No. 17-10812

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In re: DEPUY ORTHOPAEDICS, INC; DEPUY PRODUCTS, INC; DEPUY SYNTHES, INC.; JOHNSON & JOHNSON; JOHNSON & JOHNSON SERVICES, INC.; JOHNSON & JOHNSON INTERNATIONAL

RESPONSE TO PETITION FOR WRIT OF MANDAMUS

On Petition for Writ of Mandamus to the United States District Court
for the Northern District of Texas, MDL No. 2244
Honorable Ed Kinkeade, District Judge

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CERTIFICATE OF INTERESTED PERSONS

In re: DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig., No. 17-10812.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Ramon Alicea and Carole Alicea; Uriel Barzel and Aviva Barzel; Denise Buonaiuto and Frank Buonaiuto; Claudia Heroth and Alan Heroth; Karen Kirschner; Hazel Miura; Eugene Stevens, Jr. and Yolanda Stevens; Michael A. Stevens and Audra L. Stevens, Plaintiffs-Respondents.

2. DePuy Orthopaedics, Inc.; DePuy Products, Inc.; DePuy Synthes, Inc.; Johnson & Johnson International; Johnson & Johnson Services, Inc.; Johnson & Johnson, Defendants-Petitioners.

3. Kenneth W. Starr; The Lanier Law Firm, PC (Arthur R. Miller, W. Mark Lanier, Kevin Parker, M. Michelle Carreras); Fisher, Boyd, Johnson & Huguenard, LLP (Wayne Fisher, Justin Presnal); Neblett, Beard & Arsenault (Richard J. Arsenault, Jennifer M. Hoekstra); Simmons Hanly Conroy (Jayne Conroy, Andrea Bierstein); Wagstaff & Cartmell (Thomas J. Preuss); Martin, Harding & Mazzotti, L.L.P. (Rosemarie Riddel Bogdan); Anapol Weiss (Thomas R. Anapol); Burg Simpson Eldredge Hersh & Jardine, P.C. (Seth Katz), Counsel for Plaintiffs-Respondents.

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Respectfully submitted:

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STATEMENT REGARDING ORAL ARGUMENT

Respondents respectfully submit that, for the reasons that follow, the petition is lacking in merit and, accordingly, that oral argument is unlikely to be helpful to the Court in resolving the question presented.

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(1) Whether the District Court clearly and indisputably erred in exercising personal jurisdiction over petitioners in respondents' cases.

(2) Whether the District Court's jurisdictional determination can be addressed adequately on appeal.

PRELIMINARY STATEMENT

The multidistrict litigation from which the petition arises involves the product-liability claims of over 9,000 plaintiffs related to a defective hip implant manufactured, designed, marketed, and sold by petitioners.[1] This MDL has been pending before Judge Kinkeade over six years. Early in the proceedings, petitioners agreed to a bellwether trial process and explicitly (and repeatedly) represented that they waived their *Lexecon*[2] objections to **any** cases in the MDL being tried in the Northern District of Texas (the "Forum"). But in a clear case of buyer's remorse (and blatant forum shopping), petitioners now claim they never agreed to this broad waiver. Petitioners should not be permitted to rewrite history simply because they are dissatisfied with the outcomes of the last two bellwether trials. Nor have they demonstrated they are entitled to mandamus relief. The petition should be denied.

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[1] *In re: DePuy Orthopaedics, Inc., Pinnacle Hip Implant Products Liab. Litig.*, N.D. Tex. Case No. 3:11-md-02244-K ("MDL Dkt.").

[2] *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

BACKGROUND

In contrast to petitioners' cherry-picked and misleading factual statement, Judge Kinkeade set forth a complete and accurate recitation of the procedural history of this MDL in his order denying petitioners' motion to vacate the upcoming bellwether trial. Petitioners' App. 2-10.[3] Notwithstanding, respondents believe it helpful to provide a brief chronology of the relevant events:

- In 2011, petitioners requested and received the Forum as the venue for this MDL.[4]
- In June 2011, the parties agreed that plaintiffs could file their cases directly in the MDL Forum. This agreement benefited both sides. It "eliminate[d] delays" and "promote[d] judicial efficiency[.]" MDL Dkt. No. 8, pp.1, 5; MDL Dkt. No. 8-1, ¶16. The agreement was memorialized in Case Management Order #1. MDL Dkt. No. 20, ¶13.
- In August 2012, Judge Kinkeade issued Case Management Order #8, which "govern[s] pretrial matters in this MDL proceeding." MDL Dkt. No. 190. He ordered the parties to submit "a stipulated protocol for selection and conducting of bellwether trials in this MDL proceeding[.]" *Id.* at ¶5. He also

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[3] All exhibits referenced herein are attached either to the Appendix filed with the petition ("Petitioners' App.") or the Appendix filed contemporaneously herewith ("Respondents' App.").

[4] *In re: DePuy Orthopaedics, Inc., Pinnacle Hip Implant Products Liab. Litig.,* 787 F. Supp. 2d 1358, 1359 (U.S. Jud. Pan. Mult. Lit. 2011).

set forth the pre-trial deadlines for the first bellwether trial. *Id.* at ¶¶7-17. In consultation with the Special Master and Judge Kinkeade, petitioners and the Plaintiffs' Executive Committee ("PEC") agreed to a bellwether trial process in which Judge Kinkeade would try representative cases in the MDL Forum. MDL Dkt. No. 247; Petitioners' App. 3-4.

- On January 16, 2013, the Special Master filed, in the MDL docket, his Report Relating to Bellwether Trial Selection Protocol ("1/16/13 Report") which "[r]elate[d] to **all** [c]ases" in the MDL and set forth the parties' agreement "to selection of bellwether **trials**." MDL Dkt. No. 247, p.1 (emphasis added). In this report, he confirmed petitioners' lead counsel agreed "they w[ould] not raise a venue objection (i.e., a Lexecon objection) to **any cases in the MDL proceeding** being tried in the [Forum]." *Id.* at ¶1 (emphasis added). Significantly, the Special Master sent petitioners' counsel a draft of this report before it was filed, asking him to confirm it "correctly communicat[ed] areas of agreement regarding bellwether trials[.]" Respondents' App. 5, 9. Petitioners did not object to, or even comment on, the proposed language related to their *Lexecon* waiver. Respondents' App. 13. Nor did they object to the 1/16/13 Report after it was filed.

- On September 3, 2013, the parties filed their proposals for selecting and trying bellwether cases. Petitioners' App. 5; MDL Dkt. Nos. 338-339. In their

proposal, petitioners acknowledged the 1/16/13 Report "outlined a process that the **parties had agreed to** for moving this litigation forward through the use of **four initial bellwether trials**." MDL Dkt. No. 339, p.2 (emphasis added). Nowhere did petitioners deny waiving their *Lexecon* objections for all cases in the MDL, or suggest it was a limited waiver. *Id.*

- On September 6, 2013, petitioners objected to the PEC's bellwether proposal and claimed for the first time the MDL Forum was not the proper venue to try some cases because they were subject to remand under 28 U.S.C. §1407. Petitioners' App. 5; MDL Dkt. No. 341, pp.3-4. Petitioners argued they previously only "expressed [a] 'willingness to waive'" venue and were not willing to waive venue if Judge Kinkeade consolidated multiple cases for trial. *Id.*

- **Four days later**, at a status conference before Judge Kinkeade, petitioners' lead counsel **withdrew** this "incongruous contention and made perfectly clear that [petitioners] waived all venue objections to trying any of the cases in the MDL in [the Forum.]" Petitioners' App. 5. Specifically, counsel represented: "Your Honor, I did want to note that with respect to a filing that we made with the court on Friday with respect to one aspect of the bellwether selection process…that our position – **we have waived the lexicon [sic] restriction on these – these cases, consistent with the report that the special master**

gave to the court earlier. And I just wanted to make sure that we were clear on that on – on the record." MDL Dkt. No. 344, p.5 (emphasis added).

- In December 2014, after petitioners won the first bellwether trial, the Special Master e-mailed petitioners' counsel, asking him again to "confirm DePuy is willing to waive Lexecon **for all MDL cases** to be tried in Dallas." Petitioners' App. 25 (emphasis added). Petitioners' counsel responded: "**Confirmed**. In order to allow the Court to select the next round of bellwether cases from a broader pool of cases that can be tried in Dallas, **defendants** have agreed to waive Lexecon objections **to cases in the MDL proceeding** being tried there." *Id.* (emphasis added).
- On February 27, 2015, the Special Master filed another Report Relating to Bellwether Trial Selection, **agreed to by petitioners' counsel**, which confirmed that "[i]n order to insure the broadest pool of cases for the **bellwether selection process**, [petitioners] have agreed they will not raise a venue objection (i.e., a *Lexecon* objection) **to any cases in the MDL** being tried in the [Forum]." MDL Dkt. No. 490, p.1 (emphasis added). Nothing in that report indicated the waiver was limited to only second bellwether cases (which petitioners concede). *Id.*; Petition, p.25. And again, petitioners did not object to the report after it was filed.

- On May 24, 2016, **after losing the second bellwether trial**,[5] petitioners moved to stay all additional bellwether trials until the appeal of the second trial was resolved. MDL Dkt. No. 657-1. In a footnote, petitioners **for the first time** took the position that, "[a]lthough [they] previously waived *Lexecon* for purposes of selecting prior bellwether cases, they have never agreed to a blanket *Lexecon* waiver and do not waive their venue objections with respect to forthcoming trials." *Id.* at p.2, n.1; Petitioners' App. 7-8. Judge Kinkeade explicitly rejected this argument. MDL Dkt. No. 665, pp.8-9; Petitioners' App. 7-8.
- In June 2016, Judge Kinkeade ordered the parties to prepare seven direct-filed cases involving California plaintiffs for the third bellwether trial. MDL Dkt. No. 660. Petitioners immediately filed a mandamus petition with this Court requesting that it direct Judge Kinkeade to vacate this order. Case No. 16-10845, Doc. No. 00513562143. Nowhere in their petition did they raise the *Lexecon* waiver issue. *Id.* This Court denied their petition. *Id.* at Doc. No. 00513696885.
- In July 2016, petitioners moved to dismiss the third bellwether cases for lack of personal jurisdiction. Petitioners' App. 8. They "again asserted in a footnote

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[5] Notably, although the second trial involved five direct-filed cases of plaintiffs residing in the Southern, Eastern, and Westerns Districts of Texas, petitioners did not assert any venue objections as to these cases. Petitioners' App. 6-7.

that they had not globally waived their venue objections." *Id.* Additionally, demonstrating their constantly evolving position, they asserted **for the first time** "that their prior waiver was strictly a *Lexecon* waiver, *i.e.*, it only waived objections based on [§1407's] mandatory remand provision…for cases transferred into the MDL but did not waive venue objections relating to cases that were directly filed into the MDL pursuant to CMO #1." *Id.* Judge Kinkeade denied petitioners' motion. *Id.*

- The third bellwether trial took place in late 2016 and resulted in a plaintiffs' verdict. Petitioners' App. 9. Petitioners have recently appealed these cases, contesting, among other things, Judge Kinkeade's order denying their motions to dismiss for lack of personal jurisdiction. *See, e.g.,* Case No. 17-10828, Doc. No. 00514094893.

- In yet another shift, petitioners **never** argued to Judge Kinkeade, or to this Court in their previous mandamus petition, that their *Lexecon* waiver applied only to cases on file in the MDL at the time of the waiver.[6] In six years of litigation, they raise this argument for the **first time** in their current Petition (p.24).

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[6] *Supra*, pp.3-7; N.D. Tex. Case No. 3:15-cv-03484 at Dkt. Nos. 20-1, 49, 61, 266; N.D. Tex. Case No. 3:15-cv-03489 at Dkt. Nos. 8-1, 13, 15-1, 21.

ARGUMENT

For the **third** time in this MDL proceeding, petitioners have invoked the extraordinary remedy of mandamus, seeking to override Judge Kinkeade's considered judgment in his stewardship of this complex litigation. As with their previous efforts, this latest invocation of the most extraordinary and rare of civil litigation writs should be rejected.

A. MANDAMUS IS AN EXTRAORDINARY REMEDY.

A writ of mandamus is "a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004)(citation omitted).[7] This is because "[i]ts use has the unfortunate consequence of making a district court judge a litigant, and it indisputably contributes to piecemeal appellate litigation." *Allied,* 449 U.S. at 35. Thus, federal appellate courts traditionally only grant mandamus "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Id.* (citation and internal quotation marks omitted).[8] Mandamus is not warranted in cases in which "the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction." *Schlagenhauf v. Holder*, 379 U.S. 104, 112

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[7] *Allied Chem. Corp. v. Daiflon, Inc.,* 449 U.S. 33, 34 (1980); *Coastal (Bermuda) Ltd. v. E.W. Saybolt & Co., Inc.*, 761 F.2d 198, 203 (5th Cir. 1985).

[8] *Cheney*, 542 U.S. at 380.

(1964).[9] Only a showing of "exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of this extraordinary remedy." *Cheney*, 542 U.S. at 380, 390 (internal citations and quotation marks omitted).

For this extraordinary remedy to be warranted, three criteria must be satisfied: (1) petitioners must demonstrate they have no other adequate means to attain the relief they desire; (2) petitioners must demonstrate a "clear and indisputable" right to the writ; and (3) this Court must be satisfied the writ is appropriate under the circumstances.[10] Petitioners have entirely failed to meet their heavy burden.

B. PETITIONERS HAVE NOT SHOWN A CLEAR AND INDISPUTABLE RIGHT TO MANDAMUS RELIEF.

To demonstrate their right to the extraordinary writ, petitioners must do more than merely persuade this Court that Judge Kinkeade erred (which he did not do). *Am. Lebanese*, 815 F.3d at 206; *In re Lloyd's Register N. Am., Inc.*, 780 F.3d 283, 290 (5th Cir. 2015), *cert. denied sub nom. Pearl Seas Cruises, LLC v. Lloyd's Register N. Am., Inc.*, 136 S. Ct. 64, 193 L. Ed. 2d 31 (2015)(requiring "more than showing that the court misinterpreted the law, misapplied it to the facts, or otherwise engaged in an abuse of discretion"). "[E]ven reversible error by itself is not enough to obtain mandamus."

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[9] *Allied,* 449 U.S. at 35; *Will v. Calvert Fire Ins. Co.,* 437 U.S. 655, 661 (1978); *In re Ford Motor Co.*, 591 F.3d 406, 415 (5th Cir. 2009).

[10] *Cheney*, 542 U.S. at 380-81; *In re Am. Lebanese Syrian Associated Charities, Inc.*, 815 F.3d 204, 206 (5th Cir. 2016).

Lloyd's, 780 F.3d at 290. Rather, petitioners must show Judge Kinkeade "clearly and indisputably" erred. *Am. Lebanese*, 815 F.3d at 206.

Moreover, mandamus generally will not issue to control exercises of discretion. *Will*, 437 U.S. at 665-66. "Where a matter is committed to the discretion of a district court, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Id.*[11] The sole exception is when there is a "clear" abuse of discretion producing "patently erroneous results." *Lloyd's*, 780 F.3d at 290 ("In distinguishing between ordinary and 'clear' abuses of discretion, we are guided by the principle…that mandamus must not become a means by which the court corrects all potentially erroneous orders.").[12] "A court commits a clear abuse of discretion…when it 'clearly exceeds the bounds of judicial discretion.'" *Lloyd's*, 780 F.3d at 290 (citation omitted).

1) Judge Kinkeade Did Not Abuse His Discretion When He Determined Petitioners Waived Venue And Personal-Jurisdiction Objections For All MDL Cases For Purposes Of Conducting Bellwether Trials In The MDL Forum.

As explained below (*infra*, §B.2), Judge Kinkeade appropriately looked to petitioners' New York contacts when conducting his personal jurisdiction analysis. But even assuming, *arguendo*, that an MDL court should look to the contacts with the forum in which it sits when determining whether to exercise personal jurisdiction over

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[11] *Allied*, 449 U.S. at 36; *Kmart Corp. v. Aronds*, 123 F.3d 297, 300 (5th Cir. 1997); *In re Am. Airlines, Inc.*, 972 F.2d 605, 609 (5th Cir. 1992).

[12] *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 310, 312 (5th Cir. 2008); *Am. Airlines*, 972 F.2d at 609; *In re Estelle*, 516 F.2d 480, 483 (5th Cir. 1975).

a defendant in a bellwether trial of a direct-filed case, it is immaterial in this case because petitioners have waived any objection to venue and personal jurisdiction in the Forum for MDL cases. Although this Court has not addressed the issue, courts in other Circuits have held a district court's waiver determination is reviewed under the "abuse of discretion" standard. *Lechoslaw v. Bank of Am., N.A.*, 618 F.3d 49, 55–56 (1st Cir. 2010)("A determination as to 'waiver [of personal jurisdiction is] within the discretion of the trial court, consistent with its broad duties in managing the conduct of cases pending before it.'")(quoting *United States v. Ziegler Bolt & Parts Co.*, 111 F.3d 878, 882–83 (Fed. Cir. 1997));[13] *In re: Asbestos Products Liab. Litig.*, 661 Fed. Appx. 173, 176–77 (3d Cir. 2016)(unpublished); *In re Kutrubis*, 550 Fed. Appx. 306, 308 (7th Cir. 2013)(unpublished); *Subway Intern. B.V. v. Bletas*, 512 Fed. Appx. 82 (2d Cir. 2013)(unpublished). Thus, in order for the writ to be granted, petitioners must show Judge Kinkeade "clearly" abused his discretion in determining petitioners waived their venue and personal jurisdiction objections to any case in the MDL being tried as a bellwether in the Forum, **and** such abuse led to a patently erroneous result. *Lloyd's*,

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[13] It is well established that federal courts have the inherent authority to manage their own dockets. *Will*, 437 U.S. at 665; *Coastal*, 761 F.2d at 204 n.6. A district court's wide discretion in managing its docket is especially important in MDLs, for which "judges are encouraged to be innovative and creative to meet the needs of their cases..." Manual for Complex Litigation (Fourth), Introduction, 2004 WL 258569, at *2 (2004). *Cf. In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1018 (5th Cir. 1997); *FedEx Ground Package Sys., Inc. v. U.S. Judicial Panel on Multidistrict Litig.*, 662 F.3d 887, 891 (7th Cir. 2011).

780 F.3d at 290. They have not met, nor can they successfully meet, either of those requirements.

"Unlike subject matter jurisdiction, personal jurisdiction can be acquiesced in or waived." *Marrogi v. Howard*, 248 F.3d 382, 383 n.1 (5th Cir. 2001); *see also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999). Both the Supreme Court and this Court have recognized "'there are a variety of legal arrangements by which a litigant may give express or implied consent to the personal jurisdiction of the court.'" *PaineWebber Inc. v. Chase Manhattan Private Bank (Switzerland)*, 260 F.3d 453, 461 (5th Cir. 2001)(quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.14 (1985)). "Consent to suit in a particular forum is an independent ground for the exercise of personal jurisdiction, separate and distinct from any personal jurisdiction based on an analysis of minimum contacts." *Hanson Engineers Inc. v. UNECO, Inc.*, 64 F. Supp. 2d 797, 800 (C.D. Ill. 1999).

Petitioners clearly consented to the District Court's personal jurisdiction. As previously discussed (*supra*, pp.2-7), they (i) requested the Forum for this MDL, (ii) agreed to the bellwether process allowing Judge Kinkeade to try representative cases, and (iii) engaged in extensive pretrial discovery for over six years and participated in three lengthy bellwether trials in the MDL Forum.[14] But most

[14] "[A] party may waive any jurisdictional objections if its conduct does 'not reflect a continuing objection to the power of the court to act over the defendant's person.'" *PaineWebber*, 260 F.3d at 460 (citation omitted). *See also id.* (indicating a party may submit to a court's jurisdiction by

importantly, petitioners **explicitly and repeatedly** waived their *Lexecon* venue objections to "any cases in the MDL" being tried in the Forum. *Supra*, pp.3-7. By waiving their objection to venue, petitioners have effectively waived their objection to personal jurisdiction. "'A waiver of objection to venue would be meaningless…if it did not also contemplate a concomitant waiver of objection to personal jurisdiction.'" *Inso Corp. v. Dekotec Handelsges, mbH*, 999 F. Supp. 165, 167 (D. Mass. 1998)(quoting *Richardson Greenshields Sec., Inc. v. Metz*, 566 F. Supp. 131, 133 (S.D.N.Y. 1983)).[15] For this reason, courts in this Circuit and elsewhere regularly hold that when a party has waived or consented to venue, it has effectively waived or consented to personal jurisdiction.[16]

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commencing an action "or a related action in the very forum in which it is contesting personal jurisdiction"); *In re Polyester Staple Antitrust Litig.*, MDL 3:03CV1516, 2008 WL 906331, at *16-19 & n.54 (W.D.N.C. Apr. 1, 2008)(rejecting defendant's argument that its conduct within the MDL "has no bearing on the waiver analysis").

[15] *Nw. Nat. Ins. Co. v. Frumin*, 739 F. Supp. 1307, 1310 (E.D. Wis. 1990); *Nw. Nat. Ins. Co. v. Dennehy*, 739 F. Supp. 1303, 1306 (E.D. Wis. 1990); *Intermountain Sys., Inc. v. Edsall Const. Co., Inc.*, 575 F. Supp. 1195, 1198 (D. Colo. 1983); *Earvision, Inc. v. Wyman*, CA 11-615S, 2012 WL 1986320, at *2 (D.R.I. May 3, 2012), *report and recommendation adopted,* CA 11-615S, 2012 WL 1982463 (D.R.I. June 1, 2012); *Perlman v. Jackson Hewitt Inc.*, CV-10-051-LRS, 2010 WL 5470804, at *3 n.4 (E.D. Wash. July 30, 2010); *Mut. Fire, Marine & Inland Ins. Co. v. Armour*, CIV. A. 86-3562, 1987 WL 9658, at *1, 2 (E.D. Pa. Apr. 16, 1987).

[16] *Kevlin Services, Inc. v. Lexington State Bank*, 46 F.3d 13, 15 (5th Cir. 1995); *Ortiz v. Robert Holman Trucking, Inc.*, CIV.A. B-06-020, 2006 WL 1098904, at *2 (S.D. Tex. Apr. 11, 2006); *Stars for Art Prod. FZ, LLC v. Dandana, LLC*, 806 F. Supp. 2d 437, 447 (D. Mass. 2011); *E.I. du Pont de Nemours & Co. v. Andraea Partners*, 197 F.R.D. 424, 429–30 (D. Haw. 2000); *Hanson*, 64 F. Supp. 2d at 799-801; *Inso*, 999 F. Supp. at 167; *ECHO Health, Inc. v. NexPay, Inc.*, 1:13-CV-1563, 2013 WL 5952182, at *3 (N.D. Ohio Nov. 6, 2013); *Parsons Energy & Chemicals Group v. Williams Union Boiler*, 03-3168, 2004 WL 203165, at *5-6 (E.D. Pa. Jan. 28, 2004); *April-Marcus, Inc. v. Greenberg*, 86 CIV. 8948 (CSH), 1988 WL 42040, at *1 (S.D.N.Y. Apr. 28, 1988); *supra*, fn.15. Courts also regularly find the reverse to be true; a party waives any objection to venue when it waives or consents to personal jurisdiction. *Vomastek v. AXA Equitable Life Ins. Co.*, 5:15-CV-50-JRG,

Notably, petitioners do not dispute this proposition. Instead, they argue their *Lexecon* waiver only applied to the first two bellwether trials. Petition, p.21. They are wrong. Their prior representations to the District Court were not limited; they simply seem to have changed their minds. *Supra*, pp.3-7. Petitioners have top flight lawyers. They easily could have stated they would not raise a *Lexecon* objection to only those cases tried in the first two bellwether trials, if that was truly their position at the time. They did not. *Id.* They also could have stated their *Lexecon* waiver only applied to cases on file in the MDL at the time the waiver was made. Again, they did not. *Id.* Instead, they repeatedly stated they would not raise a *Lexecon* objection to "any cases in the MDL proceeding being tried in the [Forum]." *Id.*[17]

Similar language was held to be an express *Lexecon* waiver in *Zimmer*. 2015 WL 5164772, at *3. In *Zimmer*, the plaintiffs' liaison counsel, on behalf of plaintiffs and

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2016 WL 3771278, at *2 (E.D. Tex. Feb. 17, 2016); *Knapper v. Safety Kleen Sys., Inc.*, CIV A 908-CV-84-TH, 2009 WL 909479, at *3 (E.D. Tex. Apr. 3, 2009); *KMR Capital, L.L.C. v. Bronco Energy Fund, Inc.*, CIVLSA06CA-189OG, 2006 WL 4007922, at *5 (W.D. Tex. July 11, 2006); *Twenty First Century Communications, Inc. v. TechRadium, Inc.*, 2:09-CV-1118, 2010 WL 3001721, at *4 (S.D. Ohio July 30, 2010).

[17] *In re Fosamax Products Liab. Litig.*, 815 F. Supp. 2d 649, 654 (S.D.N.Y. 2011)(parties waived *Lexecon* objections to the pool of bellwether-eligible cases); *In re Zimmer Durom Hip Cup Products Liab. Litig.*, CIV.A. 09-4414, 2015 WL 5164772, at *3-5 (D.N.J. Sept. 1, 2015); *Baxter v. Lincoln Elec. Co.*, 1:08-WF-17037, 2012 WL 112526, at *3–4 (N.D. Ohio Jan. 12, 2012)(plaintiff who agreed to his case being tried as a bellwether by the MDL court waived his right of remand to transferor court); *Solis v. Lincoln Elec. Co.*, 1:04-CV-17363, 2006 WL 266530, at *2–6 (N.D. Ohio Feb. 1, 2006)(same); *cf. In re Carbon Dioxide Indus. Antitrust Litig.*, 229 F.3d 1321, 1326 (11th Cir. 2000)("If the [plaintiffs] believed that they had a right to have their cases remanded to their original districts, they should not have asked the court to try the case in Orlando. 'Having induced the court to rely on a particular erroneous proposition of law or fact, a party in the normal case may not at a later stage of the case use the error to set aside the immediate consequences of the error.'")(citation omitted).

defendants, "waive[d] their [*Lexecon* objections], and instead, consent[ed] to trial of the cases in the MDL by th[e] Court." *Id.* Counsel later attempted to argue this waiver only applied to the first two bellwether trials. *Id.* at *2. The MDL court rejected this argument, finding the "express language of the waiver unequivocally waive[d] the parties' rights for 'the cases in the MDL'" and such language was "not patently or latently ambiguous." *Id.* at *3, *5. The court also noted counsel had "an opportunity to protest or voice concern when the [order describing the waiver] was filed if they believed there was an error, or to indicate that something contrary to the parties' agreement regarding the *Lexecon* waiver was documented[,]" but failed to do so for months. *Id.* at *4-5. In this case: petitioners expressed their waivers **numerous** times; waited over **three years** to argue these waivers were limited to the first two bellwether trials or did not apply to direct-filed cases; and, to date, have **never** argued to Judge Kinkeade that their waivers only applied to cases on file at the time the waivers were made. *Supra*, pp.3-7.

Petitioners also argue a stronger showing is needed to find a party waived personal jurisdiction and venue in the MDL context. Petition, p.21. To support this proposition, they cite only to a single out-of-circuit MDL case. *Armstrong v. LaSalle Bank Nat. Ass'n*, 552 F.3d 613 (7th Cir. 2009).[18] At issue in *Armstrong* was whether the

[18] The other cases petitioners cite did not involve MDLs and are inapposite. *City of New Orleans v. Mun. Admin. Services, Inc.*, 376 F.3d 501, 504 (5th Cir. 2004)("For a contractual clause to prevent a party from exercising its right to removal, the clause must give a 'clear and unequivocal' waiver

plaintiffs relinquished their right to remand and consented to venue in the MDL court by: (i) filing a consolidated complaint, at the court's request, stating venue was proper in the MDL court; and (ii) participating in pretrial proceedings in which trial dates were set by the MDL court. 552 F.3d at 617. The court held such conduct did not sufficiently "demonstrate an intent to relinquish the right to remand the case to the transferor court." *Id.*[19] In this case, however, petitioners' repeated waivers were clear and unambiguous (*supra*, pp.3-7), satisfying the heightened *Armstrong* standard. Moreover, petitioners **have not even argued**, let alone proven, that there is good cause to revoke their waivers. Petitioners' App. 20-22; *Fosamax*, 815 F. Supp. 2d at 654; *Zimmer*, 2015 WL 5164772, at *3-4.

Accordingly, Judge Kinkeade did not abuse his discretion, let alone "clearly" do so, in finding petitioners waived their personal jurisdiction and venue objections to respondents' cases being tried in the MDL Forum. Moreover, even if such finding was an abuse of discretion (which it was not), petitioners have not established it will lead to a patently erroneous result. As discussed below, the hardship resulting from

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of that right."); *Northside Iron & Metal Co., Inc. v. Dobson & Johnson, Inc.*, 480 F.2d 798 (5th Cir. 1973)(commission of tort in foreign district is insufficient basis for inferring waiver of privilege under bank venue statute).

[19] The court reasoned that neither the complaint's venue statement nor the setting of trial dates as part of pretrial proceedings were, in and of themselves, incompatible with an intent to seek remand. *Id.* at 617-19. Additionally, the plaintiffs requested remand as soon as the pretrial proceedings were terminated. *Id.* at 619.

litigation expenses, or even an unnecessary trial, is not sufficient to justify the extraordinary remedy of mandamus. *Infra*, pp.26-27.

2) Judge Kinkeade Did Not Err When He Determined His Court Could Exercise Personal Jurisdiction Over Petitioners In Respondents' Direct-Filed Cases To The Same Extent As A New York Court.

Petitioners also claim Judge Kinkeade "clearly erred" in exercising jurisdiction over them in respondents' cases because an MDL court cannot exercise another court's personal jurisdiction to try cases in an MDL proceeding. Petition, p.17. Petitioners appear to be making two distinct arguments: (i) they are not subject to the District Court's jurisdiction in respondents' direct-filed cases because of petitioners' purported lack of Texas contacts; and (ii) the District Court cannot exert personal jurisdiction over petitioners in **any** cases (direct-filed or transferred) involving non-Texas plaintiffs **for trial**. Petitioners are incorrect on both counts.[20]

It is well established that, in cases transferred to an MDL, the MDL court can exercise personal jurisdiction to the same extent as the transferor court could.[21] It is equally well established that cases directly filed in an MDL are treated "as if they were

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[20] Petitioners also imply Judge Kinkeade's waiver determination reflects a concession that his court does not have the authority to "act as a New York court" in respondents' cases. Petition, pp.1-2. This is clearly not the case, however, as Judge Kinkeade devoted a significant portion of his order to his determination that petitioners have sufficient New York contacts to establish personal jurisdiction in respondents' cases. Petitioners' App. 14-18.

[21] *In re FMC Corp. Patent Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.L. 1976); *In re Norplant Contraceptive Products Liab. Litig.*, 915 F. Supp. 845, 852 (E.D. Tex. 1996); *In re Testosterone Replacement Therapy Products Liab. Litig. Coordinated Pretrial Proceedings*, 136 F. Supp. 3d 968, 973 (N.D. Ill. 2015); *In re Ski Train Fire in Kaprun, Austria on November 11, 2000*, 343 F. Supp. 2d 208, 213 (S.D.N.Y. 2004); *In re Telectronics Pacing Sys., Inc.*, 953 F. Supp. 909, 913 (S.D. Ohio 1997).

transferred from a judicial district sitting in the state where the case originated." *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, 3:09-MD-02100-DRH, 2011 WL 1375011, at *5–6 (S.D. Ill. Apr. 12, 2011).[22] For medical device cases, the originating forum is considered to be the state where the plaintiff purchased and used the prescribed product.[23] In these cases, respondents are New York residents, were implanted with the device in New York, and suffered their injuries in New York. Petition, p.12; Petitioners' App. 15. Thus, their direct-filed cases should be treated as if originally filed in New York, with the District Court having personal jurisdiction to the same extent a New York court would have jurisdiction. Judge Kinkeade properly recognized this principle when he looked to petitioners' New York contacts in his personal-jurisdiction analysis of respondents' cases.[24]

Significantly, petitioners do not dispute Judge Kinkeade's findings that they would be subject to personal jurisdiction for respondents' cases in New York.

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[22] *In re Fresenius Granuflo/NaturaLyte Dialysate Prods. Liab. Litig.*, 76 F. Supp. 3d 294, 303–04 (D. Mass. 2015); *In re Watson Fentanyl Patch Prods. Liab. Litig.*, 977 F. Supp. 2d 885, 888 (N.D. Ill. 2013); *In re: Bard IVC Filters Prods. Liab. Litig.*, MDL 15-2641 PHX DGC, 2016 WL 3970338, at *1 n.1 (D. Ariz. July 25, 2016); *In re Boston Sci. Corp., Pelvic Repair Sys. Prods. Liab. Litig.*, 2:12-CV-9912, 2015 WL 1405504, at *3 (S.D.W. Va. Mar. 26, 2015), *aff'd sub nom. Hay-Rewalt v. Boston Sci. Corp.*, 623 Fed. Appx. 92 (4th Cir. 2015); *In re Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig.*, 12-MD-2342, 2014 WL 2445790, at *2 n.13 (E.D. Pa. May 29, 2014); *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 07-MD-01871, 2012 WL 3205620, at *2 (E.D. Pa. Aug. 7, 2012); *cf. Wahl v. Gen. Elec. Co.,* 786 F.3d 491, 494 (6th Cir. 2015); *Sanchez v. Boston Sci. Corp.*, 2:12-CV-05762, 2014 WL 202787, at *4 (S.D.W. Va. Jan. 17, 2014).

[23] *Watson*, 977 F. Supp. 2d at 888; *Avandia*, 2012 WL 3205620, at *2; *Yaz*, 2011 WL 1375011, at *6.

[24] *Cf. Am. Lebanese*, 815 F.3d at 206 (denying mandamus relief; district court did not clearly and indisputably err in finding statute conferred it with subject-matter jurisdiction when there were no controlling cases interpreting how that statute applied).

Petitioners instead argue Judge Kinkeade should have looked to their **Texas** contacts because respondents' cases were directly filed in the MDL Forum. Petition, pp.1-2, 17. They claim *Yaz* is inapposite because it involved the question of which forum's choice-of-law principles applied, rather than a question of personal jurisdiction. Petition, pp.19-20. But they fail to explain the significance of this distinction. Moreover, their takeaway from *Yaz* appears to be that direct-filed cases should **not** be treated differently than transferred cases because that would produce the "odd result" of subjecting plaintiffs to different rules "simply because they took advantage of the direct filing procedure…" Petition, p.19 (citations and internal quotation marks omitted). Respondents agree direct-filed cases and transferred cases should be treated equally. That is exactly what Judge Kinkeade's order does. Petitioners disagree, arguing he is treating direct-filed cases differently than transferred cases because, although an MDL court inherits a transferor's personal jurisdiction for **pretrial** proceedings in transferred cases, it lacks personal jurisdiction to **try** such cases under *Lexecon*. Petition, p.20. Thus, the same should be true for direct-filed cases. *Id.*

Petitioners' argument is fundamentally flawed. To begin with, the underlying premise is incorrect. MDL courts can, and regularly do, try bellwether cases with the consent of the parties. *See, e.g., Chevron*, 109 F.3d at 1019 (benefits of bellwether trials are generally accepted "by both bench and bar"); *supra*, fn.17. **Petitioners agreed to**

such a bellwether process in this MDL. *Supra*, pp.2-5.[25] Both direct-filed and transferred cases were eligible to be chosen for bellwether trials.[26] Were Judge Kinkeade to apply different personal-jurisdiction principles depending on whether the case was transferred or directly filed, he would be producing the same "odd result" petitioners acknowledge should be avoided. Petition, pp.19-20.[27]

Petitioners concede that "an MDL court inherits a transferor court's personal jurisdiction…for 'pretrial proceedings[.]'" Petition, p.20 (quoting *FMC*, 422 F. Supp. at 1165). Yet they do not even attempt to explain why an MDL court should apply a different personal-jurisdiction analysis for cases tried as bellwethers than it would for the pretrial proceedings of those same cases.[28] Such an approach would undermine the very purpose of bellwether trials. Practically speaking, petitioners posit that, despite their **explicit agreement** to a bellwether process for this MDL, the only cases

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[25] Thus, petitioners' suggestion that Judge Kinkeade improperly "create[d]" jurisdiction in his court based solely on the direct-file order is wholly without merit. Petition, p.18. And the case they cite in support is inapposite. *Point Landing, Inc. v. Omni Capital Intern., Ltd.*, 795 F.2d 415 (5th Cir. 1986), *aff'd sub nom. Omni Capital Intern., Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97 (1987)(finding no basis for fashioning federal common law on amenability of out-of-state alien defendant to personal jurisdiction of federal court in action under Commodity Exchange Act).

[26] In fact, the four cases petitioners initially proposed as bellwethers were all directly filed in the MDL Forum and involved non-Texas plaintiffs. MDL Dkt. No. 338 at 15-19, No. 339 at 3; N.D. Tex. Case Nos. 3:12-cv-03074, 3:12-cv-02695, 3:12-cv-02557, 3:12-cv-04354.

[27] Certainly if respondents' cases were transferred to New York courts at the end of this MDL proceeding, petitioners would not argue the personal-jurisdiction analysis should be based on their Texas contacts. Thus, petitioners' true issue is with Judge Kinkeade trying respondents' cases as bellwether cases in the MDL Forum. But, as previously discussed, petitioners (i) requested this Forum for this MDL, (ii) agreed to the bellwether process, and (iii) waived their *Lexecon* objections as to **any** cases in the MDL being tried as bellwethers. *Supra*, pp.2-7, §B.1.

[28] *FMC* did not address personal jurisdiction and venue issues in the context of a bellwether trial. 422 F. Supp. 1163.

Judge Kinkeade can try as bellwethers are those involving Texas plaintiffs (Petition, p.12) or those individual cases for which petitioners choose to waive venue and personal jurisdiction (which, of course, would be the cases most favorable to them). Subject to such artificial limitations, the bellwether process would be rendered ineffective, as the cases tried would not be representative of the entire MDL class and would not adequately "illustrate how the parties could value the cases." MDL Dkt. No. 665, p.3; Petition, p.4.

Thus, in an MDL in which the parties have consented to a bellwether process, there is no reason the MDL court should inherit the transferor court's personal jurisdiction for pretrial proceedings of a transferred case, but not for a bellwether trial of that same case. Although they do not say so explicitly, petitioners appear to be arguing that, under those circumstances, direct-filed cases should be treated differently than transferred cases. Of course, this again would create the same "odd result" petitioners warn against elsewhere in their submission. Petition, pp.19-20.

Petitioners cite two cases in which an MDL court analyzed personal jurisdiction in direct-filed cases by assessing the defendant's contacts with the state where the MDL was located: *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, CIV.A. H-10-171, 2011 WL 1232352, at *4-14 (S.D. Tex. Mar. 31, 2011) and *In re Chinese Manufactured Drywall Products Liab. Litig.*, 767 F. Supp. 2d 649, 657 n.2 (E.D. La. 2011). But there is no indication in either case that the plaintiffs even argued the personal-jurisdiction analysis should look to defendants' contacts with any state other

than the state in which the MDL court sat. *Heartland*, 2011 WL 1232352, at *4-5, *8 (plaintiffs argued defendant's Texas contacts subjected it to personal jurisdiction in Texas); *Chinese*, 767 F. Supp. 2d at 654-56, 661-66 (plaintiffs alleged and argued insurers' Louisiana contacts subjected them to the general jurisdiction of the MDL court). Moreover, neither case addressed the personal jurisdiction of a defendant in a personal-injury action. *Heartland*, 2011 WL 1232352, at *1, *3 (involving economic losses incurred from a criminal intrusion into the database of a company which processes credit-card transactions);[29] *Chinese*, 767 F. Supp. 2d at 653-566 (potentially liable builders and contractors brought declaratory judgment actions against their insurers seeking defense and/or indemnification for losses relating to their installation of defective drywall).[30] Nor did they analyze personal jurisdiction in the context of a bellwether trial. *Heartland*, 2011 WL 1232352; *Chinese*, 767 F. Supp. 2d 649. Regardless, to the extent these lower-court cases stand for the proposition that direct-filed cases must be treated differently than transferred cases when analyzing personal jurisdiction, respondents respectfully suggest they were wrongly decided for the reasons discussed above. *Supra*, pp.17-21.

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[29] The plaintiffs, nine financial institutions (located in multiple states), directly filed their combined lawsuit in the MDL. *Id.* at *4.

[30] Although the MDL included some cases alleging personal-injury damages from the defective drywall, the specific cases at issue in the court's personal-jurisdiction analysis were not personal-injury cases. *Id.*

Accordingly, Judge Kinkeade did not "clearly and indisputably err" when he looked to petitioners' New York contacts in determining whether his court could exercise personal jurisdiction in respondents' direct-filed cases.

C. PETITIONERS FAILED TO SHOW THEY HAVE AN INADEQUATE REMEDY ON APPEAL.

Petitioners not only must show Judge Kinkeade "clearly and indisputably erred[,]" but also that such error is "irremediable on ordinary appeal[.]" *In re Avantel, S.A.*, 343 F.3d 311, 317 (5th Cir. 2003). They cannot do so. It is well established that "appellate courts are reluctant to interfere with the decision of a lower court on jurisdictional questions which it was competent to decide and which are reviewable in the regular course of appeal." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943); *Belcher v. Grooms*, 406 F.2d 14, 17 (5th Cir. 1968).[31] The only exception is when "'[t]he challenged assumption or denial of jurisdiction [is] so plainly wrong as to indicate failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine.'" *Am. Fid. Fire Ins. Co. v. U.S. Dist. Court for N. Dist. of California*, 538 F.2d 1371, 1374 (9th Cir. 1976)(quoting *Am. Airlines v. Forman*, 204 F.2d 230, 232 (3d Cir. 1953)). But "'[i]f a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling,'" mandamus is not

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[31] *In re Ivy*, 901 F.2d 7, 10 (2d Cir. 1990); *Gulf Research & Dev. Co. v. Leahy*, 193 F.2d 302, 304 (3d Cir. 1951), *aff'd,* 344 U.S. 861 (1952); *In re MIU Automation Corp.*, 930 F.2d 37, at *1 (Fed. Cir. 1991)(unpublished); *United States v. King*, 767 F.2d 922, at *1 (6th Cir. 1985)(unpublished).

appropriate "'even though on normal appeal a reviewing court might find reversible error.'" *Id.*[32]

As explained above, the District Court did not err in exercising personal jurisdiction over petitioners for the bellwether trial of respondents' cases. *Infra*, §B. At a minimum, the District Court had a rational basis for making its determination. *Id.* This case is therefore entirely distinguishable from the jurisdictional mandamus cases cited by petitioners.[33] For example, *In re Roman Catholic Diocese of Albany, New York, Inc.*, 745 F.3d 30 (2d Cir. 2014) involved a sex abuse case against a New York Catholic Diocese filed in federal court in Vermont. *Id.* at 33. In denying a motion to dismiss, the district court found the defendant subject to **general** jurisdiction in Vermont "based on occasional worship services held there by a small number of priests associated with the Diocese and other limited contacts." *Id.* The Second Circuit acknowledged that, as a general rule, "'appellate courts should avoid determining jurisdictional issues on a petition for mandamus.'" *Id.* at 37 (citation omitted). However, it determined this was an "extraordinary case" warranting

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[32] *In re Chicago, R.I. & P. Ry. Co.*, 255 U.S. 273, 275–76 (1921); *In re Briscoe*, 448 F.3d 201, 216 (3d Cir. 2006); *In re Tesco Corp. (US)*, 179 Fed. Appx. 2, 3 (Fed. Cir. 2006)(unpublished); *In re SGS-Thomson Microelectronics, Inc.*, 960 F.2d 154, 1992 WL 55571, at *1-2 (Fed. Cir. Feb. 11, 1992)(unpublished).

[33] *Sunbelt Corp. v. Noble, Denton & Associates, Inc.*, 5 F.3d 28, 30 (3d Cir. 1993)(granting mandamus to vacate improper transfer order because "the possibility of an appeal in the transferee forum following a final judgment there is not an adequate alternative to obtain the relief sought"); *In re Impact Absorbent Techs., Inc.*, 106 F.3d 400, at *3 (6th Cir. 1996)(unpublished)(granting mandamus because district court asserted jurisdiction without properly considering due process considerations).

mandamus relief due to a **combination** of "exceptional circumstances,"[34] including: (i) "[t]he district court's jurisdictional analysis [wa]s clearly erroneous[;]" (ii) "the case would be time-barred if brought in New York (likely the only state with jurisdiction)[;]" (iii) "the irreparable harm [that would be] caused by a needless foray into prior abuse investigations within the Diocese, exposing victims and their families to grueling [and unnecessary] inquiries[;]" and (iv) "the need for guidance from [the] Court regarding the proper general personal jurisdiction inquiry, particularly as applied to religious and other charitable organizations[.]" *Id.* at 33, 37, 41. Significantly, the court emphasized: "**[T]his opinion should not be read as inviting mandamus petitions to be filed whenever a party disagrees with a district court's jurisdictional ruling**." *Id.* at 37 n.3 (emphasis added).

An "unusual combination" of factors also rendered *Abelesz v. OTP Bank*, 692 F.3d 638 (7th Cir. 2012), one of "the rare case[s]" in which mandamus was appropriate to direct a district court to dismiss claims for lack of personal jurisdiction. *Id.* at 645, 661. The plaintiffs were Holocaust victims who filed a $75 billion lawsuit against two Hungarian banks in federal court in Illinois for allegedly "expropriating property from Hungarian Jews during the Holocaust[,]" more than sixty years earlier. *Id.* at 644-45. The district court exercised **general** jurisdiction over the defendants despite "the complete absence of any arguable basis" for doing so. *Id.* at 645. The

[34] *Id.* at 41 (noting "[t]he individual aspects that have contributed to our conclusion would, alone, be insufficient…to demonstrate that…mandamus is appropriate").

Seventh Circuit determined mandamus was appropriate because of the "combination of the extraordinary scale of the litigation, the inherent involvement with U.S. foreign policy, and the crystal clarity of the lack of any foundation for exercising general personal jurisdiction over [defendants] in the courts of the United States." *Id.* at 661. Notably, although the court did consider, "as a factor in the overall decision[,]" the settlement pressure the defendants might face given the "sheer magnitude" of their potential exposure, it acknowledged that "**[b]y itself, of course, such pressure is not enough to justify an encroachment on the final-judgment rule by use of mandamus**." *Id.* at 652 (emphasis added). Moreover, the court emphasized that if there had been "a colorable argument supporting the district court's exercise of jurisdiction," it would have viewed the case differently. *Id.* at 653.

Unlike in those cases, there is far more than a colorable argument supporting the District Court's exercise of jurisdiction over petitioners in respondents' cases. *Supra*, §B. Any claim of error can be properly addressed on appeal. Indeed, petitioners will have the opportunity to raise this issue in the currently pending appeal of the third bellwether cases. *Supra*, p.7.

Petitioners claim an end-of-case appeal is not an adequate remedy because they will have to incur the additional costs of another bellwether trial. Petition, p.27. First, this argument is disingenuous given the fact petitioners could have raised this issue in their mandamus petition seeking to stay the third bellwether trial. *Supra*, p.6. They failed to do so. More importantly, it is well established that hardship resulting from

litigation expenses, or even an unnecessary trial, is not sufficient to justify the extraordinary remedy of mandamus. *Schlagenhauf*, 379 U.S. at 110.[35]

Petitioners also claim immediate review by mandamus is appropriate because it will "afford an important opportunity for this Court to clarify the law of the Circuit on matters that will recur frequently in MDL litigation." Petition, p.29. They do not explain, however, why an appeal would not afford the Court this same opportunity. As the Third Circuit recognized:

> 'The petitioners' implied premise is that final appeal is a presumptively inadequate means of review in megalitigation. If we accepted that position, however, every significant interlocutory order in this case would arguably be subject to review on petition for mandamus. That would be an untenable result.'

Briscoe, 448 F.3d at 214-15 (citation omitted). Moreover, the cases petitioners cite in support of their position are factually distinguishable. *Schlagenhauf*, 379 U.S. at 111 (mandamus appropriate to challenge district court's order requiring defendant to submit to mental and physical examinations under FRCP 35 when order "appear[ed] to be the first of its kind" in any reported federal court decisions under that rule); *Ford*, 591 F.3d at 412-17 (granting mandamus because district court clearly erred in not reconsidering MDL court's pretrial denial of motion to dismiss Mexican plaintiffs'

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[35] *Roche*, 319 U.S. at 30-31; *Lloyd's*, 780 F.3d at 288-89 ("There has to be a greater burden, some obstacle to relief beyond litigation costs that renders obtaining relief not just expensive but effectively unobtainable."); *Overton v. City of Austin*, 748 F.2d 941, 958 (5th Cir. 1984); *Plekowski v. Ralston Purina Co.,* 557 F.2d 1218, 1220 (5th Cir. 1977); *Estelle*, 516 F.2d at 484; *Briscoe*, 448 F.3d at 214; *Gulf*, 193 F.2d at 304-05; *Impact*, 106 F.3d at *2; *MIU*, 930 F.2d at *1.

suit on *forum non conveniens* (FNC) grounds; among other reasons, binding precedent established Mexico was an available forum and appeals "'provide no remedy for a patently erroneous failure to transfer venue'" in FNC cases)(quoting *Volkswagen*, 545 F.3d at 318-19 (granting mandamus in FNC case)); *Chevron*, 109 F.3d at 1017-21 (granting mandamus in mass tort action to preclude district court from using the results of a non-bellwether trial to determine the defendant's liability in the remaining untried cases);[36] *In re Burlington N., Inc.*, 822 F.2d 518 (5th Cir. 1987)(granting mandamus because district court compelled production of potentially privileged documents without first making the proper factual determination whether such documents were discoverable); *In re E.E.O.C.*, 709 F.2d 392, 394-95 (5th Cir. 1983)(granting mandamus to vacate order compelling counter-discovery in an EEOC subpoena enforcement action).

Petitioners have not demonstrated they have no adequate remedy on appeal. Mandamus is therefore not appropriate.

CONCLUSION

The District Court did not err in exercising personal jurisdiction over petitioners, let alone do so clearly and indisputably. Moreover, petitioners have an

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[36] Notably, this Court also held the district court had the discretion to conduct such a trial, noting "[t]he results of any such trials and appropriateness of the requisite findings necessary to so proceed will then be matters for another panel to consider in the event those decisions are subject to appellate review." *Id.* at 1021.

adequate remedy on appeal. Accordingly, for the reasons stated above, mandamus is entirely inappropriate. The petition should be denied.

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Pursuant to Rule 32(g)(1) of the Federal Rules of Appellate Procedure, I hereby certify that:

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August 14, 2017.

/s/W. Mark Lanier
W. Mark Lanier

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I hereby certify that on August 14, 2017, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that service will be accomplished by the CM/ECF system or by electronic mail.

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