

McKesson distributed the pills that they ingested is not information within their personal knowledge. (Dkt. No. 302 at 3). The parties appear to agree that McKesson almost certainly distributed the pills ingested by some, but not all, of the Plaintiffs.²

Thus, Defendants request that Plaintiffs provide (1) the identify and address of the pharmacies from which the Plaintiffs obtained Lipitor; (2) the dates on which they purchases or obtained Lipitor; and (3) a signed authorization to collect records from their pharmacies. (Dkt. No. 283 at 2). Defendants argue that with this information they should be able to determine, at least in a number of cases, whether McKesson distributed the Lipitor ingested by particular Plaintiffs. (*Id.*)

While Courts generally look to the complaint to determine whether a defendant has been fraudulently joined, limited jurisdictional discovery can be appropriate “to identify the presence of discrete and undisputed facts that would preclude plaintiff’s recovery against the in-state defendant.” *Smallwood v. Illinois Cent. R.R. Co.*, 385 F.3d 568, 573-74 (5th Cir. 2004); *see also AIDS Counseling and Testing Ctrs v. Group W TV, Inc.*, 903 F.2d 1000, 2004 (4th Cir. 1990) (“In order to determine whether an attempted 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.”) (internal quotes omitted). Examples of such discrete facts include “the in-state doctor defendant did not treat the plaintiff patient, the in-state pharmacist defendant did not fill a prescription for the plaintiff patient, a party’s residence was not as alleged, or any other fact that easily can be disproved if not true.” *Smallwood*, 385 F.3d at 574

² Plaintiffs allege the McKesson distributes one-third of medications used daily in North America. (Dkt. No. 302-2 at 3). Based on McKesson’s preliminary analysis of Plaintiff Fact Sheets provided in the MDL, it has no records of distributing Lipitor to about half of the pharmacies identified by Plaintiffs and reviewed by McKesson. (Dkt. No. 283 at 2). There are over 3,000 plaintiffs in these eighty-one (81) cases.

n.12. Such fact issues concerning the “status” of a non-diverse defendant as a person that cannot possibly be liable on the plaintiff’s claim are appropriate areas for limited jurisdictional discovery. *Wells’ Dairy, Inc. v. Am. Indus. Refrig., Inc.*, 157 F. Supp. 2d 1018, 1038-39 (N.D. Iowa 2001). “[T]he decision of whether or not to permit jurisdictional discovery is a matter committed to the sound discretion of the district court.” *Base Metal Trading, Ltd. v. OJSC Novokuznetsky Aluminum Factory*, 283 F.3d 208, 216 n.3 (4th Cir. 2002)

Whether McKesson distributed the Lipitor ingested by Plaintiffs is a discrete factual issue where limited jurisdictional discovery might be appropriate if the parties agreed this fact was determinative of jurisdiction. However, both parties claim that other issues are dispositive of the motions to remand regardless of whether McKesson was the distributor of the Lipitor ingested by Plaintiffs. Plaintiffs claim that they can state a claim against McKesson arising out of McKesson’s role in the sales and marketing of Lipitor, regardless of whether McKesson actually distributed the pills that they ingested. (Dkt. No. 302 at 7). Defendants claim that McKesson is fraudulently joined in all actions and that Plaintiffs cannot state a claim against McKesson in any of the actions, even actions where McKesson is the distributor. (Dkt. No. 283 at 4 n.2). In their Notices of Removal, Pfizer also contends that jurisdiction exists under the Class Action Fairness Act’s mass action provisions, which do not require complete diversity. (*See, e.g.*, Case No. 2:14-cv-2231, Dkt. No. 1). Finally, Plaintiffs contend that their claims cannot be severed and that, accordingly, jurisdiction is proper if McKesson is properly joined as to a single Plaintiff. (Dkt. No. 203 at 9).

The Court’s ruling on any one of these four issues may obviate the need for discovery on whether McKesson distributed the Lipitor ingested by Plaintiffs. The Court does not wish to stay briefing on the motions to remand pending discovery that may prove unnecessary. Therefore,

the Court **DENIES** the request for jurisdictional discovery **WITHOUT PREJUDICE**. Should the Court determine that the existence of subject matter jurisdiction turns solely on whether McKesson distributed the Lipitor ingested by Plaintiffs, the Court will revisit the issue of jurisdictional discovery at that time.

AND IT IS SO ORDERED.



Richard Mark Gergel
United States District Court Judge

July 8, 2014
Charleston, South Carolina