BY FAX

PANISH SHEA & BOYLE LLP
KEVIN BOYLE, State Bar No. 192718
boyle@psblaw.com
PETER L. KAUFMAN, State Bar No. 269297
kaufman@psblaw.com
JESSE MAX CREED, State Bar No. 272595
creed@psblaw.com
GREGORY M. SONSTEIN, State Bar No. 320184
sonstein@psblaw.com
11111 Santa Monica Boulevard, Suite 700
Los Angeles, California 90025
Telephone: 310.477.1700
Facsimile: 310.477.1699

SIMINOU APPEALS, INC.
BENJAMIN I. SIMINOU, State Bar No. 254815
ben@siminouappeals.com
2305 Historic Decatur Rd., Ste. 100
San Diego, CA 92106
Telephone: 858.877.4184

Attorneys for Plaintiff
MATTHEW COON

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SAN MATEO COUNTY
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

MATTHEW COON, an individual

Plaintiff,

vs.

F. HOFFMANN-LA ROCHE LTD..; HOFFMANN-LA ROCHE, INC.; GENENTECH, INC.; GENENTECH USA, INC.; ROCHE LABORATORIES, INC. and DOES 1 – 100,

Defendants.

Case No. 19CIV02658

COMPLAINT FOR DAMAGES

1. Strict Products Liability – Failure to Warn
2. Negligence
3. Deceit by Concealment (Violation of Civil Code §§ 1709-1710)
4. Fraud
5. Negligent Misrepresentation and Concealment

DEMAND FOR JURY TRIAL

19 – CIV – 02658
CMP
Complaint
1824652

COMPLAINT

Plaintiff Matthew Coon ("Plaintiff"), by and through his attorneys, bring this Complaint against Defendants F. Hoffmann-La Roche Ltd. ("Swiss Roche"), Roche Laboratories, Inc. ("Roche Laboratories"), Hoffmann-La Roche, Inc. ("U.S. Roche," and together with Swiss Roche and Roche Laboratories, "Roche"), Genentech, Inc. ("Genentech"), Genentech USA, Inc. ("Genentech USA"), and Does 1-100 (together with the other defendants, "Defendants") for damages. All allegations are made on information and belief, except those allegations explicitly about Plaintiff. Plaintiff alleges as follows:

INTRODUCTION

1. This action arises out of Roche's egregious failure to warn our U.S. military and service members of the substantial and irreversible dangers of its antimalarial drug Lariam ("Lariam") that have left thousands of our nation's veterans severely and permanently sick. Lariam is widely recognized as one of the most dangerous malaria prevention drugs on the market, and Lariam toxicity is believed to be the modern-day version of Agent Orange in scope, scale, and scandal.

2. Roche marketed and sold Lariam to the U.S. military for service members deployed to Somalia for the prevention of malaria. Virtually every deployed service member took Lariam or its generic equivalent while in Somalia for the U.S.-led military operation called Operation Restore Hope during the 1990s. At the height of the Somalia operation, tens of thousands of prescription of Lariam were written by military doctors, equating to over a million tablets. The market opportunity was vast and demand was strong.

3. As a result of Defendants' failure to warn and flawed drug design, Plaintiff has suffered lasting neurological and psychiatric injuries. He experiences severe paranoia of death and drowning and that people seek to murder his family in the United States, repeat nightmares "reliving" a delusion of a violent attack of people entering his home that never actually happened, and chronic depression, anxiety, and confusion.

4. Despite decades of research, Defendants willfully hid the risks of Lariam from the U.S. military, U.S. service members, and the public and continued to sell the drugs knowing of flawed prescribing protocols to pad its bottom line with wartime profits.

5. No soldier is sick with malaria when Lariam is taken for prevention. But after taking the drug, a sizeable group of soldiers have severe and irreversible symptoms that mimic the symptoms of post-traumatic stress disorder, evading accurate diagnosis.

6. These symptoms are believed to have led military service members worldwide to commit well-publicized acts of unspeakable human tragedy. In 1992, two Canadian peacekeeping soldiers who took Lariam as part of a controlled drug trial beat to death a Somali teenager. Dubbed the Shame of Canada, it led a Canadian public health agency's senior physician to blame Lariam and resign in protest. In the summer of 2002, three Special Operations soldiers murdered their wives and then committed suicide at Ft. Bragg. After taking Lariam during their deployments to Afghanistan, all three showed uncharacteristic behaviors including delusions, paranoia and fits of rage. A formal Army investigation report left open the distinct possibility that Lariam was the cause of these atrocious killings. Media reports tied Lariam to an uptick in military suicides in 2003. More recently, experts believe that the murder of 16 Afghan civilians in Afghanistan by an Army staff sergeant in 2012 was linked to his use of Lariam. Not accounting for the tragic murder of these 16 Afghan civilians, a 2007 study found that Lariam has been causally linked to 19 deaths in users, including three suicides.

7. Roche well knew of the substantial danger of severe and irreversible neuropsychiatric side effects of Lariam, because that danger is well-documented. Before Roche began the sale of Lariam in 1989, the risk of brain toxicity from the chemical family to which Lariam belongs had been widely known for decades. By 1998, there were widespread reports of Lariam causing permanent bad reactions, including symptoms of paranoia, hallucinations, and suicidal thoughts, that persisted even after the patients' discontinuation of the drug.

8. As mounting evidence of Lariam's devastating side effects became more widespread, Roche concealed their scope and nature and recklessly sold the drug as a safe and effective first-line treatment for malaria prevention. Safer and more effective drugs for malaria

prevention existed on the market, including doxycycline. But re-designing Lariam to be a last-resort pill for malaria prevention is a sure-fire way to extinguish its stranglehold on the market and the strong demand for it by the U.S. military.

9. Roche's knowledge that the U.S. military could practically never follow safe prescribing protocols is a further sign of the fundamentally flawed drug design. Not only did Roche know that U.S. service members would be incapable of receiving the follow-up assessments Roche knew were vital to their safety, but it knew that any immediately apparent side effects such as paranoia, anxiety, and restlessness would be confused for the natural feelings of soldiers in war.

10. The prospect of wartime profits is what led Roche to recklessly continue to market and sell a fundamentally flawed antimalarial pill to the U.S. military. During the Somalia operation, thousands of U.S. forces fought abroad, with virtually all being required to take the drug during months-long seasons of endemic malaria.

11. The perilous design flaws of Lariam are universally recognized by regulatory agencies and the medical community. As the FDA stated in 2013 when it slapped a "black box" warning on the drug:

> Neurologic side effects can occur at any time during drug use, and can last for months to years after the drug is stopped or can be permanent. Patients, caregivers, and health care professionals should watch for these side effects. When using the drug to prevent malaria, if a patient develops neurologic or psychiatric symptoms, mefloquine should be stopped, and an alternate medicine should be used. If a patient develops neurologic or psychiatric symptoms while on mefloquine, the patient should contact the prescribing health care professional. The patient should not stop taking mefloquine before discussing symptoms with the health care professional.
>
> The mefloquine drug label already states that mefloquine should not be prescribed to prevent malaria in patients with major psychiatric disorders or with a history of seizures. The changes to the mefloquine drug label better describe the possibility of persistent neurologic (vestibular) adverse effects after mefloquine is discontinued and the possibility of permanent vestibular damage.

12. After the FDA warning, the U.S. military immediately changed its Lariam prescribing policies. It re-designated Lariam as a drug of last resort after other malaria prevention drugs were found to be ineffective. The U.S. military's policy change demonstrates that adequate

warnings of Lariam side effects would not have just been words on a label nobody reads, but would have spared U.S. service members of lifelong psychiatric and neurological disorders.

13. The history of military use of Lariam shows that Roche's concealment was a blatant attempt to protect profits. When the U.S. military finally downgraded Lariam to a last-resort therapy after alternatives failed, the number of Lariam prescriptions dropped to 216.

14. Plaintiff is a victim of Defendants' scheme to profiteer from the U.S. military. He enlisted in the United States Marine Corps in December 1999 without any history of neuropsychiatric symptoms. In April 2002 while deployed with the 22nd Expeditionary Unit, while on board the USS Wasp, Plaintiff was given Roceh-branded Lariam and immediately began experiencing severe neuropsychiatric and physical side effects. He had bad nightmares on the very first night and developed hallucinations and vivid nightmares/dreams into the thirty days. In October 2004, Plaintiff started getting throbbing headaches when reading, leading him to discover that he was having vision problems and had unexplained sensitivity to sunlight. His symptoms worsened over time with anger, depression, anxiety, insomnia, cognitive dysfunction, nightmares, paranoia, restlessness, suicide ideation, hyper alertness, light sensitivity, vertigo, central and peripheral nervous system damage, dizziness, nausea, migraine headaches, tinnitus, visual impairment, tremors/jolts, and vestibular – loss of balance degrading his quality of life in 2005 to present day.

15. se specified (NOS), bipolar disorder, and restless leg syndrome (RLS), dizziness and disequilibrium.

16. Despite his suffering, nobody had ever told him these are the classic symptoms of Lariam toxicity until recently. His doctors at the VA had confounded his symptoms of mefloquine toxicity for post-traumatic stress disorder. He kept returning to them diligently in search of answers to his intractable medical problems, but no doctor ever linked mefloquine to his chronic neuropsychiatric conditions. He had no knowledge, nor should he have, of Roche's failure to warn of the permanent neuropschiatric side effects of Lariam. He did not learn that the injuries he was experiencing may have been caused by Lariam until September 2017 when he first learned of a link between Lariam and the symptoms he was experiencing. He did not learn that the

injuries he was experiencing may have resulted from the wrongdoing of Roche until no earlier than September 2017, when he first made a link between Roche's wrongdoing and his injuries. Because the first time Plaintiff ever had inquiry notice of mefloquine toxicity and Roche's wrongdoing was September 2017, his suit is timely.

PARTIES

17. Plaintiff is a resident of New York.

18. Swiss Roche is a Swiss corporation headquartered in Basel, Switzerland, with operations worldwide, with a principal place of business in the United States in South San Francisco, California. Swiss Roche is a wholly-owned subsidiary of Roche Holding AG.

19. U.S. Roche is a New Jersey corporation with its principal place of business in South San Francisco, California. U.S. Roche is an affiliate of Swiss Roche. U.S. Roche was formerly headquartered in Nutley, New Jersey, but relocated its Nutley headquarters to the Genentech headquarters in South San Francisco in March 2009 following Roche's acquisition of Genentech that same year.[1] Genentech's website states: "Genentech's South San Francisco campus now serves as the headquarters for Roche pharmaceutical operations in the United States." *See* Exhibit A. Roche has been in the business of developing, manufacturing, selling, marketing, and distributing Lariam throughout the United States from 1989 to 2008. U.S. Roche is a general manager of Swiss Roche in California.

20. Genentech is a Delaware corporation with its principal place of business in South San Francisco, California, 94080. Genentech is an indirect wholly-owned subsidiary of Roche Holding AG and a member of the Roche Group of companies. According to Genentech and Roche, Genentech "now serves as the headquarters for Roche pharmaceutical operations in the United States." Roche and Genentech merged in March 2009, and Roche subsequently relocated their Nutley, New Jersey U.S. headquarters to Genentech's headquarters. Genentech is a general manager of Swiss Roche in California.

21. Genentech USA is a Delaware corporation with its principal place of business in South San Francisco, California. Genentech USA is a wholly-owned subsidiary of Genentech.

[1] Genentech, *About Us*, https://www.gene.com/about-us (last accessed June 27, 2018).

22. Roche Laboratories is a Delaware corporation with its principal place of business in South San Francisco, California. Roche Laboratories is a general manager of Swiss Roche in California, as Roche Laboratories was listed on the FDA label for Lariam is the distributor of Lariam in the United States for pills manufactured by Swiss Roche.

23. Does 1 to 100 are the employees, servants, agents, affiliates, and/or contractors of the Defendants. Plaintiff is ignorant of the true identities of Does 1 to 100.

JURISDICTION AND VENUE

24. This Court has unlimited civil jurisdiction over this case under California Code of Civil Procedure § 88 because the amount in controversy exceeds $25,000.00.

25. This Court has personal jurisdiction over the parties because each Defendant (other than Swiss Roche) lives or has their principal places of business in the State of California and is fairly regarded as "at home" in the State of California. Two federal district courts have determined that U.S. Roche has its principal place of business in, and is therefore a citizen of, the State of California for diversity of citizenship purposes. *See* Exhibit B & C. The Supreme Court has held that a corporation is subject to general jurisdiction of the courts of a State if that corporation has its principal place of business in that State. For the same reasons identified in the federal district court order as to U.S. Roche, Roche Laboratories has its principal place of business in California. One federal district court has determined that Roche Laboratories has its principal place of business in, and is therefore a citizen of, the State of California for diversity purposes. *See* Exhibit C. Roche Laboratories has the same officers and directors as U.S. Roche, including its principal executive officer who works out of his South San Francisco office.

26. Venue is proper in the Superior Court of California, San Mateo County under California Code of Civil Procedure § 395 because Genentech, U.S. Roche, Roche Laboratories, and Genentech USA reside in San Mateo County.

GENERAL ALLEGATIONS

A. History of Lariam in the United States and Abroad

27. Discovered by the Walter Reed Army Institute of Research after the Vietnam War, Lariam is a prescription drug indicated for the treatment and prevention of malaria. During

the Vietnam War, the U.S. military conducted a malaria drug discovery program in response to outbreaks of malaria in 1% of U.S. troops in Vietnam. There is no question that the world needed safe and effective antimalarial drugs at the time. Driven by need, Lariam was rushed through the FDA approval process, with the completion of only Phase I and Phase II clinical trials. No Phase III trial ever occurred, even though it is the most probing of drug safety and efficacy through a randomized and blind testing of a large population. Without a Phase III trial, the FDA approved the drug in 1989. Roche became the exclusive worldwide brand-name manufacturer of Lariam and is the official holder of the New Drug Application.

28. Lariam is now widely known to be a poison to the human nervous system. Within months of FDA approval, major safety concerns emerged. In the 1990s, European drug safety agencies – in the heart of Swiss-based Roche-country – received recurring reports of severe neuropsychiatric symptoms. In the Netherlands, Lariam was the cause of the highest or second-highest number of drug-related adverse reports in 1998 and 1999. A case control study of 564 Dutch travelers between 1997 to 2000 found a three-fold increase in serious psychiatric side effects compared to the control population.

29. In 1995, researchers conducted two successive double-blind trials of Lariam in British soldiers in Kenya. The goal was to look at the prevalence of neuro-psychiatric disorders in military users of Lariam. The researched compared Lariam with the pre-existing standard regimen of chloroquine and proguanil. The results clearly indicated that a third of all soldiers taking Lariam had very severe side effects that interfered with their daily life and were intolerable. In one of the trials, there were two extreme, unpredictable events. One soldier became psychotic and had to be evacuated to the UK, and another soldier committed suicide.

30. In the early 2000s, three randomized controlled trials confirmed that Lariam has the strong potential to cause psychological illness and an excessive number of neuropsychiatric side effects.

31. In a 2001 study, a team of researchers conducted a randomized controlled trial of Lariam in a mixed population of general travelers and compared the adverse effects of Lariam to those of another antimalarial drug sold under the brand name Malarone. The results were

striking. The study found that 67.1% of study participants reported more than one adverse event, and 6% reported these events were severe. The comparator drug performed far better than Lariam in every measure: they had fewer treatment-related neuropsychiatric events (71.4% to Lariam's 67.3%), fewer adverse events of moderate or severe intensity (10% to Lariam's 19%), and fewer patients who had to discontinue the prevention drug (1.2% to Lariam's 5%). The study decidedly concluded that Malarone was equally effective as Lariam, but substantially safer.

32. By 1996, Roche's Lariam became a focus of drug safety regulators. That year, the U.K.'s Committee on Safety of Medicines slapped Roche's Lariam drug with a warning about the dangerous incidence of neuropsychiatric side effects. In 2004, the FDA insisted that a patient medication guide be given to all Lariam patients.

33. The origins of Lariam's central nervous system toxicity trace back to the mid-1940s when synthetic quinoline derivatives used as antimalarials and related to Lariam caused irreversible central nervous system toxicity. Studies had linked the use of these antimalarial quinoline derivatives to neurological degeneration in human and animal subjects, concluding the drugs induced "highly localized degenerative changes in the [central nervous system] associated with functional derangement."

34. Nearly three decades later, more studies reached similar conclusions about quinoline derivatives similar to Lariam. A synthetic version of the chemical then in common use as an antimalarial had been linked to neurological disorders involving the permanent degeneration of neurons. In short, initial evidence of Lariam toxicity is the central nervous system toxicity caused by its antimalarial quinoline drug cousins that are chemically related.

35. Lariam has been the cause of enormous tragedy. It has been causally linked by experts, including regulators, with the following events:

- In 1992, two Canadian soldiers who took Lariam killed a Somali civilian on a peacekeeping mission in Somalia. The incident was documented by photos. A Member of the Canadian Parliament and a senior official of Canada's equivalent of the FDA have publicly stated that the soldiers' erratic conduct may have been the result of Lariam toxicity.

- In the summer of 2002, two soldiers in the Ft. Bragg area killed their wives and then committed suicide. Two other soldiers murdered their wives in Ft. Bragg around

the same time. The Army could definitively conclude that three of these soldiers took Lariam and concluded that it was possible that Lariam side effects were the cause of the murderous and suicidal behaviors.

- In 2012, an Army Sargent murdered 16 Afghan civilians in Afghanistan while taking a generic version of Lariam. Experts and physicians had concluded that the murders are causally linked to the transformative side effects of Lariam.

36. Roche marketed and sold Lariam to the U.S. military for service members deployed to Somalia for the prevention of malaria. During the War on Terrorism, over a million U.S. forces fought abroad in Somalia, with virtually all being required to take the drug during months-long seasons of endemic malaria. The Centers for Disease Control and Prevention states that malaria is a high risk to people in all areas of Somalia. The U.S. military ordered all service members deployed there during those months to take malaria-prevention pills. For most of the time before its withdrawal from the U.S. market in 2008, Roche was the U.S. military's main supplier of malaria-prevention pills with assurances that Lariam was a safe and effective first-line therapy for that purpose. When Roche had a patent monopoly on the Lariam market, nearly 50,000 prescriptions of Lariam were written by military doctors annually, equating to over millions of tablets. The market opportunity was vast and demand was strong.

37. In 2009, a U.S. Army policy memorandum prioritized the use of other antimalarial medications after increased exposure to Lariam led to the recognition of the prevalence of neuropsychiatric side effects experienced by service members using the drug.

38. In July 2013, the FDA slapped a "black box" warning for Lariam – its strictest form of warning. The FDA warned of Lariam's severe neuropsychiatric side effects, which could "persist after mefloquine has been discontinued." The warning read as follows:

> Neurologic side effects can occur at any time during drug use, and can last for months to years after the drug is stopped or can be permanent. Patients, caregivers, and health care professionals should watch for these side effects. When using the drug to prevent malaria, if a patient develops neurologic or psychiatric symptoms, mefloquine should be stopped, and an alternate medicine should be used. If a patient develops neurologic or psychiatric symptoms while on mefloquine, the patient should contact the prescribing health care professional. The patient should not stop taking mefloquine before discussing symptoms with the health care professional.

> The mefloquine drug label already states that mefloquine should not be prescribed to prevent malaria in patients with major psychiatric disorders or with a history of seizures. The changes to the mefloquine drug label better describe the possibility of persistent neurologic (vestibular) adverse effects after mefloquine is discontinued and the possibility of permanent vestibular damage.

39. After the FDA warning, the U.S. military immediately changed its Lariam prescribing policies. It re-designated Lariam as a drug of last resort after other malaria prevention drugs were found to be ineffective. The U.S. military's policy change demonstrates that adequate warnings of Lariam side effects would not have just been words on a label nobody reads, but would have spared U.S. service members of lifelong psychiatric and neurological disorders.

40. In 2016, a committee of the British House of Commons conducted a months-long inquiry into the safety of Lariam for British Armed Forces. The investigation noted that Lariam has a high risk profile and a minority of users experience severe side-effects. The committee concluded that Lariam should be considered as a "drug of last resort" and be prescribed only to those who are unable to take any of the available alternatives. In the course of that investigation, it is clear that Roche knew of the distinct risk that military culture, operations, and prescribing protocols would cause military agencies to breach Roche's prescribing guidance. Mike Kindell, the Roche's Lead of Established Products, testified as follows :

> **Q47** **Chair:** And therefore, while reiterating that you are not responsible for the way in which the MoD and the medical staff within the MoD prescribe your product, does this not raise an obvious problem when the person who is prescribed the drug may have some history of psychiatric illness or depression, for example, but may feel unable to disclose that to the person proposing to prescribe Lariam to them for fear of damaging their career?
>
> ***Mike Kindell:*** I would think that is certainly a very much hypothetical risk, yes.
>
> **Q48** **Chair:** More than just hypothetical.
>
> ***Mike Kindell:*** It is a risk, yes.
>
> **Q49** **Chair:** So, in other words, you are a soldier and you know that you have had some episode or some anxieties in the past, but you really would feel pretty inhibited before saying to the Medical Officer in your regiment, "I really shouldn't take this stuff, because it could have a very serious effect on me."
>
> ***Mike Kindell:*** I think that is a fair statement.

41. In the hearing, Dr. Frances Nichols, Roche's Head of Drug Safety Quality, admitted that the British military's use of a mass prescribing protocol was a violation of its own prescribing guidelines:

> **Q8** **[Member]:** I accept that. The premise of my question is: if there is an organisation that does not do individual risk assessments, is that, or is that not, clearly outside the manufacturer's guidelines?
>
> ***Dr Nichol:*** The expectation would be that an individual risk assessment is done by prescribers at the time.
>
> ...
>
> **Q10** **[Member]:** When you push out the drug, you have your manufacturer's guidelines and within that you say that it should be prescribed after an assessment. So if an organisation goes outside that, surely they are using the drug outside the guidelines that you stated as the manufacturer of that drug.
>
> ***Dr Nichol:*** Yes, the guidelines do say an individual risk assessment should be done, and in the material that we have circulated there is a checklist that the physicians are supposed to go through with each individual—

42. Roche's testimony before the British Parliament establishes that they had reason to believe that British service members had a special risk of evading a proper risk assessment and the British military had a mass prescribing protocol inconsistent with Roche's own guidelines. So too for U.S. service members and the U.S. military.

43. Because of the heightened risk Lariam presents to service members, the military forces of Germany, Netherlands, Denmark, and Canada have all banned the prescription of Lariam among their personnel.

44. At least until 2009, Roche designed, made, distributed, and marketed Lariam to the U.S. military as a first-line drug for malaria prophylaxis. Roche knew or should have known that the risk of serious side effects of Lariam far outweighs the benefits of prophylaxis. Safer and equally effective alternatives for malaria prophylaxis existed, including doxycycline. Despite these safer alternatives, Roche recklessly marketed and sold Lariam to the U.S. military for use by soldiers in Somalia.

45. Roche knew or should have known of the risk of severe neuropsychiatric symptoms of mefloquine toxicity and the risk that U.S. military personnel would be unable to

make an appropriate judgment to discontinue the drug if these symptoms presented. The U.S. military personnel were taking Lariam in remote parts of Somalia. They were surrounded by threatening enemy forces, making for inherently stressful environments. It was unreasonable for Roche to expect such military personnel to make a judgment linking the source of anxiety, depression, and paranoia to Lariam and discontinue the drug, rather than to the enemy forces.

46. Upon information and belief, in providing Lariam to Plaintiff in connection with his overseas deployments, the military and Plaintiff's physicians relied upon information published in the package inserts or Physician's Desk Reference (hereinafter "PDR") or otherwise disseminated by the Reference Listed Drug Company (hereinafter "RLD"), or the New Drug Application Holder (hereinafter "NDA holder"). Roche is responsible for the contents and dissemination of that information . Roche failed to adequately warn Plaintiff, his physicians, and the U.S. military of the risks of severe and life-altering psychiatric and neurological side effects.

47. Upon information and belief, the U.S. military and Plaintiff's physicians were not aware of information different from or contrary to the inaccurate, misleading, materially incomplete, false and/or otherwise inadequate information disseminated in the PDR.

B. Defendants' Military-Lariam Business and the Role of Defendants in the Manufacture, Sale, Marketing, and Distribution of Lariam to the Military

48. At all relevant times, Swiss Roche was the manufacturer of Lariam. At all relevant times, U.S. Roche was the new drug application holder, rendering it responsible for the labeling and packaging of Lariam in the United States.

49. Before the acquisition of Genentech by the Roche Group, Roche Laboratories marketed and sold Lariam to the Department of Defense under a Distribution and Pricing Agreement ("DAPA"). A DAPA obligated Roche Laboratories to offer Lariam for sale to the Defense Logistics Agency ("DLA") at the prices set forth in the DAPA. Roche did in fact sell Lariam to the military under these agreements up until the Genentech acquisition in or around 2009. Such sales occurred in California where a number of offices for the Defense Logistics Agency are located and ordered and purchased Lariam from Roche Laboratories for distribution to defense forces abroad, including in Somalia.

50. Roche Laboratories acted in concert with U.S. Roche and Swiss Roche in all marketing and sale activities with respect to the U.S. military. U.S. Roche was the sole NDA holder for Lariam and had exclusive rights to commercially exploit the drug up until 2002 or 2003. This meant that U.S. Roche had to authorize, and did in fact authorize, Swiss Roche to manufacture the drug and Roche Laboratories to market and sell the drug. The three entities worked in concert at all points in the manufacture and distribution chain. In fact, U.S. Roche and Roche Laboratories had common officers and directors at all relevant times such that all relevant decisions were made or overseen by the same group of individuals. U.S. Roche was the sole owner of Roche Laboratories at all relevant times.

51. After the Genentech acquisition, Roche Laboratories transferred the military-Lariam business to Genentech USA and Genentech USA became the mere continuation of Roche Laboratories with respect to the military-Lariam line of business. At that time, Roche Laboratories had terminated or withdrawn from its DAPA agreement to offer Lariam for sale to the U.S. military. Concurrently therewith, Genentech USA succeeded to the DAPA agreement and became the official DAPA holder of Lariam for the Roche Group, meaning Genentech USA was the only entity in the Roche Group capable of offering Lariam for sale to the U.S. military.

52. Genentech USA paid Roche Laboratories nothing for the military-Lariam line of business. It gave Roche Laboratories no consideration for this line of business. Moreover, Genentech USA had a common stockholder with Roche Laboratories, U.S. Roche, and Genentech. All entities were owned by Roche Holdings, Inc. Genentech USA had common officers and directors with Roche Laboratories, Genentech, and U.S. Roche at all relevant times. In sum, Genentech USA was a mere continuation and thus successor of Roche Laboratories with respect to the military-Lariam line of business, and the military was the single largest customer of Lariam for the Roche Group.

53. Genentech is the alter ego of Genentech USA. Genentech is the sole stockholder of Genentech USA. Genentech undercapitalized Genentech USA, commingled assets and operations (insofar as they had common assets and operations), and/or failed to observe corporate formalities.

54. Genentech is also a successor-in-interest to Roche. After the acquisition of Genentech by Roche Holding AG, the Roche Group made a strategic decision to transfer the commercial pharmaceutical operations of U.S. Roche and Roche Labs (including manufacturing, marketing, labeling, research, design, sales, and regulatory affairs) to Genentech, rebranding all Roche drugs in the U.S. as Genentech. Genentech took over the employees, assets, brands, and other operational functions of U.S. Roche and Roche Labs. Genentech has told the public and all customers of U.S. Roche and Roche Labs of the consolidation. Genentech paid U.S. Roche and Roche Labs nothing for these assets, employees, goodwill, and operations. Genentech controls U.S. Roche and Roche Labs out of South San Francisco, where all the decisions to relocate the commercial pharmaceutical operations were made.

55. With respect to all causes of action below, Genentech and Genentech USA is the successor-in-interest to the military-Lariam business of all Roche entities, thereby rendering it liable for its predecessors activities.

56. With respect to all causes of action below, Genentech is the alter ego of Genentech USA.

C. Plaintiff's Lariam Toxicity as a Result of Roche's Drug

57. Plaintiff is a Marine Corps veteran who is permanently disabled because of Lariam toxicity.

58. In December 1999, Plaintiff entered the military without any history of neuropsychiatric symptoms. The military conducts a rigorous physical exam to see if the enlistee is in good physical and mental health and ensure he can safely make it through basic training and meet the daily demands and stress of service. During the enlistment process, Plainitff reported no medical history of neuropsychiatric symptoms. He had no history of neuropsychiatric problems, including insomnia, depression, anxiety, amnesia or other memory loss, or any nervous trouble of any sort.

59. Plaintiff's consumption of Lariam after his deployment with the 22nd Marine Expeditionary Unit in September 2002 changed his mental and psychiatric condition forever. Following his honorable discharge from the Marine Corps for "adjustment disorder with depressed

mood," among other reasons, he has suffered classic symptoms of what he recently discovered were caused by Lariam. Over the next nine years to the present day, Plaintiff had cycled through a number of psychiatric treatments and confounding diagnoses.

60. Defendants could have spared Plaintiff of his personal injuries had they adequately warned the U.S. military of the risks of Lariam and made a well-designed drug. In 2013, after the FDA slapped the "black box" warnings on Lariam, the U.S. military virtually ceased prescribing the drug to its soldiers in endemic malaria regions. Those warnings of risks that Roche had long knew of could have prevented Plaintiff's injuries.

61. Plaintiff had no reason to suspect that his permanent and chronic neuropsychiatric injuries resulted from Lariam until September 2017 when Plaintiff was told by a doctor that the symptoms he was experienced were actually caused by Lariam toxicity. He went to see the doctor as a result of a news report he saw in or around August 2017 of the work of a doctor investigating the causal link between mefloquine and veterans' neuropsychiatric disorders. Plaintiff had no reason to suspect that his permanent and chronic neuropsychiatric injuries resulted from Roche's wrongdoing until September 2017 when he became aware that Roche had manufactured the drug Lariam, failed to do all it could to protect consumers of the drug, and knew of the severe and permanent neuropsychiatric risks and failed to warn of them.

FIRST CAUSE OF ACTION

STRICT PRODUCTS LIABILITY – FAILURE TO WARN

(Against All Defendants)

62. Plaintiff hereby incorporates by reference, as if fully set forth herein, each and every allegation set forth in the preceding paragraphs and further alleges as follows:

63. Roche developed, manufactured, and sold Lariam during all relevant times. As the brand-name manufacturer of Lariam, Roche is responsible under California law to warn of the risks about which it knew or reasonably should have known or were scientifically knowable.

64. Roche had actual or constructive knowledge of the substantial danger of serious and permanent neuropsychiatric side effects from the consumption of Lariam in a sizeable

minority of patients. When Plaintiff consumed Lariam, Roche knew of (1) the lasting side effects of Lariam based on the scientific and medical literature, case reports, and governmental and regulatory investigations and (2) the existence of safer, equally effective malaria prevention alternatives.

65. Roche's warnings of these substantial dangers were nonexistent or at least inadequate. Roche failed to adequately inform the U.S. military and U.S. service members of side effects that might occur upon foreseeable use of Lariam.

66. Plaintiff consumed Lariam for malaria prevention, which was an indicted use of the drug.

67. None of Plaintiff, the U.S. Military, and Plaintiff's physicians would have ordinarily discovered the substantial danger of serious and permanent neuropsychiatric side effects from consuming Lariam.

68. Had Roche adequately warned of the substantial danger of severe and permanent neuropsychiatric side effects of Lariam, the history record is clear: the U.S. military would not have purchased, and Plaintiff would not have ingested, Lariam.

69. The lack of sufficient warnings was a substantial factor in causing Plaintiff's harm.

70. As a direct and proximate result of the inadequate warnings for Lariam, Plaintiff suffered severe and permanent injuries, incurred significant expenses for medical care and treatment, suffered lost wages and earnings, was otherwise economically injured, and experienced pain and suffering.

71. Upon information and belief, Genentech and Genentech USA are the successors-in-interest to the liability of the Roche Defendants arising out of this First Cause of Action.

SECOND CAUSE OF ACTION

NEGLIGENCE

(Against All Defendants)

72. Plaintiff hereby incorporates by reference, as if fully set forth herein, each and every allegation set forth in the preceding paragraphs and further alleges as follows:

73. Each Roche Defendant owed a duty to exercise reasonable care to Plaintiff in its manufacture, design, and labeling of Lariam so that Lariam can be safely used as intended by the consumer.

74. Each Roche Defendant breached this duty of care by negligently designing Lariam as a first-line drug for malaria prophylaxis for U.S. service members in remote and inherently stressful environments.

75. Roche knew of the substantial danger of serious neuropsychiatric side effects from Lariam and the existence of safer, equally effective alternatives. They likewise knew that it was impractical for the U.S. military to follow adequate prescribing protocols for soldiers deployed in remote parts of Somalia. The risk that those troops would not be able to accurately identify Lariam side effects in stressful combat zones surrounded by enemy threats and make a judgment to discontinue Lariam was reasonably foreseeable. Accordingly, in light of the foregoing, Roche should not have sold Lariam to the U.S. military as a first-line drug for malaria prophylaxis for our troops in Somalia without adequate warnings, distribution controls, and training for proper prescribing protocols.

76. A reasonably careful drug maker would have warned the U.S. military and the public at large of the substantial danger of Lariam's permanent and severe neuropsychiatric side effects under the circumstances. Such a drug maker would have designed and marketed the drug as a last-resort therapy after all other equally effective alternatives (which existed) failed or presented equally severe side effects. A reasonably careful drug maker would have issued guidance and technical assistance to the U.S. military to ensure effective protocols for drug administration and follow-up were in place for soldiers in remote and threatening environments.

77. Plaintiff's injuries and damages alleged herein were and are the direct and proximate result of the carelessness and negligence of the Defendants as follows:

a. In their manufacture, testing, packaging, promotion, marketing, sale, and/or distribution of the prescription drug Lariam;

b. In their failure to warn or instruct and/or adequately warn or adequately instruct, prescribing physicians, the U.S. Military and users of Lariam, including Plaintiff herein, of the dangerous and defective characteristics of Lariam;

c. In their promotion of the prescription drug Lariam in a deceitful, and fraudulent manner, despite evidence as to the product's defective and dangerous characteristics due to its propensity to cause serious injury;

d. In representing that the prescription drug Lariam was safe for its intended use when, in fact, the product was unsafe for its intended use;

e. In failing to perform appropriate pre-market testing of the prescription drug Lariam;

f. In failing to perform appropriate post-market testing of Lariam; and

g. In failing to perform appropriate post-market surveillance of Lariam.

78. Roche knew or should have known that patients such as Plaintiff would foreseeably suffer injury as a result of the Defendants' failure to exercise reasonable and ordinary care.

79. Roche failed to exercise reasonable and ordinary care by failing to adequately warn prescribing physicians and patients, such as Plaintiff, of the serious risk of developing neuropsychiatric injuries and mefloquine toxicity after ingesting Lariam.

80. As a direct and proximate result of the defective and inappropriate warnings and the unreasonably dangerous and defective characteristics of Lariam, and Roche's failure to comply with the care required of a careful drug manufacturer, Plaintiff suffered severe and permanent injuries and incurred significant expenses for medical care and treatment, suffered lost wages and earnings, was otherwise economically injured, and experienced pain and suffering.

81. Upon information and belief, Genentech and Genentech USA are the successors-in-interest to the liability of the Roche Defendants arising out of this Second Cause of Action.

THIRD CAUSE OF ACTION

DECEIT BY CONCEALMENT – VIOLATION OF CALIFORNIA CIVIL CODE §§ 1709, 1710

(Against All Defendants)

82. Plaintiff hereby incorporates by reference, as if fully set forth herein, each and every allegation set forth in the preceding paragraphs and further alleges as follows:

83. The Roche Defendants had actual knowledge based upon studies, published reports, and clinical experience, that the prescription drug Lariam created an unreasonable risk of serious bodily injury, such as neuropsychiatric injuries and mefloquine toxicity, or should have known such information.

84. The Roche Defendants willfully omitted, concealed and suppressed this information from the product labeling, promotions, and advertising of Lariam, and instead labeled, promoted, and advertised the prescription drug Lariam as safe in order to avoid losses and sustain profits in its sale to consumers and thereby induce consumers and their prescribing or treating physicians to use Lariam. Defendants knew that Plaintiff's healthcare providers and the United States military would not have exposed Plaintiff to Lariam, had Plaintiff's healthcare providers known or otherwise been aware of the true facts concerning Lariam's administration.

85. Plaintiff and Plaintiff's healthcare providers reasonably relied, to their detriment, upon Roche's fraudulent actions and omissions in their representations concerning the risks of Lariam in the labeling, advertising, and promoting of said product.

86. Plaintiff and Plaintiff's healthcare providers reasonably relied upon the Roche Defendants' representations to them that Lariam was safe for human consumption and/or use, and that Roche's labeling, advertising, and promotions fully described all known risks of Lariam.

87. As a direct and proximate result of the defective and inappropriate warnings and the unreasonably dangerous and defective characteristics of Lariam, and the Defendants' failure to comply with federal standards and requirements, Plaintiff suffered severe and permanent

injuries and incurred significant expenses for medical care and treatment, suffered lost wages and earnings, was otherwise economically injured, and experienced pain and suffering.

88. Upon information and belief, Genentech and Genentech USA are the successors-in-interest to the liability of the Roche Defendants arising out of this Third Cause of Action.

FOURTH CAUSE OF ACTION

FRAUD

(Against All Defendants)

89. Plaintiff hereby incorporates by reference, as if fully set forth herein, each and every allegation set forth in the preceding paragraphs and further alleges as follows:

90. The Roche Defendants concealed, and continue to conceal, past and present facts from the consuming public, including Plaintiff, which they had a duty to disclose.

91. The facts concealed and not disclosed include, but are not limited to, those set forth in this Complaint.

92. Each of the facts concealed and not disclosed were material.

93. Defendants concealed and continue to fail to disclose material facts to the consuming public with the intent that the consuming public, like Plaintiff, would take a course of action that it would otherwise not have taken if it had been informed of the actual facts known to the Defendants, including the totality of the risks associated with the use of Lariam.

94. Plaintiff took such action relying on the assumption that the undisclosed facts did not exist and/or were different than they actually were.

95. The reliance of Plaintiff was justified.

96. As a result of Plaintiff's reliance on the incomplete and inaccurate information communicated by the Defendants and their assumption that the non-disclosed facts about the risks associated with the use of Lariam did not exist, Plaintiff suffered the injuries and damages alleged in this Complaint.

97. As a direct and proximate result of Defendants, Plaintiff suffered serious physical injury, harm, damages and economic loss.

98. As a result of the foregoing by the Defendants, and each of them, Plaintiff suffered injuries and damage as alleged herein.

99. Upon information and belief, Genentech and Genentech USA are the successors-in-interest to the liability of the Roche Defendants arising out of this Fourth Cause of Action.

FIFTH CAUSE OF ACTION

NEGLIGENT MISREPRESENTATION AND CONCEALMENT

(Against All Defendants)

100. Plaintiff hereby incorporates by reference, as if fully set forth herein, each and every allegation set forth in the preceding paragraphs and further alleges as follows:

101. The Roche Defendants labeled, promoted, and advertised Lariam as safe, fit and effective for use in humans.

102. The Roche Defendants made the foregoing representations without any reasonable ground for believing them to be true. In supplying the false information, Roche failed to exercise reasonable care in labeling, promoting and advertising the prescription drug Lariam.

103. The representations made by Roche were, in fact, false, in that Lariam was not safe, fit and effective for use in humans.

104. Plaintiff's healthcare providers would not have exposed Plaintiff to Lariam had his healthcare providers known or otherwise been aware of the true facts concerning the prescription drug Lariam.

105. Plaintiff and Plaintiff's healthcare providers reasonably relied, to their detriment, upon Roche's actions, concealment and omissions in their representations concerning the risks of Lariam in the labeling, advertising, and promoting of said product.

106. Plaintiff and Plaintiff's healthcare providers reasonably relied upon Roche's representations to them that Lariam was safe for human consumption and/or use and that the Defendants' labeling, advertising, and promotions fully described all known risks of Lariam .

107. As a direct and proximate result of the defective and inappropriate warnings and the unreasonably dangerous and defective characteristics of Lariam, and Roche's failure to comply with federal standards and requirements, Plaintiff suffered severe and permanent injuries and incurred significant expenses for medical care and treatment, suffered lost wages and earnings, and was otherwise economically injured.

108. Upon information and belief, Genentech and Genentech USA are the successors-in-interest to the liability of the Roche Defendants arising out of this Fifth Cause of Action.

PUNITIVE DAMAGES ALLEGATIONS

109. Plaintiff hereby incorporates by reference, as if fully set forth herein, each and every allegation set forth in the preceding paragraphs and further alleges as follows:

110. Roche knew or should have known that the administration of Lariam could result in the development of mefloquine toxicity and severe and lasting neuropsychiatric side effects when administered to patients in the manner as was administered to Plaintiff.

111. Roche attempted to misrepresent and did misrepresent facts concerning the safety of Lariam.

112. The Roche Defendants' misrepresentations included knowingly withholding material information from the medical community and the public, including Plaintiff, concerning the safety of Lariam.

113. Roche knew and recklessly disregarded the fact that Lariam could result in the development of mefloquine toxicity and severe and lasting neuropsychiatric side effects when administered to patients in the manner as was administered to Plaintiff. Notwithstanding the foregoing, Roche continued to aggressively market Lariam to the U.S. military and consumers, including Plaintiff herein, without disclosing the fact that administration of Lariam could result in

the development of mefloquine toxicity when administered to patients in the manner as was administered to Plaintiff.

114. The Roche Defendants knew of the defective and unreasonably dangerous nature of the prescription drug Lariam as set forth herein, but continued to manufacture, market, distribute, and sell it so as to maximize sales and profits at the expense of the health and safety of the public, including Plaintiff, in conscious and/or negligent disregard of the foreseeable risks of injury.

115. The Roche Defendants intentionally concealed and/or recklessly failed to disclose to the public, including Plaintiff, the potentially life-threatening side effects of the administration of Lariam in order to ensure continued and increased sales.

116. The Roche Defendants' intentional and/or reckless failure to disclose information deprived Plaintiff and his health care providers of necessary information to enable Plaintiff and his healthcare providers to weigh the true risks of using Lariam against the benefits.

117. As a direct and proximate result of Roche's conscious and deliberate disregard for the rights and safety of consumers such as Plaintiff, and the unreasonably dangerous and defective characteristics of Lariam, and Roche's failure to comply with federal standards and requirements, Plaintiff suffered severe and permanent injuries, including but not limited to the development of mefloquine toxicity and severe and lasting neuropsychiatric injuries. Plaintiff incurred significant expenses for medical care and treatment, suffered lost wages and earnings, and was otherwise economically injured. Plaintiff suffered severe pecuniary loss. Plaintiff seeks actual and punitive damages from the Defendants as alleged herein.

118. Roche's conduct was committed with knowing, conscious, and deliberate disregard for the rights and safety of consumers, including Plaintiff, thereby entitling Plaintiff to punitive damages in an amount appropriate to punish Roche and deter them from similar conduct in the future.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against each of the Defendants as follows:

a. Awarding actual damages in an amount to be determined at trial;

b. Awarding punitive damages to the Plaintiff;

c. Awarding pre-judgment and post-judgment interest to the Plaintiff;

d. Awarding the costs and expenses of this litigation to the Plaintiff;

e. Awarding reasonable attorneys' fees and costs to the Plaintiff as provided by law; and

f. Granting all such other relief as the Court deems necessary, just and proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all Counts and as to all issues.

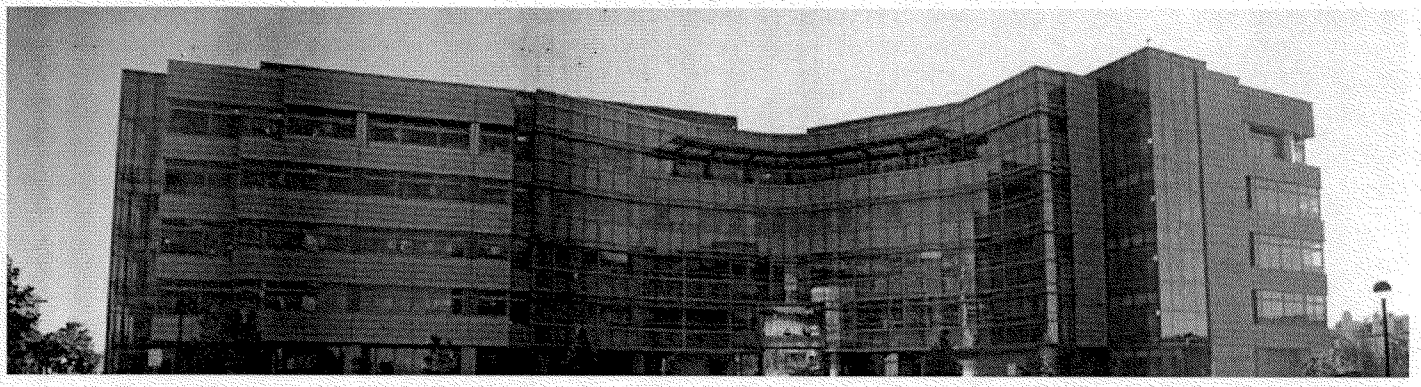
Dated: May 15, 2019

PANISH SHEA & BOYLE LLP

By _____

JESSE MAX CREED
Attorneys for Plaintiff

Exhibit A



ABOUT US

Considered the founder of the industry, Genentech, now a member of the Roche Group, has been delivering on the promise of biotechnology for over 40 years.

Genentech is a leading biotechnology company that discovers, develops, manufactures and commercializes medicines to treat patients with serious or life-threatening medical conditions. We are among the world's leading biotech companies, with multiple products on the market and a promising development pipeline.

Our Purpose: Doing now what patients need next

We believe it's urgent to deliver medical solutions right now – even as we develop innovations for the future. We are passionate about transforming patients' lives. We are courageous in both decision and action. And we believe that good business means a better world.

That is why we come to work each day. We commit ourselves to scientific rigor, unassailable ethics, and access to medical innovations for all. We do this today to build a better tomorrow.

We are proud of who we are, what we do, and how we do it. We are many, working as one across functions, across companies, and across the world.

We are Roche.

Our Values

The three Roche values—Integrity, Courage, and Passion—are core to how we want to behave, as individuals and collectively as an organization.

- **Passion** means we use our drive and commitment to energize, engage and inspire others.
- **Courage** means we are entrepreneurial and thus take risks, reach beyond boundaries and experiment.
- **Integrity** means we are consistently open, honest, ethical and genuine.

These values define fundamental attributes for guiding decisions and actions leading to increased innovation and business performance.

A Member of the Roche Group

Genentech became a member of the Roche Group in March of 2009. As part of their merger agreement, Roche and Genentech combined their pharmaceutical operations in the United States. Genentech's South San Francisco campus now serves as the headquarters for Roche pharmaceutical operations in the United States. Genentech Research and Early Development operates as an independent center within Roche.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ANDREW SHEETS, et al.,

Plaintiffs,

v.

F. HOFFMANN-LA ROCHE LTD, et al.,

Defendants.

Case No. 18-cv-04565-JST

ORDER GRANTING MOTION TO REMAND

Re: ECF No. 10

Defendants Hoffmann-La Roche Inc. ("HLR") and Genentech, Inc. (together, "Removing Defendants") removed this action from state court on the basis of diversity jurisdiction. ECF No. 1. Before the Court is Plaintiffs' motion to remand. ECF No. 10. For the reasons below, the Court will grant the motion.

I. BACKGROUND

Plaintiff Andrew Sheets and his wife, Kristie Sheets, filed this products liability action in the Superior Court for the State of California, County of Sonoma. ECF No. 1 ¶ 1. They assert various tort claims under California law arising out of complications suffered by Mr. Sheets after taking the anti-malarial drug Lariam. *See generally* ECF No. 1-2 ("Complaint"). According to Plaintiffs, Mr. Sheets was prescribed Lariam upon his Naval deployment to Afghanistan in 2003. ECF No. 1-2 ¶ 13. He had severe nightmares the first night he took the medication. *Id.* These nightmares have continued to the present, augmented by other symptoms like depression, paranoia, and vision problems as Mr. Sheets's condition has deteriorated over time. *Id.* Sheets allegedly did not discover that Lariam toxicity could be causing his condition until May 2017. *Id.* Plaintiffs do not plead any federal cause of action. *See generally* Compl.

The complaint names as defendants Hoffmann-La Roche Inc. ("HLR," which Plaintiffs

refer to as "U.S. Roche"); Genentech, Inc.; and F. Hoffmann-La Roche Ltd ("FHLR," which Plaintiffs refer to as "Swiss Roche"). *Id.* at 8. All three defendants are wholly-owned subsidiaries of Roche Holding Ltd. ("Roche Holding"). ECF No. 18 at 2 (HLR); ECF No. 19 at 2 (Genentech); ECF No. 33 at 2 (FHLR).

At the time of removal, FHLR had not yet been served. ECF No. 1 ¶ 5. Only HLR and Genentech filed the notice of removal now before the Court. ECF No. 1 at 2.

A. Citizenship of the Parties

The parties do not dispute that Mr. and Mrs. Sheets live in Cazadero, California, and are thus citizens of California for the purpose of establishing diversity jurisdiction. *Id.* ¶ 12; ECF No. 1-2 ¶¶ 14-15. Similarly, the parties do not dispute that FHLR is a Swiss entity headquartered in Basel, Switzerland. ECF No. 1 ¶ 17; ECF No. 1-2 ¶¶ 16.

As for the Removing Defendants, the parties agree that Genentech is a Delaware corporation with its principal place of business in South San Francisco, California. ECF No. 1 ¶ 20; ECF No. 1-2 ¶ 18.[1] However, HLR's citizenship is disputed. HLR is incorporated in New Jersey, but the parties disagree about the location of its principal place of business. ECF No. 1 at 4; ECF No. 10 at 7. Removing Defendants insist that HLR's headquarters is in New Jersey, "making it a citizen of New Jersey, only." ECF No. 1 at ¶ 16. Meanwhile, Plaintiffs argue that HLR relocated its headquarters to South San Francisco when Roche Holding acquired Genentech in 2009 and is now a citizen of California. ECF No. 10 at 7. Plaintiffs also point to evidence that several HLR decisionmakers, including HLR's CEO and secretary, Sean A. Johnston, work out of South San Francisco to argue that HLR's activities are directed, controlled, and coordinated out of HLR's office there. *Id.* at 8.

II. LEGAL STANDARD

"[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . . to the district court of the United

[1] Removing Defendants assert that Genentech's California citizenship does not defeat diversity jurisdiction because Genentech was fraudulently joined. Because the Court concludes that HLR is a citizen of California, it does not address this argument.

States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). "It is to be presumed," however, "that a cause lies outside [the] limited jurisdiction [of the federal courts] and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (internal citation omitted); see also *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (stating that the Ninth Circuit "strictly construe[s] the removal statute against removal jurisdiction"). "Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." *Gaus*, 980 F.2d at 566. "The strong presumption against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper." *Id.* (internal quotation marks omitted). District courts must "resolve[ ] all ambiguity in favor of remand to state court." *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1042 (9th Cir. 2009). If the district court determines that it lacks jurisdiction, the action must be remanded back to the state court. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 134 (2005).

Generally, the existence of federal subject matter jurisdiction may be premised on either diversity of the parties or a federal question. *See Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1183 & n.2 (9th Cir. 2002). Diversity jurisdiction exists where an action is between citizens of different states and more than $75,000 is in dispute. 28 U.S.C. § 1332(a). "A civil action otherwise removable solely on the basis of [diversity] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." *Id.* § 1441(b). For diversity purposes a corporation is a citizen of the state of its incorporation and the state where it maintains its "principal place of business." *Id.* § 1332(c)(1). The principal place of business is usually "the place where the corporation maintains its headquarters – provided that the headquarters is the actual center of direction, control, and coordination, i.e., the 'nerve center,' and not simply an office where the corporation holds its board meetings." *Hertz Corp. v. Friend*, 559 U.S. 77, 93 (2010).

III. DISCUSSION

The principal question here is whether HLR is a California citizen. If it is, the Court must remand because its presence would destroy complete diversity of the parties, 28 U.S.C. § 1332,

and because a defendant may not remove to federal court if it is a citizen of the forum state, 28 U.S.C. 1441(b). Having considered the competing evidence presented by the parties,[2] the Court concludes that the Removing Defendants have not met their burden to establish diversity jurisdiction, because they have failed to rebut evidence presented by Plaintiffs indicating that HLR's "nerve center" is located in California rather than New Jersey.

The Plaintiffs have submitted considerable evidence showing that HLR's operational, administrative, and executive functions shifted from New Jersey to California once Roche Holding acquired Genentech in 2009. *See* ECF No. 10 at 14-17. For instance, a Roche-branded press release from 2009, entitled "Bringing a successful partnership to the next level," describes HLR's intent to transplant its manufacturing, commercial, and executive functions to California. *See* ECF No. 10-2 at 16; *id.* at 19 (describing "[r]elocat[ion of the] commercial headquarters [from Nutley, NJ] to South San Francisco" as part of the "combined organization" of HLR and Genentech); *id.* at 20 (announcing a "[m]ove to new South San Francisco HQ" which will "[c]onsolidate HQ functions" there). Similarly, a letter from the Roche Holding Chairman and CEO to Genentech employees describing the merger identifies a commitment to "locating the combined company's U.S. headquarters at Genentech's current facility in South San Francisco." ECF No. 10-4 at 2; *see also* ECF No. 10-19 at 2 (Roche Holding investor update describing "South San Francisco site to become headquarters of combined U.S. commercial operations"). Moving to the present day, Roche's public website includes a page entitled, "Tale of Two Sites," that calls the Genentech site in South San Francisco "Roche's North America hub" and "the headquarters of Roche Commercial Operations for North America." ECF No. 10-12 at 3. The website of Genentech – a Roche subsidiary – states plainly, "Following our March 2009 merger with Roche, Genentech's South San Francisco campus *became the headquarters* for Roche pharmaceutical operations in the United States." ECF No. 10-24 at 2 (emphasis added).

By contrast, the evidence in support of HLR having its nerve center in New Jersey is both

[2] Removing Defendants object to Plaintiffs' submission of new evidence on reply without offering them an opportunity to respond. ECF No. 37. The Court sustains the objection and does not consider the exhibits attached to Plaintiffs' reply. *See, e.g.*, *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996).

slight and equivocal. Defendants primarily offers filings before the New Jersey Treasury Department and California Secretary of State, both of which name New Jersey as HLR's principal place of business. ECF No. 17-2 at 2; ECF No. 17-3 at 2. However, the Supreme Court has explicitly "reject[ed] suggestions . . . that the mere filing of a form . . . would, without more, be sufficient proof to establish a corporation's 'nerve center.'" *Hertz Corp.*, 559 U.S. at 97. Allowing such self-serving allegations to be determinative of jurisdiction "would readily permit jurisdictional manipulation" – for instance, where "the alleged 'nerve center' is nothing more than a mail drop box, [or] a bare office with a computer." *Id.*

As further support, HLR offers a declaration from Gerald Bohm, HLR's assistant secretary, which provides little more than conclusory allegations: for instance, the claim that "[f]rom January 1, 2018 through the date of this declaration, HLR operated and conducted its corporate affairs from the State of New Jersey." ECF No. 17-1 ¶ 5. The Bohm declaration further alleges that "HLR's Board of Directors, with the exception of Sean A. Johnston, has its annual meetings in HLR's Little Falls, NJ office." ECF No. 17-1 ¶ 7. As previously noted, however, the principal place of business is usually "*not* simply an office where the corporation holds its board meetings," but rather "the actual center of direction, control, and coordination, i.e., the 'nerve center[.]'" *Hertz*, 559 U.S. at 93 (emphasis added); *see also id.* at 96 (the "nerve center" test "points courts in a single direction, toward the center of overall direction, control, and coordination").

Defendants also assert that "Plaintiff's [e]vidence fails to disprove that HLR is a New Jersey [c]itizen." ECF No. 17 at 13. The argument misses the point. For one thing, no one disputes that HLR is a New Jersey citizen by virtue of its incorporation there; the question is whether HLR is also a citizen of California for diversity purposes because its principal place of business is in South San Francisco. Moreover, the burden with regard to citizenship rests with HLR, not Plaintiffs. "The strong presumption against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper." *Gaus*, 980 F.2d at 566. And any ambiguity in the parties' evidence must be resolved "in favor of remand to state court." *Philip Morris USA*, 582 F.3d at 1042. As set forth above, HLR has not met his burden.

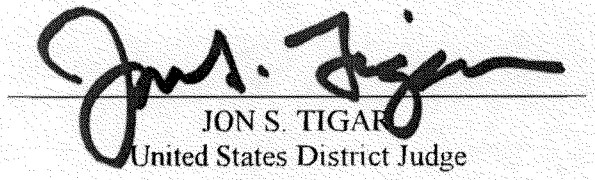
For the foregoing reasons, the Court will grant the motion to remand.[3]

CONCLUSION

Because Defendants have failed to demonstrate that HLR is not a California citizen, they have failed to carry their burden to show that removal is proper. Plaintiffs' motion is granted and the Court hereby remands this action to the Sonoma County Superior Court. Plaintiffs' request for jurisdictional discovery is denied as moot.

IT IS SO ORDERED.

Dated: December 7, 2018



JON S. TIGAR
United States District Judge

[3] In light of the Court's conclusion regarding HLR's citizenship, it need not reach the parties' remaining arguments.

EXHIBIT C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARKELL POOL,

Plaintiff,

v.

F. HOFFMAN-LA ROCHE, LTD., et al.,

Defendants.

Case No. 19-cv-01005-EMC

ORDER GRANTING PLAINTIFF'S MOTION TO REMAND

Docket No. 31

Plaintiff Markell Pool initiated this lawsuit in state court against the following defendants:

(1) F. Hoffman-La Roche Ltd. ("FHLR").

(2) Hoffman-La Roche, Inc. ("HLR").

(3) Roche Laboratories, Inc. ("Roche Labs").

(4) Genentech, Inc.

(5) Genentech USA, Inc. ("Genentech USA").

The first three defendants above shall hereinafter be referred to collectively as the "Roche Defendants." The last two defendants shall hereinafter be referred to collectively as the "Genentech Defendants." According to Mr. Pool, the Roche Defendants were responsible for manufacturing, marketing, and/or selling an antimalarial drug known as Lariam but failed to adequately warn about its toxic effects and thus are liable to him. He claims that the Genentech Defendants are also liable based on a theory of successor liability.

After Mr. Pool filed suit, four of the five defendants – *i.e.*, all defendants except for FHLR – removed the case to federal court. *See* Docket No. 1 (notice of removal). These four defendants shall hereinafter be referred to as the "Removing Defendants." According to Removing

Defendants, removal was proper based on diversity jurisdiction, once the citizenship of the fraudulently joined defendants (*i.e.*, the Genentech Defendants) was ignored.

Following removal, all five defendants filed motions to quash and/or dismiss. *See* Docket No. 8 (FHLR's motion); Docket No. 10 (Genentech Defendants' motion); Docket No. 11 (HLR and Roche Labs' motion). Mr. Pool then filed a motion to remand, and the parties agreed that the motion to remand should be addressed before the five defendants' motions. *See* Docket No. 32 (stipulation and order). Currently pending before the Court is Mr. Pool's motion to remand.

Having considered the parties' briefs and accompanying submissions, as well as all other evidence of record, the Court hereby **GRANTS** the motion to remand.

I. FACTUAL & PROCEDURAL BACKGROUND

A. General Allegations in Complaint

In his complaint, Mr. Pool alleges as follows.

Mr. Pool was previously part of the U.S. military. *See* Compl. ¶¶ 2, 14. The Roche Defendants "marketed and sold Lariam to the U.S. military for service members deployed to Somalia [in the 1990s] for the prevention of malaria." Compl. ¶ 2. Mr. Pool was deployed to Somalia during this time and took Lariam while there. *See* Compl. ¶ 3; *see also* Compl. ¶ 14.

Lariam is extremely toxic. *See* Compl. ¶ 1; *see also* Compl. ¶ 5 (alleging that, "after taking the drug, a sizeable group of soldier have severe and irreversible symptoms that mimic the symptoms of post-traumatic stress disorder"). The Roche Defendants knew of this fact at all relevant times, but hid the risks of the drug. *See* Compl. ¶ 4, 7. "As a result of [the] failure to warn [about the risks] and flawed drug design, [Mr. Pool] has suffered lasting neurological and psychiatric injuries." Compl. ¶ 3; *see also* Compl. ¶ 14 (describing effects on Mr. Pool).

In 2013, the FDA "slapped a 'blackbox' warning on the drug." FAC ¶ 11. "After the FDA warning, the U.S. military immediately changed its Lariam prescribing policies," "re-designating Lariam as a drug of last resort after other malaria prevention drugs were found to be ineffective." Compl. ¶ 12.

Mr. Pool seeks to hold the Roche Defendants liable because they were responsible for manufacturing, marketing, and/or selling Lariam. According to Mr. Pool:

- FHLR (a Swiss corporation) was the manufacturer of Lariam. *See* Compl. ¶ 47.
- HLR (a New Jersey corporation) was the new drug application holder for Lariam, which made it "responsible for the labeling and packaging of Lariam in the United States." Compl. ¶ 47.
- Roche Labs (a Delaware corporation) marketed and sold Lariam to the Department of Defense under a Distribution and Pricing Agreement (also known as a "DAPA"). *See* Compl. ¶ 48.

Mr. Pool seeks to hold the Genentech Defendants (both Delaware corporations) liable on a successor liability theory. In 2009, Genentech was acquired by a Roche entity. According to Mr. Pool, after the acquisition of Genentech in 2009, Roche Labs essentially transferred its "military-Lariam business" to the Genentech Defendants – *i.e.*, the Genentech Defendants "became the mere continuation of Roche Lab[s] with respect to the military-Lariam line of business." Compl. ¶ 50.

Based on, *inter alia*, the above allegations, Mr. Pool has asserted the following causes of action:

(1) Strict products liability – failure to warn.

(2) Negligence.

(3) Deceit by concealment in violation of California Civil Code §§ 1709-10.

(4) Fraud.

(5) Negligent misrepresentation and concealment.

B. Allegations in Complaint Related to Citizenship

As noted above, the Removing Defendants removed this case to federal court on the basis of diversity jurisdiction. Thus, citizenship of the parties is a critical issue.

Mr. Pool is a citizen of California. He alleges that most of the other defendants are also citizens of California (and thus there is not complete diversity), not because of their state of incorporation but rather because of their principal places of business.

For example, Mr. Pool alleges that HLR and Roche Labs both have their principal places of business in South San Francisco, California, and not Little Falls, New Jersey (as the Removing Defendants claim).

Mr. Pool also alleges that the Genentech Defendants have their principal places of business in South San Francisco – a fact that the Removing Defendants do not dispute. However, the Removing Defendants claim that the Genentech Defendants have been fraudulently joined to this case and thus their California citizenship should be disregarded.

II. DISCUSSION

A. Legal Standard

Title 28 U.S.C. § 1441 provides in relevant part "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed." 28 U.S.C. § 1441(a). "A defendant may remove an action to federal court based on federal question jurisdiction or diversity jurisdiction. However, [i]t is to be presumed that a cause lies outside [the] limited jurisdiction [of the federal courts] and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1042 (9th Cir. 2009) (internal quotation marks omitted). Thus, in a removal situation, the defendant has the burden of proving jurisdiction, and the burden of proof is preponderance of the evidence. *See Geographic Expeditions, Inc. v. Estate of Lhotka*, 599 F.3d 1102, 1106-07 (9th Cir. 2010). "Federal jurisdiction must be rejected *if there is any doubt* as to the right of removal in the first instance." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (emphasis added); *see also Hunter*, 582 F.3d at 1042 ("The '*strong presumption* against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper,' and that the court resolves all ambiguity in favor of remand to state court.") (emphasis added).

In light of the above, the Removing Defendants bear the burden of proving the diversity of citizenship between HLR/Roche Labs and Mr. Pool in the instant case. *See Sheets*, 2018 U.S. Dist. LEXIS 207248, at *9 (stating that "the burden with regard to citizenship rests with HLR [defendant], not Plaintiffs"); *see also Int'l Cultural Exch. Grp. v. Harifa, Inc.*, No. 5:14-cv-03014-PSG, 2014 U.S. Dist. LEXIS 152681, at *7 (N.D. Cal. Oct. 27, 2014) (stating that "there is no dispute that as the removing parties, Defendants bear the burden of proving the diversity of their citizenship from that of ICEG [plaintiff][;] Defendants do not dispute they bear this burden, nor do they dispute that this court must resolve all doubts as to the parties' diversity of citizenship in

favor of remand").

As for fraudulent joinder (as noted above, here, the Removing Defendants argue that the California citizenship of the Genentech Defendants may be disregarded because they were fraudulently joined to the lawsuit), the Ninth Circuit has noted that

> [t]here are two ways to establish fraudulent joinder: "(1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court." *Hunter v. Phillip Morris USA*, 582 F.3d 1039, 1044 (9th Cir. 2009) . . . . Fraudulent joinder is established the second way if a defendant shows that an "individual[] joined in the action cannot be liable on any theory." *Ritchey v. Upjohn Drug Co*, 139 F.3d 1313, 1318 (9th Cir. 1998). But "if there is a *possibility* that a state court would find that the complaint states a cause of action against any of the resident defendants, the federal court must find that the joinder was proper and remand the case to the state court." *Hunter*, 582 F.3d at 1046 . . . . A defendant invoking federal court diversity jurisdiction on the basis of fraudulent joinder bears a "heavy burden" since there is a "general presumption against [finding] fraudulent joinder." *Id.* (citations omitted).
>
> We have upheld rulings of fraudulent joinder where a defendant demonstrates that a plaintiff is barred by the statute of limitations from bringing claims against that defendant. *See Ritchey*, 139 F.3d at 1320; *Hamilton Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007). We have also upheld such rulings where a defendant presents extraordinarily strong evidence or arguments that a plaintiff could not possibly prevail on her claims against the allegedly fraudulently joined defendant. *See McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987) (defendant's conduct was privileged under state law); *United Comput. Sys. Inc. v. AT&T Corp.*, 298 F.3d 756, 761 (9th Cir. 2002) (plaintiff's claims against alleged sham defendant were all predicated on a contract to which the defendant was not a party); *Kruso v. Int'l Tel. & Tel. Corp.*, 872 F.2d 1416, 1426-27 (9th Cir. 1989) (same). We have declined to uphold fraudulent joinder rulings where a defendant raises a defense that requires a searching inquiry into the merits of the plaintiff's case, even if that defense, if successful, would prove fatal. *See Hunter*, 582 F.3d at 1046 (holding that an implied preemption affirmative defense was not a permissible ground for finding fraudulent joinder).

GranCare, LLC v. Thrower, 889 F.3d 543, 548-49 (9th Cir. 2018) (emphasis in original).

Notably, in *GranCare*, the Ninth Circuit underscored that a fraudulent joinder analysis is not the same as a 12(b)(6) analysis, although there are "some similarities." *Id.* at 549.

> A claim against a defendant may fail under Rule 12(b)(6), but that defendant has not necessarily been fraudulently joined. We emphasized in *Hunter* that a federal court must find that a defendant

> was properly joined and remand the case to state court if there is a "*possibility* that a state court would find that the complaint states a cause of action against any of the [non-diverse] defendants." *Hunter*, 582 F.3d at 1046 (emphasis added) (internal quotations and citation omitted) . . . . This standard accords with that adopted by a majority of our sister circuits. . . .
>
> A standard that equates fraudulent joinder with Rule 12(b)(6) conflates a jurisdictional inquiry with an adjudication on the merits. Because the purpose of the fraudulent joinder doctrine is to allow a determination whether the district court has subject matter jurisdiction, the standard is similar to the "wholly insubstantial and frivolous" standard for dismissing claims under Rule 12(b)(1) for lack of federal question jurisdiction. *Bell v. Hood*, 327 U.S. 678, 682-83, 66 S. Ct. 773, 90 L. Ed. 939 (1946); *Franklin v. Murphy*, 745 F.2d 1221, 1227 n.6 (9th Cir. 1984) ("A paid complaint that is 'obviously frivolous' does not confer federal subject matter jurisdiction."). The relative stringency of the standard accords with the presumption against removal jurisdiction, under which we "strictly construe the removal statute," and reject federal jurisdiction "if there is any doubt as to the right of removal in the first instance." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (per curiam).

Id. at 549-50. In other cases, the Ninth Circuit has also held that "[f]raudulent joinder must be proven by *clear and convincing evidence*." *Hamilton Materials Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007) (emphasis added).

B. Defect in Notice of Removal

As an initial matter, the Court addresses Mr. Pool's argument that the motion to remand can be easily granted because the Removing Defendants' notice of removal was defective. More specifically, Mr. Pool asserts that the notice failed to allege what the citizenship of Roche Labs was. Mr. Pool acknowledges that, about three weeks after the filing of the notice of removal, the Removing Defendants tried to cure this problem by filing a notice of errata and an amended notice of removal. *See* Docket No. 22 (notices). But Mr. Pool argues that this attempt to cure should be rejected because it was tendered outside of the removal period (*i.e.*, outside the "30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based").[1] 28 U.S.C. § 1446(b).

Mr. Pool is correct that the original notice of removal failed to address the citizenship of

[1] In terms of timing, the complaint was served on the Removing Defendants on January 23, 2019. The Removing Defendants removed on February 22, 2019. The Removing Defendants then filed their notice of errata and amended notice of removal on March 12, 2019.

Roche Labs. But he is incorrect that a defective allegation of jurisdiction cannot be cured. Title 28 U.S.C. § 1653 provides: "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U.S.C. § 1653. And the main case on which Mr. Pool relies – *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001) – specifically noted that § 1653 allows for the curing of defective allegations regarding citizenship. *See id.* at 857-58 (noting that the defendant had failed to specify what the plaintiffs' state citizenship was, instead only referring to their state residence, but adding that the defendant "could potentially have cured its defective allegations regarding citizenship by amending its notice of removal") (citing § 1653). Furthermore, the district court cases that Mr. Pool cites all fail to address § 1653.

To the extent Mr. Pool suggests that a defect may be cured only within the thirty-day period for removing a case to federal court, he is also incorrect. He does have a district court case to support his position (although, as noted above, that case failed to discuss § 1653). *See Contreras v. BMS of N. Am., LLC*, No. CV 18-8014 PA (MAAx), 2018 U.S. Dist. LEXIS 172828, at *5 (C.D. Cal. Oct. 18, 2018) (noting that defendant failed to allege its own citizenship; although defendant filed an amended notice of removal, it was filed "*after* the Court had already identified the defect in the original Notice of Removal and more than 30 days after [the defendant] was served with the Summons and Complaint" and thus concluding that "the Amended Notice of Removal does not cure the procedural defect in the original Notice of Removal") (emphasis in original). But § 1653 on its face does not put any time limits on amendment, and, as the Moore's treatise notes, "[s]ection 1653's liberal amendment rule permits a party who has not alleged that diversity exists to amend the pleadings *even as late as on appeal*." 15A Moore's Fed. Prac. – Civ. § 102.17[a] (emphasis added). In addition, the Ninth Circuit has indicated that an amendment after the thirty-day period is permissible:

> A defendant seeking to remove a case to federal court must do so within thirty days of being served with the complaint. *See* 28 U.S.C. § 1446(b). The Notice of Removal "cannot be amended to add a separate basis for removal jurisdiction after the thirty day period." *O'Halloran v. University of Washington*, 856 F.2d 1375, 1381 (9th Cir. 1988). *However, a defendant may amend the Notice of Removal after the thirty day window has closed to correct a "defective allegation of jurisdiction." See* 28 U.S.C. § 1653; *see also* 16 Moore's Federal Practice § 107.30[2][a][iv] ("Amendment

> may be permitted after the 30-day period if the amendment corrects defective allegations of jurisdiction, but not to add a new basis for removal jurisdiction.").

ARCO Envtl. Remed., L.L.C. v. Dep't of Health & Envtl. Quality, 213 F.3d 1108, 1117 (9th Cir. 2000) (emphasis added).

Accordingly, the notice of removal was not procedurally defective.

C. Genentech Defendants and Successor Liability

Although the defect in the removal notice is curable, Mr. Pool ultimately prevails on the merits on his motion to remand. The Court addresses first the issue of whether the Genentech Defendants – who are undisputedly California citizens – were fraudulently joined to this lawsuit.

As noted above, Mr. Pool maintains that the Genentech Defendants are liable based on a successor liability theory. The main case on which Mr. Pool relies with respect to successor liability is *Cleveland v. Johnson*, 209 Cal. App. 4th 1315, 1327 (2012). In *Cleveland*, the plaintiffs were two individuals who entered into an agreement with a company, ISI, under which the plaintiffs would provide $75,000 in capital to ISI so that it could develop a new business (an Internet service provider) to be known as The Central Connection. In turn, the plaintiffs were to receive 100% of the net cash receipts from the Internet project until all capital invested had been recouped; after that, the plaintiffs were to be paid 5% of gross receipts from the project. *See id.* at 1320.

Several years after entering into the agreement, the plaintiffs were told that the Internet project failed. *See id.* at 1321. However, the plaintiffs later discovered that the president of ISI had set up a business known as IS West that was similar to The Central Connection; IS West was a lucrative business. *See id.* at 1324. The plaintiffs thus filed suit, claiming that there was "a design and scheme 'to hijack the internet service provider business enterprise then known as Central Connection [now known as IS West], for [defendants'] own use and profit without the burden of the obligations owed to [the plaintiff].'" *Id.* The plaintiffs sued both the ISI president and IS West itself. According to the plaintiffs, IS West was liable for breach of contract because, *inter alia*, it was the successor to ISI. *See id.* More specifically, the plaintiffs argued that "IS West was the successor of ISI 'dba The Central Connection,' *not* ISI as a corporate entity." *Id.* at 1326

(emphasis added). A jury found in favor of the plaintiffs on the successor liability theory. *See id.* at 1325.

On appeal, the defendants contested the successor liability theory. The court rejected the defendants' argument:

> Defendants can prevail in this case only if, as a matter of law, there can never be successor liability when a corporation takes over a specific line of business that was operated separately by another corporation – that is where, as here, the assets of a separately maintained business or division (The Central Connection) of a company (ISI) are transferred to a new company (IS West). Where there may be circumstances under which successor liability in that situation would be in appropriate, that conclusion does not follow as a matter of law. Here, the facts were sufficient to support successor liability.

Id. at 1326.

The court explained that, for purposes of successor liability,

> "the purchaser does not assume the seller's liabilities unless (1) there is an express or implied agreement of assumption, (2), the transaction amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is a mere continuation of the seller, or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts."

Id. at 1327.

For the third successor liability theory above – *i.e.*, the mere continuation theory, "it has long been held that 'corporations cannot escape liability by a mere change of name or a shift of assets when and where it is shown that the new corporation is, in reality, but a continuation of the old.'" *Id.*

> Further, *Ray v. Alad* [19 Cal. 3d 22 (1977)] tells us, " . . . California decisions holding that a corporation acquiring the assets of another corporation is the latter's mere continuation and therefore liable for its debts have imposed such liability only upon a showing of *one or both* of the following factual elements: (1) no adequate consideration was given for the predecessor corporation's assets and made available for meeting the claims of its unsecured creditors; (2) one or more persons were officers, directors, or stockholders of both corporations."

Id. (emphasis in original).[2]

The court went on to note that the jury was instructed on the mere continuation theory and the question before it was essentially "one of law: may the doctrine of successor liability be applied to a corporation that succeeds to the assets of an unincorporated, but clearly separate, line of business of another corporation?" *Id.* at 1328. According to the court, "[w]e see no reason why the doctrine of successor liability should not be applied, and defendants offer no case law expressly forbidding its application." *Id.* Indeed, there was case law to support the application of successor liability – recognizing, for example, that "recognition of the fiction of separate corporate existence [as opposed to continuation] would foster an injustice or further a fraud." *Id.*

> These cases establish that the principles underlying the "mere continuation" theory of successor liability are not confined to corporations. A corporation may be a "mere continuation" of a partnership . . . . The very similar principles of alter ego liability will be applied where "the recognition of the fiction of separate corporate existence would foster an injustice or further a fraud . . . ."

Id. at 1329.

The court also rejected the defendants' argument that successor liability should not apply because "doing business under a fictitious business name [*i.e.*, The Central Connection] does not create a separate legal entity" from ISI. *Id.* at 1330. The court explained that

> [s]uccessor liability issues are equitable issues to be examined "on their own unique facts," and defendants offer no authority for the proposition that it "is simply a legal impossibility" for IS West to be the successor of ISI doing business as The Central Connection. *In short, the controlling point is that successor liability, like alter ego and similar principles, is an equitable doctrine.* As with other equitable doctrines, "it is appropriate to examine successor liability issues on their own unique facts" and "[c]onsiderations of fairness and equity apply." On the facts established in this case, we see no basis to conclude that, as a matter of law, a corporation (IS West) may not be found to be a "mere continuation" of a separately operated line of business (ISI doing business as The Central Connection).

[2] *See also Cleveland*, 209 Cal. App. 4th at 1334 ("The significant principle is that if a corporation organizes another corporation with practically the same shareholders and directors, transfers all the assets but does not pay all the first corporation's debts, and continues to carry on the same business, the separate entities may be disregarded and the new corporation held liable for the obligations of the old.") (internal quotation marks omitted).

> Defendants refer us to several cases they say support the proposition that a corporation like IS West "cannot be subjected to 'successor' liability where the seller [(ISI)] retained its separate corporate identity and continued to operate after the asset transfer." But this claim, too, presupposes the point we have just rejected: the assertion that there can never be successor liability as between a separately operated division of a company and a new corporation. The equitable principles we have described compel rejection of that assertion under the circumstances of this case.

Id. at 1330-31 (emphasis added). *Compare Garcia v. New Albertson's, Inc.*, No. 2:13-CV-05941-CAS (JCGx), 2014 U.S. Dist. LEXIS 142422, at *38 (C.D. Cal. Oct. 3, 2014) (stating that "[c]omparable equitable considerations are absent here[;] [u]nlike in *Cleveland*, the entity that allegedly wronged plaintiff is an active company that retains most of its pre-sale assets, easily sufficient to satisfy a judgment for plaintiff").

In his complaint, Mr. Pool makes allegations that map the legal landscape on the successor liability/mere continuation theory laid out in *Cleveland*. To wit:

> 47. At all relevant times, [FHLR] was the manufacturer of Lariam. At all relevant times, [HLR] was the new drug application holder, rendering it responsible for the labeling and packaging of Lariam in the United States.
>
> 48. Before the acquisition of Genentech by the Roche Group, Roche Lab[s] [a subsidiary of HLR] marketed and sold Lariam to the Department of Defense under a Distribution and Pricing Agreement ("DAPA"). A DAPA obligated Roche Lab[s] to offer Lariam for sale to the Defense Logistics Agency ("DLA") at the prices set forth in the DAPA. Roche did in fact sell Lariam to the military under these agreements up until the Genentech acquisition in or around 2009. . . .
>
> . . . .
>
> 50. After the Genentech acquisition, Roche Lab[s] transferred the military-Lariam business to Genentech USA and Genentech USA became the mere continuation of Roche Lab[s] with respect to the military-Lariam line of business. *At that time, Roche Lab[s] had terminated or withdrawn from its DAPA agreement to offer Lariam for sale to the U.S. military. Concurrently therewith, Genentech USA succeeded to the DAPA agreement and became the official DAPA holder of Lariam for the Roche Group,* meaning Genentech USA was the only entity in the Roche Group capable of offering Lariam for sale to the U.S. military.
>
> 51. *Genentech USA paid Roche Lab[s] nothing for the military-Lariam line of business. It gave Roche Lab[s] no consideration for this line of business. Moreover, Genentech USA had a common stock holder with Roche Lab[s] . . . . [Both] entities were owned by*

> *Roche Holdings, Inc. [And] Genentech USA had common officers and directors with Roche Lab[s] . . . at all relevant times.* In sum, Genentech USA was a mere continuation and thus successor of Roche Lab[s] with respect to the military-Lariam line of business, and the military was the single largest customer of Lariam for the Roche Group.

Compl. ¶¶ 47-51 (emphasis added).

Given these allegations in the complaint, it is possible that a state court would find in Mr. Pool's favor on the successor liability/mere continuation theory, and therefore remand is appropriate. *See GranCare*, 889 F.3d at 548-49 (emphasizing that, "'if there is a *possibility* that a state court would find that the complaint states a cause of action against any of the resident defendants, the federal court must find that the joinder was proper and remand the case to the state court'") (emphasis in original).

The Removing Defendants' arguments to the contrary are not persuasive. For example, the Removing Defendants assert that there can be no successor liability where the predecessor company (here, HLR and/or Roche Labs) still exists. But *Cleveland* indicates otherwise – *i.e.*, there, only a line of business was transferred from ISI to IS West, but the court still considered the possibility of successor liability.

The Removing Defendants also make much of the fact that the Genentech Defendants never sold Lariam. *See, e.g.*, Docket No. 1-4 (Gray Decl. ¶¶ 2-3) (testifying that "[t]he last lots of Lariam for U.S. distribution were manufactured in December of 2005" and that the last lots "expired in December 2008," *i.e.*, before Genentech was acquired in 2009); Docket No. 1-3 (letter, dated February 2019, from Defense Logistics Agency, in response to a FOIA request, stating that "the product [Lariam] was no longer purchased after September 2008," *i.e.*, before Genentech was acquired in 2009)[3]; Docket No. 1-5 (Bohm Decl. ¶ 17) (testifying that HLR voluntarily applied to withdraw its new drug application for Lariam in June 2009). But that fact is immaterial because Mr. Pool is not seeking to hold the Genentech Defendants liable on a direct liability theory; rather, he is claiming only successor liability. The Removing Defendants have failed to show that the

[3] Mr. Pool has objected to this evidence. However, the objection is essentially moot because, even taking the evidence into account, the Court ultimately finds in Mr. Pool's favor on the merits of the remand motion.

Genentech Defendants could not be held liable for their predecessors' conduct with respect to Lariam.

Finally, the Removing Defendants maintain that "the facts of the instant case are so far removed from those present in *Cleveland* that successor liability cannot, as a matter of fact and law, be applied." Opp'n at 17. But *Cleveland* explains that successor liability is ultimately about equity. Here, it is possible that a state court could find, as an equitable matter, that the Genentech Defendants should have successor liability because the relevant Roche parent made a decision to spin off HLR or Roche Labs' commercial operations – or at least the military line of business – into the Genentech Defendants without adequate consideration being given to HLR or Roche Labs. The Removing Defendants argue that successor liability makes no sense here because Mr. Pool is "attempt[ing] to apply the reverse of successor liability (i.e., he attempts to impute liability to the *purchased* corporation [Genentech]), whereas successor liability imputes the liability of the purchased corporation to the *purchasing* corporation [a Roche entity]." Opp'n at 17 (emphasis added). Although, as a formal matter, a Roche entity acquired Genentech, that does not preclude Genentech succeeding to liability of, *e.g.*, HLR or Roche Labs. The critical question is whether a Genentech Defendant is in effect a mere continuation of HLR or Roche Labs. *See also Cleveland*, 209 Cal. App. 4th at 1327 (acknowledging that, "[h]ere, we do not have one corporation formally purchasing the assets of another corporation"; but there are "'California decisions holding that a corporation acquiring the assets of another corporation is the latter's mere continuation and therefore liable for its debts").

That a Genentech Defendant could be a mere continuation is suggested by not only the allegations in the complaint but also by evidence submitted by Mr. Pool. More specifically, Mr. Pool has offered evidence indicating that a Roche parent made a purposeful decision to spin off HLR/Roche Labs' commercial operations to a Genentech entity in South San Francisco. For example:

- A document found on the www.roche.com website, dated February 9, 2009, and titled "Bringing a successful partnership to the next level." The document addresses the acquisition of Genentech by a Roche entity. *See* Creed Decl., Ex. 1

(Document at 3) ("Roche makes a tender offer to acquire all publicly held shares in Genentech."). The document states that there will be "[r]eloc[ation] [of] commercial headquarters to South San Francisco by combining marketing and support services." Creed Decl., Ex. 1 (Document at 18). The document also states that there will be "[c]onsolidat[ion] [of] HQ functions in South San Francisco." Creed Decl., Ex. 1 (Document at 18).

- A message dated August 23, 2018, to Genentech employees from Roche Chairman Franz Humer and Roche CEO Severin Schwan. The message states: "We remain committed to maintaining the Genentech brand name in the U.S. and locating the combined company's U.S. headquarters at Genentech's current facility in South San Francisco." Creed Decl., Ex. 3 (Message at 1).
- A webpage available on the www.roche.com website, titled "tale of two sites." The webpage discusses employees working in Basel, Switzerland, and San Francisco. It states: "Basel is home to the Roche company headquarters; South San Francisco to Genentech, the US headquarters." Creed Decl., Ex. 7 (Webpage at 2). The webpage also states: "The Genentech site in California, Roche's North America hub, . . . also serves as the headquarters of Roche Commercial Operations for North America." Creed Decl., Ex. 7 (Webpage at 2).
- A document found on the www.roche.com website, dated April 14, 2009, and titled "Investor Update." The update states: "Pascal Soriot will be appointed as CEO Genentech. In his new role he will lead all Pharma activities in the US and report directly to Group CEO Severin Schwan. . . . [¶] [T]he combined commercial operations of Roche Pharma North America and Genentech will be headquartered in South San Francisco. Pascal Soriot will directly lead this function." Creed Decl., Ex. 21 (Update at 1-2). The update continues: "George Abercrombie, CEO and President of [HLR], has agreed to support the integration through the end of 2009. In this role he will assist Pascal Soriot with the transition of the US Commercial Headquarters from Nutley [New Jersey] to South San Francisco."

Creed Decl., Ex. 21 (Update at 2).

- A webpage found on the website www.roche-nutley.com. The webpage states: "The former [HLR] site in Nutley, NJ, was sold in 2016 and is no longer operational. THIS WEBSITE IS ONLY ABOUT THE ENVIRONMENTAL REMEDIATION OF THE FORMER ROCHE NUTLEY SITE. . . . [¶] For all other information, use the following contacts. ROCHE PHARMACEUTICAL INQUIRIES: Roche's North American pharmaceutical headquarters is Genentech in South San Francisco." Creed Decl., Ex. 22 (Webpage at 1).

The Removing Defendants protest that the above evidence is hearsay. *Cf. M.E.S., Inc. v. Snell*, 712 F.3d 666, 671 (2d Cir. 2013) (stating that, where a defendant files a Rule 12(b)(1) motion to dismiss, a court is "permitted to rely on non-conclusory, non-hearsay statements outside the pleadings"). This argument lacks merit. Mr. Pool has raised at least a potentially meritorious argument that the evidence is not hearsay – *i.e.*, because the evidence comes from a Roche parent website, it amounts to a party admission or at least has sufficient indicia of reliability to fall within the residual exception to the hearsay rule. *See* Fed. R. Evid. 801(d)(2), 807. Defendants fail to negate the possibility that a state court could find successor liability. Notably, defense counsel conceded at the argument that HLR now only has but three employees and that at least some of its operational functions were taken over by a Genentech entity. There is thus a substantial basis from which a state court might infer successor liability.

Accordingly, the Court holds that, because the Removing Defendants have failed to carry its heavy burden of proving that the Genentech Defendants were fraudulently joined, there is no diversity of citizenship and thus removal of the instant case was not proper.

D. Citizenship of HLR and Roches Labs

There is a second, independent basis that also supports remand. More specifically, the Removing Defendants have failed to meet their burden of showing that HLR and La Roche are not citizens of California. Or, to state the matter somewhat differently, the Removing Defendants have failed to establish that the principal places of business for the two companies are in Little Falls, New Jersey.

1. Supreme Court's *Hertz* Decision

In evaluating what are the principal places of business for HLR and Roche Labs, the Court first takes into account the Supreme Court's decision *Hertz Corp. v. Friend*, 559 U.S. 77 (2010). There, the Supreme Court addressed the definition of "principal place of business" as used in the diversity jurisdiction statute, 28 U.S.C. § 1332. The Court stated, in relevant part, that

> we place primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible. And we conclude that the phrase "principal place of business" refers to the place *where the corporation's high level officers direct, control, and coordinate the corporation's activities*. Lower federal courts have often metaphorically called that place the corporation's "*nerve center*."

Id. at 80-81 (emphasis added). The Court added that, "in practice," the nerve center

> should normally be the place where the corporation maintains its headquarters – provided that the headquarters is the actual center of direction, control, and coordination, . . . and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion).

Id. at 93.

Notably, the Supreme Court rejected the proposition that a corporation's principal place of business is determined by "the amount of a corporation's business activity State by State" – *i.e.*, "[i]f the amount of activity is significantly larger or substantially predominates in one State, then that State is the corporation's principal place of business" and, only "[i]f there is no such State, then the principal place of business is the corporation's nerve center, *i.e.*, the place where the majority of its executive and administrative functions are performed." *Id.* at 82. This was, relatively speaking, too complicated an approach. *See id.* at 90 (noting that "a general 'business activities' approach has proved unusually difficult to apply" – *e.g.*, "[c]ourts must decide which factors are more important than others: for example, plant location, sales or servicing centers; transactions, payrolls, or revenue generation"); *id.* at 94 (noting that a "more general business activities test" "invites greater litigation and can lead to strange results" – *e.g.*, "if a corporation may be deemed a citizen of California on th[e] basis of activities [that] roughly reflect California's larger population . . . nearly every national retailer – no matter how far flung its operations – will

be deemed a citizen of California for diversity purposes") (internal quotation marks omitted).

The Supreme Court acknowledged "there will be hard cases" even under the nerve center test – *e.g.*, "in this era of telecommuting, *some corporations may divide their command and coordinating functions among officers who work at several different locations*, perhaps communicating over the Internet"; nevertheless, the Court still found the nerve center test more appropriate than the more general business activities test:

> [O]ur test . . . points courts in a single direction, toward the center of overall direction, control, and coordination. Courts do not have to try to weigh corporate functions, assets, or revenues different in kind, one from the other. Our approach provides a sensible test that is relatively easier to apply, not a test that will, in all instances, automatically generate a result.

Id. at 96 (emphasis added).

The Supreme Court also

> recognize[d] that the use of a "nerve center" test may in some cases produce results that seem to cut against the basic rationale for 28 U.S.C. § 1332 [*i.e.*, protecting out-of-state defendants from local prejudice]. For example, if the bulk of a company's business activities visible to the public take place in New Jersey, while its top officers direct those activities just across the river in New York, the "principal place of business" is [still] New York. One could argue that members of the public in New Jersey would be *less* likely to be prejudiced against the corporation than persons in New York – yet the corporation will still be entitled to remove a New Jersey state court to federal court. And note too that the same corporation would be unable to remove a New York state case to federal court, despite the New York public's presumed prejudice against the corporation.

Id. (emphasis in original). But, it explained, "in view of the necessity of having a clearer rule, we must accept [such anomalies]." *Id.*

Finally, the Court concluded by pointing out that its nerve center test should not be misconstrued to allow for manipulation of jurisdiction. For example, "we reject suggestions [that] the mere filing of a form like the Securities and Exchange Commission's Form 10-K listing a corporation's 'principal executive offices' would, without more, be sufficient proof to establish a corporation's 'nerve center.'" *Id.* at 97. Also, "if the record reveals . . . that the alleged 'nerve center' is nothing more than a mail drop box, a bare office with a computer, or the location of an annual retreat," that would not be sufficient to establish the principal place of business. *Id.*

2. Judge Tigar's *Sheets* Decision

Judge Tigar's *Sheets* case is instructive on the issue of principal place of business. *See Sheets v. F. Hoffman La Roche Ltd.*, No. 18-cv-04565-JST, 2018 U.S. Dist. LEXIS 207248 (N.D. Cal. Dec. 7, 2018). This is especially so given that *Sheets* is similar to the instant case – *i.e.*, the plaintiff claimed that he suffered injury after taking Lariam while he was in the military and thus sued FHLR, HLR, and Genentech. HLR and Genentech removed the plaintiff's case from state to federal court, and the plaintiff responded by filing a motion to remand. The plaintiff was represented by the same counsel who represent Mr. Pool here.

Judge Tigar held that the removing defendants (HLR and Genentech) failed to meet their burden of showing that removal was proper: "The Plaintiffs have submitted considerable evidence [such as Roche-branded press releases, internal documents, and public websites] showing that HLR's operational, administrative, and executive functions shifted from New Jersey to California once Roche Holding acquired Genentech in 2009." *Id.* at *6.

Judge Tigar continued: "By contrast, the evidence in support of HLR having its nerve center in New Jersey is both slight and equivocal." *Id.* at *7. Although the removing defendants

> offer[ed] filings before the New Jersey Treasury Department and California Secretary of State, both of which name New Jersey as HLR's principal place of business[,] . . . the Supreme Court has explicitly "reject[ed] suggestions . . . that the mere filing of a form . . . would, without more, be sufficient proof to establish a corporation's 'nerve center.'" Allowing such self-serving allegations to be determinative of jurisdiction "would readily permit jurisdictional manipulation" – for instance, where "the alleged 'nerve center' is nothing more than a mail drop box, [or] a bare office with a computer."

Id. at *7-8. As for the fact that board meetings took place in New Jersey, that was not particularly meaningful given that, under Supreme Court law, "the principal place of business is usually '*not* simply an office where the corporation holds its board meetings,' but rather 'the actual center of direction, control, and coordination, i.e., the "nerve center[.]"'" *Id.* at *8-9 (emphasis in original).

Finally, Judge Tigar addressed the defendants' contention that

> "Plaintiff's [e]vidence fails to disprove that HLR is a New Jersey [c]itizen." The argument misses the point. . . . [T]he burden with regard to citizenship rests with HLR, not Plaintiffs. "The strong

> presumption against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper." And any ambiguity in the parties' evidence must be resolved "in favor of remand to state court." As set forth above, HLR has not met this burden.

Id. at *9.

The *Sheets* decision itself is not dispositive here. Mr. Pool does not argue that HLR and Roche Labs are subject to collateral estoppel because of *Sheets*. In addition, the record being presented to the Court here appears to be somewhat different from that presented to Judge Tigar in *Sheets* (although, admittedly, Mr. Pool presents much of the same evidence). Nevertheless, *Sheets* is instructive on whether the Removing Defendants satisfied their burden of proving the principal places of HLR and Roche Labs are in Little Falls, New Jersey rather than South San Francisco, California.

3. Nerve Center

As noted above, in *Hertz*, the Supreme Court held that "principal place of business" means the corporation's nerve center, *i.e.*, "the place where the corporation's high level officers direct, control, and coordinate the corporation's activities." *Hertz*, 559 U.S. at 80. "[I]n practice," the nerve center

> should normally be the place where the corporation maintains its headquarters – provided that the headquarters is the actual center of direction, control, and coordination, . . . and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion).

Id. at 93 (emphasis added).

In the instant case, where the center of direction, control, and coordination is complicated by the fact that the high-level officers are not all in one location. *See id.* at 96 (acknowledging that, "in this era of telecommuting, some corporations may divide their command and coordinating functions among officers who work at several different locations, perhaps communicating over the Internet"). This appears to be true for both HLR and Roche Labs.

For HLR, the Removing Defendants have submitted a declaration from HLR's Assistant Secretary, Gerald Bohm, in which he testifies that the company's acting officers "include" five

persons, four of whom are based in Little Falls, New Jersey, and one of whom is based in Nutley, New Jersey. *See* Bohm Decl. ¶ 15. But this declaration fails to tell the whole story. While the acting officers technically "include" these five people, a declaration that Mr. Bohm submitted in the *Sheets* case makes clear that HLR actually has "seven directors and officers." Creed Decl., Ex. 24 (*Sheets* Bohm Decl. ¶ 6 & Ex. A) (HLR's 2018 Annual Report). And notably, the two people that Mr. Bohm failed to mention in the declaration submitted to this Court are both based in South San Francisco, California – *i.e.*, Sean A. Johnston (Director, Secretary, and Vice President) and Bruce Resnik (Vice President). *See* Creed Decl., Ex. 24 (*Sheets* Bohm Decl., Ex. A).

The Court acknowledges that, when all seven people are considered, the sheer numbers do weigh in favor of Little Falls, New Jersey, over South San Francisco, California (four to two). But sheer numbers are not dispositive. Without an understanding of what each director or officer actually does for HLR as a practical matter, where the nerve center of the company is cannot be determined. For example, if Mr. Johnston and Mr. Resnik were primarily responsible for the direction, control, and coordination of HLR, and the remaining individuals simply played more ancillary roles, then the nerve center would be South San Francisco and not Little Falls. In this regard, the Court takes note that, in a filing HLR made with the state of California, Mr. Johnston is identified as the company's CEO. *See* Creed Dec., Ex. 24 (*Sheets* Bohm Decl., Ex. B) (Statement of Information, filed with the California Secretary of State). His governance role would appear to be highly significant.

That Mr. Bohm states in his declaration that HLR's "decisions are made out of Little Falls," Bohm Decl. ¶ 11, is not sufficient to show that Little Falls is in fact the nerve center of the company. That statement is entirely conclusory in nature. As for Mr. Bohm's statement in his removal declaration that "HLR's corporate activities are run by myself in Little Falls, New Jersey via unanimous consent of HLR's Officers and Directors," Docket No. 1-5 (Bohm Decl. ¶ 6), the Court does not understand this to mean that Mr. Bohm is, in effect, the sole decisionmaker of HLR. Such testimony could not be squared with testimony in his former declaration, indicating that there are other HLR officers who also perform substantive job functions. *See* Bohm Decl. ¶¶ 15-16 (testifying that five of the seven officers "perform[] [their] job functions" in New Jersey).

Nor does it appear to account for the fact that Mr. Johnston, in California, has been identified as the CEO.

As for Roche Labs, the Removing Defendants again rely on the Bohm declaration, wherein Mr. Bohm testifies that the company's acting officers "include" three persons, all based in Little Falls, New Jersey, and one of whom is based in Nutley, New Jersey. *See* Bohm Decl. ¶ 15. But, as above, this declaration is less than forthcoming because it omits Mr. Johnston. And similar to above, Mr. Johnston is listed in a California state filing as the CEO of Roche Labs. *See* Creed Decl., Ex. 25 (Statement of Information, filed with the California Secretary of State).

Given the above doubts about the propriety of removal, the Court finds – as Judge Tigar did in *Sheets* – that a remand is appropriate, more specifically, on the basis that the Removing Defendants failed to meet their burden of proving that the nerve center is in fact Little Falls for HLR and Roche Labs. The Court need not consider whether Mr. Pool should be given jurisdictional discovery to explore the issue of nerve center precisely because it is the Removing Defendants' burden to prove diversity of citizenship and, clearly, the Removing Defendants should have had in their possession, custody, or control information about where the nerve center is for HLR and Roche Labs but failed to produce sufficient persuasive evidence. *See Sheets*, 2018 U.S. Dist. LEXIS 207248, at *9 (finding "Plaintiffs' request for jurisdictional discovery . . . moot" in light of the ruling that the removing defendants failed to meet their burden of proving that removal was proper). *Compare Anwar v. Fairfield Greenwich, Ltd.*, No. 09 Civ. 0118 (VM) (THK), 2009 U.S. Dist. LEXIS 37077, at *17 (S.D.N.Y. May 1, 2009) (granting defendants discovery with respect to information about *plaintiffs* because defendants "have demonstrated that 'a more satisfactory showing of the facts' will aid the District Court in ascertaining jurisdiction").

E. Attorney's Fees and Costs

For the reasons stated above, the Court grants Mr. Pool's motion to remand. The only question remaining is whether Mr. Pool is entitled to attorney's fees and costs. *See* 28 U.S.C. § 1447(c) ("An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal."). In the exercise of its discretion, the Court denies the request for fees and costs. Although the Court is remanding the case back to state

court, the removal of the case was not frivolous. *See SWC Inc. v. Elite Promo Inc.*, 234 F. Supp. 3d 1018, 1026 (N.D. Cal. 2017) (indicating that fees may be denied where the defendant took a position that was not frivolous).

III. CONCLUSION

For the foregoing reasons, the Court hereby **GRANTS** the motion to remand.

The Clerk of the Court is ordered to remand the case back to state court and close the file in the case.

This order disposes of Docket No. 31.

IT IS SO ORDERED.

Dated: May 7, 2019

EDWARD M. CHEN
United States District Judge

United States District Court
Northern District of California