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. 85** **This Order relates to:** *Scotino, et. al. v. Pfizer, Inc.*, Case No. 2:15-cv-03169 *Allen, et. al. v. Pfizer, Inc.*, Case No. 2:15-cv-03170

Motions to Remand

For the reasons stated below, Plaintiffs' Motions to Remand (Case No. 2:15-cv-03169, Dkt. No. 11; Case No. 2:15-cv-03170, Dkt. No. 11)[1] are GRANTED.

A. Background

These two actions were originally filed in the Missouri Circuit Court, Twenty-Second Judicial Circuit, St. Louis City, Missouri. In *Scotino*, there are 88 named Plaintiffs from fifteen different states, 20 of which allege that they are citizens of the state of New York. (Case No. 2:15-cv-03169, Dkt. No. 1-3). In *Allen*, there are 97 named Plaintiffs from fifteen different states, one of which alleges that she is a citizen of New York. (Case No. 2:15-cv-03170, Dkt. No. 1-3). 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. (*See id.*).

Defendant removed the actions to the United States District Court for the Eastern District of Missouri, and the cases were subsequently transferred to this Court by the Judicial Panel on

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

Multidistrict Litigation. (Case No. 2:15-cv-03169, Dkt. Nos. 1, 30; Case No. 2:15-cv-03170, Dkt. Nos. 1, 31). 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. 2:15-cv-03169, Dkt. No. 11; Case No. 2:15-cv-03170, Dkt. No. 11). Prior to transfer by the JPML, Defendant also filed motions to dismiss the claims of non-Missouri Plaintiffs for lack of personal jurisdiction, and these motions were also pending at the time of transfer to this Court. (Case No. 2:15-cv-03169, Dkt. No. 6; Case No. 2:15-cv-03170, Dkt. No. 6).

Defendant removed these actions to federal court based on diversity jurisdiction. (Case No. 2:15-cv-03169, Dkt. No. 1; Case No. 2:15-cv-03170, Dkt. No. 1). The parties agree that both Defendant Pfizer and at least one named Plaintiff in each case are residents of New York. Thus, complete diversity is lacking on the face of the Complaint. However, Defendant claims that the Court lacks personal jurisdiction over the non-Missouri Plaintiffs, that the Court should take up its motions to dismiss first, and that, if these Plaintiffs are dismissed, diversity jurisdiction exists. Defendant also claims that the non-Missouri Plaintiffs are fraudulently misjoined, that the claims of non-Missouri Plaintiffs should be severed and remanded, and that the Court has subject matter jurisdiction over the claims of the remaining plaintiffs.

This Court referred Plaintiffs' motions to remand to Magistrate Judge Marchant. Judge Marchant issued orders granting Plaintiffs' motions for remand. (Dkt. Nos. 1330, 1331). 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.*). Defendant objected to the Magistrate Judge's orders, Plaintiffs filed a

response to those objections, and Defendant filed a reply. (Dkt. Nos. 1356, 1422, 1454). Both Plaintiffs and Defendants submitted supplemental authority to the Court after Judge Marchant issued his opinion, and each party filed a response. (Dkt. Nos. 1523, 1541, 1555). This matter is now before the Court for de novo review of the motions to remand.

B. The Court will address Plaintiffs' Motions to Remand for Lack of Subject Matter Jurisdiction before Defendant's Motions to Dismiss for Lack of Personal Jurisdiction.

Pfizer argues that the Court should resolve its motions to dismiss for lack of personal jurisdiction before addressing Plaintiffs' motions to remand, and Plaintiffs argue that the Court should resolve their motion to remand for lack of subject matter jurisdiction first. The U.S. Supreme Court has held that a district court has discretion to consider either motion first. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 576 (1999). If personal jurisdiction raises difficult questions of state law and subject-matter jurisdiction is resolved as easily as personal jurisdiction, "a district court will ordinarily conclude that federalism concerns tip the scales in favor of initially ruling on the motion to remand." *Id.* at 586 (internal quotation marks omitted). "However, the district court may find that concerns of judicial economy and restraint are overriding." *Id.* "Where . . . a district court has before it a straightforward personal jurisdiction issue presenting no complex question of state law, and the alleged defect in subject-matter jurisdiction raises a difficult and novel question, the court does not abuse its discretion by turning directly to personal jurisdiction." *Id.* at 588.

While the subject matter jurisdictional issues raised are complex, they are raised in different combinations in a 128 other cases, and the Court will have to delve into them and resolve them in this MDL. Pfizer's personal jurisdiction arguments, on the other hand, are raised only in these two member cases. Thus, judicial economy favors resolving the motions to remand

first. Secondly, the issues of personal jurisdiction are not "straightforward," as can be seen from the split among Missouri courts cited below.[2] Finally, part of the reasoning of *Ruhrgas* was that both personal jurisdiction and subject matter jurisdiction were threshold issues that would potentially end the federal case in its entirety. *See Ruhrgas*, 526 U.S. at 585 ("It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits."). It did not discuss the situation present here, where the Defendant moves to dismiss ***only some*** of the claims for lack of personal jurisdiction and thereby create subject matter jurisdiction. The Court is hesitant to address the issue personal jurisdiction first under these circumstances. Therefore, the Court finds concerns of judicial economy and federalism favor resolving the motions to remand first.

C. Diversity Jurisdiction

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

[2] *See infra* at 7-8. The parties also dispute whether Fourth or Eight Circuit law would apply to Defendant's motions to dismiss for lack of personal jurisdiction. (*See* Dkt. No. 1454 at 8, Dkt. No. 1541 at 2).

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.

Defendant argues that non-Missiouri Plaintiffs are both fraudulently joined and fraudulently misjoined. The Court takes each argument in turn.

D. 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

Pfizer argues that because the state court lacks personal jurisdiction over it for the purposes of the claims of non-Missiouri Plaintiffs, including New York Plaintiffs, these Plaintiffs were fraudulently joined and should be not be considered by the Court when determining whether diversity jurisdiction exists.

As initial matter, Plaintiffs dispute whether the fraudulent joinder doctrine can ever be applied to a plaintiff, as opposed to a defendant, and whether the doctrine applies in the context of personal jurisdiction. Without reaching these issues, the Court assumes the doctrine applies to plaintiffs and applies in the context of personal jurisdiction, as Pfizer argues. However, there is at least "glimmer of hope" that personal jurisdiction exists over the claims of non-Missouri Plaintiffs in state court. Therefore, the doctrine is unavailing for Defendant.

To prevail under the fraudulent joinder doctrine, Defendant must show that there is "no possibility" that the Missouri state court would have personal jurisdiction over it with regard to the claims of New York Plaintiffs. *E.g., Johnson*, 781 F.3d at 704. Plaintiffs argue that Pfizer has consented to personal jurisdiction in Missouri by designating an agent to accept service of process and by registering to do business in the state. (*See* Dkt. No. 1416 at 21). Pfizer argues such an act does not amount to consent to general jurisdiction. Federal district courts in Missouri are split on the issue. *Compare, e.g, Beard v. Smithkline Beecham Corp.*, No. 4:15-CV-1833 RLW, 2016 WL 1746113, at *2 (E.D. Mo. May 3, 2016) (finding no consent jurisdiction); *Chalkey v. Smithkline Beecham Corp.*, No. 4:15 CV 1838 DDN, 2016 WL 705134, at *2 (E.D. Mo. Feb. 23, 2016) (same); *Keeley v. Pfizer Inc.*, No. 4:15CV00583 ERW, 2015 WL 3999488, at *4 (E.D. Mo. July 1, 2015) (same) *with Regal Beloit Am., Inc. v. Broad Ocean Motor LLC*, No. 4:16-CV-00111-JCH, 2016 WL 3549624, at *5 (E.D. Mo. June 30, 2016) (finding consent

jurisdiction); *Trout v. SmithKline Beecham Corp.*, No. 4:15 CV 1842 CDP, 2016 WL 427960, at *1 (E.D. Mo. Feb. 4, 2016) (same); *Mitchell v. Eli Lilly & Co.*, 159 F. Supp. 3d 967, 979 (E.D. Mo. 2016) (same).[3]

The Missouri trial court opinion relied on by Pfizer notes that the court's "struggle with its ruling . . . was further exacerbated by the glut of foreign case law decisions reaching each of two antagonistic conclusions, coupled with a glaring dearth of binding Missouri state case law willing to squarely address the jurisdictional issues presented here." (Dkt. No. 1523-2 at 2). Given this state of the law in Missouri, the Court cannot find that there is "no possibility" that personal jurisdiction would exist in Missouri state court. Therefore, it finds that the non-Missouri Plaintiffs are not fraudulently joined.

E. 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.[4] (*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.

Under Missouri law, "[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

[3] This dispute centers on whether *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196 (8th Cir. 1990) (finding consent jurisdiction under Minnesota law) is still good law after the U.S. Supreme Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

[4] 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.

common to all of them will arise in the action." Missouri Rules of Civ. P. 52.05(a). While 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. (Dkt. No. 759 at 14).[6]

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. (Case No. 2:15-cv-03169, 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. (Case No. 2:15-cv-03169, Dkt. No. 1-2). In that case, 14 plaintiffs brought an action against 38 defendants alleging

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[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] Pfizer incorporated prior briefing from other cases. (Dkt. No. 1356 at 21).

injuries from Reglan or its generic equivalent. (*Id.* 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 the claims of New York Plaintiffs 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 non-Missouri Plaintiffs are properly joined under Missouri law. Therefore, these Plaintiffs are not fraudulently misjoined, the Court lacks diversity jurisdiction over this matter, and Plaintiffs' motion to remand is granted.

G. Conclusion

For the reasons stated above, Plaintiffs' motions to remand (Case No. 2:15-cv-03169, Dkt. No. 11; Case No. 2:15-cv-03170, Dkt. No. 11) are **GRANTED**, and these actions are **REMANDED** to the Missouri Circuit Court, Twenty-Second Judicial Circuit, St. Louis City, Missouri.

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AND IT IS SO ORDERED.

Richard Mark Gergel
United States District Court Judge

October 26, 2016
Charleston, South Carolina