

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS (Phentermine/ Fenfluramine/Dexfenfluramine) PRODUCTS LIABILITY LITIGATION	:	MDL DOCKET NO. 1203
THIS DOCUMENT RELATES TO:	:	
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SUSAN ACHORN	:	
v.	:	CIVIL ACTION NO. 04-23800
WYETH, et al.	:	
KATHRYN DANIELS	:	
v.	:	CIVIL ACTION NO. 04-23790
WYETH, et al.	:	
SARAH DETELUS	:	
v.	:	CIVIL ACTION NO. 04-23799
WYETH, et al.	:	
FRANCES GARVER	:	
v.	:	CIVIL ACTION NO. 04-23796
WYETH, et al.	:	
DORIS KNIGHT	:	
v.	:	CIVIL ACTION NO. 04-23788
WYETH, et al.	:	
FAY NICHOLSON	:	
v.	:	CIVIL ACTION NO. 04-23791
WYETH, et al.	:	
CAROLINE PAULY	:	
v.	:	CIVIL ACTION NO. 04-23797
WYETH, et al.	:	

MEMORANDUM AND PRETRIAL ORDER NO.

Bartle, J. November , 2004

Before the court are the motions of plaintiffs in the seven above-captioned actions to remand to the Circuit Court of Hillsborough County, Florida.

I.

Plaintiffs, citizens of Florida, have sued Wyeth, the manufacturer of Pondimin and Redux, a related company, Wyeth Pharmaceuticals, as well as Eckerd Corporation ("Eckerd"), a retail pharmacy chain that allegedly marketed, sold, promoted, and/or distributed Wyeth's diet drugs to plaintiffs. Plaintiffs

have also named as defendants several sales representatives of Wyeth. Wyeth and its related company are of diverse citizenship while Eckerd and the sales representatives are not. Plaintiffs assert claims for strict product liability, negligence, negligent misrepresentation, and fraud. No federal claim for relief is alleged. The pending motion is before the undersigned as the transferee judge in Multi-District Litigation ("MDL") 1203, the mass tort litigation involving Pondimin and/or Redux.

Plaintiffs have exercised their right of intermediate or back-end opt-out under the Nationwide Class Action Settlement Agreement ("Settlement Agreement") in Brown v. American Home Products Corporation, CIV.A. No. 99-20593 (E.D. Pa. Aug. 28, 2000) (Pretrial Order ("PTO") No. 1415), which encompassed persons who ingested Wyeth's diet drugs Pondimin and Redux. See e.g., Settlement Agreement at § IV.(A), (B), and (D)(4). Under the Settlement Agreement, those who have exercised an intermediate or back-end opt-out may sue Wyeth for compensatory damages in the tort system rather than obtain benefits from the AHP Settlement Trust.

Plaintiffs originally filed their complaints in the Circuit Court of Hillsborough County, Florida in the fall of 2003, nearly six years after the diet drugs were withdrawn from the market in September, 1997. Wyeth timely removed these cases to the United States District Court for the Middle District of Florida, asserting that plaintiffs fraudulently joined Eckerd and the sales representatives. Thereafter, plaintiffs moved to

remand this action under 28 U.S.C. § 1447(c). The Florida federal court deferred ruling on plaintiffs' motions, and the cases were then transferred to this court as part of MDL 1203.

Wyeth contends that remand is inappropriate because Eckerd and the sales representatives are fraudulently joined. With respect to plaintiffs' claims against defendant Eckerd, there is no evidence that any plaintiff except Knight filled any of their diet drug prescriptions at an Eckerd store. Accordingly, there is no possibility that any of the plaintiffs except Knight can recover against defendant Eckerd. Thus, Eckerd is fraudulently joined as to all plaintiffs except Knight.

With respect to plaintiff Knight's claim against Eckerd and all plaintiffs' claims against the non-diverse sales representatives, this court addressed similar issues in Memorandum and PTO No. 3856 in Bankston, et al. v. Wyeth, et al., CIV.A. No. 03-20765 (E.D. Pa. Aug. 12, 2004), which is also part of the nationwide diet drug litigation. In Bankston, we laid out in detail the standards for removal based on diversity jurisdiction and fraudulent joinder. See id. Because we examined the same legal issues as they applied to nearly identical facts in Bankston, we need not revisit them here.

As in Bankston, plaintiffs argue that complete diversity does not exist as required by 28 U.S.C. § 1332. Similarly, plaintiffs here deny Wyeth's allegations of fraudulent joinder of Eckerd and the sales representatives, the non-diverse defendants. For the same reasons set forth in Bankston, we find

that plaintiffs have fraudulently joined Eckerd and the sales representatives in an effort to defeat federal diversity jurisdiction.

We will deny plaintiffs' motions to remand this action to the Circuit Court of Hillsborough County, Florida and will dismiss the complaints as to all defendants except Wyeth and Wyeth Pharmaceuticals.

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PRETRIAL ORDER NO.

AND NOW, this day of November, 2004, for the
reasons set forth in the accompanying Memorandum, it is hereby
ORDERED that:

- (1) the motions of plaintiffs to remand are DENIED;
- and
- (2) all defendants in the above-captioned actions
except Wyeth and Wyeth Pharmaceuticals are DISMISSED.

BY THE COURT:

J.