IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

Civil Action No. _____

PHILIP B. EPSTEIN,

Plaintiff,

v.

GILEAD SCIENCES, INC.; CHARLES PACKARD; CESAR PIZARRO; and LUIS GRULLON,

Defendants.

State Action Filed: Sept. 24, 2019

State Action Served: Oct. 1, 2019

DEFENDANT GILEAD SCIENCES, INC.'S NOTICE OF REMOVAL

Notice is hereby given that, pursuant to 28 U.S.C. §§ 1332, 1441 and 1446, Defendant Gilead Sciences, Inc. ("Gilead") hereby removes this civil action, pending as 50-2019-CA-12348XXXXMB-DIV: AK in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida (the "State Court Action"), to the United States District Court for the Southern District of Florida.

INTRODUCTION

1. On September 24, 2019, Plaintiff Phillip B. Epstein ("Plaintiff") filed the State Court Action against Gilead and three present or former Gilead sales employees: Defendants Charles Packard ("Packard"), Cesar Pizarro ("Pizarro"), and Luis Grullon ("Grullon") (collectively, the "Individual Defendants").

2. A copy of Plaintiff's Complaint and all process, pleadings, and orders served upon Gilead in the State Court Action is attached hereto as Exhibit A. *See* 28 U.S.C. § 1446(a).

On October 1, 2019, Gilead was served with a copy of the Complaint setting forth the claims for relief upon which the State Court Action is based. *See* 28 U.S.C. § 1446(b)(1). Pizarro and Grullon were served with a copy of the Complaint on October 9, 2019, and Plaintiff purported to serve (but did not properly serve) Packard on the same date.

3. This case relates to two of Gilead's HIV medications—Viread® and Atripla®. The Complaint alleges that: (1) Gilead should have replaced one of the components of Viread® and Atripla®, tenofovir disoproxil fumarate, with an allegedly superior compound, tenofovir alafenamide; (2) Gilead failed to adequately warn Plaintiff or his doctors about kidney and bone risks associated with Viread® and Atripla®; (3) Gilead misleadingly promoted Viread® and Atripla® as safe when they allegedly were not in light of kidney and bone risks; and (4) Plaintiff suffered kidney and bone injuries as a result of using Viread® and Atripla®. *See* Ex. A ¶¶ 1–22.

4. Based on these allegations, Plaintiff asserts the following claims for relief: (1) strict products liability – design defect against Gilead; (2) strict products liability – failure to warn against Gilead and the Individual Defendants; (3) negligence against Gilead and the Individual Defendants; (4) fraud against Gilead; (5) violation of Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA") against Gilead[1]; (6) breach of express warranty against Gilead; and (7) breach of implied warranty against Gilead. *Id.* ¶¶ 147–263.

5. Among other relief, Plaintiff seeks actual, compensatory, and/or statutory damages; punitive and exemplary damages; restitution and disgorgement; and costs and reasonable attorney fees. *Id.* at 52–53 (prayer for relief); *see also id.* ¶¶ 23, 25, 264–66.

[1] Plaintiff does not expressly state which defendant or defendants his FDUTPA claim is brought against. Ex. A ¶¶ 232–252. However, on the face of the Complaint, it is apparent that this claim is brought solely against Gilead because it contains no mention of—let alone any allegations regarding—the Individual Defendants. *Id.*

6. The United States District Court for the Southern District of Florida has subject matter jurisdiction over this action under 28 U.S.C. § 1332(a)(1), and removal is proper under 28 U.S.C. §§ 1441 and 1446.

I. THIS COURT HAS SUBJECT MATTER JURISDICTION UNDER 28 U.S.C. § 1332(a)(1).

7. Section 1332(a)(1) provides: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States." 28 U.S.C. § 1332(a)(1). For the reasons set forth below, all of the jurisdictional requirements for "diversity jurisdiction" are satisfied in this case.

A. The Relevant Parties Are Completely Diverse.

8. Cases fall within a federal court's diversity jurisdiction only if "diversity of citizenship among the parties is complete, *i.e.*, only if there is no plaintiff and no defendant who are citizens of the same State." *Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 388 (1998).

9. Plaintiff alleges that he is a citizen of Florida, while Gilead is a citizen of Delaware and California. Ex. A ¶¶ 24, 26; *see also* 28 U.S.C. § 1332(c)(1) ("[A] corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business."). Thus, as between Plaintiff and Gilead, diversity of citizenship is complete.

10. Although Plaintiff alleges that the Individual Defendants are also citizens of Florida, Ex. A ¶¶ 28–30, Packard is a citizen of Georgia and all of the Individual Defendants were "fraudulently joined" to defeat federal diversity jurisdiction. *See Legg v. Wyeth*, 428 F.3d 1317, 1320 (11th Cir. 2005) (describing the "common strategy" of naming "local parties" as

defendants, often "local sales representatives," in order to defeat a defendant's "right to remove a case to federal court").

11. The doctrine of "fraudulent joinder" permits courts to ignore allegations against a non-diverse party where the defendant can show either that: "(1) there is no possibility the plaintiff can establish a cause of action against the resident defendant; or (2) the plaintiff has fraudulently pled jurisdictional facts to bring the resident defendant into state court." *Stillwell v. Allstate Ins. Co.*, 663 F.3d 1329, 1332 (11th Cir. 2011) (quoting *Crowe v. Coleman*, 113 F.3d 1536, 1538 (11th Cir. 1997)).

12. Here, Plaintiff has alleged two claims against the Individual Defendants: (1) strict products liability – failure to warn; and (2) negligence. Ex. A ¶¶ 170–214. The Individual Defendants are all current or former sales employees of Gilead. *Id.* ¶¶ 28–30. The relevant paragraphs of Plaintiff's Complaint only contain allegations against Gilead, as the sole "[d]efendant." *See id.* ¶¶ 170–214. Indeed, there is no mention at all of any of the Individual Defendants in those paragraphs—let alone any substantive allegations against them based on actions taken in their individual or personal capacities, as opposed to their capacities as Gilead employees. *Id.* In any event, there is no possibility that Plaintiff can establish a strict liability claim (failure to warn) or negligence claim against any of the Individual Defendants.

13. Florida courts have adopted the doctrine of strict product liability. *Samuel Friedland Family Enters. v. Amoroso*, 630 So. 2d 1067, 1068 (Fla. 1994). But they have "limited the doctrine's application to manufacturers and others in the distributive chain including retailers, wholesalers, and distributors." *See Clay v. Wyeth*, No. 5:04-CV-192-OC-10GRJ, 2004 WL 7330338, at *10 & n.86 (M.D. Fla. Aug. 17, 2004) (citing, *e.g.*, *Mobley v. S. Fla. Beverage Corp.*, 500 So. 2d 292 (Fla. 3d DCA 1986); *Visnoski v. J.C. Penney Co.*, 477 So. 2d 29 (Fla. 2d

DCA 1985)). Strict liability ensures that entities within a product's distributive chain "who profit from the sale or distribution of [the product] to the public, rather than an innocent person injured by it, . . . bear the financial burden of even an undetectable product defect." *Samuel Friedland Family Enters.*, 630 So. 2d at 1068 (quoting *N. Miami Gen. Hosp., Inc. v. Goldberg*, 520 So. 2d 650, 651 (Fla. 3d DCA 1988)). "Those entities are in a better position to ensure the safety of the products they market, to insure against defects in those products, and to spread the cost of any injuries resulting from a defect." *Id.*

14. The Complaint contains no allegation that any of the Individual Defendants played any role in the design or manufacture of Viread® or Atripla®. Nor does it contain any allegation that any of the Individual Defendants is a distributor, retailer, or wholesaler of those medications. *See Clay*, 2004 WL 7330338, at *10; *see also Johnson v. Supro Corp.*, 498 So. 2d 528, 529 (Fla. 3d DCA 1986) (explaining that the doctrine of strict liability "is based on the essential requirement that the responsible party is in the business of and gains profits from distributing or disposing of the 'product' in question through the stream of commerce"). Nor could Plaintiff allege any such facts because none of them would be true. Accordingly, there is no reasonable basis upon which Plaintiff can possibly establish a strict liability claim against any of the Individual Defendants under Florida law.

15. To state a claim for negligence under Florida law, the plaintiff must establish that: "(1) the defendant had a duty to protect the plaintiff; (2) the defendant breached that duty; and (3) the defendant's breach was the proximate cause of the plaintiff's injuries and resulting damages." *Clay*, 2004 WL 7330338, at *8 & n.75 (citing *Lake Parker Mall, Inc. v. Carson*, 327 So. 2d 121, 123 (Fla. 2d DCA 1976), *cert. denied*, 344 So. 2d 323 (Fla. 1977)); *see also H and U Foods v. Ellison*, 439 So. 2d 923, 923–24 (Fla. 4th DCA 1983). Here, none of the Individual

Defendants is alleged to have owed any duty to Plaintiff. *See Clay*, 2004 WL 7330338, at *8. Moreover, even if there was a duty, the Complaint contains no allegation that any of the Individual Defendants "concealed [a] dangerous condition of which [they] knew or should have known." *See id.* at *8 & n.76 (citing *Spadafora v. Carlo*, 569 So. 2d 1329, 1330 (Fla. 2d DCA 1990)); *see also Lester's Diner II, Inc. v. Gilliam*, 788 So. 2d 283, 286 (Fla. 4th DCA 2000).

16. Plaintiff's Complaint contains no allegation that the Individual Defendants acted other than in their capacities as Gilead employees, had special or independent knowledge of any alleged risks associated with Viread® or Atripla® beyond what they learned from Gilead, or made any statements about Viread® or Atripla® beyond those authorized by Gilead. *See Sobkowski v. Wyeth, Inc.*, No. 5:04-CV-96-OC-10GRJ, 2004 WL 3569704, at *5 (M.D. Fla. May 17, 2004), *report and recommendation adopted*, 2004 WL 3581799, at *1 (M.D. Fla. June 24, 2004); *see also Buckles v. Coombs*, No. 6:16-CV-1619-ORL-37KRS, 2017 WL 38801, at *3–4 (M.D. Fla. Jan. 4, 2017); *Wilssens v. Medtronic, Inc.*, No. 09-60792-CIV, 2009 WL 9151079, at *6 (S.D. Fla. July 23, 2009).[2] Accordingly, Plaintiff has "no reasonable basis" for asserting a negligence claim against any of the Individual Defendants. *See Clay*, 2004 WL 7330338, at *9.

17. Because there is no possibility that Plaintiff can establish a strict liability or negligence cause of action against any of the Individual Defendants, those defendants are fraudulently joined and should be disregarded for purposes of establishing diversity of citizenship. Complete diversity otherwise exists between Plaintiff and Gilead, which makes removal of this case proper under 28 U.S.C. §§ 1332, 1441, and 1446.

[2] *See, e.g.*, *Merced-Torres v. Merck & Co., Inc.*, 393 F. Supp. 2d 1299, 1304 (M.D. Fla. 2005); *Petty v. Wyeth*, No. 3:04-CV-82/MCR, 2005 WL 2893734, at *4 (N.D. Fla. Apr. 28, 2005); *Fowler v. Wyeth*, No. 3:04-CV-83/MCR, 2004 WL 3704897, at *4 (N.D. Fla. May 14, 2004).

B. The Alleged Amount In Controversy Exceeds $75,000.

18. Under 28 U.S.C. § 1332(a), the amount in controversy must "exceed[] the sum or value of $75,000." The amount in controversy in this case indisputably exceeds $75,000, given the nature of Plaintiff's alleged injuries and the requested relief. *See Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 87–89 (2014) (holding that "a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold" and "should be accepted when not contested by the plaintiff or questioned by the court").

19. Plaintiff alleges he was prescribed Atripla® in July 2007, switched to Viread® in February 2008, and continued to ingest Viread® until August 2010. Ex. A ¶ 3. As a result, Plaintiff claims he suffered substantial physical injuries and permanent disability—including kidney damage, neuropathy, and bone density loss. *Id.* ¶ 19, 25. Plaintiff also claims that he suffered from Fanconi syndrome, which led to osteomalacia and muscle weakness. *Id.* ¶ 25. Plaintiff states that he has incurred and will continue to incur medical expenses associated with his physical injuries, along with mental anguish and emotional distress. *Id.* ¶¶ 25, 264–65. Plaintiff further alleges that his injuries have reduced his enjoyment and permanently altered his way of life. *Id.* ¶ 19.

20. Based on those allegations, Plaintiff seeks substantial compensatory damages, punitive and exemplary damages, attorney fees, and other forms of relief, all contributing to an amount in controversy that exceeds $75,000. *See id.* ¶¶ 23, 25, 264–66.

21. Courts in this district have found that the amount-in-controversy requirement has been satisfied in similar product liability cases. *See, e.g.*, *Friedman v. I-Flow Corp.*, No. 10-60474-CIV, 2010 WL 11601459, at *4 (S.D. Fla. June 9, 2010); *Wilssens v. Medtronic, Inc.*, No. 09-60792-CIV, 2009 WL 9151079, at *9 (S.D. Fla. July 23, 2009); *Bolin ex rel. Bolin*

v. SmithKline Beecham Corp., No. 08-60523-CIV, 2008 WL 3286973, at *3 (S.D. Fla. Aug. 7, 2008); *see also Ward v. Boston Sci. Corp.*, No. 18-0435-WS-M, 2018 WL 6696679, at *3–4 (S.D. Ala. Dec. 19, 2018).

22. Although determining the amount in controversy requires assuming the Complaint's allegations are true, Gilead does not waive any defenses to any claims, and, further, denies that Plaintiff is entitled to any relief. *See Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1096 (11th Cir. 1994) (explaining that the amount-in-controversy analysis presumes that "plaintiff prevails on liability"); *Jackson v. Am. Bankers Ins. Co. of Fla.*, 976 F. Supp. 1450, 1454 (S.D. Ala. 1997) ("The appropriate measure is the litigation value of the case assuming that the allegations of the complaint are true and assuming a jury returns a verdict for the plaintiff on all claims made in the complaint.").

II. GILEAD HAS SATISFIED THE PROCEDURAL REQUIREMENTS FOR REMOVAL.

23. Under 28 U.S.C. § 1441(a), a defendant may remove "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." To remove a case from state court, the defendant need only file notice in the federal forum "containing a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a); *see also Dart Cherokee*, 574 U.S. at 87.

24. A notice of removal "shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading." 28 U.S.C. § 1446(b)(1). This Notice of Removal is timely because fewer than 30 days have passed since Gilead was served with the Complaint in the State Court Action on October 1, 2019.

25. Under 28 U.S.C. § 1441(b)(2), "[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." (emphasis added). Likewise, under 28 U.S.C. § 1446(b)(2)(A), "[w]hen a civil action is removed solely under section 1441(a), all defendants who have been *properly joined* and served must join in or consent to the removal of the action." (emphasis added).

26. As explained above, the Individual Defendants have not been "properly joined" in this action—they have been *fraudulently joined*. Thus, neither the forum-defendant rule (28 U.S.C. § 1441(b)(2)) nor the defendant-unanimity rule (28 U.S.C. § 1446(b)(2)(A)) are applicable here. *See, e.g.*, *De La Flor v. Ritz-Carlton Hotel Co., L.L.C.*, 930 F. Supp. 2d 1325, 1328 (S.D. Fla. 2013) ("[T]he fraudulent joinder doctrine is an exception to the requirement of complete diversity and the forum defendant rule."); *Seminole Cas. Ins. Co. v. Metro. Cas. Ins. Co.*, No. 08-81227-CIV, 2009 WL 10701430, at *3 (S.D. Fla. Mar. 23, 2009) ("Fraudulent joinder provides an exception to the unanimity requirement, in that the consent of a fraudulently joined defendant is not required to remove a case." (citation omitted)). In any event, for purposes of the defendant-unanimity rule, the Individual Defendants all join in or consent to this Notice of Removal.

27. This Court is the appropriate venue because it is "the district and division embracing" Palm Beach County, Florida, *i.e.*, the location where the State Court Action is "pending." *See* 28 U.S.C. § 1441(a).

28. Gilead will promptly file a copy of this Notice of Removal with the Clerk of the Fifteenth Judicial Circuit, and will give written notice thereof to all adverse parties. *See* 28 U.S.C. § 1446(d).

29. By filing this Notice of Removal, Gilead does not waive, either expressly or implicitly, its rights to assert any defense that it could have asserted in the State Court Action.

CONCLUSION

WHEREFORE, Gilead respectfully requests that the Court assume jurisdiction over this action.

Date: October 29, 2019

Respectfully submitted,

By: /s/ *Barbara Bolton Litten*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 29, 2019, I electronically filed the foregoing with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served on all counsel of record identified on the below Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to electronically receive Notices of Electronic Filing.

/s/ *Barbara Bolton Litten*
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