IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: LIPITOR (ATORVASTATIN CALCIUM) MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	**MDL No. 2:14-mn-02502-RMG**	
	CASE MANAGEMENT ORDER NO. 88	
	This Order relates to cases:	
	2:14-cv-1811	2:14-cv-2363
	2:14-cv-2307	2:14-cv-2371
	2:14-cv-2329	2:14-cv-2375
	2:14-cv-2360	2:14-cv-2378

Motion to Remand (Dkt. No. 268)

For the reasons stated below, Plaintiffs' Motion to Remand (Dkt. No. 268) is GRANTED IN PART.[1]

A. Background

Each of these cases was originally filed in California state court against Defendants Pfizer, Inc. ("Pfizer") and McKesson Corp. ("McKesson"). Plaintiffs allege that Lipitor caused them to develop Type II diabetes and that, among other things, Defendants did not properly disclose the risks associated with Lipitor. Defendants removed these actions to federal district courts in California, asserting (1) diversity jurisdiction and (2) federal jurisdiction under the Class Action Fairness Act of 2005 (CAFA).

After removal, these cases were transferred to this MDL by the JPML, and Plaintiffs' filed a motion to remand. (Dkt. No. 268). In these eight cases, diversity is apparent from the

[1] This Order addresses this motion with regard to *Banks, et al. v. Pfizer Inc., et al.*, 2:14-cv-1811; *Bowser v. Pfizer Inc., et al.*, 2:14-cv-2329; *Constant v. Pfizer Inc., et al.*, 2:14-cv-2360; *Hodges v. Pfizer Inc. et al.*, 2:14-cv-2375; *Lubniewski v. Pfizer Inc., et al.*, 2:14-cv-2378; *Owens v. Pfizer Inc., et al.*, 2:14-cv-2307; *Pierce v. Pfizer Inc., et al.*, 2:14-cv-2371; and *Willis v. Pfizer Inc., et al.*, 2:14-cv-2363. The Court has addressed the motion with regard to all other cases in CMO 87, Dkt. No. 1726.

face of the Complaints. However, McKesson is a resident of California, and Plaintiffs argue that the forum defendant rule bars removal under diversity jurisdiction. Plaintiffs also dispute whether federal jurisdiction under CAFA exists and argue that the Court should remand the cases to California federal courts in accordance with CAFA. The Court referred this motion to remand to the Magistrate Judge. (Dkt. No. 292).

The Magistrate Judge issued an order granting the motions to remand and ordering that these actions be transferred to the federal district courts in California from which they came. (Dkt. No. 715). However, because it has not been definitively established whether an order of remand is dispositive such that it must be ruled on by a District Judge absent consent of the parties, Judge Marchant ordered that the parties were allowed to file objections to the order of remand and that if any objections were filed, the case be forwarded to this Court for de novo review and final disposition. (*Id.*). Defendants filed objections, Plaintiffs responded, and the parties have filed several notices of supplemental authority and additional briefing. (*See* Dkt. Nos. 755, 796, 829, 845, 867, 889, 894, 1654, 1664, 1673). This matter is now before the Court for de novo review.

B. Forum Defendant Rule

Title 28 U.S.C. § 1441(b)(2), known as the "forum defendant rule" or "home-state defendant rule," provides that "[a] civil action otherwise removable solely on the basis of [diversity jurisdiction] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."[2] In their initial

[2] The rule also does not apply to cases removed under the Class Action Fairness Act, which Defendants have also asserted as a basis for jurisdiction. *See* 28 U.S.C. § 1453(b). However, if these cases were properly removed on the basis of diversity jurisdiction, it is undisputed that the cases should stay as member cases of the MDL. If the cases were not properly removed on the basis of diversity jurisdiction, the Court must address whether the cases should stay in the MDL.

brief, Plaintiffs argued that the forum defendant rule prevented removal of these cases because McKesson was a forum defendant. (Dkt. No. 267 at 24-25). In response, Pfizer argues that forum defendant rule was inapplicable (1) in all eight cases because McKesson was not "properly joined and served" at the time of removal and (2) in seven of the cases because Plaintiffs had waived this issue under Section 1447(c). (Dkt. No. 755 at 32). Pfizer also argues that McKesson was fraudulently joined and should not be considered when applying the forum defendant rule. Plaintiffs addressed these issues in their response brief to Pfizer's objections, (Dkt. No. 796 at 25-27), and Pfizer addressed them again on reply. (Dkt. No. 829 at 17-19).

1. The Timing of Service

The parties agree that McKesson was not served prior to removal but was served after removal. (*See* Dkt. No. 755 at 32; Dkt. No. 796 at 25-26). Section 1441(b)(2) prevents removal solely on the basis of diversity jurisdiction "if any of the parties in interest ***properly joined and served as defendants*** is a citizen of the State in which such action is brought." (emphasis added). There is a split of authority on whether the "properly joined and served" language in this statute allows an in-state defendant to remove a case as long as it does so before service. Some cases hold that the statutory language is clear, and that removal is proper if done before service. *See, e.g., McCall v. Scott*, 239 F.3d 808, 813 (6th Cir. 2001) ("[T]he inclusion of an *unserved* resident defendant in the action does not defeat removal under 28 U.S.C. § 1441(b)."") (emphasis in original), *amended on denial of reh'g on other grounds*, 250 F.3d 997 (6th Cir. 2001); *Regal Stone Ltd. v. Longs Drug Stores California, L.L.C.*, 881 F. Supp. 2d 1123, 1127 (N.D. Cal. 2012) ("[T]he clear and unambiguous language of the statute only prohibits removal after a properly joined forum defendant has been served."); *Ripley v. Eon Labs Inc.*, 622 F. Supp. 2d 137, 140 (D.N.J. 2007) ("The Court finds that the plain language of 28 U.S.C. § 1441(b) does not bar the

Defendants' removal in this case because at the time that the action was removed, the Defendants had not yet been 'properly joined and served.'"); *Wensil v. E.I. Dupont De Nemours & Co.*, 792 F. Supp. 447, 449 (D.S.C. 1992) ("The statute is clear. The presence of unserved resident defendants does not defeat removal where complete diversity exists.").

Other courts hold that despite the clear language, Congress could not have intended to allow such gamesmanship. *See, e.g., Sullivan v. Novartis Pharm. Corp.*, 575 F. Supp. 2d 640, 646 (D.N.J. 2008) ("[T]he court deems that such a result is bizarre or absurd, and even in the absence of any substantially helpful legislative materials, is determinative that section 1441(b) must not be read literally in this instance."); *Oxendine v. Merck & Co.*, 236 F. Supp. 2d 517, 526 (D. Md. 2002) ("[R]emovability cannot rationally turn on the timing or sequence of service of process."). These cases note that the language was added to the statute to prevent gamesmanship by plaintiffs and that "[t]he tactics employed by defendants such as in the instant case turn Congressional intent on its head by allowing *defendants* to employ gamesmanship, specifically by rushing to remove a newly filed state court case before the plaintiff can perfect service on anyone." *Ethington v. Gen. Elec. Co.*, 575 F. Supp. 2d 855, 862 (N.D. Ohio 2008) (emphasis in original). Moore's Federal Practice states that these cases reflect the "modern trend." 16 James Wm. Moore et al., Moore's Federal Practice § 107.55[2] (3d ed. 2015); *see also Oxendine*, 236 F. Supp. 2d at 524 (stating that "the majority of courts" reject the argument that removability turns on the date of service).

The Court agrees with the modern trend as recognized by Moore's Federal Practice. "The literal application of § 1441(b) in this case would both produce bizarre results that Congress could not have intended, and results that are demonstrably at odds with the objectives Congress did intend to effect." *Sullivan*, 575 F. Supp. 2d at 643. The Eightieth Congress, sitting

in 1948, "could not possibly have anticipated the tremendous loophole that would one day manifest from technology enabling forum defendants to circumvent the forum defendant rule by, *inter alia*, electronically monitoring state court dockets." *Id.* at 645. Therefore, the Court finds that, notwithstanding the timing of service, the forum defendant rule bars removal of these cases on the basis of diversity jurisdiction.

2. Waiver

Pfizer next argues that in seven of the eight cases at issue, Plaintiffs waived their arguments under the forum defendant rule because Plaintiffs did not move for remand within 30 days of removal.

While a plaintiff can raise the lack of subject matter jurisdiction at any time, a motion to remand, "on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal." 28 U.S.C.A. § 1447(c); *see also Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 198 (4th Cir. 2008) ("Section 1447(c) effectively assigns to the parties the responsibility of policing non-jurisdictional questions regarding the propriety of removal, permitting them to assert a procedural defect or to waive the defect if they choose to remain in the federal forum.").

Although the Fourth Circuit has not ruled on the issue, nine federal courts of appeal have held that the forum defendant rule is a procedural defect that is waivable under Section 1447(c). *See Samaan v. St. Joseph Hosp.*, 670 F.3d 21, 28 (1st Cir. 2012); *Shapiro v. Logistee USA Inc.*, 412 F.3d 307, 313-15 (2d Cir. 2005); *Korea Exch. Bank v. Trackwise Sales Corp.*, 66 F.3d 46, 50 (3d Cir. 1995); *In re Shell Oil Co.*, 932 F.2d 1518, 1523 (5th Cir. 1991); *Plastic Moldings Corp. v. Park Sherman Co.*, 606 F.2d 117, 119 n. 1 (6th Cir. 1979); *Morris v. Nuzzo*, 718 F.3d 660, 665 (7th Cir. 2013); *Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933 (9th Cir. 2006); *Am. Oil Co. v.*

McMullin, 433 F.2d 1091 (10th Cir.1970); *Snapper, Inc. v. Redan*, 171 F.3d 1249, 1258 (11th Cir. 1999). Only one federal court of appeals has held to the contrary, *see Hurt v. Dow Chem. Co.*, 963 F.2d 1142, 1144-45 (8th Cir. 1992), and its holding is called into question by later statutory changes. *See FIA Card Servs., N.A. v. Gachiengu*, No. CIV.A. H-07-2382, 2008 WL 336300, at *3 (S.D. Tex. Feb. 5, 2008). Thus, the Court follows the majority holding and finds that the forum defendant rule is a procedural defect that is waivable under Section 1447(c).[3]

Plaintiffs argue that Pfizer sought and secured stays in these cases in the transferor courts, pending transfer by the JPML, and that their 30-day time limit under Section 1447(c) did not begin running until the stays were lifted. (Dkt. No. 796 at 27). The Court can find no authority directly on point, and the better practice would have been for Plaintiffs to either file the motion to remand (as counsel in the *Banks* case did) or request language in the stay order specifically staying their 30-day deadline was tolled. *See D's Pet Supplies, Inc. v. Microsoft Corp.*, No. 00-70481, 2000 WL 34423492, at *1 (E.D. Mich. May 19, 2000) (stating that during the stay "[a]ll relevant time limits-including, without limitation, Plaintiff's time limit in *Fine*, No. 00-70481, to file a motion seeking remand . . . are hereby tolled"). However, the Court finds that the stays entered in these cases tolled the 30-day statutory time limit from the date the stay was entered until transfer to this MDL. The Court rejects Plaintiffs' argument that 30-day clock completely reset on the day the stay was lifted. Rather, the Court finds that the 30-day time limit began run on the date of removal, was then tolled from the date the stay was entered, and began running again when transferred to this MDL and the stay was lifted.

[3] Plaintiffs do not appear to dispute that the forum defendant rule is waivable, stating "Pfizer is technically correct that a plaintiff must move for remand within 30 days of removal to be able to invoke the forum defendant rule." (Dkt. No. 796 at 27).

Applying this rule, the motions to remand were timely under Section 1447(c). In most of the cases, the Notice of Removal was filed on March 12, 2014, and the district court stayed the cases on March 21, 2014, such that nine days of the time period lapsed before the stay was entered. (*See, e.g., Owens v. Pfizer*, Case No. 2:14-cv-02307, Dkt. Nos. 1, 10.) The cases were then transferred to this Court on June 12, 2014, and, thus, unstayed. (Case No. 2:14-cv-02307, Dkt. No. 17). The motions to remand were filed eleven days later on June 23, 2014. (Case No. 2:14-cv-02307, Dkt. No. 29). Thus, twenty days of the statutory time limit had passed when the motions were filed.

In one case, the stay was entered on March 25, 2014, adding four days. (*See Lubniewski v. Pfizer*, Case No. 2:14-cv-2378, Dkt. No. 12). This case was also transferred one day earlier, adding an additional day, (Dkt. No. 19), but the total time of twenty-five days is still within the 30-day statutory time limit. Therefore, the Court finds that Plaintiffs' have not waived the forum defendant rule.

3. Fraudulent Joinder

There is a split of authority on whether the fraudulent joinder doctrine applies to the forum defendant rule. *Compare Yellen v. Teledne Continental Motors, Inc.*, 832 F. Supp. 2d 490, 503 (E.D.Pa. Dec. 6, 2011) (fraudulent joinder doctrine applies to forum defendant rule); *Sargent v. Cassens Corp.*, No. 06 CV 1042, 2007 WL 1673289 at *2 (S.D. Ill. June 7, 2007) (same) *with Yount v. Shashek*, 472 F. Supp. 2d 1055, 1059 (S.D.Ill.2006) (fraudulent joinder doctrine does not apply to forum defendant rule); *Davenport v. Toyota Motor Sales*, No. 09 CV 532, 2009 WL 4923994 at *3 (S.D.Ill. Dec. 14, 2009) (same); *see also Morris v. Nuzzo*, 718 F.3d 660, 670–71 (7th Cir. 2013) ("[W]e think it a very close question whether the fraudulent joinder doctrine ought to extend to diverse resident defendants, and we are reluctant to rule definitively

on the issue today absent a more thorough and more able presentation of the relevant balance of interests."). However, the Court need not decide the issue.

In CMO 87, the Court found that McKesson was not fraudulently joined for the purposes of determining whether diversity jurisdiction existed. (Dkt. No. 1726 at 3-9). For the same reasons, even if the fraudulent joinder doctrine does apply to the forum defendant rule, McKesson is not fraudulently joined, and the forum defendant rule bars removal on the basis of diversity jurisdiction.

C. CAFA

Defendants also assert federal jurisdiction under the Class Action Fairness Act (CAFA). Under CAFA, federal courts have jurisdiction over class actions if there is minimal diversity and the amount in controversy, when aggregated, exceeds $5 million.[4] CAFA specifically provides that, for the purposes of the statute, "a mass action shall be deemed to be a class action," removable under the statute if it meets the other requirements of the statute. *Id.* at § 1332(d)(11)(A). The term "mass action" is defined as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." *Id.* at § 1332(d)(11)(B)(i). The term specifically does not include actions in which "claims have been consolidated or coordinated solely for pretrial proceedings." *Id.* at § 1332(d)(11)(B)(ii)(IV). The parties dispute whether the cases removed here are a "mass action" within the meaning of CAFA.

However, Plaintiffs argue that the Court need not reach the issue because even if the cases are mass actions, the CAFA statute prevents their transfer to an MDL and the cases should be remanded back to district courts in California. (Dkt. No. 796 at 7-9). This Court agrees.

[4] There are additional requirements not relevant here, such as the proposed class must have at least 100 members. *See* 28 U.S.C. § 1332(d).

CAFA explicitly provides that any "mass actions" removed under CAFA "shall not thereafter be transferred to any other court pursuant to section 1407 [the MDL statute], or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407." 28 U.S.C. § 1332(d)(11)(C)(I). The JPML has held that this statute only restricts the transfer of mass actions "made removable only pursuant to CAFA." *In re Darvocet, Darvon & Propoxyphene Prod. Liab. Litig.*, 939 F. Supp. 2d 1376, 1381 (JPML 2013). In other words, CAFA "does not prohibit Section 1407 transfer of an action removed pursuant to CAFA's mass action provision so long as another ground for removal is asserted." *Id.* at 1381. Thus, the JPML transferred these actions to the MDL because Defendants asserted diversity jurisdiction as well as CAFA jurisdiction. *See In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prod. Liab. Litig. (No. II)*, No. MDL 2502, 2015 WL 7769022, at *1 (JPML June 8, 2015) (transferring similarly situated California actions to this MDL). However, this Court has now held that these cases are not properly removed on the basis of diversity jurisdiction and that the only possible proper basis for removal is CAFA jurisdiction.

The question, then, is what happens to a case when the transferee Court (the MDL court) determines that no proper basis for removal exists other than (possibly) CAFA. Plaintiffs argue that the case should be remanded back to transferor court, in accord with Congressional intent. Defendants argue that statute only restricts initial transfer and that once the case is in the MDL, the issue is moot, and that any attempt to transfer the case back would be "overruling" the JPML.

The Magistrate Judge found that transfer of the cases back to California district courts was proper. "Otherwise, the Defendants in any case would be able to circumvent the consent requirement of § 1332(d)(11)(C)(I) simply by adding non-CAFA grounds for removal that are

frivolous." (Dkt. No. 715 at 23). Thus, the Magistrate Judge found that the Court should suggest remand of these actions back to California district courts.

After the Magistrate Judge's recommendation in this MDL, the Darvocet MDL court reached the same conclusion in a well-reasoned opinion. *In re Darvocet*, 106 F. Supp. 3d 849 (E.D. Ky. 2015), *appeal dismissed* (Nov. 17, 2015), *motion to certify appeal granted*, No. 2:11-MD-2226-DCR, 2015 WL 4385926 (E.D. Ky. July 14, 2015), *leave to appeal denied* (Nov. 17, 2015). The *Darvocet* court reasoned:

> Without the benefit of precedent, this Court must determine the better of two potential outcomes. The first outcome is that the cases remain in the transferee court, despite being removed solely on the basis of CAFA's mass action provision. Although more efficient for pretrial proceedings, this cannot be the correct result, as it would allow parties to bypass § 1332(d)(11)(C)(1) simply by asserting meritless grounds for removal. Just as cases are "not transferrable merely because the defendant has cited to the mass action provision as an additional ground in its notice of removal," [MDL Record No. 2596, p. 4] cases are not bound to adjudication in a transferee court merely because the defendant has cited to additional grounds that later prove insufficient.
>
> The second potential outcome is JPML remand of mass actions to their original federal courts following a transferee court's finding that removal was proper solely on CAFA grounds. This result, although less efficient, preserves the effect of CAFA's prohibition on transfers. It does not require the JPML panel to impermissibly consider the validity of jurisdictional grounds asserted, but merely affords the transferee court an opportunity to determine jurisdiction and, where appropriate, relinquish cases that are not subject to transfer under CAFA. The JPML has noted and the parties agree that "the language of Section 1332(d)(11)(C)(i) clearly circumscribes the Panel's authority to transfer an action removed solely as a mass action." [MDL Record No. 2596, p. 2] Nothing in the JPML's decision in *In re Darvocet* suggests that a case that would otherwise have been precluded from MDL transfer under CAFA must be retained by a transferee court merely because the defendant has cited additional, meritless grounds in its notice of removal. *See* 939 F.Supp.2d at 1381. Moreover, if the grounds for removal had originally been determined by the transferor courts, § 1332(d)(11)(C)(1) would have precluded transfer to this Court. The undersigned finds no reason to reach a different result simply because of the cases' procedural posture at the time of transfer.

Id. at 858-59.

This Court agrees with the reasoning of *In re Darvocet*. Congress struck a compromise in CAFA: federal courts would have jurisdiction over mass actions but these actions could not be transferred to an MDL unless a majority of the plaintiffs so requested. Under Defendants' theory, a defendant could add a frivolous jurisdictional ground to evade this statute, and ***no court could review it***. Because the JPML, the only body with authority to transfer a case, also lacks authority to address the merits of subject matter jurisdiction, a defendant's assertion of non-CAFA jurisdiction, no matter how frivolous, requires transfer to an MDL without court review and then, once in the MDL, the case must stay there regardless of the transferee court's determinations regarding subject matter jurisdiction. The Court finds such machinations contrary to Congressional intent. Therefore, this Court will suggest that the JPML remand these cases to the federal district courts in California. Furthermore, the Court's suggestion of remand will provide the JPML with an opportunity to address this question directly, as it is the final arbiter of whether cases should be remanded to the transferor courts. *See, e.g., Pinney v. Nokia, Inc.*, 402 F.3d 430, 452 (4th Cir. 2005) (noting that only the JPML has the authority to remand a case to the transferor court).

D. Conclusion

For the reasons stated above, the Court **GRANTS IN PART** Plaintiffs' Motion to Remand (Dkt. Nos. 268). The Court finds that removal of these actions on the basis diversity jurisdiction is barred by the forum defendant rule and that the only possible basis for removal is CAFA. Therefore, for the reasons stated above, the Court **SUGGESTS** to the JPML that these actions be remanded to their transferor courts for further proceedings.

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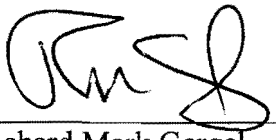
AND IT IS SO ORDERED.



Richard Mark Gergel
United States District Court Judge

November 21, 2016
Charleston, South Carolina