UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: BAYCOL PRODUCTS LITIGATION	MDL No. 1431 (MJD)

This Document also relates to:

Sharon Adams v. Bayer Corporation et al.,	Case No. 02-4831
David Alsworth v. Bayer Corporation et al.,	Case No. 02-4832
William R. Bailey v. Bayer Corporation et al.,	Case No. 02-4825
Priscilla Brooks v. Bayer Corporation et al.,	Case No. 02-4829
Elzenia Dantzler v. Bayer Corporation et al.,	Case No. 03-1178
Bobby Evans v. Bayer Corporation et al.,	Case No. 02-4824
John Richard Jones v. Bayer Corporation et al.,	Case No. 02-4833
Donald Randall v. Bayer Corporation et al.,	Case No. 02-4827
Thomas A. Smith v. Bayer Corporation et al.,	Case No. 02-4830
Stella Stewart v. Bayer Corporation et al.,	Case No. 02-4826
Earley Turner v. Bayer Corporation et al.,	Case No. 02-4822
Alberta Vaughn v. Bayer Corporation et al.,	Case No. 03-1177

James D. Shannon, Shannon Law Firm for and on behalf of Plaintiffs.

Peter W. Sipkins, Dorsey & Whitney for and on behalf of Bayer Corporation.

This matter is before the Court upon Plaintiffs' motions for remand. Bayer Corporation ("Bayer") opposes the motions, arguing that this Court has diversity jurisdiction over Plaintiffs' claims.[1]

Background

The above named plaintiffs are all citizens of the state of Mississippi. They were

[1]Originally, Plaintiffs in the Randall and Richardson (Civ. No. 02-4823) cases asserted claims against the treating physician, but have since dismissed these claims. In Richardson, the motion to remand was withdrawn. As there is no longer a dispute that complete diversity exists in the Randall case, that motion to remand is summarily denied.

each prescribed Baycol by their physicians, and each alleges they were injured as a result of ingesting Baycol.[2] Because the treating physicians are also residents of Mississippi, the above actions were originally filed in state court. Bayer Corporation timely removed these action to the United States District Court, District of Mississippi asserting subject matter jurisdiction based on diversity of citizenship under 28 U.S.C. § 1332(a). In the removal petitions, Bayer asserted that the non-diverse defendants, the treating physicians, were fraudulently joined.

Standard

Remand to state court is proper if the district court lacks subject matter jurisdiction over the asserted claims. 28 U.S.C. § 1447(c). In reviewing a motion to remand, the court must resolve all doubts in favor of remand to state court, and the party opposing remand has the burden of establishing federal jurisdiction by a preponderance of the evidence. In re Business Men's Assurance Co. of America, 992 F.2d 181, 183 (8th Cir. 1983)(citing Steel Valley Auth. v. Union Switch & Signal Div., 809 F.2d 1006, 1010 (3rd Cir. 1987) cert. dismissed 484 U.S. 1021 (1988)).

"Joinder is fraudulent and removal is proper when there exists no reasonable basis in fact and law supporting a claim against the resident defendants." Wiles v. Capitol Indemnity Corporation, 280 F.3d 868, 870 (8th Cir. 2001). The burden is on the removing party to show that there is no possibility that the plaintiff will be able to state a

[2]Although the plaintiffs have filed individual complaints, for purposes of his motion the Court notes that each complaint contains identical allegations against Bayer Corporation, GlaxoSmithKline, SmithKline Beecham Corporation and the treating physicians, with the exception of prescribing information relevant to each particular plaintiff. For ease of reference, the Court cites only to the Adams Complaint.

cause of action against the resident defendant or that there has been outright fraud in the pleading of jurisdictional facts. Parnas v. General Motors Corporation, 879 F. Supp. 91, 92 (E.D. Mo. 1995). In deciding this issue, the Court may consider the pleadings and supporting affidavits. Id.

Plaintiffs have asserted a number of claims against Bayer Corporation and SmithKlineBeecham (the "Baycol Defendants") based in strict liability, negligence, misrepresentation and fraud, and breach of warranty. In support of these claims, Plaintiffs allege that Baycol was defective, unsafe and unreasonably dangerous for its intended and/or foreseeable use, Complaint ¶ 35 (A), was in an unreasonably dangerous condition when marketed, Id. ¶ 35(B), was unaccompanied by proper warnings of the dangers that were known or knowable at the time of manufacture, marketing and distribution, Id. ¶ 35(C), and that Baycol was not adequately tested. Id. ¶ 35(D). Plaintiffs further allege that the Baycol Defendants "created, financed, supported and participated in advertising campaigns aimed at physicians throughout the United States that glamorized the success and safety of Baycol as among other things 'bringing to the rapdily-expanding statin marketplace a new competively priced drug which offers physicians and their patients a safe and effective alternative." Id. ¶ 54. "They failed to advise or adequately warn the public, doctors, hospitals, or clinics that there were special risks assocaited with the use of Baycol, especially when taken in combination with the prescription drug Lopid (gemfibrozil), even though this information was available in 1996 and prior to FDA approval of Baycol." Id. ¶ 56.

Plaintiffs further allege that the Baycol Defendants "engaged in, and conspired together, to defraud and deceive Plaintiff, her prescribing physician, pharmacists and members of the general public in Mississippi for the purpose of inducing the purchase and consumption of the drug Baycol." Id. ¶ 65. This alleged scheme was carried out by preparing false and misleading warnings and instructions, by failing to warn physicians that the side effects of rhabdomyolysis and renal failure were known prior to FDA approval and that taking higher doses of Baycol created a substantially higher risk of injury. Id. ¶ 69. It is alleged that the Baycol Defendants intended to deceive and defraud plaintiffs and their prescribing physicians, by fraudulently representing that Baycol had side effects comparable to placebo, when clinical trials showed otherwise, and by repeatedly assuring physicians that the risk of rhabdo and renal failure were very rare, when in fact such side effects were becoming more common. Id. Plaintiffs allege that the "statements, representations, omissions, advertisements or promotional schemes set out hereinabove were deceptive, false, incomplete, misleading, untrue all in violation of Miss. Code Ann. § 97-23-3 (1972)" and that Plaintiff and her prescribing physician had no knowledge of the falsity of such statements, etc and that Plaintiff and her physician had a right to rely on such statements etc. Id. ¶ 70.

Adopting and incorporating the above described allegations, the Plaintiffs next allege that the named treating physicians committed medical negligence by: failing to conduct adequate pre-clinical testing, post-marketing surveillance and blood tests to determine the safety of Baycol; negligently or carelessly prescribing Baycol; failing to warn Plaintiffs of the risks and/or side effects of Baycol; failing to engage in

comprehensive monitoring to ensure the discovery of side effects; and by failing to warn of the possibility of dying or becoming disabled as a result of Baycol ingestion. Id. ¶¶ 77-80.

It is the Baycol Defendants' position that by considering all of the allegations in the complaints, the main thrust of which is that the Baycol Defendants misrepresented the safety of Baycol, failed to warn physicians of the serious risks associated with Baycol, and that physicians reasonably relied on the Baycol Defendants assertions regarding the safety and efficacy of Baycol, the boilerplate allegations asserted against the treating physicians in the above-referenced complaints do not state a claim for medical negligence.

Plaintiffs respond that even though the Baycol Defendants misrepresented and concealed information concerning the dangers of Baycol, the treating physicians may be held liable under claims of medical negligence because they failed to follow the warnings, however inadequate, that were provided by Bayer in the Physician Desk Reference. Id., ¶ 79. As a proximate result of such negligence, Plaintiff was injured. Id. ¶ 81. If Plaintiffs' allegations of medical negligence were based solely on conclusory allegations that the treating physicians knew or should have known of Baycol's dangers, the Court would agree that such allegations are insufficient when considering the complaint as a whole. However, in these cases, Plaintiffs have sufficiently alleged a claim against the treating physicians in their complaints by alleging injury based on the treating physician's failure to follow the warnings that were in fact provided to the

public.[3]

Accordingly, IT IS HEREBY ORDERED that the Plaintiffs' Motions for remand are GRANTED as follows:

1. Civil Case Nos. 02-4822 and 02-4824 shall be remanded to the Circuit Court of the Second Judicial District, Jones County, Mississippi;

2. Civil Case Nos. 02-4829 and 02-4830 shall be remanded to the Circuit Court of Clairborne County, Mississippi;

3. Civil Case Nos. 02-4831, 02-4832 and 02-4833 shall be remanded to the Circuit Court of Jefferson County, Mississippi;

4. Civil Case Nos. 02-4825 and 02-4826 shall be remanded to the Circuit Court of Copiah County, Mississippi; and

5. Civil Case Nos. 03-1177 and 03-1178 shall be remanded to the Circuit Court of the First Judicial District, Jasper County, Mississippi.

The motion for remand filed in Civil Case No. 02-4827 is DENIED.

Date: 2003

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Michael J. Davis
United States District Court

[3]Defendants seek leave to file a supplemental response. The Court grants the request and has considered the supplemental memorandum in this opinion.