IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: LIPITOR (ATORVASTATIN CALCIUM) MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	**MDL No. 2:14-mn-02502-RMG** **CASE MANAGEMENT ORDER NO. 84** **This Order relates to:** *Sehovic, et. al. v. Pfizer, Inc.*, Case No. 2:14-cv-03254

Motion to Remand

For the reasons stated below, Plaintiffs' Motion to Remand (Case No. 2:14-cv-3254, Dkt. No. 12)[1] is GRANTED.

A. Background

This action was originally filed in the Missouri Circuit Court, Twenty-Second Judicial Circuit, St. Louis City, Missouri by 33 named plaintiffs against Defendants Pfizer, Inc. and Greenstone, LLC. (*See* Dkt. No. 1-3). Each plaintiff alleges that Lipitor caused her to develop Type II diabetes, that Defendants manufactured, marketed and distributed all of the Lipitor ingested by her, and that, among other things, Defendants did not properly disclose the risks associated with Lipitor. (*Id.*).

Defendants removed the action to the United States District Court for the Eastern District of Missouri, and the case was subsequently transferred to this Court by the Judicial Panel on Multidistrict Litigation. (Dkt. Nos. 1, 24). Prior to transfer by the JPML, Plaintiffs filed a

[1] Unless otherwise stated, references to particular docket numbers refer to the docket of Case No. 2:14-cv-03254.

motion to remand. (Dkt. No. 11). While the motion was fully briefed prior to transfer, the motion was still pending at the time of transfer to this Court. (*See* Dkt. Nos. 11, 12, 17, 24).

Defendants removed this action to federal court based on diversity jurisdiction. (Dkt. No. 1). The parties agree that both Defendant Pfizer and Plaintiff Barron are citizens of New York.[2] (Dkt. No. 1 at ¶¶ 37, 38, 39; Dkt. No. 1-3 at ¶¶ 33, 35). Thus, complete diversity is lacking on the face of the Complaint. However, Defendants claim that Plaintiff Barron was fraudulently misjoined, that her claims should be severed and remanded, and that the Court has subject matter jurisdiction over the claims of the remaining plaintiffs. (Dkt. No. 1; Dkt. No. 17).

This Court referred Plaintiffs' motion to remand to Magistrate Judge Marchant. (Dkt. No. 31). Judge Marchant issued an order granting Plaintiffs' motion for remand. (Dkt. No. 48). However, because it has not been definitively established whether an order of remand is dispositive such that it must be ruled on by a District Judge absent consent of the parties, Judge Marchant ordered that the parties were allowed to file objections to the order of remand and that if any objections were filed, the case be forwarded to this Court for de novo review and final disposition. (*Id.* at 7-8). Defendant objected to the Magistrate Judge's order, Plaintiffs filed a response to those objections, and Defendant filed a reply. (Dkt. Nos. 49, 50, 51). This matter is now before the Court for de novo review of the motion to remand.

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[2] The other 32 defendants are diverse from Defendant Pfizer. (Dkt. No.1, Dkt. No. 1-3).

Defendants allege that Defendant Greenstone is a citizen of Delaware and New York. (Dkt. No. 1 at ¶ 39). Plaintiffs allege that Defendant Greenstone is a citizen of Delaware and New Jersey. (Dkt. No. 1-3 at ¶ 36). The citizenship of Defendant Greenstone is immaterial to the outcome of Plaintiffs' motion to remand. As explained below, the Court finds that Plaintiff Barron is not fraudulently joined. Thus, her New York citizenship destroys complete diversity because Pfizer is also a citizen of New York.

B. Legal Standard

Defendants may remove any civil action from state court to federal court if the federal district court would have original jurisdiction over the action. 28 U.S.C. § 1441. The principal federal statute governing diversity jurisdiction, 28 U.S.C. § 1332, gives federal district courts original jurisdiction of all civil actions where the amount in controversy exceeds $75,000 and where there is complete diversity between all plaintiffs and defendants. *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 89 (2005).

While "[d]iversity jurisdiction is typically determined from the face of the plaintiff's well-pled complaint," two distinct doctrines allow a federal court to disregard the citizenship of improperly joined parties. *Wyatt v. Charleston Area Med. Ctr., Inc.*, 651 F. Supp. 2d 492, 496 (S.D.W. Va. 2009). The doctrine of fraudulent joinder is well established and "occurs when a plaintiff files a frivolous or illegitimate claim against a non-diverse defendant solely to prevent removal." *In re Prempro Products Liab. Litig.*, 591 F.3d 613, 620 (8th Cir. 2010); *see also Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232 (4th Cir. 1993) (holding fraudulent joinder occurs when there "is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court."). The doctrine allows the court to dismiss the non-diverse defendant and disregard that defendant's citizenship in determining whether diversity jurisdiction exists.

The doctrine of fraudulent misjoinder is a "more recent, somewhat different and novel" doctrine. *In re Prempro*, 591 F.3d at 620. It asserts that while all the claims pled may be viable, the claims of a non-diverse plaintiff (or against a non-diverse defendant) are so unrelated to the remaining causes of action that they cannot be joined in a single suit under Fed. R. Civ. P. 20 or a similar state rule. *Wyatt*, 651 F. Supp. 2d at 496; *see also In re Prempro*, 591 F.3d at 620

(stating that fraudulent misjoinder occurs "when a plaintiff sues a diverse defendant in state court and joins a viable claim involving a nondiverse party . . . even though the plaintiff has no reasonable procedural basis to join them in one action because the claims bear no relation to each other.").

The doctrine asserts that these claims must be severed and only the claims of the non-diverse plaintiff (or against the non-diverse defendant) be remanded. For instance, the doctrine might be asserted if a plaintiff sued both a diverse defendant on claims related to car accident and a non-diverse defendant on wholly unrelated employment contract claims in a single suit. The doctrine would allow a court to sever the car accident claims from the unrelated contract claims and remand the contract claims against the non-diverse defendant to state court while retaining diversity jurisdiction over the car accident claims.

In CMO 83, this Court adopted the fraudulent misjoinder doctrine and adopted a standard analogous to the fraudulent joinder standard in the Fourth Circuit, holding that to establish fraudulent misjoinder, the removing party must show (1) outright fraud or (2) that there is no possibility that plaintiffs would be able to properly join the claims involving a non-diverse party in state court.[3] (*See* CMO 83, Dkt. No. 1681).

C. Discussion

Under Missouri law,[4] "[a]ll persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action." Missouri Rules of Civ. P. 52.05(a). While

[3] The Court does not repeat its reasoning and analysis for adopting the fraudulent misjoinder doctrine and this standard but incorporates Sections B and C of CMO 83 by reference here.

[4] This case was originally filed in Missouri Circuit Court.

Defendant concedes that "the 'common question' requirement may in some cases be satisfied by plaintiffs who allege the same injury from ingestion of the same medicine,"[5] it argues that the same transaction or series of transactions requirement cannot be met in such an instance.[6] (Dkt. No. 49 at 14).

The Court can find no Missouri appellate case law on point, and the parties have cited none. Defendant attached two Missouri trial court opinions to its Notice of the Removal. In the first, *Ballard, et. al., v. Wyeth, et. al.*, Case No. 042-07388A (Mo. 22d Jud. Cir. Aug. 24, 2005), the trial court severed the claims of plaintiffs alleging harm from hormone replacement therapy (HRT) drugs. (Dkt. No. 1-1). In that case, however, the HRT drugs at issue were manufactured by multiple different pharmaceutical companies. The *Ballard* court noted an Eight Circuit case, *Mosely v. Gen. Motors Corp.*, 497 F. 2d 1330 (8th Cir. 1974), that allowed the joinder of multiple plaintiffs against the same defendant in an employment discrimination suit holding that all of the plaintiffs' claims arose out of a company-wide policy of racial discrimination and constituted the same series of transaction or occurrences under the joinder rules. (*Id.* at 4). The *Ballard* court distinguished this Eighth Circuit case on the basis that multiple drug manufacturers were sued in the case at hand and there was "no overarching policy at issue . . . or even a single defendant responsible for each Plaintiff's injury." (*Id.*)

The second trial court opinion attached by Pfizer, *Brown, et. al., v. Walgreens Co.*, Case No. 1022-CC00765 (Mo. 22d Jud. Cir. Nov. 15, 2010), is very similar. In that case, 14 plaintiffs brought an action against 38 defendants alleging injuries from Reglan or its generic equivalent.

[5] Indeed, the creation of this MDL was based in part on the JPML's finding that "these actions involve common questions of fact." (*In re Lipitor*, Case No. 2:14-mn-2502, Dkt. No. 1 at 3).

[6] Defendant does not argue that Plaintiffs engaged in outright fraud. (*See generally*, Dkt. Nos. 17, 49, 51).

(Dkt. No. 1-2 at 2). The trial court again distinguished the *Mosley* case on the fact that there were "multifarious defendants, and none of the Plaintiffs themselves have the same relationship to all of the Defendants." (*Id.* at 4).

While these two trial courts might reach the same decision in a case where each plaintiff ***does*** have the same relationship to a single manufacturer and a single distributor of a drug, this Court cannot say that they would certainly do so. In other words, the Court cannot find that there is ***no possibility*** that these courts would find Plaintiff Barron's claims properly joined.

Given the minimal guidance provided by Missouri state courts, the Court turns to federal precedent. *See, e.g., Buemi v. Kerckhoff*, 359 S.W.3d 16, 23 (Mo. 2011) ("While not binding, the Court should give significant consideration to federal court decisions construing a federal rule when this Court subsequently adopts a rule on the same subject and uses the same or virtually identical language."); *State ex rel. Cohen McNeile & Pappas, P.C. v. Blankenship*, 375 S.W.3d 233, 235 (Mo. Ct. App. 2012) ("Where the Missouri and federal rules are essentially the same, federal precedent constitutes persuasive, although not binding, authority on Missouri courts."); *see also In re Fosamax (Alendronate Sodium) Products Liab. Litig. (No. II)*, No. CIV.A. 11-3045, 2012 WL 1118780, at *3 (D.N.J. Apr. 3, 2012) ("Missouri's permissive joinder rule is substantively identical to Fed.R.Civ.P. 20(a)."), *aff'd*, 751 F.3d 150 (3d Cir. 2014).

As can be seen from the federal cases cited by both parties, "[t]he federal courts are divided as to whether a group of plaintiffs who allege that they took the same drug and suffered similar injuries, but took the drug at different times, received it from different sources, and live in different states can be joined under Rule 20." *In re Propecia (Finasteride) Prod. Liab. Litig.*, No. 12-CV-2049 JG VVP, 2013 WL 3729570, at *6 (E.D.N.Y. May 17, 2013). While most parties agree that there are common issues of fact and law in such cases, the question of whether

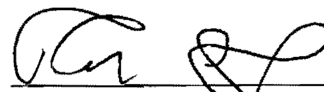
such claims meets the same transaction, occurrence, or series of transactions or occurrences is a difficult issue. *Id.* Some courts find that the transaction test is not met under such circumstances because "the prescriptions were provided through different health care providers," " the drug was taken at different times for various durations," the plaintiffs' medical histories "varied greatly," and the plaintiffs "are all from different states" with "no apparent connection." *E.g., Boschert v. Pfizer, Inc.*, No. 4:08-CV-1714 CAS, 2009 WL 1383183, at *3 (E.D. Mo. May 14, 2009). Others find the test met because "[the defendant's] actions and/or omissions necessarily constitute the principal transactions and occurrences at issue." *E.g., Almond v. Pfizer Inc.*, No. 1:13-CV-25168, 2013 WL 6729438, at *5 (S.D.W. Va. Dec. 19, 2013).

The Court need not resolve the issue. Given the divergent case law and without any guidance from the Missouri Supreme Court, the Court can safely say that it is ***possible*** that Plaintiff Barron is properly joined under Missouri law. Therefore, Plaintiff Barron was not fraudulently misjoined, the Court lacks diversity jurisdiction over this matter, and Plaintiffs' motion to remand is granted.

D. Conclusion

For the reasons stated above, Plaintiffs' motion to remand (Dkt. No. 11 in Case No. 2:14-cv-3254) is **GRANTED**, and this action is **REMANDED** to the Missouri Circuit Court, Twenty-Second Judicial Circuit, St. Louis City, Missouri.

AND IT IS SO ORDERED.



Richard Mark Gergel
United States District Court Judge

October 24, 2016
Charleston, South Carolina