UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: BAYCOL PRODUCTS LITIGATION	MDL No. 1431 (MJD/JGL)
	MEMORANDUM AND ORDER
This Document also relates to:	
Nanette Lowe v. Bayer et al.	Civil Case No. 03-3150
Ora Lee Washington v. Bayer et al.	Civil Case No. 03-3151

Carol E. Rhodes, Rhodes Law Offices, for and on behalf of Plaintiffs.

William F. Goodman III, Rebecca Wiggs, and C. Alleen McClain, Watkins & Eager PLLC, for and on behalf of Bayer Corporation.

Joshua J. Wiener, Butler Snow O'Mara Stevens & Cannada, for and on behalf of SmithKline Beecham Corporation d/b/a GlaxoSmithKline.

This matter is before the Court upon Plaintiffs' Motions for Remand to the Circuit Court of Jefferson County, Mississippi. Defendants oppose the motions, arguing that this Court has diversity jurisdiction over Plaintiffs' claims.

I. BACKGROUND

These cases were originally filed in Mississippi state court, and both Plaintiffs are citizens of the state of Mississippi. The complaints are virtually identical, with only the applicable names and dates being different in each complaint. Therefore, any citations to the complaint will include the identical paragraphs in both complaints, unless otherwise noted. Plaintiffs allege that they were prescribed Baycol and suffered permanent injuries; mental, emotional, and physical pain and suffering; worry, depression, anxiety, and psychological problems; loss of income and earning capacity;

and loss of vitality and capacity to enjoy life as a result of taking the drug. (Compl. ¶¶ 35I, 81, 89.) Plaintiffs have asserted a number of claims against Defendants Bayer and GlaxoSmithKline. Plaintiffs have also asserted claims against their treating physicians.

Defendants timely removed this 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 petition, Defendants asserted that the non-diverse defendants, Plaintiffs' treating physicians, were fraudulently joined. Subsequently, these matters were transferred to this Court by the Judicial Panel on Multidistrict Litigation.

II. 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. See 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)). In determining the propriety of remand, the Court must review the plaintiffs' pleadings as they existed at the time of removal. See Pullman Co. v. Jenkins, 305 U.S. 534, 537 (1939); Crosby v. Paul Hardeman, Inc., 414 F.2d 1, 3 (8th Cir. 1969).

"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 Indem. Corp., 280 F.3d 868, 871 (8th Cir. 2001) (citation omitted). The burden is on the removing party to show that there is no possibility that the plaintiff will be able to state a cause of action against the resident defendant. See Masepohl v. American Tobacco Co., Inc., 974 F. Supp. 1245, 1250 (D. Minn. 1997). In deciding this issue, the Court may consider the pleadings and supporting affidavits. See Parnas v. General Motors Corp., 879 F. Supp. 91, 92 (E.D. Mo. 1995).

III. DISCUSSION

Plaintiffs have asserted a number of claims against Bayer and Glaxo ("Defendants") based in strict liability, negligence, misrepresentation, fraud, and breach of implied and express warranties. (Compl. ¶¶ 34-73.) Generally, the claims against Defendants are based on allegations that Baycol was unsafe and in an unreasonably dangerous condition when marketed; that Defendants knew Baycol was unsafe; that Defendants failed to adequately warn of Baycol's risks; that Defendants failed to conduct proper testing of Baycol; and that Defendants made false statements to physicians and the public regarding Baycol's safety. (Id.) Plaintiff Washington also asserts negligence claims against her physician, Dr. McArthur; and Plaintiff Lowe asserts identical claims against her physician, Dr. Bills. (Compl. ¶¶ 74-89.)

Defendants argue that the main thrust of Plaintiffs' complaints is that Defendants misrepresented the safety of Baycol, and failed to warn of the serious risks associated with Baycol when manufacturing and selling the drug. Thus, according to Defendants, Plaintiffs have failed to sufficiently plead either that their physicians proximately caused Plaintiffs' injuries, or that the physicians knew or should have known of Baycol's risks. In addition, Defendants aver that Plaintiffs have failed to provide a sufficient factual basis for their allegations that the physicians did not perform the appropriate testing recommended by Defendants. Having failed to alleged a cause of action against the physicians, Defendants assert that the physicians' joinder in this case was fraudulent. For support, Defendants cite, *inter alia*, another case decided in conjunction with this MDL, Spier v. Bayer Corp., No. 02-4835, 2003 WL 21223842 (D. Minn. May 27, 2003). In Spier, this Court concluded that since the complaint alleged that Bayer failed to properly represent Baycol's safety and failed to adequately warn physicians of Baycol's risks, the plaintiff failed to demonstrate that her physician know or should have known of Baycol's risks. See Spier, 2003 WL 21223842, at *2. This Court found that the plaintiff's physician had been fraudulently joined, and denied the plaintiff's motion to remand to state court. See id. The Court finds that the complaints in the instant cases suffer from the same deficiencies as the complaint in Spier.

Plaintiffs assert that their physicians violated the appropriate standard of care in the following ways:

A. Failing to conduct adequate pre-clinical testing, post-marketing surveillance, and blood tests to determine the safety of Baycol;
B. Negligently or carelessly prescribing Baycol;
C. Failing to warn or inform [Plaintiffs] prior to or during [their] use of Baycol . . . about the . . . risks and/or side effects, of which these Defendant [physicians] knew or should have known;
D. The need for comprehensive, regular monitoring to ensure discovery of potentially serious side effects;
E. The possibility of dying or becoming disabled as a result of the drug's use and/or having to undergo surgery to correct kidney damage that [sic];
F. That Rhabdomyolysis may result in permanent injuries.

(Compl. ¶ 77.) Plaintiffs also assert that their physicians did not perform "adequate and/or subsequent lab tests recommended by the manufacturers of Baycol," did not properly monitor Plaintiffs' Baycol use, and were "otherwise careless or negligent in other material respects to be shown at trial." (Id. ¶¶ 79, 80, 88.)

The vast majority of Plaintiffs' complaints, however, support the position that the manufacturers concealed Baycol's risks, and that the physicians did not know those risks prior to prescribing the drug. The complaints state, *inter alia*, that

> Drug Company Defendants knew, or should have known, that unreasonably dangerous risks were associated with the use of [Baycol] . . . and permitted [Baycol] to be promoted and sold without adequate warnings of the serious side effects and dangerous risks to the consuming public.
>
> Drug Company Defendants . . . failed to advise or adequately warn the public, doctors, hospitals, or clinics that there were special risks associated with the use of Baycol.
>
> Drug Company Defendants engaged in, and conspired together, to defraud and deceive Plaintiff[s] and [their] prescribing physician[s], pharmacist and members of the general public.

Drug Company Defendants engaged in a fraudulent advertising, marketing and distribution scheme . . . directed at Plaintiff[s], [their] prescribing physician[s], pharmacist[s] and the general public.

Drug Company Defendants . . . falsely and fraudulently represented to physicians . . . and members of the general public, that the drug was in fact safe and not unreasonably dangerous to its users.

Drug Company Defendants . . . failed to inform and advise Plaintiff[s] [and their] prescribing physician[s] . . . that the side effects of rhabdomyolysis and renal failure were known prior to approval of the drug.

Drug Company Defendants . . . failed to emphasi[ze] to Plaintiffs [and their] prescribing physician[s] . . . that patients with pre-existing kidney problems should not take Baycol and that there was no reliable way to protect them.

Drug Company Defendants . . . failed to advise Plaintiff[s] [and their] prescribing physician[s] . . . prior to June 2001 that taking higher starting dosages of Baycol created a substantially higher risk of rhabdomyolysis and renal failure.

Drug Company Defendants, with the intent to deceive and defraud Plaintiff[s] and [their] prescribing physician[s] . . . fraudulently . . . represented that the drug Baycol had side effects comparable to placebo when, in fact, clinical trials . . . revealed that patients who took Baycol had an incidence of muscle pain almost seven times higher . . . and joint pain almost four times higher than patients given placebos.

Drug Company Defendants . . . falsely promoted Baycol to Plaintiff[s] [and their] prescribing physician[s] . . . as a drug whose safety was backed up by clinical tests. The Drug Company Defendants . . . further fraudulently failed to inform Plaintiff[s] [and their] prescribing physician[s] . . . that since January 2000, over 100 fatalities were linked to the use of Baycol.

Plaintiff[s] and [their] prescribing physician[s] had a right to rely on such statements, representations, omissions, advertisements or promotional schemes which were material to the decision to take or prescribe Baycol and, [their] prescribing physician[s] would not have prescribed it, if [they]

> had known that said statements . . . were deceptive, false, incomplete, misleading, and untrue.

(Compl. ¶¶ 53, 55, 65, 66, 69(C), 69(D), 69(E), 69(F), 69(H), 69(J), 70.)

The Court finds that Plaintiffs have failed to demonstrate that their physicians knew or should have known of Baycol's risks. Spier, 2003 WL 21223842, at *2. A defendant cannot be held liable for failing to warn of unknown risks. Therefore, Plaintiffs' motions to remand must be denied on this basis. See id. (stating that "conclusory allegations" are insufficient to defeat a finding of fraudulent joinder).

Plaintiffs also aver that their physicians "did not perform adequate and/or subsequent lab tests recommended by the manufacturers of Baycol," and did not properly monitor Plaintiffs' Baycol use. (Compl. ¶¶ 79, 88.) The complaints never identify any specific tests or monitoring, other than "liver tests," which their physicians failed to conduct, and do not even state that Plaintiffs suffered liver problems as a result of taking Baycol. The Court also finds these conclusory allegations insufficient to defeat a finding of fraudulent joinder. The overwhelming thrust of Plaintiffs' complaints is that no one, not even their physicians, were properly informed about Baycol's risks. In addition, Plaintiffs do not even attempt to establish what tests and monitoring were required once Baycol was prescribed, and thus, have failed to establish any standard of care which their physicians allegedly breached. Accordingly, Plaintiffs' motions are denied.

IT IS HEREBY ORDERED:

(1) Plaintiff Nannette Lowe's Motion for Remand to the Circuit Court of Jefferson County, Mississippi [Doc. No. 7 in Civil Case No. 03-3150] is **DENIED**; and

(2) Plaintiff Ora Lee Washington's Motion for Remand to the Circuit Court of Jefferson County, Mississippi [Doc. No. 6 in Civil Case No. 03-3151] is **DENIED**.

Date: _____

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MICHAEL J. DAVIS
United States District Court