HON. THOMAS S. ZILLY

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

CITY OF SEATTLE,

Plaintiff,

v.

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 MOTION TO REMAND AND FOR EXPEDITED CONSIDERATION

NOTE ON MOTION CALENDAR:
November 24, 2017

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I. PRELIMINARY STATEMENT

The story of Seattle's opioid crisis cannot fully be told without reference to both opioid manufacturers, who deceptively marketed their drugs in Seattle, and the Seattle Pain Center, which "served" many of the opioid abusers this marketing scheme created. The opioid manufacturers *knew* that Seattle Pain Center providers were grossly overprescribing opioids and that their patients were overdosing at alarming rates. At least 16 Seattle Pain Center patients fatally overdosed on opioids between 2010 and 2015 and dozens more died for reasons yet to be determined. Rather than alert authorities, as the law requires, the manufacturers either did nothing or sent sales representatives to the Seattle Pain Center to further promote their drugs. This interrelated misconduct—deceptive marketing coupled with foreseeable and known overprescribing—has resulted in a public health crisis in Seattle of historic proportions.

As part of an ongoing effort to combat this crisis, the City of Seattle filed a Complaint in King County Superior Court on September 28, 2017, against leading opioid manufacturers (the "Manufacturing Defendants") and the Seattle Pain Center (together with its principal Frank D. Li, "SPC"). Although certain of Seattle's claims are directed only at the Manufacturing Defendants, all Defendants are joined in the Complaint's statutory and common-law nuisance counts. There is a straightforward reason for this. Anyone who *contributes* to a nuisance is liable under Washington nuisance law. Joining the chief contributors to Seattle's opioid epidemic in a single action will conserve judicial resources that would be spoiled on parallel proceedings, while ensuring that liability and damages can be determined and, if necessary, apportioned in a coordinated fashion.

Manufacturing Defendants' contention that non-diverse SPC was misjoined—the only basis they assert for this Court to exercise removal jurisdiction—disregards the efficiencies and common questions that overwhelmingly support joinder. But the Court need not even delve into these issues. Removal is foreclosed here for an even more fundamental reason: The Ninth Circuit has *never recognized* misjoinder as a basis to disregard a non-diverse party and exercise removal jurisdiction. And district courts in this circuit have "repeatedly and consistently declined" to endorse this novel and widely criticized procedure, which would expand federal

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subject matter jurisdiction without any statutory authorization. *See Thee Sombrero, Inc. v. Murphy*, 2015 WL 4399631, at *4 (C.D. Cal. July 17, 2015) (internal quotation marks omitted). Manufacturing Defendants offer no reason why this Court should depart from the clear majority approach.

The absence of legal support for removal reveals what really is going on: Manufacturing Defendants do not want this Court to do anything. It is no coincidence in this regard that one day after removing this action, certain Manufacturing Defendants identified this case in a Notice of Related Action submitted to an MDL panel evaluating whether to consolidate opioid-related cases pending in federal courts across the country. *See In re: National Prescription Opiate Litigation*, MDL 2804 ("Opioids MDL"). The strategy obviously is to get out of King County Superior Court and transfer this case to an MDL where Seattle's motion to remand would likely languish for *years* undecided. *See infra* Point III(D) (discussing typical MDL delays). There is, of course, nothing improper about removing a case in which federal jurisdiction exists and taking rapid steps to fold it into an MDL. But when these maneuvers are predicated on a notice of removal as faulty as this one, there is reason to be concerned that removal and MDL procedures are being misused for purely strategic ends.

In these circumstances, putative "transferor" district courts, such as this one, have an important role to play. The MDL panel has scheduled a hearing for November 30, 2017, to determine whether an MDL should be created. Consistent with past practice, a ruling can be expected within days of the hearing. In the meantime, however, this Court retains full authority to rule on Seattle's motion to remand. *See* JPML Rule 2.1(d). Because the right to litigate in an MDL depends on the existence of federal subject matter jurisdiction, remand motions are "particularly appropriate for resolution before the Panel acts." Manual for Complex Litigation § 20.131 (4th ed. 2004); *see also 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 Opioids MDL transfer order before creation of MDL).

Early resolution of Seattle's remand motion is even more appropriate given that the King County Superior Court set this case for trial on September 24, 2018 (less than eleven months

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from now). *See League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency*, 558 F.2d 914, 917 (9th Cir. 1977) (joinder rules should be applied "to expedite the final determination of disputes"). With prompt remand, this action could be fully resolved before an MDL would likely even reach the propriety of removal. In these unique circumstances, and given the great public harm this lawsuit seeks to abate, expedited treatment is warranted and respectfully requested.

II. BACKGROUND

A. Seattle's allegations against Manufacturing Defendants and SPC are factually and legally intertwined.

Historically, opioids were considered too addictive for the treatment of chronic pain and were prescribed only for short-term acute pain and for palliative (end-of-life) care. *See* Compl. ¶ 3. To access the lucrative market for chronic pain treatments, Manufacturing Defendants initiated in the 1990s a misinformation campaign designed to "re-educate" doctors and patients about the supposed efficacy of their drugs. *Id.* ¶ 4. Proceeding on half-truths, pseudoscience, and outright lies, this marketing campaign grossly understated the risk of addiction posed by long-term opioid use while exaggerating the countervailing therapeutic benefits. *Id.* Among the falsehoods Manufacturing Defendants promoted was the concept of "pseudoaddiction"—the notion that drug-seeking behaviors in patients should be perceived not as signs of addiction, but rather as untreated pain requiring even more opioids. *Id.*

Manufacturing Defendants disseminated misinformation through patients' pamphlets and persistent in-person "detailing" of physicians. *Id.* ¶ 5. They also took a cue from the tobacco companies and laundered their messages through ostensibly neutral third-parties under their control—including influential doctors and associations they funded. *Id*. By operating behind the scenes, Manufacturing Defendants were able to dress their marketing scheme in a veneer of scientific neutrality that was instrumental in altering the perceptions and prescribing habits of physicians. *Id.* ¶¶ 5, 58.

For Manufacturing Defendants, these efforts were a resounding financial success. Opioids are now the most prescribed class of drugs, generating $11 billion in revenue for the drug companies in 2014 alone. *Id.* ¶ 7. For the people of Seattle, the scheme has proven

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catastrophic. The annual number of doses prescribed statewide has exceeded 112 million—enough to supply every person in the state with 16 pills each. *Id.* ¶ 12. Abuse, misuse, and overdoses have followed. Last year, more than 435 Washingtonians, and 107 King County residents, overdosed on opioids. *Id.* ¶¶ 14, 182. Many of these deaths, and much of the devastation wrought by the opioid epidemic, occurred (and continues to occur) in Seattle. *Id.* ¶¶ 183, 202.

The crisis Seattle confronts does not, however, begin and end with the opioid manufacturers. One foreseeable consequence of deceptively marketing highly addictive narcotics is that, when patients grow dependent, they will turn to illicit supply channels. *Id.* ¶¶ 11, 178. And this is a prime reason why the opioid epidemic is so entrenched in Seattle and elsewhere. Doctors who have recognized the dangers posed by opioids and taken steps to wean addicted patients have found their efforts stymied by the ready availability of opioids through other distribution channels. *Id.* ¶ 15. In Seattle, the primary illicit source was, until shuttered by state officials, SPC and the roster of indiscriminate prescribers it employed. *Id.* ¶¶ 148-71.

SPC, in short, was a "pill mill." Most SPC providers prescribed opioids to more than 90% of their patients, and did so in disregard of obvious signs that these dangerous drugs were being abused. *Id.* ¶¶ 153, 169. SPC practitioners were encouraged to work fast and cut corners. Patients typically would be seen for less than five minutes, or just about the time it took to write an opioid prescription. *Id.* ¶ 151.

Pressured to churn through patients, SPC providers routinely disregarded signs of abuse and doled out aggressive and escalating dosages of opioids without any corresponding medical need. *Id.* ¶¶ 151-55. Notably, although SPC patients were required to submit urine samples on every visit, this was purely a scheme to increase medical billings. *Id.* ¶ 153. The test results themselves were routinely ignored and patients who tested positive for drug abuse or even negative for opioids—indicating that they were reselling their pills on the street—were able to refill prescriptions. *Id.* ¶ 153. After gaining a reputation as an easy place to obtain opioids, SPC's patient base exploded and it expanded out of its Seattle headquarters to open clinics throughout the region. *Id.* ¶¶ 154, 148. All told, SPC served *25,000* patients, many of whom

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obtained opioids from an SPC provider after being rejected by practitioners at other facilities. *Id.* ¶ 154.

The results, tragically, were predictable. At least 60 SPC patients died between 2010 and 2015. *Id.* ¶ 156. State officials reviewed medical records for 18 of these patients and concluded that 16 of them overdosed on opioids within days or weeks of filling a prescription issued by an SPC provider. *Id.* ¶ 156. After investigating these deaths, Washington State's Medical Quality Assurance Commission ("MQAC") summarily suspended the medical license of Frank Li, SPC's director, effectively closing the clinic. *Id* ¶ 159. In doing so, MQAC found:

> SPC established a business model and clinical practice that focused of maximizing billable amounts by increasing the number of patients treated, the frequency of patient office visits, and the volume of billable services. Respondent and SPC sought out vulnerable chronic pain patients enrolled in Medicaid insurance and maintained these patients on opioid therapy by providing continuing prescriptions despite knowledge of medication abuse, diversion and overdose.

Id.

Manufacturing Defendants enabled pill mills like SPC by marketing their drugs in a way that would inevitably lead to widespread addiction and abuse. *Id.* ¶¶ 11, 178. But the connection between these Defendants is even more immediate. Manufacturing Defendants knew that SPC was grossly overprescribing opioids. *Id.* ¶ 162. They knew because they maintain highly sophisticated and granular databases that track the prescribing habits of doctors across the country. *Id.* ¶¶ 162-63. The nature of SPC's operations could have eluded no one in Manufacturing Defendants' position—what publicly available data exist indicate that nearly all SPC providers were *four or five times* more likely to prescribe opioids than the average Washington practitioner in the same field. *Id.* ¶ 169. Manufacturing Defendants did not, however, alert authorities to the goings on at SPC. Instead, at least two Manufacturing Defendants sent representatives directly to SPC to purchase meals for SPC employees and to pitch their drugs. *Id.* ¶ 171.

On these and other factual allegations, Seattle's Complaint asserts five claims. Seattle's leading two claims allege a public nuisance in violation of RCW 7.48 and the common law.

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These nuisance counts join both the Manufacturing Defendants and SPC, because all Defendants contributed to the opioid nuisance Seattle confronts and, under Washington law, nuisance liability extends to all nuisance contributors. *See Wilson v. Key Tronic, Corp.*, 40 Wash. App. 802, 812 (1985) (emphasis added); *see also* infra at 11. Seattle's remaining three claims concern only Manufacturing Defendants' marketing scheme and properly are directed solely against the Manufacturing Defendants.[1]

Among other remedies, Seattle seeks injunctive relief, civil penalties, and damages to recover the public health, policing, criminal justice, and programmatic resources it has devoted, and will continue to devote, towards abating the nuisance Defendants have caused in Seattle.

B. Manufacturing Defendants removed this action even though federal subject matter jurisdiction is lacking on the face of the Complaint.

Seattle asserts only state-law causes of action. There also is no dispute that Seattle and SPC are citizens of Washington and that, accordingly, complete diversity is absent. *See* Notice of Removal at ¶ 4. With no federal question, and without complete diversity, this action is not embraced by the plain terms of the removal statute, which permits removal of only those actions over which federal courts "have original jurisdiction." *See* 28 U.S.C. 1441(a).

On October 24, 2017, Manufacturing Defendants nevertheless filed a notice of removal, contending that non-diverse SPC "should be ignored for purposes of diversity jurisdiction." *Id.* ¶ 11. Manufacturing Defendants acknowledge that the Complaint joins them with SPC on the same nuisance claims but assert that the claims rest on entirely "separate and distinct factual allegations." *Id.* ¶ 42. Solely on this purported basis, Manufacturing Defendants contend that SPC was misjoined under Rule 20 and should be severed from the action to create complete diversity.

[1] Namely, Seattle's claims for civil conspiracy and violations of the Consumer Protection Act, RCW 19.86.020, and Criminal Profiteering Act, RCW 9A.82.

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III. ARGUMENT

A. This Court should exercise a strong presumption against removal.

The Federal courts "are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (internal citations omitted). Accordingly, a "suit commenced in state court must remain there until cause is shown for its transfer under some act of Congress." *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002). Removal statutes are to be "strictly construed" and courts must exercise a "strong presumption against removal." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (internal quotation marks omitted). The removing "defendant always has the burden of establishing that removal is proper." *Id.* Any and all "doubts as to the right of removal must be resolved in favor of remanding to state court." *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1252 (9th Cir. 2006) (internal quotation marks omitted).

B. There is no basis for removal jurisdiction here.

Although the removal statute does not explicitly authorize courts to disregard non-diverse parties, *see* 28 U.S.C. § 1441, the Ninth Circuit has recognized one exception for circumstances in which the non-diverse party was "fraudulently joined." *See Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001). A fraudulent joinder occurs if "the plaintiff fails to state a cause of action" against the non-diverse party and "the failure is obvious according to the settled rules of the state." *Id.* (internal quotation marks omitted).

Here, Manufacturing Defendants do *not* contend that SPC was fraudulently joined. Instead, they invoke fraudulent *mis*joinder, a doctrine originating in the Eleventh Circuit that has "come under intense scrutiny by courts in this and other Circuits, as well as by prominent commentators." *Stone-Jusas v. Wal-Mart Stores, Inc.*, 2014 WL 5341686, at *4 (D. Nev. Oct. 20, 2014).

The fraudulent misjoinder concept was first articulated in *Tapscott v. MS Dealer Serv. Corp.*, which held that a non-diverse party can be disregarded on removal if (1) the claims against that party lack sufficient "commonality" with claims asserted against diverse defendants to permit joinder under Rule 20 and (2) the absence of commonality "is so egregious as to

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constitute fraudulent joinder." 77 F.3d 1353, 1360 (11th Cir. 1996). Thus, while fraudulent joinder looks at whether there is a claim to assert against the non-diverse party, fraudulent misjoinder (where accepted) assesses whether that claim, even if viable, is so distinct that its joinder is egregious.

For reasons set forth below, this Court should follow the "decided majority" of jurists to reject fraudulent misjoinder. *Garcia v. Allstate Ins. Co.*, 2014 WL 12611285, at *2 (C.D. Cal. Oct. 3, 2014). Even if the doctrine were applied, however, SPC was properly joined and cannot be severed from the action.

1. The doctrine of fraudulent misjoinder has been forcefully rejected by courts throughout the Ninth Circuit.

Fraudulent misjoinder has "not been adopted by the Ninth Circuit Court of Appeals." *Ramirez v. Our Lady of Lourdes Hosp.*, 2013 WL 5373213, at *3 (W.D. Wash. Sept. 25, 2013) (Martinez, C.J.). And "district courts throughout the circuit have repeatedly and consistently declined to adopt the doctrine." *Thee Sombrero*, 2015 WL 4399631, at *4 (internal quotation marks omitted).[2] The reasons "are many and persuasive." *Id.*

First, applying fraudulent misjoinder involves hopeless circularity. It requires that the court evaluate, before it has jurisdiction, whether a non-diverse party should be severed under procedural rules, which itself "presumes the Court has jurisdiction to act." *Id.* (internal quotation marks omitted). A court cannot take adjudicative action—severing a party no less—only to "then find it has jurisdiction." *Id.* (internal quotation marks omitted); *see also Ramirez*, 2013 WL 5373213, at *3 (observing that "circular logic" of the doctrine has been found "faulty"); *cf.*

[2] *Lopez v. Pfeffer*, 2013 WL 5367723, at *4 (N.D. Cal. Sept. 25, 2013) ("The Court finds it inappropriate to apply the novel theory of fraudulent misjoinder…."); *Dekalb v. C.R. Bard, Inc.*, 2013 WL 12146518, at *5 (C.D. Cal. Oct. 8, 2013) (rejecting fraudulent joinder, noting that "courts in this circuit have criticized the 'fraudulent misjoinder' doctrine"); *accord Ellis v. Amerigas Propane, Inc., No.*, 2016 WL 8673036, at *2 (E.D. Cal. Nov. 18, 2016); *Shears v. Park*, 2013 WL 5492257, at *5 (E.D. Cal. Sept. 30, 2013); *Perry v. Luu*, 2013 WL 3354446, at *5 (E.D. Cal. July 2, 2013); *Early v. Northrop Grumman Corp.*, 2013 WL 3872218, at *3 (C.D. Cal. July 24, 2013); *Osborn v. Metro. Life Ins. Co.*, 341 F. Supp. 2d 1123, 1127 (E.D. Cal. 2004); *Stone-Jusas*, 2014 WL 5341686, at *4; *Blasco v. Atrium Med. Corp.*, 2014 WL 12691051, at *5 (N.D. Cal. Oct. 29, 2014).

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Syngenta Crop Protection, 537 U.S. at 33 (courts may not use All Writs Act to remove cases because All Writs Act cannot be invoked without some "independent grant of jurisdiction").

Second, although removal statutes are supposed to be "narrowly construed" against removal, "[f]raudulent misjoinder flips this maxim on its head by making cases removable that by § 1441's plain terms should not be, effectively increasing the jurisdiction of federal courts beyond what the rules envision." *Early*, 2013 WL 3872218, at *3; *accord Dekalb*, 2013 WL 12146518, at *4. Federal jurisdiction "is not to be expanded by judicial decree," *Kokkonen*, 511 U.S. at 377, but that is precisely what fraudulent misjoinder purports to do. Courts in the Ninth Circuit recognize that, absent "Congress amending the rules," fraudulent misjoinder cannot properly be recognized. *See Early*, 2013 WL 3872218, at *3.

Third, courts have rejected fraudulent misjoinder because, where applied, it has engendered "enormous judicial confusion." *Thee Sombrero*, 2015 WL 4399631, at *5 (internal quotation marks omitted). For one, "[e]ven within the Eleventh Circuit it is unclear when 'mere misjoinder' becomes so 'egregious' to constitute fraudulent misjoinder." *Early*, 2013 WL 3872218, at *2; *accord Osborn*, 341 F. Supp. 2d at 1127. In addition, there is no consensus as to whether state or federal joinder rules should govern, or whether the doctrine applies in cases involving only a single plaintiff. *See Early*, 2013 WL 3872218, at *2; *Brazina v. Paul Revere Life Ins. Co.*, 271 F. Supp. 2d 1163, 1172 (N.D. Cal. 2003). The absolute "last thing the federal courts need is more procedural complexity." *Osborn*, 341 F. Supp. 2d. at 1127.

Finally, to the extent there are legitimate joinder issues to be resolved, the "better approach is to require the defendant to challenge the claimed misjoinder in state court." *Stone-Jusas*, 2014 WL 5341686, at *4. Proceeding in this way will leave "little doubt about which portions of a dispute are properly removable," if any. *Blasco v. Atrium Med. Corp.*, 2014 WL 12691051, at *5 (internal quotation marks omitted). Leading commentators agree: "[C]onfusion could be reduced if removing parties would challenge fraudulent joinders and misjoinders in state court, before defendants file a removal notice." Wright, Miller & Cooper, Fed. P. and Proc. 3d § 3723.

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Failing to confront any of this, Manufacturing Defendants stake their fate to the *only two* decisions from this circuit to apply the doctrine of fraudulent misjoinder—*Sutton v. Davol, Inc.*, 251 F.R.D. 500 (E.D. Cal. 2008), and *Green v. Wyeth*, 344 F. Supp. 2d 674 (D. Nev. 2004). *Sutton* and *Greene* carry almost no precedential weight. These decisions have not been followed by a single court in this circuit,[3] have been forcefully criticized,[4] and are routinely disregarded by judges (and magistrate judges) from the very districts in which they issued.[5] Manufacturing Defendants' failure to acknowledge this damaging subsequent treatment is misleading, at best.

Manufacturing Defendants also neglect to mention that just weeks ago a court in the Eastern District of Tennessee rejected their removal of a similar action on supposed misjoinder grounds. *See Staubus*, 2017 WL 4767688. The plaintiffs there, a consortium of Tennessee district attorneys, joined opioid manufacturers Purdue and Endo with certain local providers on state-law nuisance claims (among others). *Id.* at *4. The complaint alleged, as here, that Purdue and Endo had "created a fraudulent scheme to grow the prescription opioid market by misleading doctors and the public about the addictive nature of opioids." *Id.* at *1. The local provider defendants were not involved in that effort, but allegedly contributed to the nuisance by overprescribing and illicitly distributing opioids to the public.

In *Staubus*, as here, Purdue and Endo removed the action, asserting that the claims against the local defendants arose from distinct factual bases and should be disregarded to manufacture complete diversity. The district court rejected the argument and remanded. In doing so, the court refused to endorse fraudulent misjoinder as a basis to create diversity, observing that only "a few courts" have embraced the fraudulent misjoinder concept and that even these courts "struggle to apply it." *Id.* at *5. The court held, further, that even if the doctrine applied, Purdue and Endo were not misjoined. *Id.* at *6.

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[3] *See Ellis*, 2016 WL 8673036, at *2 (since *Sutton* and *Greene*, "district courts have been consistently negative towards the fraudulent misjoinder doctrine").

[4] *See Thee Sombrero*, 2015 WL 4399631, at *5 (*Greene* and *Sutton* improperly "expand[ed] jurisdictional rules" on perceived "equitable grounds").

[5] *See Stone-Jusas*, 2014 WL 5341686, at *3 (refusing to follow *Greene* as "an outlier"); *Ellis*, 2016 WL 8673036, at *2 (rejecting *Sutton*).

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2. Even if this Court were to apply fraudulent misjoinder doctrine, remand would be required.

In federal court, defendants may be joined in a single action if "[1] any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and [2] any question of law or fact common to all defendants will arise in the action." Fed. R. Civ. P. 20(a)(2).[6] This standard must be "construed liberally in order to promote trial convenience and to expedite the final determination of disputes, thereby preventing multiple lawsuits." *League to Save Lake Tahoe v. Tahoe Reg. Planning Agency*, 558 F.2d at 917. Courts must "'entertain[ ] the broadest scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.'" *Ferger v. C.H. Robinson Worldwide, Inc.*, 2006 WL 2091015, at *1 (W.D. Wash. July 25, 2006) (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966)).

Here, because Manufacturing Defendants and SPC are joined on two nuisance claims, the Rule 20 analysis is informed by the substantive nuisance law to be applied. Under Washington law, anyone who "*contributes* to the creation of a nuisance is liable to any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance." *Wilson*, 40 Wash. App. at 812 (emphasis added). If the plaintiff's injuries are deemed indivisible, the joint tortfeasors "are jointly and severally liable for the entire harm." *Cox v. Spangler*, 141 Wash. 2d 431, 443 (2000) (en banc) (internal quotation marks omitted). If not, "the burden of proving allocation of those damages among themselves is upon defendants." *Id.* (internal quotation marks omitted).

"The majority of courts have found that joinder of defendants is proper where," as here, "they are alleged to be 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 &

[6] Because fraudulent misjoinder has been rejected by courts in the Ninth Circuit, there is no consensus as to whether state or federal joinder rules should be applied under the doctrine. For ease of the Court, Seattle will assume, *arguendo*, that federal joinder rules control.

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Cooper, Fed. P. and Proc. 3d § 1653. In this context, a multitude of common factual questions are inevitable, including as the causes of the plaintiff's injuries, their extent, and the relative culpability of the joint tortfeasors. *See Gonzales,* 2014 WL 2591690, at *8; *see also Jacques v. Hyatt Corp.*, 2012 WL 3010969, at *4 (N.D. Cal. July 23, 2012). Joining the tortfeasors also helps to ensure that any apportionment of damages is conducted in a coordinated fashion that protects against over and under-recovery. *See Gonzales*, 2014 WL 2591690, at *8 ("The common question of apportioning liability between successive tortfeasors alone has been found to be sufficient to satisfy" Rule 20.).

These common issues are more than sufficient to join SPC. But the Complaint does not stop there. It joins the Manufacturing Defendants and SPC in a common factual narrative, showing how their conduct was related and interdependent. *See Ramirez,* 2013 WL 5373213, at *3 (joinder appropriate where factual allegations were "intertwined"). Without Manufacturing Defendants' deceptive marketing scheme, which spawned a population of opioid abusers, SPC would have had few "patients" to serve. Manufacturing Defendants knew, moreover, that their marketing scheme would lead to addicts and pill mills. And they knew about SPC in particular. Rather than notify appropriate authorities, they either did nothing or, worse, encouraged SPC to distribute their pills. These common allegations, standing alone, would also be sufficient to permit joinder. *Jacques*, 2012 WL 3010969, at *4 (Rule 20 "simply requires related activities and similarity in the factual background of a claim"). And this is to say nothing of the common legal issues, including as to the contours of Washington statutory and common-law nuisance doctrine, the applicability of the statute of limitations, proximate causation, and the recoverability of municipal costs.

In challenging joinder, Manufacturing Defendants rely principally on cases in which plaintiffs have sought to join (1) a products-liability claim against a manufacturer of a drug or device with (2) a malpractice claim against a provider who administered the drug or device. *See* Notice of Removal ¶¶ 36-39. Putting aside that these operative facts are frequently found sufficient to permit joinder, *see, e.g., Ramirez,* 2013 WL 5373213, at *4, they bear no resemblance to this case. Here, Manufacturing Defendants and SPC are joined on the *same*

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nuisance claims, under the same legal theories, on the basis of overlapping facts, and against a legal backdrop that authorizes liability against all nuisance contributors. Disaggregating claims against individual nuisance contributors, as Manufacturing Defendants propose, would serve no substantive purpose—it would only spawn multiple proceedings and an attendant risk of irreconcilable outcomes.[7]

Joinder is particularly appropriate here because Manufacturing Defendants have previously argued that their culpability is minimized, or even eliminated, by the "intervening" actions of medical providers. *See City of Chicago v. Purdue Pharma L.P.*, 211 F. Supp. 3d 1058, 1080 (N.D. Ill. 2016). It would be patently unfair for Manufacturing Defendants to advance that defense while simultaneously objecting to the joinder of the most egregious Seattle provider. *See Ramirez*, 2013 WL 5373213, at *4; *Gonzales*, 2014 WL 2591690, at *8 ("Allowing Defendants to point to the 'empty chair' as the source of Plaintiff's injuries would prejudice Plaintiff.").

Finally, even if this Court adopted fraudulent misjoinder doctrine, and Defendants showed a misjoinder, remand would *still* be required. Where recognized, fraudulent misjoinder generally is construed to require "more than simply the presence of nondiverse, misjoined parties, but rather a showing that the misjoinder reflects an egregious or bad faith intent on the part of the plaintiffs to thwart removal." *In re Prempro Prod. Liab. Litig.*, 591 F.3d 613, 623 (8th Cir. 2010). Manufacturing Defendants have not asserted, much less shown, that SPC's joinder was egregious or otherwise in bad faith. At least 60 SPC patients died over a five-year span, and 16 of the 18 deaths studied are confirmed overdoses. SPC freely dispensed opioids to an additional *25,000* patients without regard for the risk of addiction and abuse. SPC, in short,

[7] This is not to suggest that SPC is a *necessary* party under Rule 19. Manufacturing Defendants' discussion of Rule 19 is not inaccurate in this respect. *See* Notice of Removal at ¶ 41. It is, however, wildly off topic. The issue here is whether SPC can be permissibly joined, not whether its joinder is mandatory for the action to proceed.

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was anything but a bit player in Seattle's opioid crisis. It is entirely appropriate—indeed, responsible—for Seattle to seek to hold this provider accountable for its flagrant misconduct.[8]

3. Manufacturing Defendants' severance and fraudulent misjoinder arguments are indistinguishable and should be rejected for the same reasons.

In a clever attempt to circumvent this circuit's rejection of fraudulent misjoinder doctrine, Manufacturing Defendants' Notice of Removal leads with a purportedly stand-alone contention that SPC should be "severed" under Rule 21. This is pure wordplay implying that there are alternative grounds to disregard SPC and perfect diversity—one premised on "fraudulent misjoinder" and another premised on distinct "severance principles." The arguments, however, manifestly are one and the same.

Fraudulent misjoinder, where recognized, is just a "defendant's motion to sever" at the time of removal. *See Blasco*, 2014 WL 12691051, at *5; *Carper v. Adknowledge, Inc.*, 2013 WL 5954898, at *4 (N.D. Cal. Nov. 4, 2013) ("[F]raudulent misjoinder removal involves the procedural law of severance and joinder"). That is, to contend that claims are fraudulently misjoined is only to say that they were improperly joined under Rule 20 and should be disaggregated under Rule 21 (or state-law counterparts). It is thus no surprise that the "severance" and fraudulent misjoinder sections of Manufacturing Defendants' Notice of Removal rely primarily on the same two (widely rejected) cases—*Sutton* and *Greene*. *See* Notice of Removal ¶¶ 36-39, 49. Manufacturing Defendants cannot revive fraudulent misjoinder by using different words to describe the same discredited procedure.

[8] Manufacturing Defendants place undue weight on two recent decisions from the Southern District of West Virginia—*Cty. Comm'n of McDowell Cty. v. McKesson Corp.*, 2017 WL 2843614, at *5 (S.D. W. Va. July 3, 2017) ("*McDowell*"), and *City of Huntington v. AmerisourceBergen Drug Corp.*, 2017 WL 3317300, at *4-5 (S.D. W. Va. Aug. 3, 2017) ("*Huntington*"). In these related cases, the court concluded that non-diverse provider defendants were fraudulently joined because the plaintiffs had failed to provide requisite presuit notice. Manufacturing Defendants do not argue fraudulent joinder here—*i.e.*, that Seattle has no claim against SPC. Having ruled on fraudulent joinder grounds, the court's ensuing discussion of fraudulent *mis*joinder was purely dicta. It is inapt in any case. For one, courts within the Fourth Circuit, unlike the Ninth, have been receptive to fraudulent misjoinder doctrine. *McDowell*, 2017 WL 2843614, at *5, *3. More critically, there was no joint nuisance claim in *McDowell* or *Huntington*, nor factual allegations (as here) tying the local providers to the diverse parties.

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To the extent there is any difference between fraudulent misjoinder and ordinary misjoinder it is that the former, as just noted, generally requires some showing of egregiousness. Manufacturing Defendants' "severance" argument thus boils down to a request that this Court not only endorse fraudulent misjoinder doctrine, but *expand it* to embrace circumstances where no egregiousness can be shown. This Court should decline that invitation. The principal reasons to reject fraudulent misjoinder—including its circularity and unauthorized expansion of federal jurisdiction—apply with added force to an even more aggressive iteration of the doctrine.

It appears that Manufacturing Defendants may also intend to argue that SPC can be severed under Rule 21 even if it was *properly joined* under Rule 20. If so, the argument never gets off the ground. To be sure, courts in this circuit have used Rule 21 to sever properly joined parties, but only *long after* assuming jurisdiction, usually because there was some realignment of the parties or legal ruling that defeated complete diversity. *See* Notice of Removal at ¶ 35 (collecting cases). In this entirely distinguishable context, severance conserves judicial and party resources because the alternative is dismissing the action and "forcing the parties to begin anew." *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1154 (9th Cir. 1998); *Cuviello v. Feld Entm't, Inc.*, 304 F.R.D. 585, 593 (N.D. Cal. 2015) ("This is precisely why courts are allowed the discretion under Rule 21 to dismiss nondiverse, dispensable parties."). And still, severance is permitted only if it "does not prejudice the remaining parties." *Galt G/S*, 142 F.3d at 1154.

The same procedure is not available at the time of removal and Manufacturing Defendants have identified no decision from this circuit to have used it. There are good reasons for this. First, there are no sunk litigation efforts to preserve at the initial removal stage. Second, severance would prejudice plaintiffs by depriving them of their chosen forum and the ability to litigate against all parties they properly have joined. Third, and perhaps most significantly, severing *properly joined* parties to perfect diversity on removal would effect a massive—and utterly discretionary—expansion of federal jurisdiction without any statutory basis. Jurisdiction cannot be enlarged by fiat. *Kokkonen*, 511 U.S. at 377.

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C. Seattle is entitled to costs and fees pursuant to § 1447(c).

Where, as here, remand is appropriate, the court "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). Ordinarily, fees are awardable under §1447(c) "only where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005).

Having sought to remove this action on a grounds courts in this circuit have "repeatedly and consistently declined to adopt," *Thee Sombrero*, 2015 WL 4399631, at *4, and then initiated the process for transferring this case to an MDL the very next day, the most sensible conclusion to draw is that Manufacturing Defendants have invoked the removal statute to cause delay. Fee shifting under § 1447(c) exists to deter this tactic. *See Deutsche Bank Nat. Tr. Co. v. Duran*, 2015 WL 349898, at *3 (C.D. Cal. Jan. 23, 2015) (awarding fees where removal "was merely a tactic to delay the expeditious resolution of this case").

D. Seattle's motion for remand warrants expedited treatment.

This matter will be fully submitted on Friday, November 24, 2017, under Local Rule 7. Respectfully, Seattle asks the Court to promptly remand the case to King County Superior Court where it has a trial date of September 24, 2018—that is, exactly ten months from when this motion will be noted. *See* Declaration of Steve W. Berman ("Berman Decl.") ¶ 8. The alternative is almost certainly substantial delay. And in a crisis that claims hundreds of King County lives every year, delay imposes the most extreme prejudice.

Delay looms because, on November 30, an MDL Panel will convene in St. Louis to determine whether various opioid-related lawsuits filed across the country should be consolidated in an MDL proceeding. The MDL Panel commonly issues decisions within days of convening, and it has given no reason to anticipate delay in this instance. Certain Manufacturing Defendants have filed a Notice of Related Action in the MDL listing this case. This means that if an MDL is created, the Clerk of the Panel will be authorized to enter a conditional transfer

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order ("CTO") transferring this case to the district court in which consolidation occurs. *See* JPML Rule 7.1(b). Objections to CTOs are permitted, *see* JPML Rule 7.1(c), but seldom granted.

It is true, as Manufacturing Defendants will surely note, that MDL courts are vested with full authority to rule on pending remand motions. But as a practical matter, those rulings can be delayed years as other pressing MDL issues are coordinated and adjudicated. *See* Berman Decl. ¶ 3. There is a name for this phenomenon: the "MDL Black Hole." *See Brewster v. A.W. Chesterton Co.*, 2007 WL 1056774, at *4 (N.D. Cal. Apr. 6, 2007); Gary Wilson; Vincent Moccio; Daniel O. Fallon, *The Future of Products Liability in America*, 27 Wm. Mitchell L. Rev. 85, 104 (2000) ("[T]he MDL often becomes a black hole from which cases, plaintiffs and defendants cannot escape.").

Examples abound. In *In re: Vioxx Products Liability Litigation*, MDL No. 1657 (E.D. La.), motions to remand were stayed for *more than seven years*, and, when the stay was finally lifted, the submission for opening remand briefs was set more than a year out. *See* Berman Decl. ¶ 5. Proceedings have moved more rapidly in *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, MDL NO. 2672 (N.D. Cal.), a pending MDL overseen by the Honorable Charles R. Breyer. But even there, remand motions were stayed for nearly two years as the court focused on other issues, and remand briefing is ongoing. *See* Berman Decl. ¶ 7.

It is precisely because of these common delays that remand motions are "particularly appropriate for resolution *before* the Panel acts." Manual for Complex Litigation § 20.131 (4th ed. 2004) (emphasis added). In fact, courts around the country have held that even when defendants have requested a stay in light of a pending MDL (which has not occurred here), it is appropriate to "give preliminary scrutiny to the merits of the motion to remand" and "[i]f this preliminary assessment suggests that removal was improper, the court should promptly complete

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its consideration and remand the case to state court." *Conroy v. Fresh Del Monte Produce, Inc.*, 325 F. Supp. 2d 1049, 1053 (N.D. Cal. 2004).[9]

Seattle is confident that any measure of judicial scrutiny will expose the absence of federal jurisdiction here. But given the status of MDL proceedings, there is a real risk that it will be years before any jurist is positioned to make that determination. For this reason, and because of the great public (and localized) import of this litigation, Seattle respectfully requests that this Court expeditiously evaluate its jurisdiction and issue a summary order resolving Seattle's motion to remand. *Katonah v. USAir, Inc.*, 876 F. Supp. 984, 985 (N.D. Ill. 1995) ("agree[ing] to expedite" proceedings on remand motion "due to the upcoming meeting of the Multidistrict Litigation Panel"); *see also Staubus*, 2017 WL 4767688, at *8 & n.4 (remanding improperly removed action subject to Opioids MDL transfer order before action by MDL panel).

IV. CONCLUSION

"Justice delayed is justice denied" is not just an old saying. It represents one of the fundamental principles of our court system. Criminal defendants have speedy trial rights, and plaintiffs are entitled to their day in court in a timely fashion. For the reasons set forth above, this action should be remanded to King County Superior Court and, pursuant to 28 U.S.C. § 1447(c), Seattle should be awarded all costs and fees associated with removal proceedings.

[9] *Guardado v. Highshaw*, 2013 WL 12137105, at *2 (C.D. Cal. May 6, 2013); *Utah v. Eli Lilly & Co.*, 509 F. Supp. 2d 1016, 1019 (D. Utah 2007); *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).

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DATED this 2nd day of November, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2017, I caused the foregoing to be served by U.S. Mail on the following parties:

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c/o Frank Li
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Frank D. Li
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I further certify that on November 2, 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:

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