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

IN RE: LIPITOR (ATORVASTATIN CALCIUM) MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	**MDL No. 2:14-mn-02502-RMG** **CASE MANAGEMENT ORDER NO. 90** **This Order relates to cases:** 2:14-cv-01222 2:15-cv-02733 2:14-cv-01223 2:15-cv-02953 2:14-cv-01224 2:15-cv-02954 2:14-cv-01225 2:15-cv-03465 2:14-cv-01226 2:15-cv-03630 2:14-cv-01227 2:15-cv-04135 2:14-cv-01228 2:15-cv-04437 2:15-cv-00063 2:15-cv-04816 2:15-cv-01037 2:15-cv-05086 2:15-cv-01224 2:16-cv-00446 2:15-cv-01283 2:16-cv-00991 2:15-cv-02204 2:16-cv-01034 2:15-cv-02319 2:16-cv-01075 2:15-cv-02504

Motions to Remand

For the reasons stated below, Plaintiffs' Motions to Remand (Dkt. Nos. 1248, 1278, 1325, 1359, 1363, 1364, 1365, 1367, 1368, 1403, 1476, 1477, 1478, 1479, 1480, 1481, 1482, 1483, 1484, 1485, 1486, 1487, 1488, 1489, 1490, 1491, 1497) are GRANTED.

A. Background

Each of these cases was originally filed in California state court against Defendants Pfizer, Inc. ("Pfizer") and McKesson Corp. ("McKesson"). Plaintiffs allege that Lipitor caused them to develop Type II diabetes and that, among other things, Defendants did not properly disclose the risks associated with Lipitor. Defendants removed these actions to federal district courts in California, asserting (1) diversity jurisdiction and (2) federal jurisdiction under the

Class Action Fairness Act of 2005 (CAFA). While complete diversity is lacking on the face of the Complaints, Pfizer contends that (a) McKesson was fraudulently joined and should be disregarded for the purposes of determining whether diversity jurisdiction exists and (b) that non-California Plaintiffs are fraudulently misjoined and that their claims should be severed.

After removal, these cases were transferred to this MDL by the JPML, and Plaintiffs' filed motions to remand. In addition to lack of subject matter jurisdiction, Plaintiffs also argue that the Court should remand the cases to California federal courts in accordance with CAFA.

The Court referred these motions to remand to the Magistrate Judge. The Magistrate Judge issued an order granting the motions to remand and ordering that these actions be transferred to the federal district courts in California from which they came. (Dkt. No. 1580). 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 filed objections. (*See* Dkt. Nos. 1593, 1601). This matter is now before the Court for de novo review.

B. Discussion

Except for one narrow issue, this Court has previously addressed all issues raised by these motions in CMO 87, Dkt. No. 1726. In CMO 87, the Court found that Defendant McKesson was not fraudulently joined as to the California Plaintiffs, that non-California Plaintiffs were not fraudulently misjoined, and that, therefore, the Court lacked diversity jurisdiction over the California actions at issue. (*Id.*). Because the only possible basis for federal

jurisdiction was CAFA, the Court suggested to the JPML that the actions be remanded to their transferor court for further proceedings. (*Id.*).

The exact same issues are present here, and the parties submit substantially identical briefing on them. The Court finds no reason that CMO 87 should not apply to the actions at issue here. Therefore, the Court incorporates CMO 87 by reference.

Pfizer also raises one additional issue not previously addressed by the Court. Pfizer argues that in sixteen of the actions at issue, Plaintiffs did not move for remand until after the Court excluded the expert testimony of a number of Plaintiffs' experts. (Dkt. No. 1593 at 16). Seven of these cases were pending for more than two years before Plaintiffs sought remand, and, during this time, Plaintiffs did not seek discovery of McKesson. Pfizer argues that these Plaintiffs could have sought discovery from McKesson and that their failure to do so indicates a lack of good faith intent to pursue claims against McKesson. (*Id.* at 17-18). Thus, Pfizer argues, the Court should follow *In re Avandia Mktg., Sales Practices & Prod. Liab. Litig.*, No. 07-MD-1871, 2014 WL 2011597 (E.D. Pa. May 15, 2014) ("*Avandia II*"), and find McKesson fraudulently joined in these cases.

In the Avandia MDL, a number of California Plaintiffs named McKesson as a defendant. The fraudulent joinder issue was initially raised early in the MDL, in 2008. At that time, the *Avandia* court found that the plaintiffs could have colorable claims against McKesson under California law and, thus, McKesson was not fraudulently joined. *See id.* at *2; *see also In re: Avandia Mktg., Sales Practices and Products Liability Litig.*, 624 F. Supp. 2d 396 (E.D.Pa. 2009) ("*Avandia I*"). However, the issue was raised again, five years later, in 2014. In 2014, the *Avandia* court held that plaintiffs had "no real intention in good faith to prosecute the action against the defendant or seek a joint judgment," and, thus, held that McKesson was fraudulently

joined. *Avandia II*, 2014 WL 2011597 at *2 (quoting *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990)). The court noted that not a single plaintiff sought any discovery from McKesson in the intervening five years and that, at a hearing on the matter, counsel could not explain why they had not done so despite the fact that discovery of the other defendant (the manufacturer) had long been completed. *Id.* at 3.

The Court does not find the facts here analogous to *Avandia II*. While these cases were not stayed, under CMO 4 no party was allowed to conduct "any discovery of another party not expressly authorized" by the Discovery Plan in CMO 4. (Dkt. No. 101 at 17). The parties agreed to, and the Court adopted in CMO 4, an initial discovery plan that included limited discovery of all Plaintiffs (Plaintiff Fact Sheets, medical authorizations, and certain disclosures), discovery of Plaintiffs in the discovery pool, and discovery of Pfizer. But this plan did not include discovery of McKesson. The parties agreed to proceed with basic discovery from Plaintiffs and with discovery from the common defendant Pfizer first, and the parties were not allowed to conduct other discovery. Thus, the Court cannot infer a lack of intention to prosecute the claims against McKesson from a failure to seek discovery, and the Court finds that McKesson was not fraudulently joined.

C. Conclusion

For the reasons stated above and in CMO 87, the Court GRANTS Plaintiffs' Motions to Remand (Dkt. Nos. 1248, 1278, 1325, 1359, 1363, 1364, 1365, 1367, 1368, 1403, 1476, 1477, 1478, 1479, 1480, 1481, 1482, 1483, 1484, 1485, 1486, 1487, 1488, 1489, 1490, 1491, 1497). The Court finds that it lacks diversity jurisdiction over these actions and that the only possible basis for federal jurisdiction is CAFA. Therefore, the Court **SUGGESTS** to the JPML that these actions be remanded to their transferor courts for further proceedings.

AND IT IS SO ORDERED.

Richard Mark Gergel
United States District Court Judge

November 30, 2016
Charleston, South Carolina