The Honorable Thomas S. Zilly

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

CITY OF SEATTLE, a municipal corporation,

Plaintiff,

v.

PURDUE PHARMA L.P.; PURDUE PHARMA INC.; THE PURDUE FREDERICK COMPANY, INC.; TEVA PHARMACEUTICALS 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-01577-TSZ

REMOVING DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO REMAND AND FOR EXPEDITED CONSIDERATION

Action Filed: Sept. 28, 2017

BAKER & HOSTETLER LLP
999 Third Avenue, Suite 3600
Seattle, WA 98104-4040
Telephone: (206) 332-1380

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BAKER & HOSTETLER LLP
999 Third Avenue, Suite 3600
Seattle, WA 98104-4040
Telephone: (206) 332-1380

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BAKER & HOSTETLER LLP
999 Third Avenue, Suite 3600
Seattle, WA 98104-4040
Telephone: (206) 332-1380

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999 Third Avenue, Suite 3600
Seattle, WA 98104-4040
Telephone: (206) 332-1380

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BAKER & HOSTETLER LLP
999 Third Avenue, Suite 3600
Seattle, WA 98104-4040
Telephone: (206) 332-1380

INTRODUCTION

This case is one of more than 120 federal actions pending nationwide alleging that manufacturers of FDA-approved prescription opioid medications misrepresented the risks and benefits of these products, supposedly causing state and local governments to incur expenses stemming from opioid abuse. The complaints in this case and others focus on this alleged conduct by manufacturers. Yet the plaintiffs in this case and others, transparently seeking to evade removal, added on unrelated claims against non-diverse defendants—here, a Seattle "pill mill" and its former medical director who allegedly prescribed opioid products to consumers without any legitimate medical purpose. Federal diversity jurisdiction cannot be circumvented so easily.

In analogous circumstances, courts across the county have denied remand as to diverse defendants like the manufacturers here where non-diverse defendants were unnecessary parties under Rule 19 and thus subject to severance under Rule 21. Here, the non-diverse pill mill and its former medical director are unnecessary parties—a fact that Plaintiff concedes in its motion to remand. (Pl.'s Mot. to Remand ("Mot.") at 13 n.7 (Dkt. 11) (conceding that the pill mill is "not . . . a *necessary* party under Rule 19") (emphasis in original).) The proper course is to sever these peripheral defendants and deny remand as to the manufacturer defendants. Alternatively, these non-diverse defendants should be severed under Rule 20 or the procedural misjoinder doctrine.

Severing the pill mill and its former medical director will not, as Plaintiff contends, result in prejudicial "delay" warranting an expedited ruling here. For one, Plaintiff's cries of delay ring hollow given that its Complaint copies many allegations nearly verbatim from complaints filed in other opioid-related cases dating back to 2014, and asserts many of the same or similar claims. Moreover, keeping this case in federal court will yield significant efficiencies, not delay. As set forth in Defendants' pending motion to stay (Dkt. 22), next week the Judicial Panel on Multidistrict Litigation will hear a motion to create a Multidistrict Litigation ("MDL") that would

BAKER & HOSTETLER LLP
999 Third Avenue, Suite 3600
Seattle, WA 98104-4040
Telephone: (206) 332-1380

include this case. Courts repeatedly have recognized the efficiencies of having an MDL transferee court resolve motions to remand. Indeed, federal district courts have already stayed more than 40 lawsuits with claims similar to those asserted here—including several cases in which remand motions are pending—until the MDL motion is resolved. Plaintiff's effort to evade that sensible process through an "expedited" ruling by this Court should be rejected.

If the Court does not grant Defendants' motion to stay this case, the Court should deny remand as to the diverse manufacturer defendants, and sever and remand the claims against the non-diverse defendants.

BACKGROUND

Plaintiff, the City of Seattle, brought this action in state court against several out-of-state companies that manufacture and market FDA-approved prescription opioid medications indicated for management of pain (the "Manufacturer Defendants").[1] (Compl. ¶¶ 1-7, 25-35, 42-147.) The Complaint also asserts claims against a Seattle-based "pill mill" and its former medical director whose medical license has been suspended (the "Provider Defendants"). (*Id.* ¶¶ 8-10, 36-37, 148-160.) Plaintiff's factual allegations against the Provider Defendants are wholly distinct from the allegations against the Manufacturer Defendants.

As to the Manufacturer Defendants, Plaintiff's claims center on alleged false and misleading misrepresentations regarding the risks and benefits of opioid medications. Specifically, Plaintiff alleges that the Manufacturer Defendants "falsely touted the benefits of long-term opioid use" (*id.* ¶ 4), "disseminated . . . messages to reverse the popular and medical

[1] The Manufacturer Defendants, each of which is diverse from Plaintiff, are Endo Pharmaceuticals Inc.; Endo Health Solutions Inc.; 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.; Allergan plc f/k/a/ Actavis plc; Watson Pharmaceuticals, Inc. n/k/a Actavis, Inc.; Watson Laboratories, Inc.; Actavis LLC; and Actavis Pharma, Inc. f/k/a Watson Pharma, Inc.

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999 Third Avenue, Suite 3600
Seattle, WA 98104-4040
Telephone: (206) 332-1380

understanding of opioids" (*id.* ¶ 5), "made claims that were not supported by or were contrary to the scientific evidence" (*id.* ¶ 97), and "deceptively trivialized and failed to disclose the risks of long-term opioid use . . . through a series of misrepresentations" in order to "convince doctors and patients that opioids are safe" (*id.* ¶ 98). According to Plaintiff, this alleged conduct has "unleash[ed] a healthcare crisis" that caused Plaintiff to "expend significant resources to address the opioid crisis." (*Id.* ¶¶ 2, 202.)

Plaintiff's claims against the Provider Defendants are entirely different; indeed, none involves purported misrepresentations about opioid medications. Instead, Plaintiff alleges that the Provider Defendants unlawfully prescribed opioid medications to consumers without any legitimate medical basis, "[p]ressured" their practitioners to "crank out opioid prescriptions," and became "'well known amongst opioid addicts and other drug seekers as an easy place to get drugs.'" (*Id.* ¶¶ 8-10, 36-37, 148-160.)

The Complaint asserts five causes of action against the Manufacturer Defendants: (1) statutory public nuisance; (2) common law public nuisance; (3) violation of Washington's Consumer Protection Act, RCW Chapter 19.86; (4) violation of Washington's Criminal Profiteering Act, RCW 9A.82; and (5) common law civil conspiracy.[2] (Compl. ¶¶ 205-279.) Plaintiff asserts only the statutory and common law nuisance claims against the Provider Defendants. (*Id.* ¶¶ 205-227.)

On October 24, 2017, all properly joined and served Manufacturer Defendants removed the action to this Court based on diversity jurisdiction. (Dkt. 1.) On November 2, 2017, Plaintiff moved to remand this entire action to state court. (Dkt. 11.)

[2] The Criminal Profiteering Act and civil conspiracy claims are asserted against the following Manufacturer Defendants only: Purdue, Janssen, Cephalon, and Endo. (Compl. ¶¶ 241-279.)

BAKER & HOSTETLER LLP
999 Third Avenue, Suite 3600
Seattle, WA 98104-4040
Telephone: (206) 332-1380

ARGUMENT

I. THE COURT SHOULD DENY PLAINTIFF'S MOTION TO REMAND AS TO THE MANUFACTURER DEFENDANTS

Plaintiff's motion to remand should be denied as to the Manufacturer Defendants. Plaintiff does not dispute that the amount-in-controversy requirement is satisfied, and Plaintiff is diverse from all Manufacturer Defendants. The citizenship of the Provider Defendants should be ignored because they should be severed under Rule 21 or the procedural misjoinder doctrine.

A. The Court Has Diversity Jurisdiction Because the Non-Diverse Provider Defendants Should Be Severed Under Federal Rule of Civil Procedure 21

Numerous courts have held that a plaintiff cannot evade federal diversity jurisdiction simply by joining severable claims against non-diverse defendants. Even where the face of a complaint shows a lack of complete diversity, removal based on diversity jurisdiction is nonetheless proper if the claims against any non-diverse defendants are severable under Rule 21. Defendants are severable under Rule 21 if they are either unnecessary or dispensable under Rule 19, or if the claims against them are sufficiently distinct from claims against other defendants under Rule 20. Here, the Provider Defendants should be severed on both grounds, each of which preserves diversity jurisdiction as to the Manufacturer Defendants.

1. The Provider Defendants Are Unnecessary and Dispensable Parties Under Rule 19

It is settled law in this Circuit that Rule 21 "grant[s] . . . discretionary power [to a federal court] to perfect its diversity jurisdiction by dropping a nondiverse party provided the nondiverse party is not indispensable to the action under Rule 19." *Cuviello v. Feld Entm't, Inc.*, 304 F.R.D. 585, 593 (N.D. Cal. 2015) (quoting *Kirkland v. Legion Ins. Co.*, 343 F.3d 1135, 1142 (9th Cir. 2003)); *see also Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1523 (9th Cir. 1987) ("[I]t is now settled in this circuit that . . . we may dismiss a dispensable,

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999 Third Avenue, Suite 3600
Seattle, WA 98104-4040
Telephone: (206) 332-1380

non-diverse party in order to perfect retroactively the district court's original jurisdiction."); *Sams v. Beech Aircraft Corp.*, 625 F.2d 273, 277 (9th Cir. 1980) (same). Indeed, as the United States Supreme Court has observed, "it is well-settled that Rule 21 invests district courts with authority to allow a dispensable nondiverse party to be dropped *at any time*." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989) (emphasis added).

Plaintiff offers no meaningful response to this well-settled authority or to the fact that the Provider Defendants are neither necessary nor indispensable parties under Rule 19. In fact, Plaintiff concedes that the Provider Defendants are not necessary parties under Rule 19. (Mot. at 13 n.7 (stating that the "Manufacturing Defendants' discussion of Rule 19 is not inaccurate in this respect").) That concession both forecloses any argument that the Provider Defendants are indispensable and ends the Rule 19 analysis. *See Temple v. Synthes Corp.*, 498 U.S. 5, 8 (1990) ("[N]o inquiry under Rule 19(b) is necessary, because the threshold requirements of Rule 19(a) have not been satisfied."); *DeGidio v. Centocor, Inc.*, No. 3:09CV721, 2009 WL 1867676, at *4 (N.D. Ohio June 29, 2009) ("Because indispensable parties are a subset of necessary parties, given my conclusion that the Healthcare Defendants are not necessary parties, they cannot be indispensable either.") (alterations and internal quotation marks omitted). Having conceded that the Provider Defendants are not necessary, they are severable as a matter of law and the removal here was proper.

Severance is particularly appropriate here because of the efficiencies to be gained from participation in the upcoming MDL, as well as the prejudice that the Manufacturer Defendants would suffer absent severance. As one court explained in materially identical circumstances:

> The Court's decision to sever . . . [the non-diverse healthcare provider] will not greatly prejudice [plaintiff], but failure to do so could subject [the diverse manufacturer defendant] to considerable prejudice. [Plaintiff] will be forced to pursue two separate suits, but it will not

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999 Third Avenue, Suite 3600
Seattle, WA 98104-4040
Telephone: (206) 332-1380

> alone bear the administrative and financial burdens of pursuing its claims against [the manufacturer] in the MDL proceedings. For its part, [the manufacturer] could be exposed to numerous related suits if courts considering suits similar to this one refused to sever claims against [the manufacturer] from those against the providers that prescribed [the drug].

Cooke-Bates v. Bayer Corp., No. 3:10-CV-261, 2010 WL 3984830, at *4 (E.D. Va. Oct. 8, 2010) (internal citations omitted); *see also, e.g.*, *Sutton v. Davol, Inc.*, 251 F.R.D. 500, 505 (E.D. Cal. 2008) ("Plaintiffs' claims against the [non-diverse defendants] are severed and remanded pursuant to Rule 21 . . . so as to preserve the removing Defendants' right to removal in the remaining multidistrict action and to preserve the interests of judicial expediency and justice so that all pre-trial discovery on the products liability case can be coordinated in a single forum."); *Sullivan v. Calvert Mem'l Hosp.*, 117 F. Supp. 3d 702, 707 (D. Md. 2015) ("Severance is particularly appropriate in this case because it would allow for the transfer of [plaintiff's] claims against the [diverse manufacturer] to Multi-District Litigation."); *Mayfield v. London Women's Care, PLLC*, No. 15-19-DLB, 2015 WL 3440492, at *5 (E.D. Ky. May 28, 2015) (severing claims against dispensable non-diverse defendants and noting efficiencies arising from participation in MDL). The same considerations strongly support severance here.

In an effort to avoid severance of the Provider Defendants, Plaintiff attempts to blur the distinction between fraudulent misjoinder and severance under Rule 21. But the two are not "one and the same," as Plaintiff contends. (Mot. at 14.) As courts in this Circuit have held, "[s]everance under Rule 21 is not limited solely to curing misjoinder of parties, given that the rule explicitly provides that the court may sever 'any' claim against a party." *Seely v. Baca*, No. 3:15-cv-00118-MMD-VPC, 2016 WL 829915, at *1 & n.2 (D. Nev. Mar. 1, 2016) (collecting cases); *accord Joseph v. Baxter Int'l Inc.*, 614 F. Supp. 2d 868, 874 (N.D. Ohio 2009) ("[C]ourts agree that [Rule 21] may apply even in the absence of misjoinder.") (citation omitted); *Sullivan*,

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999 Third Avenue, Suite 3600
Seattle, WA 98104-4040
Telephone: (206) 332-1380

117 F. Supp. 3d at 705 ("The general consensus is that parties may be severed under Rule 21 even when they have been properly joined, so long as the party is not necessary and indispensable under Rule 19."). Indeed, courts routinely sever dispensable non-diverse defendants under Rule 21 (and deny remand as to diverse defendants) regardless of whether the non-diverse defendants are fraudulently misjoined. As one court explained, "[b]ecause Rule 21 applies to properly joined parties . . . [the court's] conclusion regarding the dispensability of the [non-diverse defendants] is determinative," and there is "no need to opine on . . . whether the [non-diverse defendants] were fraudulently misjoined to determine whether diversity jurisdiction exists." *Baxter*, 614 F. Supp. 2d at 874. Numerous other decisions are in accord.[3]

Equally unavailing is Plaintiff's argument that Rule 21 severance for dispensable parties "is not available at the time of removal" and is appropriate "only long after assuming jurisdiction." (Mot. at 15 (emphasis omitted).) In fact, courts frequently deny motions to remand—before assuming jurisdiction—on the ground that the non-diverse defendants are dispensable parties subject to severance. *E.g.*, *Baxter*, 614 F. Supp. 2d at 872-74; *Sullivan*, 117 F. Supp. 3d at 707 & n.4; *Mayfield*, 2015 WL 3440492, at *6; *McElroy v. Hamilton Cty. Bd. of Educ.*, No. 1:12-cv-297, 2012 WL 12871469, at *3 (E.D. Tenn. Dec. 20, 2012) (declining to remand entire case where "the Board is not a necessary party under Rule 19" and the court "drop[ped] it from this action [to] retain its federal diversity jurisdiction"); *DeGidio*, 2009 WL 1867676, at *2.

[3] *E.g.*, *Sullivan*, 117 F. Supp. 3d at 707 n.4 ("Since the Court has concluded that it has discretion to sever the claims against the [non-diverse healthcare provider defendants] because they are not necessary parties to the claims against the [diverse manufacturer], it need not decide . . . whether the [non-diverse healthcare provider defendants] have been fraudulently misjoined."); *Mayfield*, 2015 WL 3440492, at *6 ("Having concluded that [the non-diverse defendants] should be severed from this action pursuant to Rule 21, the Court need not address the doctrine of fraudulent misjoinder."); *DeGidio*, 2009 WL 1867676, at *2 ("I sever . . . the nondiverse, dispensable . . . [d]efendants to perfect diversity jurisdiction" and "need not decide whether diversity jurisdiction exists under the doctrine[] of fraudulent misjoinder.").

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999 Third Avenue, Suite 3600
Seattle, WA 98104-4040
Telephone: (206) 332-1380

In short, Plaintiff's concession that the Provider Defendants are unnecessary and thus dispensable parties under Rule 19 is alone sufficient to sever the Provider Defendants under Rule 21 and retain diversity jurisdiction over the diverse Manufacturer Defendants. And severance is particularly appropriate here based on the substantial efficiencies to be gained from participation in an MDL. *See Cooke-Bates*, 2010 WL 3984830, at *4; *Sutton*, 251 F.R.D. at 505; *Sullivan*, 117 F. Supp. 3d at 707; *Mayfield*, 2015 WL 3440492, at *5.

2. The Provider Defendants Are Also Misjoined Under Rule 20

The claims against the Provider Defendants are also misjoined under Rule 20, which provides a distinct basis for severance. Rule 21 permits severance of claims against non-diverse defendants that do not "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences" as the claims against other defendants. Fed. R. Civ. P. 20(a)(1)(A); *see Loeffelbein v. Milberg Weiss Bershad Hynes & Lerach, LLP*, No. Civ.A. 02-2435-CM, 2003 WL 21313957, at *5 (D. Kan. May 23, 2003) ("Rule 21 is a mechanism for correcting . . . the misjoinder . . . of parties or claims" which "arises when the claims and parties fail to satisfy any of the conditions of permissive joinder under Rule 20(a)."") (citation omitted). Courts in this Circuit and other circuits have repeatedly denied remand as to diverse defendants and severed claims against non-diverse defendants where the claims against the non-diverse defendants were separate and distinct, and arose from different transactions or occurrences. *See Sutton*, 251 F.R.D. at 502-05; *Greene v. Wyeth*, 344 F. Supp. 2d 674, 683 (D. Nev. 2004).[4]

[4] *See also Loeffelbein*, 2003 WL 21313957, at *6 (severing non-diverse defendant and denying remand as to diverse defendants; "[w]hile plaintiffs do not distinguish between each of the defendants in the individual counts of the petition, the counts clearly arise from two different sets of facts"); *DirecTV, Inc. v. Beecher*, 296 F. Supp. 2d 937, 945 (S.D. Ind. 2003) (severing misjoined claims under Rule 21 where plaintiff "allege[d] that many individuals have wronged it in the same way, but in separate transactions or occurrences"); *Randleel v. Pizza Hut of Am., Inc.*, 182 F.R.D. 542, 543 (N.D. Ill. 1998) (severing misjoined claims where "the factual scenarios underlying each incident are different, the times are different, and the people involved are different") (footnote omitted).

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Seattle, WA 98104-4040
Telephone: (206) 332-1380

Sutton, 251 F.R.D. 500, is particularly instructive. There, two California citizens filed a personal injury action in state court arising from the implant of a medical device. *Id.* at 502. Plaintiffs asserted products liability claims against the out-of-state device manufacturer, as well as medical malpractice claims against the doctor who performed the procedure and the hospital, both California citizens. *Id*. The manufacturer removed the action to federal court based on diversity jurisdiction, arguing that the non-diverse doctor and hospital were not properly joined. *Id*. The court denied plaintiffs' motion to remand the entire case, explaining that "Plaintiffs' claims based on strict products liability against the [manufacturer] are separate from Plaintiffs' claims of medical malpractice against the [doctor and hospital] in implanting a previously recalled [medical device] in Plaintiff." *Id.* at 505. Unlike the claims against the manufacturer, the claims against the doctor and hospital were "not based on the allegedly negligent testing and manufacture of the" device. *Id.* Because of these differences, the court "severed and remanded [the claims against the doctor and hospital] pursuant to Rule 21 . . . so as to preserve the [manufacturer's] right to removal" based on diversity jurisdiction. *Id.*

Greene, 344 F. Supp. 2d at 674, is in accord. There, users of a diet drug filed a state court action against the out-of-state manufacturer and two non-diverse defendants—a physician who prescribed the drug and a sales representative. *Id.* at 677, 679. The manufacturer removed the case to federal court based on diversity jurisdiction, contending that the two non-diverse defendants were improperly joined and subject to severance. *Id.* at 679. As in *Sutton*, the court denied plaintiffs' motion to remand the entire case. *Id.* at 685. The court reasoned that, although the "claims against the [manufacturer] may regard the 'same transaction or occurrence'—i.e., the manufacture and marketing of [the drug]—this characterization of the complaint would not apply equally to the physician and sales representative." *Id*. at 683. "[T]he only common attribute

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999 Third Avenue, Suite 3600
Seattle, WA 98104-4040
Telephone: (206) 332-1380

among the Plaintiffs' claims against the [manufacturer] and those against the non-diverse Defendants is that each Plaintiff ultimately ingested [the drug] due to the alleged actions of one or more of these Defendants. Individual circumstances, actions, and omissions were involved in each Plaintiff's choice to ingest the medication, as well as each Defendant's role in, and responsibility for, that decision." *Id*. at 683-84. The court, "mindful of its authority under . . . Rule 21[] to add or drop parties," held that the manufacturer's "right of removal ha[d] been frustrated by Plaintiffs' improper joinder," warranting severance of the non-diverse defendants. *Id*. at 685.

Here, too, Plaintiff does not meaningfully respond to Defendants' showing that the Provider Defendants are misjoined under Rule 20. Instead, Plaintiff relies on its same flawed theory (discussed above) that Rule 21 severance and fraudulent misjoinder are "one and the same." (Mot. at 14.) Plaintiff is wrong. This Court can and should sever the Provider Defendants as misjoined under Rule 20 and deny remand as to the Manufacturer Defendants, regardless of the fraudulent misjoinder doctrine—just like the courts in *Sutton* and *Greene* did. As in *Sutton* and *Greene*, Plaintiff's claims here against the Manufacturer Defendants and Provider Defendants rely on separate and distinct factual allegations. Specifically, Plaintiff alleges that the Manufacturer Defendants misrepresented the benefits and risks of FDA-approved opioid medications. (Compl. ¶¶ 1-7.) By contrast, Plaintiff alleges that the Provider Defendants unlawfully prescribed opioid medications to consumers without any legitimate medical basis. (*Id.* ¶¶ 8-10, 36-37, 148-160.) There is no material overlap between the factual allegations against the Manufacturer Defendants and the factual allegations against the Provider Defendants. Plaintiff concedes as much by not asserting a civil conspiracy claim against any Provider Defendant as it does against certain Manufacturer Defendants, who are alleged to have conspired with each other and others to "deceiv[e] health care providers, patients and the general public." (*Id.* ¶¶ 272-279.) Because the

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999 Third Avenue, Suite 3600
Seattle, WA 98104-4040
Telephone: (206) 332-1380

claims do not "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences," the claims against the Provider Defendants are misjoined and severable. Fed. R. Civ. P. 20(a)(1)(A); *see Sutton*, 251 F.R.D. at 502-05; *Greene*, 344 F. Supp. 2d at 683-85.

B. In the Alternative, the Court Can Uphold Removal Under the Fraudulent Misjoinder Doctrine

As an alternative to severance under Rule 21, the citizenship of the Provider Defendants can be ignored for purposes of diversity jurisdiction under the fraudulent misjoinder doctrine. Fraudulent misjoinder, also called procedural misjoinder, "refers to the joining of claims into one suit in order to defeat diversity jurisdiction where in reality there is no sufficient factual nexus among the claims to satisfy the permissive joinder standard." *Reed v. Am. Med. Sec. Grp., Inc.*, 324 F. Supp. 2d 798, 803 n.8 (S.D. Miss. 2004) (citation and internal quotation marks omitted); *see also Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996) ("Misjoinder may be just as fraudulent as the joinder of a resident defendant against whom a plaintiff has no possibility of a cause of action.") (footnote omitted), *abrogated on another ground in Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000). Under this doctrine, the Court may find that, based on the misjoinder of the Provider Defendants, the parties are completely diverse and the case is removable *ab initio*.

While the Ninth Circuit has not yet adopted fraudulent misjoinder, district courts in this Circuit have applied the doctrine. *E.g.*, *Sutton*, 251 F.R.D. at 504-05 (finding misjoinder and describing defendants' "legal and factual position" for applying the fraudulent misjoinder doctrine as "compelling"); *Greene*, 344 F. Supp. 2d at 684-85 ("Although the Ninth Circuit has not yet published an opinion addressing the fraudulent misjoinder rule, this Court agrees with the Fifth and Eleventh Circuits that the rule is a logical extension of the established precedent that a plaintiff may not fraudulently join a defendant in order to defeat diversity jurisdiction in federal court.")

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999 Third Avenue, Suite 3600
Seattle, WA 98104-4040
Telephone: (206) 332-1380

(footnotes omitted); *Ellis v. Amerigas Propane, Inc.*, No. 1:16-CV-1184 AWI SKO, 2016 WL 8673036, at *2 (E.D. Cal. Nov. 18, 2016) ("[F]raudulent misjoinder has been explicitly applied twice by district courts within the jurisdiction of the Ninth Circuit.") (citing *Sutton* and *Greene*).[5] As explained above, Plaintiff's claims against the Manufacturer Defendants are factually distinct from, and therefore are misjoined with, the claims against the Provider Defendants.

Notably, in opioid-related cases like this one, federal district courts recently relied on the fraudulent misjoinder doctrine to ignore the citizenship of non-diverse defendants and deny remand based on diversity jurisdiction. *See Cty. Comm'n of McDowell Cty. v. McKesson Corp.*, Civ. A. No. 1:17-00946, 2017 WL 2843614, at *5 (S.D. W. Va. July 3, 2017); *City of Huntington v. AmerisourceBergen Drug Corp.*, Civ. A. No. 3:17-01362, 2017 WL 3317300, at *4-5 (S.D. W. Va. Aug. 3, 2017). In *McKesson Corp.*, the plaintiff filed suit in state court against diverse distributors of opioid products for allegedly "flood[ing] McDowell County with opioids well beyond what was necessary to address pain and other [legitimate] reasons," and also against a non-diverse doctor for allegedly "provid[ing] written opioid prescriptions for patients, knowing that the drugs were likely to be abused, diverted or misused." 2017 WL 2843614, at *1. The court found that these claims were fraudulently misjoined and accordingly denied remand because "plaintiff's claims against the [distributors] and the claims against [the doctor]" lacked "common questions of law or fact" and were "separate and distinct." *Id.* at *5. In *AmerisourceBergen Drug Corp.*, the court reached the same conclusion for substantially the same reasons. 2017 WL 3317300, at *5 (claims against diverse and non-diverse defendants were "separate and distinct"). If the Court does not sever the Provider Defendants under Rule 21, it should deny remand under the fraudulent misjoinder doctrine.

[5] Other courts in this Circuit have declined to apply the doctrine. *See Sutton*, 251 F.R.D. at 504-05 (describing the "split").

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999 Third Avenue, Suite 3600
Seattle, WA 98104-4040
Telephone: (206) 332-1380

Plaintiff criticizes Defendants' Notice of Removal for "neglect[ing] to mention" a remand order in *Staubus v. Purdue Pharma, L.P.*, No. 2:17-CV-122-TAV-CLC, 2017 WL 4767688 (E.D. Tenn. Oct. 20, 2017) (Mot. at 10), but that case is inapposite. In *Staubus*, the court held that the notice of removal was "procedurally defective" because "[s]everal [properly joined and served] defendants did not consent [to removal]," rendering remand "appropriate." 2017 WL 4767688, at *6. The court found that consent to removal was required from the non-diverse, non-consenting defendants because their joinder was proper under a Tennessee state statute. *Id.* at *5-6. Unlike in *Staubus*, there is no dispute here that all properly joined and served defendants consented to removal. And, unlike in *Staubus*, Plaintiff has failed to identify any provision of Washington state law that permits joinder of the Provider Defendants. In fact, Plaintiff "assume[s], *arguendo*, that federal joinder rules control." (Mot. at 11 n.6.) For both reasons, *Staubus* is distinguishable.[6]

Plaintiff also argues that the Provider Defendants are somehow properly joined because anyone who "contributes to the creation of a nuisance is liable." (Mot. at 11 (internal citation and emphasis omitted).) But Plaintiff ignores that its nuisance claims against the Manufacturer Defendants and Provider Defendants—the only claims asserted against both sets of defendants—rest on materially distinct factual allegations, as explained above. Thus, while Plaintiff does not "distinguish between each of the defendants" in its two nuisance counts, the Provider Defendants are not properly joined since "the counts clearly arise from two different sets of facts." *Loeffelbein*, 2003 WL 21313957, at *6 (severing misjoined non-diverse defendants); *see Nelson v. Aim Advisors, Inc.*, No. 01-CV-0282-MJR, 2002 WL 442189, at *3 (S.D. Ill. Mar. 8, 2002) ("Although Plaintiffs' claims against all Defendants are pled under the same legal theory, it

[6] *Staubus* is also distinguishable because the court in that case declined to consider whether the non-diverse defendants were "dispensable and whether they should be dropped from the litigation [under Rule 21]." *Id.* at *7. As explained above, the Provider Defendants can and should be severed under Rule 21.

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999 Third Avenue, Suite 3600
Seattle, WA 98104-4040
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is only in this abstract sense that Plaintiffs' claims share anything in common . . . [and] does not mean that there are common issues of law and fact sufficient to satisfy Rule 20(a).").[7]

Finally, that some Manufacturer Defendants supposedly "knew about" the Provider Defendants (Mot. at 12), and that two Manufacturer Defendants (Janssen and Purdue) allegedly "purchased multiple meals for" the Provider Defendants (Compl. ¶ 171), changes nothing. These allegations, even if true, have no bearing on the nuisance claims and do not come remotely close to establishing proper joinder. *See, e.g.*, *Caton v. Barry*, 500 F. Supp. 45, 54 (D.D.C. 1980) ("Although the claims . . . all relate generally to the operation of the Emergency Assistance Program, they do not arise out of the same transaction or occurrence as required for joinder by Rule 20(a). Rather, the claims of the Parkside residents involve discrete questions of fact . . . only tangentially related to the instant proceeding.") (internal citations omitted).

II. THE COURT SHOULD DENY PLAINTIFF'S REQUEST FOR "EXPEDITED TREATMENT" OF THE MOTION TO REMAND

As set forth more fully in the Manufacturer Defendants' motion to stay (Dkt. 22), this lawsuit is one of more than 120 federal actions pending nationwide in which governmental entities and/or others assert claims against pharmaceutical manufacturers, including the Manufacturer Defendants, relating to the marketing of FDA-approved prescription opioid medications. Plaintiffs in dozens of these opioid-related actions, many of which make nearly identical claims against the same Manufacturer Defendants in this case, have moved to transfer this case and others like it to an MDL court for coordinated pretrial proceedings.

[7] For the same reason, Plaintiff's assertion that it would be "unfair" to find misjoinder because that might permit the Manufacturer Defendants to "point to the empty chair" of the Provider Defendants is unfounded. (Mot. at 13 (internal citation omitted).) Indeed, the Provider Defendants' alleged criminal prescribing of opioid products without any legitimate medical basis bears no material relation to the Manufacturer Defendants' alleged misrepresentations concerning opioid medications.

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999 Third Avenue, Suite 3600
Seattle, WA 98104-4040
Telephone: (206) 332-1380

Critically, the "general rule is for federal courts to defer ruling on pending motions to remand in MDL litigation until after the [JPML] has transferred the case to the MDL [court]." *North v. Merck & Co.*, No. 05-CV-6475L, 2005 WL 2921638, at *1 (W.D.N.Y. Nov. 4, 2005) (citation and internal quotation marks omitted). In an opioid-related case similar to this one, the district court *sua sponte* stayed proceedings where, as here, a motion to remand is also pending. *See City of Lorain v. Purdue Pharma, L.P.*, Case No. 1:17-cv-01639, Dkt. 66 (N.D. Ohio Oct. 27, 2017). Likewise, here, Plaintiff's remand motion—which raises issues similar to those raised in pending remand motions filed in other cases subject to the MDL motion—should be decided by the MDL court. This approach will conserve the resources of the Court and the parties, and will ensure consistent resolution of issues raised in multiple cases.

Ignoring the "general rule," as well as the efficiencies that would arise from having the MDL court decide the remand motion here with other similar remand motions in other cases, Plaintiff seeks expedited treatment of its remand motion by this Court. Plaintiff has noted its motion for November 24, 2017 (the day after Thanksgiving) and asks the Court to rule on the motion before the MDL panel (which meets on November 30) issues a decision on the pending MDL motion. (Mot. at 16.) Plaintiff claims that absent an expedited ruling on its remand motion, it will be prejudiced by "delay." (*Id.*)

Plaintiff's cries of "delay" ring hollow because Plaintiff's Complaint appears to have been largely cut-and-pasted from complaints filed in other opioid-related cases dating back as early as 2014. Indeed, the very first line of Plaintiff's Complaint is virtually identical to the opening line from another complaint filed by the same private lawyers over three years ago (in May of 2014) in *People of the State of California v. Purdue Pharma L.P. et al.*, No. 30-2014-00725287-

BAKER & HOSTETLER LLP
999 Third Avenue, Suite 3600
Seattle, WA 98104-4040
Telephone: (206) 332-1380

CU-BT-CXC (attached hereto as **Exhibit 1**).[8] Other allegations similarly appear to have been copied virtually word-for-word from the *California* complaint and other complaints filed years ago.[9] The thrust of Plaintiff's claims is substantially similar to claims asserted against manufacturer defendants in dozens of cases filed before this one. In any event, any delay would be minimal, as the Judicial Panel on Multidistrict Litigation is hearing the MDL motion just ten days from today, with a decision expected shortly thereafter.

Plaintiff cites the Manual for Complex Litigation as support for its claim that "precisely because of [MDL] delays . . . remand motions are 'particularly appropriate for resolution before the Panel acts.'" (Mot. at 17 (emphasis omitted).) Plaintiff mischaracterizes the Manual, which actually states that remand motions raising "issues *unique* to the particular case, *may be* particularly appropriate for resolution before the Panel acts." Manual for Complex Litigation § 20.131 (4th ed. 2017) (emphasis added). The Manual goes on to explain that "it may be advisable to defer certain matters until the Panel has the opportunity to rule on transfer," and that "the pendency of motions raising questions common to related actions can itself be an additional justification for transfer." *Id.* As noted above, several other federal actions subject to the MDL motion present removal-related issues substantially similar to those presented here—*i.e.*, whether diversity jurisdiction exists because claims against non-diverse defendants are severable under Rule 21 from, or are fraudulently misjoined with, claims against diverse manufacturer

[8] *Compare* **Ex. 1**, ¶ 1 ("A pharmaceutical manufacturer should never place its desire for profits above the health and well-being of its customers."), *with* Compl. ¶ 1 ("Drug companies should never place their desire for profits above the health and well-being of their customers.").

[9] *Compare* Compl. ¶ 16 ("Defendants' deceptive marketing campaign deprived patients and their doctors of the ability to make informed medical decisions, and, instead, caused important, sometimes life-or-death decisions to be made based not on science, but on hype."), *with* **Ex. 1** ¶ 17 (making virtually identical allegation); *compare* Compl. ¶ 13 ("opioid abuse also has not displaced heroin, but rather triggered a resurgence in its use, imposing additional burdens on Seattle agencies that address heroin use and addiction"), *with* **Ex. 2** ¶ 10 (Complaint filed June 2, 2014 in *City of Chicago v. Purdue Pharma L.P. et al.*) (making virtually identical allegation); *compare* Compl. ¶ 39 ("generally accepted standards of medical practice dictated that opioids should only be used short-term for acute pain, pain relating to recovery from surgery, or for cancer or palliative (end-of-life) care"), *with* **Ex. 3** ¶ 78 (Complaint filed Aug. 31, 2016 in *County of Suffolk v. Purdue Pharma L.P. et al.*) (making virtually identical allegation).

BAKER & HOSTETLER LLP
999 Third Avenue, Suite 3600
Seattle, WA 98104-4040
Telephone: (206) 332-1380

defendants.[10] In two of those cases, the non-diverse defendants, like the Provider Defendants here, allegedly engaged in criminal drug dealing activity by distributing opioid medications to consumers without any legitimate medical purpose.[11] Additional lawsuits raising these same jurisdictional issues continue to be filed across the country. These related jurisdictional issues should be decided by the MDL court to conserve judicial resources and to help ensure, where appropriate, consistent treatment of similar issues.[12]

III. THE COURT SHOULD DENY PLAINTIFF'S REQUEST FOR ATTORNEY'S FEES

Plaintiff's request for attorney's fees should be denied. "[A]bsent unusual circumstances, attorney's fees should not be awarded when the removing party has an objectively reasonable basis for removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 136 (2005). As shown above, multiple courts in this Circuit and other circuits have denied remand as to diverse manufacturer defendants in circumstances like those here. Further, while the Ninth Circuit has not addressed the fraudulent misjoinder doctrine, district courts in the Ninth Circuit have adopted the doctrine. *See Ramirez v. Our Lady of Lourdes Hosp. at Pasco*, No. 2:13-cv-01108-RSM, 2013 WL 5373213, at

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[10] *See City of Dayton v. Purdue Pharma L.P. et al.*, No. 3:17-cv-00229-TMR (S.D. Ohio) (Dkt. 1 (Notice of Removal), 10 (Remand Motion), & 21 (Remand Opposition)); *City of Lorain v. Purdue Pharma L.P. et al.*, No. 1:17-cv-01639-DAP (N.D. Ohio) (Dkt. 1 (Notice of Removal), 32-1 (Remand Motion), & 34 (Remand Opposition)); *City of Parma v. Purdue Pharma L.P. et al.*, No. 1:17-cv-01872-DAP (N.D. Ohio) (Dkt. 1 (Notice of Removal), 37 (Remand Motion), & 42 (Remand Opposition)); *County of San Joaquin et al. v. Purdue Pharma L.P. et al.*, No. 2:17-cv-01485-MCE-GGH (E.D. Cal.) (Dkt. 1 (Notice of Removal), 21-1 (Remand Motion), & 30 (Remand Opposition)); *Scott County v. Purdue Pharma L.P. et al.*, No. 4:17-cv-00193-RLY-DML (S.D. Ind.) (Dkt. 1 (Notice of Removal) & 17 (Remand Motion)); *County of Mora v. Purdue Pharma L.P. et al.*, No. 1:17-cv-01044-JB-JHR (D.N.M.) (Dkt. 1 (Notice of Removal), 20 (Remand Motion), & 73 (Remand Opposition)); *Richland Cty. Children's Servs. v. Purdue Pharma L.P.*, No. 1:17-cv-02185 (N.D. Ohio.) (Dkt. 1 (Notice of Removal) & 33-1 (Remand Motion)).

[11] *See Scott County v. Purdue Pharma L.P. et al.*, No. 4:17-cv-00193-RLY-DML (S.D. Ind.) (Dkt. 1 (Notice of Removal) & 17 (Remand Motion)); *County of Mora v. Purdue Pharma L.P. et al.*, No. 1:17-cv-01044-JB-JHR (D.N.M.) (Dkt. 1 (Notice of Removal), 20 (Remand Motion), & 73 (Remand Opposition)).

[12] In opposing the Manufacturer Defendants' motion to stay, Plaintiff claims that there is no other case pending in the Ninth Circuit, and subject to the MDL motion, where the jurisdictional issue of fraudulent misjoinder is being litigated. (Dkt. 23 at 10.) Plaintiff is wrong. That issue is raised in the pending remand motion in *County of San Joaquin et al. v. Purdue Pharma L.P. et al.*, No. 2:17-cv-01485-MCE-GGH (E.D. Cal.) (Dkt. 1 (Notice of Removal), 21-1 (Remand Motion), & 30 (Remand Opposition)).

BAKER & HOSTETLER LLP
999 Third Avenue, Suite 3600
Seattle, WA 98104-4040
Telephone: (206) 332-1380

*4 (W.D. Wash. Sept. 25, 2013) ("Because other district courts in the Ninth Circuit have issued a stay of proceedings [pending transfer to an MDL] or severed [misjoined] parties instead of granting a motion to remand in similar cases, [defendant] did not lack an objectively reasonable basis for seeking removal of this action[,] [and] Plaintiffs' fee request shall be denied.") (citations omitted). Even in *Staubus*, a case on which Plaintiff relies, the district court denied fees. 2017 WL 4767688, at *8. The arguments supporting removal of this case are not only "objectively reasonable," they establish the existence of diversity jurisdiction in this Court.

CONCLUSION

For the foregoing reasons, the Court should either grant Defendants' pending motion to stay this case pending resolution of the MDL motion (Dkt. 22) or deny Plaintiff's motion to remand as to the Manufacturer Defendants, and sever and remand the claims against the Provider Defendants.

BAKER & HOSTETLER LLP
999 Third Avenue, Suite 3600
Seattle, WA 98104-4040
Telephone: (206) 332-1380

Dated: November 20, 2017.

By: *s/ Curt Roy Hineline*

Curt Roy Hineline, WSBA No. 16317
BAKER & HOSTETLER LLP
999 Third Avenue, Suite 3600
Seattle, WA 98104-4040
Telephone: (206) 332-1101
Facsimile: (206) 624-7317
chineline@bakerlaw.com

John Lombardo*
Sean Morris*
S. Albert Wang*
Tiffany Ikeda*
ARNOLD & PORTER KAYE SCHOLER LLP
777 S. Figueroa Street, 44th Floor
Los Angeles, CA 90017
Telephone: (213) 243-4000
Facsimile: (213) 243-4199
John.Lombardo@apks.com
Sean.Morris@apks.com
S.Albert.Wang.@apks.com
Tiffany.Ikeda@apks.com

Attorneys for Defendants
ENDO HEALTH SOLUTIONS INC. and
ENDO PHARMACEUTICALS INC.
* *denotes national counsel who will seek pro hac vice admission*

Dated: November 20, 2017.

By: *s/ Thomas D. Adams*
s/ Ronald J. Friedman
s/ Andrew W. Durland

Thomas D. Adams, WSBA No. 18470
Ronald J. Friedman, WSBA No. 41629
Andrew W. Durland, WSBA No. 49747
KARR TUTTLE CAMPBELL
701 Fifth Avenue, Suite 3300
Seattle, WA 98104
Telephone: (206) 223-1313
Facsimile: (206) 682-7100
Email: tadams@karrtuttle.com
Email: rfriedman@karrtuttle.com
Email: adurland@karrtuttle.com

Attorneys for Defendants PURDUE PHARMA L.P.; PURDUE PHARMA INC.; and THE PURDUE FREDERICK COMPANY INC.

Dated: November 20, 2017.

By: *s/ Angelo J. Calfo*

Angelo J. Calfo, WSBA No. 27079
CALFO EAKES & OSTROVSKY PLLC
1301 Second Avenue, Suite 2800
Seattle, WA 98101-3808
Telephone: (206) 407-2200
Email: angelic@calfoeakes.com

Attorneys for Defendants JOHNSON & JOHNSON; JANSSEN PHARMACEUTICALS INC.; ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC. n/k/a JANSSEN PHARMACEUTICALS, INC.; and JANSSEN PHARMACEUTICA, INC. n/k/a JANSSEN PHARMACEUTICALS, INC.

Dated: November 20, 2017.

By: *s/ Steven A. Reed**

Steven A. Reed*
MORGAN, LEWIS & BOCKIUS LLP
1701 Market St.
Philadelphia, PA 19103-2921
Telephone: (215) 963-5603
Facsimile: (215) 963-5001
steven.reed@morganlewis.com
** denotes national counsel who will seek pro hac vice admission*

Tinos Diamantatos*
MORGAN, LEWIS & BOCKIUS LLP
77 West Wacker Drive
Chicago, IL 60601-5094
Telephone: (312) 324-1000
Facsimile: (312) 324-1001
tinos.diamantatos@morganlewis.com
** denotes national counsel who will seek pro hac vice admission*

Attorneys for Defendants TEVA PHARMACEUTICALS USA, INC.; CEPHALON, INC.; WATSON LABORATORIES, INC.; ACTAVIS LLC; and ACTAVIS PHARMA, INC. f/k/a WATSON PHARMA, INC.

Dated: November 20, 2017

By: *s/ Michael Fandel*
Michael Fandel, WSBA #16281
MILLER NASH GRAHAM & DUNN LLP
Pier 70
2801 Alaskan Way, Ste. 300
Seattle, WA 98121
Telephone: 206-777-7472
Facsimile: 206-340-9599
Email: Michael.Fandel@millernash.com

Jennifer G. Levy, P.C.
KIRKLAND & ELLIS LLP
655 15th St. NW
Washington, D.C. 20005
Telephone: 202-879-5000
Facsimile: 202-879-5200
Email: jennifer.levy@kirkland.com

Donna Welch, P.C.
Martin L. Roth
Timothy W. Knapp
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
Telephone: 312-862-2000
Facsimile: 312-862-2200
Email: donna.welch@kirkland.com
Email: rothm@kirkland.com
Email: tknapp@kirkland.com

Attorneys for Defendants ALLERGAN PLC f/k/a ACTAVIS PLC; ACTAVIS, INC., f/k/a WATSON PHARMACEUTICALS, INC. n/k/a ALLERGAN FINANCE, LLC

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2017, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties of record.

s/ Serita Smith
Serita Smith
Assistant to Curt Roy Hineline

BAKER & HOSTETLER LLP
999 Third Avenue, Suite 3600
Seattle, WA 98104-4040
Telephone: (206) 332-1380