado v. Highshaw*, 2013 WL 12137105, at *4 (C.D. Cal. May 6, 2013) (no judicial resources conserved where "motion to remand requires the Court to apply Ninth Circuit law, of which this Court is familiar").

Retreating to generalities, Manufacturing Defendants claim that a stay is warranted because four cases subject to the Putative Opioids MDL present at least some "removal and remand issues." Defs. Br. at 8 (internal quotation marks omitted). But the question is not whether other MDL cases pose *some* jurisdictional issue. The question is whether those issues are sufficiently similar to benefit from joint treatment. Manufacturing Defendants have not made that showing and the failure distinguishes this case from all those on which they seek to rely. *See Pope v. Volkswagen Grp. of Am., Inc.*, 16-cv-00146-RSM, slip. op. at 2 (W.D. Wash. Feb. 29, 2016) (staying where "MDL panel will be considering one or more motions to remand filed by Plaintiff's counsel in a companion case").[11]

[11] *See also In re Ivy*, 901 F.2d 7, 9 (2d Cir. 1990) ("The jurisdictional issue in question is easily capable of arising in hundreds or even thousands of cases."); *Stempien v. Eli Lilly & Co.*, 2006 WL 1214836, at *2 (N.D. Cal. May 4, 2006) (staying because remand issue likely "to be raised in other cases that may be transferred to MDL"); *Beatty v. Merck & Co.*, 2006 WL 2943090, at *1 (E.D. Cal. Oct. 13, 2006) (staying "[g]iven the number of cases that present this exact jurisdictional question"); *Walker v. Merck & Co.*, 2005 WL 1565839, at *2 (S.D. Ill. June 22, 2005) (staying where "it is almost certain that the transferee court will hear and decide many of the same issues"); *McClelland v. Merck & Co.*, 2007 WL 178293, at *3 (D. Haw. Jan. 19, 2007) ("Without question, similar jurisdictional issues concerning claims of fraudulent joinder have been raised in other cases, and those cases have been transferred to the MDL."); *Bernstine*

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(206) 623-7292 • FAX (206) 623-0594

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2. Manufacturing Defendants have specified no hardship rivalling the prejudice a stay would impose on Seattle.

Seattle is combatting an opioid epidemic that claims lives every day and continues to exact an enormous toll on precious municipal resources. *See* Compl. ¶¶ 180-202. To stem the tide, Seattle seeks in this action money damages to fund needed municipal programs as well as injunctive relief that puts an end to Manufacturing Defendants deceptive marketing campaign. With the crisis showing no signs of abating, any measurable delay in Seattle's ability to obtain this relief will severely prejudice Seattle and its inhabitants.

In an effort to diminish these considerations, Manufacturing Defendants assert repeatedly that any stay here should be "brief." *See* Defs. Br. at 10. This is misleading. It is true that a decision is expected soon after the MDL panel convenes November 30. But if an MDL is created, as Manufacturing Defendants believe is likely (*see* Defs. Br. at 2), Seattle's remand motion will not be the first order of business. Remand motions pending in an MDL typically sit *for years* unresolved as core aspects of consolidated proceedings progress. *See* Declaration of Steve W. Berman ("Berman Decl."), Dkt. No. 12, ¶¶ 4-7 (discussing delays of 2 and 7 years in prior MDLs); *see also* Harrington Decl. Ex. 1 at 6:23-7:4. This is why MDLs often are described as "black hole[s], into which cases are transferred never to be heard from again." Eldon E. Fallon, *et al.*, *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2330 (2008). The numbers bear this out. The MDL panel itself has reported that in the history of MDL practice only 2.6% of cases transferred to an MDL have been remanded.[12]

The prejudice to Seattle is particularly acute because, prior to removal, this case was assigned a trial date of September 24, 2018. *See* Berman Decl. Ex. J. This means that, as practical matter, Seattle could obtain the critical relief it seeks in state court before an MDL court would even reached the threshold question of whether removal was proper. *See Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1111 (9th Cir. 2005) ("A stay should not be granted unless it

v. Merck & Co., 2007 WL 1217589, at *1 (E.D. Cal. Apr. 24, 2007) (staying because remand motions in other MDL cases turned on joinder of same local defendant).

[12] *See* Harrington Decl. Ex. 2 at 3 (reporting that since 1968, only 16,600 of the 626,938 actions centralized in an MDL have been remanded).

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1918 EIGHTH AVENUE, SUITE 3300 • SEATTLE, WA 98101
(206) 623-7292 • FAX (206) 623-0594

appears likely the other proceedings will be concluded within a reasonable time in relation to the urgency of the claims presented to the court." (internal quotation marks omitted)).

Where, as here, a stay "will work damage to someone else," the movant also must "make out a clear case of hardship or inequity in being required to go forward." *Id.* (internal quotation marks omitted); *Zillow, Inc. v. Trulia, Inc.*, 2013 WL 594300, at *3 (W.D. Wash. Feb. 15, 2013). Manufacturing Defendants have identified no appreciable hardship. They claim, for example, that remand briefing is "costly." Defs. Br. at 3. But they already staked out their position in the notice of removal, which is replete with argument and caselaw. All that is left is to reformulate the notice into a brief. Whatever the cost of that undertaking, it will be dwarfed by the cost of proceeding as Manufacturing Defendants' propose—that is, completing an additional round of stay briefing only to restart remand briefing from scratch in an MDL, likely years from now.

Manufacturing Defendants also raise the specter of duplicative proceedings without explaining how they might manifest. Seattle is not seeking to proceed in this Court with the full panoply of pretrial proceedings that would need to be revisited in an MDL. Seattle instead requests only that this Court decide its pending remand motion. If the motion is granted, "the case can be remanded before federal resources are further expended." *Guardado*, 2013 WL 12137105, at *4. If it is denied, this action will remain in federal court and, in the likely event an MDL is created, a conditional order will issue transferring the case to the chosen MDL venue.

There is no conceivable duplication of efforts in these circumstances. The only issue is where, and when, Seattle's motion to remand is resolved. While Manufacturing Defendants may hope the motion is resolved (if at all) in an MDL in the distant future, they are not *prejudiced* if it is decided by this Court now.

IV. CONCLUSION

Manufacturing Defendants' motion to stay boils down to an attempt to misuse the MDL process to delay, if not evade, reckoning in the state-court forum where Seattle rightfully has chosen to litigate. The motion should be denied in full.

HAGENS BERMAN
1918 EIGHTH AVENUE, SUITE 3300 • SEATTLE, WA 98101
(206) 623-7292 • FAX (206) 623-0594

1 DATED this 15th day of November, 2017

Respectfully submitted,

HAGENS BERMAN SOBOL SHAPIRO LLP

By: */s/ Steve W. Berman*
Steve W. Berman, WSBA #12536
1918 Eighth Ave., Suite 3300
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 580-6559
steve@hbsslaw.com

Peter S. Holmes, WSBA #15787
Seattle City Attorney
Seattle City Attorney's Office
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
Telephone: (206) 684-8200
peter.holmes@seattle.gov

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2017, I caused the foregoing to be served by U.S. Mail on the following parties:

Seattle Pain Center Medical Corporation
c/o Frank Li
1519 E. Denny Way, Unit 3
Seattle, WA 98122

Frank D. Li
1519 E. Denny Way, Unit 3
Seattle, WA 98122

I further certify that on November 15, 2017, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent by email to all parties noted below by operation of the Court's electronic filing system:

- Thomas Dean Adams
  tadams@karrtuttle.com
- Steve W. Berman
  steve@hbsslaw.com
- Carolyn Robbs Bilanko
  cbilanko@bakerlaw.com
- Angelo J. Calfo
  angeloc@calfoeakes.com
- Andrew W. Durland
  adurland@karrtuttle.com
- Kent Michael Fandel
  michael.fandel@millernash.com
- Ronald J. Friedman
  rfriedman@karrtuttle.com
- Curt Roy Hineline
  chineline@bakerlaw.com
- Peter Samuel Holmes
  peter.holmes@seattle.gov
- Bruce A Rubin
  bruce.rubin@millernash.com
- Timothy W. Knapp
  timothy.knapp@kirkland.com
- Jennifer G. Levy
  jennifer.levy@kirkland.com
- Martin L. Roth
  martin.roth@kirkland.com
- Donna M. Welch
  donna.welch@kirkland.com

/s/ Steve W. Berman
Steve W. Berman, WSBA #12536

HAGENS BERMAN
1918 EIGHTH AVENUE, SUITE 3300 • SEATTLE, WA 98101
(206) 623-7292 • FAX (206) 623-0594