

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF ILLINOIS**

----- X

IN RE YASMIN AND YAZ : 3:09-md-02100-DRH-  
(DROSPIRENONE) MARKETING, SALES : PMF  
PRACTICES AND RELEVANT :  
PRODUCTS LIABILITY LITIGATION : MDL No. 2100

----- :

**This document relates to:** Judge David R. Herndon

ORDER

**Laura Hardwick v. Bayer Corporation  
et. al., 3:10-cv-20143-DRH-PMF**

**ORDER**

**I. INTRODUCTION**

Plaintiff moves this Court for leave to file a first amended complaint adding McKesson Corporation (“McKesson”) as a defendant and for an order remanding the above-captioned matter to the Superior Court of California for the County of Los Angeles based on lack of diversity jurisdiction (3:10-cv-20143 Doc. 14). The Bayer Defendants oppose the motion (3:10-cv-20143 Docs. 20 and 28). For the following reasons, the Court grants Plaintiff’s motion for leave to file an amended complaint (3:10-cv-20143 Doc. 14). Plaintiff is instructed to file her amended complaint (3:10-cv-20143 Doc. 16-1 (Exhibit A)) instanter. Upon filing of the amended complaint, the Court will remand this action to the Superior Court of California for the County of Los Angeles.

## II. BACKGROUND

### A. McKesson and Other Orders Pertaining to McKesson

McKesson, a California citizen,<sup>1</sup> is a wholesale distributor of prescription medications that purchases YAZ/Yasmin and sells it to retail pharmacies. The Court has considered numerous remand motions in actions involving McKesson that were originally brought in California state court, removed to California district courts, and transferred to this MDL.

In these member actions McKesson's California citizenship has been significant for two reasons. First, for actions that were originally brought in California state court, the forum defendant rule is implicated. Second, in member actions involving Plaintiffs who are citizens of California, McKesson's presence in the case raises issues with respect to diversity. In considering these remand motions, the Court has concluded, a pharmaceutical distributor such as McKesson could be held liable under California law (*See e.g., Jankins v. Bayer Corp. et al.*, 3:10-cv-20095 Doc. 52). The Court, however, has declined to remand certain member actions governed by the substantive law of California because the Plaintiffs failed to allege that McKesson supplied the drugs the Plaintiffs ingested (*See e.g., Id.*) (finding that McKesson had been fraudulently joined because Plaintiff did not allege that McKesson sold the subject drugs).

---

<sup>1</sup> McKesson is also a citizen of Delaware.

## **B. Procedural Background for the Above Captioned Member Action**

Plaintiff filed suit in Los Angeles Superior Court on November 19, 2009 (3:10-cv-20143 Doc. 16 p. 1). Defendants removed the action to the Central District of California on January 6, 2010 on diversity grounds (3:10-cv-20143 Doc. 1). At the time of removal, the parties to this action included, Plaintiff, a California citizen (3:10-cv-20143 Doc. 1 p. 17 ¶ 3); and three Bayer entities, none of whom is a California citizen, (collectively “Bayer”) (3:10-cv-20143 Doc. 1 p. 1 ¶ 2).<sup>2</sup> On February 5, 2010, Plaintiff filed a motion to amend her complaint for the purpose of joining McKesson Corporation, a California citizen, as a named defendant and to remand her action to state court (3:10-cv-20143 Doc. 14; 3:10-cv-20143 Doc. 16). Plaintiff claims that she has met the requirements for joinder of a non-diverse defendant after removal. Plaintiff’s amended complaint alleges the following with regard to McKesson:

At all relevant times, Defendant McKesson Corporation was engaged in the business of researching, designing, developing, licensing, compounding, testing, producing, manufacturing, assembling, processing, packaging, inspecting, labeling, warranting, marketing, promoting, advertising, distributing, and/or selling YAZ/Yasmin in the State of California. On information and belief, Defendant McKesson Corporation distributed the YAZ/Yasmin product ingested by Plaintiff.

(3:10-cv-20143 Doc. 16-1 (Exhibit A) ¶ 11).

Defendants filed a response on February 12, 2010 (3:10-cv-20143 Doc. 20) and Plaintiff filed a reply on February 19, 2010 (3:10-cv-20143 Doc. 21).

---

<sup>2</sup> On September 3, 2010, Plaintiff amended her Complaint for the purpose of adding Bayer Schering Pharma A.G. as a Defendant (3:10-cv-20143 Doc. 26).

On February 24, 2010 the Central District of California stayed all proceedings in the action pending a final determination as to whether the case would be included in this MDL (3:10-cv-20143 Doc. 23). The case was transferred to and became a part of this MDL on March 12, 2010 (3:10-cv-20143 Doc. 26). On September 24, 2010 Bayer filed a second memorandum in opposition to Plaintiff's motion to amend and remand for the purpose of supplementing its initial responsive pleading with governing Seventh Circuit law (3:10-cv-20143 Doc. 28 p. 2 n. 2). Plaintiffs have not replied to the supplementary briefing.

### **C. Governing Substantive Law**

A federal transferee court sitting in diversity applies the choice-of-law rules followed by the transferor court. ***Jaurequi v. John Deere Co.*, 986 F.2d 170, 172 (7th Cir. 1993)**. Thus, in this case, the Court would apply California choice-of-law principles to determine which state's substantive law governs. The parties, however, seem to agree that Plaintiff's claims are governed by California substantive law. Accordingly, the Court need not undertake a lengthy choice-of-law analysis and may presume that Plaintiff's claims are governed by the substantive law of California. ***See Employers Mut. Cas. Co. v. Skoutaris*, 453 F.3d 915, 923 (7th Cir. 2006)** (where neither party raised conflict of law issue in diversity action, law of forum state governed).

#### **D. Pleading Standard**

Although, federal procedural rules typically apply to cases removed from state court to federal court, when assessing whether a non-diverse defendant has been fraudulently joined a court must determine whether there is “any reasonable possibility that a *state* court would rule against the non-diverse defendant[.]” ***Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 73 (7th Cir. 1992)** (emphasis added). Thus, to the extent the issue of fraudulent joinder is relevant to the Court’s analysis, the Court considers California’s pleading standards.<sup>3</sup>

#### **E. Law Governing Federal Matters**

A federal transferee court sitting in diversity applies its own circuit’s precedent in interpreting federal matters. ***See McMasters v. U.S.*, 260 F.3d 814 (7th Cir. 2001)**. Thus, in this case, the Court considers Seventh Circuit

---

<sup>3</sup> California pleading standards provide that a complaint must “allege every fact that [the plaintiff] must prove.” ***Hughes v. Western MacArthur Co.* (1987) 192 Cal. App. 3d 951, 956, 237 Cal. Rptr. 738 (Cal. App. 1987)**. Generally, “a plaintiff claiming to have been injured by a defective product must prove that the defendant’s product, or some instrumentality under the defendant’s control, caused his or her injury.” ***DiCola v. White Bros. Performance Products, Inc.*, 158 Cal. App. 4th 666, 677, 69 Cal. Rptr. 3d 888, 898 (Cal. App. 2008)**. ***See also Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 597-598, 607 P.2d 924, 928, 163 Cal. Rptr. 132, 136 (Cal. 1980)** (“as a general rule, the imposition of liability depends upon a showing by the plaintiff that his or her injuries were caused by the act of the defendant or by an instrumentality under the defendant’s control. The rule applies whether the injury resulted from an accidental event or from the use of a defective product.”) (internal citations omitted)

precedent when addressing whether Plaintiff has met the standard for joinder of a non-diverse defendant after removal.

**F. Liability of Distributors under California Substantive Law**

As this Court originally explained in its order denying remand in **Jankins v. Bayer Corp. et al.**, 3:10-cv-20095-DRH-PMF Doc. 52, California is a chain-of-distribution liability state. **See Taylor v. Elliott Turbomachinery Co., Inc.** 171 Cal. App. 4th 564, 575-576 (Cal. App. 2009). This means a consumer injured by a defective product can sue any business entity involved in the marketing or distribution of the product—from its manufacturer, down through the distributor and wholesaler, to the retailer. **See Id; Edwards v. A.L. Lease & Co.**, 46 Cal. App. 4th 1029, 1033 (Cal. App. 1996) (“In a product liability action, every supplier in the stream of commerce or chain of distribution, from manufacturer to retailer, is potentially liable.”); **Bostick v. Flex Equip. Co., Inc.**, 147 Cal. App. 4th 80, 88 (Cal. App. 2007) (California “imposes strict liability in tort on all of the participants in the chain of distribution of a defective product.”). There is no established exception to the imposition of such liability for pharmaceutical distributors. Accordingly, a pharmaceutical distributor such as McKesson could be subject to liability for Plaintiff’s alleged injuries.

### III. ANALYSIS

When joinder of a nondiverse party would destroy subject matter jurisdiction, **28 U.S.C. § 1447(e)** applies.<sup>4</sup> **See 28 U.S.C. § 1447(e)** (“If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.”). Thus, the Court has two options: (1) deny joinder, or (2) permit joinder and remand the action to state court. **See Schur v. L.A. Weight Loss Ctrs., Inc., 577 F.3d 752, 759 (7th Cir.2009).**

In evaluating the propriety of the joinder of a non-diverse party after removal, the Court’s analysis begins with **Schur v. L.A. Weight Loss Ctrs., Inc.** In **Schur** the United States Court of Appeals for the Seventh Circuit outlined four factors a court should consider in conducting such an analysis: (1) the plaintiff’s motive for seeking joinder, particularly whether the purpose is to defeat federal jurisdiction; (2) the timeliness of the request to amend; (3) whether the plaintiff will be significantly injured if joinder is not allowed; and (4) any other relevant equitable considerations. **See Schur, 577 F.3d at 759.**

Further, as the Seventh Circuit noted in **Schur**, a district court has discretion to permit joinder of a non-diverse party and should balance the equities in making that determination. **Id.** In **Schur**, the Court of Appeals found

---

<sup>4</sup> This is in contrast to an ordinary pretrial amendment under Rule 15(a), which provides that “a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.” **Fed.R.Civ.P. 15(a)(2).**

that joinder was warranted because the non-diverse defendants were not fraudulently joined and because the plaintiff learned of the non-diverse defendants' specific roles in the dispute only two months before seeking leave to amend the complaint. **Id. at 767**. The Court found that the plaintiff's waiting until she had a good faith basis to add the non-diverse defendants reflected a legitimate motive for seeking the joinder. **Id.** The Court of Appeals also balanced the defendant's desire to avoid the potential bias of local courts with the plaintiff's interest in avoiding the cost and inconvenience of parallel state and federal court lawsuits involving the same acts. **Id. at 768**. Ultimately, the Appellate Court found that joinder was proper. **Id.**

Applying the above stated factors and considering the Appellate Court's analysis in **Schur**, the Court finds that joinder of McKesson is appropriate. As noted, under California substantive law, distributors in the chain of distribution of a product may be held liable for injuries caused by the defective products they distribute. Plaintiff's amended complaint specifically alleges that McKesson supplied the drugs that Plaintiff ingested. Considering California's recognition of distributor liability and Plaintiff's allegation that McKesson distributed the subject drugs, the Court finds that Plaintiff has a legitimate motive for seeking joinder of McKesson, the distributor that allegedly supplied the drugs she ingested.

As to timeliness, Plaintiff filed her motion to amend shortly after the notice of removal and within ten weeks of the filing of her original complaint.

Further, Plaintiff contends that she sought to amend her complaint as soon as she discovered that McKesson distributed the drugs she ingested. The Court cannot find that this minimal delay constitutes bad faith, is excessive or is unduly prejudicial to the Defendants.

Finally, considering the substantive law of California with regard to distributor liability and Plaintiff's unambiguous allegation that McKesson supplied the allegedly injurious drugs, Plaintiff would be significantly injured if joinder were not allowed. Plaintiff would be forced to bring a separate lawsuit against McKesson in state court, which would result in additional costs to Plaintiff in both time and money. Furthermore, it would waste valuable judicial resources to consider the same liability issues in two separate proceedings. The Court takes counsel at their word and acts on the firm belief that the state court is fully capable of imposing the appropriate sanctions if it finds Plaintiff lacked a good faith basis to make such an assertion.

#### **IV. Conclusion**

The Court finds that on balance, the equities favor allowing Plaintiff to amend her complaint to join McKesson as a defendant. Accordingly, the Court **GRANTS** Plaintiff's motion to amend her complaint. The Court **DIRECTS** Plaintiff to file her amended complaint **INSTANTER**.

Because such joinder will destroy the original diversity jurisdiction upon which federal subject matter jurisdiction relies in this case, the Court will **REMAND** this case to Superior Court of California for the County of Los Angeles upon the filing of Plaintiff's amended complaint.

**SO ORDERED:**

Chief Judge  
United States District

Date: October 21, 2010