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. 86** **This Order relates to:** *Trees v. Pfizer, Inc., et al.*, Case No. 2:16-cv-0334 *Bearup, et al. v. Pfizer, Inc., et al.* Case No. 2:16-cv-0335

Motions to Remand

For the reasons stated below, Plaintiffs' Motions to Remand (Case No. 2:16-cv-0334, Dkt. No. 10; Case No. 2:16-cv-0335, Dkt. No. 9)[1] are GRANTED.

A. Background

These two actions were originally filed in Michigan state court. Each plaintiff alleges that Lipitor caused her to develop Type II diabetes, and that, among other things, Pfizer did not properly disclose the risks associated with Lipitor.

Defendant removed these actions to the United States District Court for the Eastern District of Michigan, and the cases were subsequently transferred to this Court by the Judicial Panel on Multidistrict Litigation (JPML). (Case No. 2:16-cv-0334, Dkt. Nos. 1, 24; Case No. 2:16-cv-0335, Dkt. Nos. 1, 24). Prior to transfer by the JPML, Plaintiffs filed a motion to remand in both cases, and the motions were pending at the time of transfer to this Court. (Case No. 2:16-cv-0334, Dkt. No. 10; Case No. 2:16-cv-0335, Dkt. No. 9).

[1] Unless otherwise stated, references to particular docket numbers refer to the MDL docket, Case No. 2:14-mn-2502.

Defendants removed these actions to federal court based on diversity jurisdiction. (Case No. 2:16-cv-0334, Dkt. No. 1; Case No. 2:16-cv-0335, Dkt. No. 1). The parties agree that both Defendant Meijer, Inc. ("Meijer") and at least one named Plaintiff in each case are residents of Michigan. Thus, complete diversity is lacking on the face of the Complaint. However, Defendants claim that Meijer is fraudulently joined and should be dismissed and disregarded for jurisdictional purposes. Defendants also claim that the non-Michigan Plaintiffs are fraudulently misjoined and that the claims of these Plaintiffs should be severed.

This Court referred Plaintiffs' motions to remand to Magistrate Judge Marchant. Judge Marchant issued an order granting Plaintiffs' motions for remand. (Dkt. No. 1614). 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.*). Defendants objected to the Magistrate Judge's order, and Plaintiffs filed a response to those objections. (Dkt. Nos. 1621, 1622, 1625, 1637). Oral argument was held on October 21, 2016. This matter is now before the Court for de novo review of the motions to remand.

B. Fraudulent Joinder

1. Legal Standard

The fraudulent joinder doctrine "effectively permits a district court to disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants, assume jurisdiction over a case, dismiss the nondiverse defendants, and thereby retain jurisdiction." *Johnson v. Am. Towers, LLC*, 781 F.3d 693, 704 (4th Cir. 2015) (quotations omitted). To establish that a nondiverse defendant has been fraudulently joined, the removing party must establish either: (1)

that there has been outright fraud in the plaintiff's pleading of jurisdictional facts or (2) that there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court. *E.g., Johnson*, 781 F.3d at 704; *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232 (4th Cir. 1993). This is a heavy burden. *Johnson*, 781 F.3d at 704.

Under the second method, the defendant must show the plaintiff cannot establish a claim against the nondiverse defendant "even after resolving all issues of law and fact in the plaintiff's favor." *Id.* The standard "is even more favorable to the plaintiff than the standard for ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6)." *Id.* (quotations marks omitted). "[T]here need be only a slight possibility of a right to relief to defeat a claim of fraudulent joinder." *Mayes v. Rapoport*, 198 F.3d 457, 466 (4th Cir. 1999) (internal quotations marks omitted). In determining whether a joinder is fraudulent, the court "is not bound by the allegations of the pleadings, but may instead consider the entire record, and determine the basis of joinder by any means available." *Id.* at 464.

2. Discussion

Plaintiffs Trees and Bearup alleged that they purchased the Lipitor they ingested from Meijer, a pharmacy. Defendants argue that there is no possibility that Plaintiffs can state a claim against Meijer under Michigan law because (a) such claims are preempted by federal law, (b) Michigan's seller immunity statute bars any claims against Meijer, (c) Meijer had no duty to warn Plaintiffs, and (d) the learned intermediary theory bars Plaintiff's claims against Meijer. (Dkt. No. 1621). The Court takes each argument in turn and ultimately finds that while Plaintiffs have no possibility establishing a cause of action against Meijer based on labeling or strict liability, they do have a "glimmer of hope" of establishing a cause of action in state court based on an assumed duty to warn.

a. Preemption

Plaintiffs admit they "may not have a claim regarding labeling with respect to Defendant Meijer, as it is a pharmacy." (Dkt. No. 1637 at 22). Even if it were possible to state a claim under state law against Meijer for labeling of a drug, any such claim would preempted by federal law. The U.S. Supreme Court has held that a generic drug manufacturer cannot change its label without FDA approval and, thus, any state law claims alleging that the manufacturer should have changed its label are preempted by federal law. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2571 (2011); *see also Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466 (2013) (holding that when a defendant's only option to comply with both state and federal law is to stop selling a drug, federal law preempts state law claims, i.e., defendants are not required to stop selling the drug). As a result of the scheme set forth by the Federal Drug and Cosmetic Act (FDCA), a pharmacy also has no authority to unilaterally change a drug's label. That authority lies with the FDA and/or with Pfizer. *See* 21 C.F.R. 314.70 (limiting label changes to those approved by the FDA and "Changes Being Effected" or "CBE" changes by the "applicant," which is the manufacturer). Thus, any claims against Meijer based on Lipitor's label are preempted under *Mensing*.

However, Plaintiffs' claims are not limited to Lipitor's label. Plaintiffs allege claims based on Defendants' (including Meijer's) alleged advertising and marketing of Lipitor.[2] (Case

[2] Contrary to Defendants' argument, all advertising materials are not considered labeling. While promotional materials sent to medical professionals are explicitly defined as "labeling," other advertising is not. *See* 21 U.S.C. § 352(n) (stating that the paragraph applies to advertising that is not determined to be labeling). Advertisements that are not considered labeling include "advertisements in published journals, magazines, other periodicals, and newspapers, and advertisements broadcast through media such as radio, television, and telephone communication systems." 21 C.F.R. § 202.1(*l*)(1).

No. 2:16-cv-0334, Dkt. No. 1-2; Case No. 2:16-cv-0335, Dkt. No. 1-2). These claims are not preempted.

b. Michigan Seller Immunity Statute

There is also no possibility that Plaintiffs would be able to establish a strict liability cause of action against Meijer under Michigan state law. Under Michigan's seller immunity statute, a seller other than a manufacturer cannot be liable for harm caused by a product, except (1) when the seller fails to exercise reasonable care or (2) when the product fails to conform to an express warranty. Mich. Comp. Laws Ann. § 600.2947(6).

However, Plaintiffs' claims against Meijer are not limited to strict liability. Plaintiffs have pled negligence, negligent misrepresentation, breach of express warranty, fraud and misrepresentation, and constructive fraud. (Case No. 2:16-cv-0334, Dkt. No. 1-2; Case No. 2:16-cv-0335, Dkt. No. 1-2). Michigan's seller immunity statute specifically does not bar such claims. *See* Mich. Comp. Laws Ann. § 600.2947(6).

c. Duty To Warn

It is undisputed that under Michigan law, "a pharmacist has no duty to warn the patient of possible side effects of a prescribed medication where the prescription is proper on its face and neither the physician nor the manufacturer has required that any warning be given to the patient by the pharmacist." *Stebbins v. Concord Wrigley Drugs, Inc.*, 416 N.W.2d 381, 387-88 (1987). Thus, there is no possibility that Plaintiffs can establish a cause of action based on an affirmative duty to warn; there is no such duty in Michigan.

However, a pharmacy can be liable under Michigan law where it "voluntarily assume[s] a function that it was under no legal obligation to assume." *Baker v. Arbor Drugs, Inc.*, 544 N.W.2d 727, 731 (1996). In *Baker*, the defendant pharmacy "implemented, used and advertised

through the media that it used" a computer system "to monitor its customers' medication profiles for adverse drug interactions." *Id.* The *Baker* court held that defendant "voluntarily assumed a duty of care when it implemented the [computer] system and then advertised that this system would detect harmful drug interactions for its customers." *Id.* For a claim to exist under *Baker*, the defendant must take some "voluntary, affirmative action." *Burlingame v. NationsRent, Inc.*, No. 291312, 2011 WL 222264, at *4 (Mich. Ct. App. Jan. 25, 2011). Making express representations to the public are voluntary actions and can lead to an assumed duty. *See Kraft v. Detroit Entm't, L.L.C.*, 683 N.W.2d 200, 205 (2004) (distinguishing *Baker* because in *Baker*, "the defendant expressly represented to the public that its computer system would prevent adverse drug interactions."). Thus, while a pharmacy has no duty to warn of possible side effects, if it voluntarily undertakes a duty to do so through advertising or telling a patient about side effects, then, under Michigan law, it ***possibly*** has a duty of care in the warnings issued.

Plaintiffs allege claims for negligent misrepresentation and fraud. In these claims Plaintiffs allege, among other things, that:

- "Defendants owed a duty in all of its undertakings, including the dissemination of information concerning Lipitor, to exercise reasonable care . . ." (Case No. 2:16-cv-00334, Dkt. No. 1-2 at 24).
- "Defendants, as drug designers, manufacturers, sellers, promoters and/or distributors, knew or should have reasonably known that health care professionals and consumers . . . rely upon information disseminated and marketed to them regarding the product." (*Id.*).
- "Defendants . . . disseminated information to . . . consumers that was negligently and materially inaccurate, misleading, false and unreasonably dangerous to consumers such as Plaintiff." (*Id.* at 25).
- "Defendants misrepresented to Plaintiff, Plaintiff's prescribing health care professionals, the healthcare industry and consumers the safety and effectiveness of Lipitor and/or fraudulently, intentionally, and/or negligently concealed material information including adverse information regarding the safety and efficacy of Lipitor." (*Id.* at 39).

There is "'arguably a reasonable basis' for predicting that the state law ***might*** impose liability" where Plaintiffs claim that Meijer "misrepresented" information regarding risks because in making any representations at all, Meijer assumed a duty of care. *Greenspan v. Bros. Prop. Corp.*, 103 F. Supp. 3d 734, 739 (D.S.C. 2015) (quoting 6 James Wm. Moore et. al., Moore's Federal Practice ¶ 102.21[5][a]) (emphasis in original). A Michigan court may hold that Plaintiffs have failed to state such a claim, may agree with Defendants that Plaintiffs' position would cause the exception to swallow the rule, and may dismiss the claims on a motion to dismiss. But the standard this Court must apply is whether there is ***any*** possibility that Plaintiffs can establish a claim under state law. *Johnson*, 781 F.3d at 704. The Court cannot say that there is no hope of establishing a claim.

Defendants also argue that Plaintiffs "generic allegations" "directed at all Defendants" is insufficient, and that Plaintiffs must make "specific allegations relating to the pharmacies' purported duty to warn." (Dkt. No. 1621 at 14). However, under Michigan law, the complaint should plead "all the ultimate facts" but need not contain "probative facts necessary to prove such ultimate facts." *Sutter v. Ocwen Loan Servicing, LLC*, No. 320704, 2016 WL 3003346, at *2 (Mich. Ct. App. May 24, 2016) (quoting *Steed v. Covey*, 94 N.W.2d 864 (1959)). While it is possible that a Michigan court may determine that Plaintiffs' allegations are insufficient, the Court cannot say it is certainly so, given case law that Plaintiffs need only allege ultimate facts.

d. Learned Intermediary Doctrine

Finally, Defendants argue that Plaintiffs cannot state a claim under Michigan law because the learned intermediary doctrine bars any such claims. The learned intermediary doctrine allows "manufacturers to assume that patients rely on physicians to evaluate the benefits and risks of using a certain prescription drug for a particular purpose." *Reaves v. Ortho Pharm.*

Corp., 765 F. Supp. 1287, 1289 (E.D. Mich. 1991). Thus, manufacturers can discharge their duty by properly warning prescribing physicians who act as "learned intermediaries" for their patients. *Id.* The Michigan Supreme Court has not decided whether the doctrine applies under Michigan law, though one federal district court has predicted that it would. *See id.* at 1288. However, this is just a prediction and not determinative of whether a claim must necessarily fail in state court. *See Greenspan*, 103 F. Supp. 3d at 738–39 ("Where there is a question of first impression and split of authority in other jurisdictions, it is reasonably possible that a claim could proceed.) (internal quotations omitted).

Even assuming the doctrine applies in Michigan generally, it possible Michigan courts would not apply the doctrine where a defendant has made affirmative misrepresentations directly to the consumer, as Plaintiffs have alleged here. *See Kasin v. Osco Drug, Inc.*, 728 N.E.2d 77, 80 (Ct. App. Ill. 2000) ("[T]he learned intermediary doctrine does not apply once a pharmacist voluntarily undertakes to warn a consumer of a drug's dangerous propensities."). There is simply not enough authority to conclusively establish that the doctrine would bar Plaintiffs' claims against Meijer. Therefore, the Court does not find Meijer fraudulently joined.

C. Fraudulent Misjoinder

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). Thus, the Court must determine whether there is any possibility that Plaintiffs' claims would be properly joined in state court. Defendants

[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.

contend that while the claims at issue may have common questions of fact, they are not a part of the same transaction or series of transactions, and are, thus, not properly joined.[4]

Under Michigan law,

> all persons may join in one action as plaintiffs (a) if they assert a 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 a question of law or fact common to all of the plaintiffs will arise in the action; ***or*** (b) if their presence in the action will promote the convenient administration of justice.

MCR 2.206 (emphasis added). Under the second prong of this test, joinder is allowed as long as no party establishes prejudice from the joinder. *E.g., Gervais v. Annapolis Homes, Inc.*, 142 N.W.2d 7, 9 (Mich. 1966); *Bacon v. Leona Grp., LLC*, No. 219900, 2000 WL 33415004, at *2 (Mich. Ct. App. Aug. 4, 2000); *Tempco Heating & Cooling, Inc. v. A. Rea Const., Inc.*, 443 N.W.2d 486, 489-90 (Mich. Ct. App. 1989). Michigan courts "have recognized the broad reach of the convenient administration of justice standard," *Bacon*, 2000 WL 33415004, at *2, and "permissive joinder of parties is even more liberal under the Michigan rule than under the Federal rule." *Gervais*, 142 N.W.2d at 8.

Furthermore, Michigan rules do not treat permissive joinder "as a matter of pleading in which there had to be a legal similarity in the causes of action joined and relief demanded," but instead "as a matter of trial convenience." *Id.* Thus, "[t]he final determination of whether convenient administration of justice exists, with no resulting prejudice, should properly be made after pretrial and discovery proceedings are exhausted." *Id.* at 9.

Given the broad permissive joinder rules in Michigan and the fact that legal similarity is not even required, the Court cannot say there is no possibility that Plaintiffs' claims are properly joined and, therefore, finds the claims are not fraudulently misjoined.

[4] This argument only applies to the *Bearup* case. The *Trees* case is a single-plaintiff case.

D. Attorney's Fees and Costs

Plaintiffs ask for attorneys fees under 18 U.S.C. § 1447(c) if the Court grants their motions to remand. "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). Defendants had an objectively reasonable basis for seeking removal in these cases. As explained above, some of the claims asserted against Meijer had no possibility of success. The fact that the Court found Plaintiffs had a "glimmer of hope" as to at least one cause of action does not warrant the imposition of attorney's fees. Therefore, this request is denied.

E. Conclusion

For the reasons stated above, the Court finds that it lacks diversity jurisdiction over these matters and **GRANTS** Plaintiffs' Motions to Remand (Case No. 2:16-cv-0334, Dkt. No. 10; Case No. 2:16-cv-0335, Dkt. No. 9). *Trees v. Pfizer, Inc., et al.*, Case No. 2:16-cv-0334, is **REMANDED** to the Circuit Court for the County of Macomb in the State of Michigan. *Bearup, et al. v. Pfizer, Inc., et al.*, Case No. 2:16-cv-0335, is **REMANDED** to the Circuit Court for the County of Wayne in the State of Michigan.

AND IT IS SO ORDERED.

Richard Mark Gergel
United States District Court Judge

November 1, 2016
Charleston, South Carolina