

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: BAYCOL PRODUCTS LITIGATION

MDL No. 1431
(MJD)

This Document also relates to:

Melvin Rothberg et al. v. Bayer AG et al.

Case No. 02-873

Gary M. Farmer, Jr., Gillespie, Goldman, Kronengold & Farmer, P.A. for and on behalf of Plaintiffs.

Peter W. Sipkins Dorsey & Whitney LLP and Patricia E. Lowry and John W. Little, Steel Hector & Davis LLP for and on behalf of Bayer Corporation.

This is a putative class action that was originally filed in Florida state court. Plaintiffs seek to represent a class comprised of residents of the state of Florida that have purchased and ingested Baycol. Complaint ¶ 2. Plaintiffs allege in the Complaint that Baycol was less effective than other statins on the market, and that Defendant misrepresented the efficacy and safety of Baycol to medical professionals and consumers. *Id.* ¶¶ 12-14. Plaintiffs further allege that Defendants engaged in predatory pricing activities, and engaged in a course of conduct designed to increase Baycol’s market share without regard to Baycol’s efficacy or safety. *Id.* ¶¶ 15, 16.

Based on these allegations, Plaintiffs have asserted claims for negligent misrepresentation, violation of the Florida Antitrust Act (“FAA”), and violation of the Florida Deceptive and Unfair Trade Practices Act (“DUPTA”). As a result of Defendants’ conduct, Plaintiffs allege they suffered “substantial injury and economic harm . . . in that they purchased a product that was unsafe and of inferior quality as compared to other

statin drugs on the market. The substantial injury caused to Plaintiffs and other members of the class as a result of the Defendants' conduct includes the monies paid by them to [Defendants] for the inferior product." Id. ¶ 30, 31.

Plaintiffs seek the following damages: a fund from reimbursement of monies expended on Baycol from the time it was introduced in 1997 to August 8, 2001 "(said damages limited to less than \$75,000 per Plaintiffs or class member)", injunctive relief directing Defendants to reimburse each Class member for expenses incurred in the purchase of Baycol, treble damages, attorneys fees and costs and such other relief as the Court would deem just and proper. Prayer for Relief, ¶ 2-5, 7. It is also clear that Plaintiffs seek punitive damages as well. Id. ¶ 7(b)(8).

Bayer Corporation removed this action to federal court asserting jurisdiction pursuant to 28 U.S.C. § 1332. Specifically, Bayer asserted that the parties were diverse, and that the amount in controversy exceeds \$75,000. Plaintiffs move to remand this action to state court on the basis that Defendants have not met their burden of demonstrating that the amount in controversy exceeds \$75,000.

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. 1993)(citing Steel Valley Auth. v. Union Switch & Signal Div., 809

F.2d 1006, 1010 (3rd Cir. 1987) cert. dismissed 484 U.S. 1021 (1988)).

1. Amount in Controversy

The Court begins its analysis with the principle that the amount claimed by Plaintiffs ordinarily controls in determining whether jurisdiction lies in federal court. Zunamon v. Brown, 418 F.2d 883, 885 (8th Cir. 1969)(citing St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-289 (1938)). Nonetheless, “the plaintiffs allegations of requisite jurisdictional amount are not necessarily dispositive of the issue.” Id.

Plaintiffs argue remand is appropriate because Bayer cannot meet its burden of establishing that the amount in controversy meets or exceeds the requisite jurisdictional amount. Specifically, Plaintiffs assert that the class is seeking limited damages, and have alleged in the Complaint that damages exceed \$15,000 but are less than \$75,000. Complaint ¶ 3. An allegation in a pleading, however, is not binding. The applicable rules of civil procedure liberally allow the amendment of pleadings. What is required to prevent removal is a binding stipulation or affidavit, separate from the pleadings, but filed at the time of the complaint, and signed by the plaintiffs agreeing to be so bound. See, e.g., De Aguilar v. Boeing Co., 47 F.3d 1404, 1412 (5th Cir. 1995); In re Shell Oil Co., 970 F.2d 355, 356 (7th Cir. 1992); White v. Bank of America, No. Civ.A. 3:01-CV-0189, 2001 WL 804517, at *3 (N.D. Tex. July 9, 2001)(to prevent removal, plaintiff must file with the complaint a binding stipulation or affidavit that limits the scope of their recovery). As the court in De Aguilar recognized, the procedural rules that prevent a plaintiff from claiming specific amounts in the pleadings “create[s] the potential for

abusive manipulation by plaintiffs, who may plead for damages below the jurisdictional amount in state court with the knowledge that the claim may be worth more, but also with the knowledge that they may be able to evade federal jurisdiction by virtue of the pleading.” De Aguilar, 47 F.3d at 1410. Thus, even when a plaintiff claims damages below the jurisdictional amount in the complaint, removal may still be proper if the defendant can prove by a preponderance of the evidence that the amount in controversy exceeds \$75,000. See id. at 1412; see also, In re Diet Drugs Prod. Liab. Litig., 2000 WL 556602, at **3-4 (E.D. Pa. April 25, 2000)(despite pleadings that alleged damages did not exceed \$75,000, remand denied when plaintiff sought compensatory and punitive damage for serious injuries).

Bayer points out that while paragraph 3 of the Complaint contains a general allegation to limit all damages, in the Prayer for Relief, Plaintiffs have only limited their request for damages with respect to the claim for a fund for reimbursement of monies expended on Baycol. See Prayer for Relief, ¶ 2. The requests for injunctive relief, treble damages, attorneys fees and costs, punitive damages and other relief deemed appropriate are not so limited. See Prayer for Relief, ¶¶ 3, 4, 5 and 7. Given the allegations that Plaintiffs have incurred substantial injury, and the breadth of the relief sought, the Court finds that Defendants have met their burden of demonstrating by a preponderance of the evidence that the amount in controversy easily exceeds \$75,000.

Rothberg v. Bayer AG et al., Civ. No. 02-873

IT IS HEREBY ORDERED that Plaintiffs' motion for remand in the above-referenced action is DENIED.

Date:

Michael J. Davis
United States District Court