

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

ANTHONY GAETANO,

Plaintiff,

v.

GILEAD SCIENCES, INC.,

Defendant.

Case No.:

State Action Filed: July 8, 2020

State Action Served: July 10, 2020

Other Paper Rendering Case Removable
Received: Jan. 13, 2021

**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 Case No. PAS-L-002011-20, in the Superior Court of New Jersey, Law Division, Passaic County (the “State Court Action”), to the United States District Court for the District of New Jersey.

INTRODUCTION

1. On July 8, 2020, Plaintiff Anthony Gaetano (“Plaintiff”) filed the State Court Action against Gilead in the Superior Court of New Jersey, Law Division, Passaic County. Plaintiff also named St. Joseph’s Health, Inc. (“St. Joseph’s”) and Dr. Michael Lange (“Dr. Lange”) as defendants in the State Court Action.

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

3. On July 10, 2020, Gilead was served with a copy of the Complaint setting forth the claims for relief upon which the State Court Action is based.

4. This case relates to one of Gilead’s prescription HIV medications—Truvada[®]. The Complaint alleges that: (1) Gilead should have replaced one of the components of Truvada[®], tenofovir disoproxil fumarate (“TDF”), with an allegedly superior compound, tenofovir alafenamide (“TAF”); (2) Gilead failed to adequately warn Plaintiff or his doctors about kidney and/or bone risks associated with Truvada[®], and the need to monitor patients for those risks; and (3) Plaintiff suffered “pain related to musculoskeletal disorders” as a result of using Truvada[®]. *See* Ex. A, Compl. ¶¶ 11, 40-42, 70, 73.

5. Based on those allegations, Plaintiff asserted claims for: (i) negligence against St. Joseph’s (a medical service provider) and Dr. Lange (his treating physician); and (ii) strict products liability (design defect and failure to warn) against Gilead. *Id.* ¶¶ 14-25, 26-80. Among other relief, Plaintiff seeks damages for serious bodily injuries; significant mental and physical pain and suffering; past and future medical care and treatment; and economic loss, and other physical, emotional, and economic injuries. *Id.* ¶ 80.

6. On January 13, 2021, Plaintiff voluntarily entered into a Stipulation of Dismissal with prejudice as to St. Joseph’s and Dr. Lange, attached hereto as **Exhibit B** (Stipulation of Dismissal), leaving Gilead as the only remaining defendant in the State Court Action. *See* 28 U.S.C. § 1446(b)(3).

7. The United States District Court for the District of New Jersey has subject matter jurisdiction over this action under 28 U.S.C. § 1332, 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).

8. 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” under Section 1332(a)(1) are satisfied in this case.

A. The Parties Are Completely Diverse.

9. 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).

10. Plaintiff is a citizen of New Jersey, while Gilead is a citizen of California and Delaware.¹ Ex. A, Compl. ¶¶ 1-3; *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, complete diversity exists between Plaintiff and Gilead.

10. Although Plaintiff alleges that St. Joseph’s and Dr. Lange are also citizens of New Jersey, Ex. A, Compl. ¶¶ 4-5, as noted above, both of those defendants have been voluntarily dismissed with prejudice from this action. *See, e.g., Reid v. Costco Wholesale*, No. CV 15-3558 (CCC), 2015 WL 7731476, at *2 (D.N.J. Nov. 3, 2015) (“[A] claim can . . . later be removed based on diversity if the plaintiff voluntarily creates it,” *i.e.*, where “the plaintiff has taken some affirmative act in furtherance of the non-diverse defendant’s dismissal.”); *Vazquez v. Karcher N. Am., Inc.*, No. CIV. 13-3817 (WJM), 2013 WL 5592369, at *2 (D.N.J. Oct. 8, 2013) (“[A] case is removable when the plaintiff voluntarily dismisses the claim against a non-diverse party.”); *Piacentile v. Thorpe*, No. 12-CV-7156-ES-SCM, 2013 WL 11066484, at *4-6 (D.N.J. Aug. 30, 2013) (explaining that voluntary dismissal “with prejudice” confers removal jurisdiction because

¹ Gilead was incorporated in Delaware in June 1987. *See* Gilead Sciences, Inc., Annual Report (Form 10-K) at 3 (Feb. 2020), <http://investors.gilead.com/static-files/1a607ba4-ee05-4dc5-9eeb-9509c6b8a3e4>.

such an act “unequivocally effects an abandonment of any [claims against the] resident defendant”); *Rubino v. Genuardi’s Inc.*, No. CIV.A. 10-6078, 2011 WL 344081, at *6 (E.D. Pa. Jan. 31, 2011) (recognizing that “dismissal of a non-diverse defendant by a voluntary act of the plaintiff” provides a basis for removal). As a result, diversity of citizenship is complete.

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

11. 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”).

12. Plaintiff alleges he was prescribed and ingested Truvada[®] from 2005 to 2014. Ex. A, Compl. ¶¶ 8, 17-18. As a result, Plaintiff claims he experienced pain in his hands, elbows, and/or shoulders, developed “bending/hooking” in his right hand, and was ultimately diagnosed with “chronic pain related to musculoskeletal disorders.” *Id.* ¶¶ 9-11, 19. Among other things, Plaintiff states that he has suffered serious bodily injuries, experienced significant mental and physical pain and suffering, and expended and will continue to expend large sums of money for medical care and treatment. *Id.* ¶ 80; *see also id.* ¶ 25 (alleging that Plaintiff has experienced “severe, painful and permanent injuries and emotional damages,” which have left him permanently “disabl[led]” and “incapacitated”).

13. Based on those allegations alone, Plaintiff seeks substantial damages (*e.g.*, for economic loss and other physical, emotional, and economic injuries), all contributing to an amount in controversy that indisputably exceeds \$75,000. *Id.* ¶¶ 9-11, 19, 80; *see also Angus*

v. Shiley Inc., 989 F.2d 142, 146 (3d Cir. 1993) (“[T]he amount in controversy is not measured by the low end of an open-ended claim, but rather by a reasonable reading of the value of the rights being litigated”); *Dugan v. Acme Markets, Inc.*, No. 15-5267 (RBK-KMW), 2016 WL 266350, at *3 (D.N.J. Jan. 21, 2016) (“This Court has on many occasions held that personal injury cases alleging ‘severe and permanent’ injuries will be removable absent proof to a ‘legal certainty’ that the amount in controversy cannot exceed \$75,000.”); *Fields v. Zubkov*, No. CIV.A 08-2016 (WJM), 2008 WL 4447098, at *4 (D.N.J. Sept. 26, 2008) (“[M]ost removed personal injury cases will likely remain in federal court even if they involve a very minor injury—unless the plaintiff limits her damages below the jurisdictional limit.”).

14. Courts in this district have found the amount-in-controversy requirement satisfied in similar circumstances. *See, e.g., Shore Options Inc. v. Great Am. Ins. Grp. & ABC Corps.*, No. CV 20-03835 (RBK/JS), 2020 WL 5627211, at *4 (D.N.J. Sept. 21, 2020) (finding sufficient amount in controversy where plaintiff alleged damages for “severe and permanent personal injuries,” including “a fracture of the right fifth metatarsal with delayed and improper healing,” “great mental and physical pain and suffering,” and “substantial wage loss”); *Clark v. J.C. Penney Corp.*, No. CIV.A. 08-4083 (PGS), 2009 WL 1564175, at *3-4 (D.N.J. June 1, 2009) (finding sufficient amount in controversy where plaintiff alleged “multiple serious, permanent, and disabling injuries,” including “left shoulder and left knee injuries, resulting in surgery, severe and permanent injuries, lost wages, medical care expenses and pain and suffering”); *Yocham v. Novartis Pharms. Corp.*, No. CIV 07-1810 JBS, 2007 WL 2318493, at *3 (D.N.J. Aug. 13, 2007) (finding sufficient amount in controversy where plaintiff alleged “damages relating to . . . a ‘life threatening’ skin condition involving 70% of her body, which resulted in hospitalization at a burn unit and which places her ‘at risk of further serious injury or death’”).

15. 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 Leonard Parness Trucking Corp. v. Omnipoint Commc'ns, Inc.*, No. CIV.A. 13-4148 (JLL), 2013 WL 6002900, at *3 (D.N.J. Nov. 12, 2013) (“In determining whether the amount in controversy exceeds \$75,000, the Court generally accepts the plaintiff's good faith allegations and considers ‘only whether plaintiff's claims, taken as true, allege facts sufficient to invoke the jurisdiction of the district court.’” (quoting *Suber v. Chrysler Corp.*, 104 F.3d 578, 581 (3d Cir. 1997))).

II. GILEAD HAS SATISFIED THE PROCEDURAL REQUIREMENTS FOR REMOVAL.

16. 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.

17. Generally, 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). “[I]f the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.” 28 U.S.C. § 1446(b)(3). However, “[a] case may not be removed . . . more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.” 28 U.S.C. § 1446(c)(1).

18. This Notice of Removal is timely because (i) fewer than 30 days have passed since Plaintiff voluntarily entered into a Stipulation of Dismissal with prejudice as to St. Joseph's and Dr. Lange on January 13, 2021, and (ii) less than one year has passed since Plaintiff commenced this action on July 8, 2020.

19. 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.” 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.”

20. Neither the defendant-unanimity rule (28 U.S.C. § 1446(b)(2)(A)) nor the forum-defendant rule (28 U.S.C. § 1441(b)(2)) are applicable here, because Gilead is now the sole defendant in this action and Gilead is not a New Jersey citizen. Ex. A, Compl. ¶¶ 2-3.

21. This Court is the appropriate venue because it is “the district and division embracing” Passaic County, New Jersey, *i.e.*, the location where the State Court Action is “pending.” *See* 28 U.S.C. § 1441(a).

22. Gilead will promptly file a copy of this Notice of Removal with the Clerk of the Superior Court of New Jersey, Law Division, Passaic County, and will give written notice thereof to all adverse parties. *See* 28 U.S.C. § 1446(d).

23. 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.²

² Generally, “[a]fter removal, repleading is unnecessary unless the court orders it.” Fed. R. Civ. P. 81(c)(2); *see also* 14C C. Wright & A. Miller, Federal Practice and Procedure § 3738 (4th ed. 2020) (“[A] federal court usually will not require the parties to redo the state-court

CONCLUSION

For the foregoing reasons, Gilead respectfully requests that the Court assume jurisdiction over this action.

Date: January 29, 2021

Respectfully submitted,

By: /s/ Beth S. Rose

Beth S. Rose
R. Michael Riecken
SILLS CUMMIS & GROSS P.C.
One Riverfront Plaza
Newark, New Jersey 07102
Telephone: (973) 643-7000
Facsimile: (973) 643-6500
brose@sillscummis.com
rriecken@sillscummis.com

Joshua E. Anderson, Esq. (*pro hac vice forthcoming*)
SIDLEY AUSTIN LLP
555 West Fifth Street, Suite 4000
Los Angeles, CA 90013
Telephone: (213) 896-6000
Facsimile: (213) 896-6600
janderson@sidley.com

Attorneys for Defendant Gilead Sciences, Inc.

pleadings according to federal form and content standards.”); *People of State of Ill. ex rel. Barra v. Archer Daniels Midland Co.*, 704 F.2d 935, 939 (7th Cir. 1983) (“A properly removed case can be litigated in federal court without the filing of an amended complaint changing procedural references from state to federal law.”).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 29, 2021, 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/ Beth S. Rose

Beth S. Rose

SERVICE LIST

Ari G. Bernstein, Esq.
LANDEL, BERNSTEIN
& KALOSIEH, L.L.P.
279 Franklin Avenue
Wyckoff, New Jersey 07481
Telephone: (201) 891-6955
Facsimile: (201) 891-7420
abernstein@lbklaw.com

Attorneys for Plaintiff Anthony Gaetano

VIA CM/ECF

Beth S. Rose
R. Michael Riecken
SILLS CUMMIS & GROSS P.C.
One Riverfront Plaza
Newark, New Jersey 07102
Telephone: (973) 643-7000
Facsimile: (973) 643-6500
brose@sillscummis.com
rriecken@sillscummis.com

Joshua E. Anderson, Esq. (*pro hac vice forthcoming*)
SIDLEY AUSTIN LLP
555 West Fifth Street, Suite 4000
Los Angeles, CA 90013
Telephone: (213) 896-6000
Facsimile: (213) 896-6600
janderson@sidley.com

Attorneys for Defendant Gilead Sciences, Inc.

VIA CM/ECF