UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ZOLOFT (SERTRALINE HYDROCHLORIDE) PRODUCTS LIABILITY LITIGATION	**§**	**MDL NO. 2342**
	§	**12-MD-2342**
THIS DOCUMENT RELATES TO:	**§**	**HON. CYNTHIA M. RUFE**
C.L., et al. v. Pfizer Inc., et al., **No. 2:16-cv-05540-CMR**	**§**	

DEFENDANTS PFIZER INC.'S
OPPOSITION TO PLAINTIFFS' MOTION TO REMAND

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Defendant Pfizer Inc. ("Pfizer") hereby respectfully submits this memorandum of law in opposition to Plaintiffs' Motion to Remand.

INTRODUCTION

On or about March 2, 2015, Plaintiffs filed a Complaint against Pfizer, in the Superior Court for the County of Orange. Before Pfizer was served, Plaintiffs filed their First Amended Complaint on August 26, 2016. (*See C.L. v. McKesson Corp. et al.*, No. 30-2015-00775211-CU-MT-CXC (Sup. Ct. of the State of CA, Orange County) Dkt. No. 113 ("Compl.")) Plaintiffs are 15 mothers bringing claims on behalf of their minor children, 2 mothers bringing claims on behalf of the estates of their deceased children, and 1 mother and her adult son (with each mother-child referred to herein as a "Plaintiff family"). Plaintiffs allege that the Minor Plaintiffs[1] sustained congenital defects due to maternal use during pregnancy of Zoloft, a prescription antidepressant manufactured by Pfizer, or its generic equivalent sertraline hydrochloride. (Compl. ¶¶ 1-36.). On October 3, 2016, Defendants timely removed this case to this Court on the basis of diversity of citizenship. (*See* Dkt. No. 1, ("Notice")).

Pfizer is a citizen of New York and Delaware. (*See* Compl. ¶ 37; Notice ¶ 25.) Additionally, each of the Plaintiff Families alleges their state of citizenship and the state where the Mother Plaintiff ingested Zoloft or sertraline hydrochloride during her pregnancy with the Minor Plaintiff. (*See* Compl. ¶¶ 1-36.) As set forth below, of the 18 Plaintiff families presently in this action, only 3 reside in California. The other Plaintiffs reside in 11 different states.[2] As discussed below, the out-of-state Plaintiffs are fraudulently joined due to the lack of personal jurisdiction over their claims; therefore, their citizenship should be disregarded for purposes of determining jurisdiction. Only two Plaintiff Families allege New York citizenship and none

[1] "Minor Plaintiff" is used herein to distinguish the children of the Mother Plaintiffs from their mothers. It includes the adult plaintiff Tommy Garciacano.

[2] Arizona (1 Plaintiff family), Florida (1 Plaintiff family); Georgia (1 Plaintiff family); Kentucky (1 Plaintiff family); Michigan (3 Plaintiff families); New York (2 Plaintiff families); Texas (1 Plaintiff family); Utah (1 Plaintiff family); Virginia (1 Plaintiff family); Washington (2 Plaintiff families); West Virginia (1 Plaintiff family). (Compl ¶¶ 1-36.)

allege Delaware citizenship.[3] The two New York Plaintiff Families do not allege ingestion of Zoloft or sertraline hydrochloride in California, that they were injured in California, that they were injured by conduct that occurred in California, or that any of Pfizer's activities in California gave rise to their claims. Indeed, with the exception of allegations relating specifically to the California Plaintiffs, the Complaint is nearly devoid of allegations that connect this case or any of the Plaintiff Families to California.

Plaintiffs also seek to destroy diversity by joinder of McKesson Corporation ("McKesson"), a distributor of Zoloft that had absolutely nothing to do with the research, development, manufacture, marketing, or labeling of Zoloft, all of which was done by Pfizer. McKesson is a defendant here, as it has been in previous Zoloft and other pharmaceutical cases, only because it is a California citizen. The Court should ignore McKesson's citizenship under the doctrine of fraudulent joinder. Plaintiffs have no good faith intent to obtain a judgment against McKesson, or even pursue their claims against McKesson in any meaningful way. Throughout the course of the Zoloft birth defect litigation, no plaintiffs' counsel has ever treated McKesson like an actual defendant or even taken any discovery of McKesson. Further, Plaintiffs' claims against McKesson are preempted and, therefore, are not viable as a matter of law.

For these reasons, as discussed more fully below, the Court should deny Plaintiffs' motion to remand.

ARGUMENT

I. The Non-Diverse Plaintiffs' Claims Have Been Fraudulently Joined Due to the Lack of Personal Jurisdiction Over Their Claims

A. A Lack of Personal Jurisdiction May Establish Fraudulent Joinder

Plaintiffs largely ignore Defendant's argument that Plaintiffs are fraudulently joined due to the lack of personal jurisdiction, stating only that "fraudulent joinder and personal jurisdiction" require separate analysis. Plaintiffs are wrong. As an initial matter, Plaintiffs'

[3] Doane (Compl. ¶¶ 21-22) and Harris (*id.* ¶¶ 27-28).

motion confused the concepts of "fraudulent joinder" and "fraudulent misjoinder." Both of these are terms of art that have been developed by the courts. Neither requires proof of actual fraud, rather the terms are used to describe pleading tactics intended to deprive a defendant of a federal forum. *E.g.*, *McCabe v. Gen'l Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987). With fraudulent *joinder*, the focus is on the viability of the plaintiffs' claims. "[J]oinder is fraudulent if 'there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant . . . .'" *In re Briscoe*, 448 F.3d 201, 216 (3d Cir. 2006).

Fraudulent *misjoinder*, by comparison, assumes that the plaintiffs have viable claims against all of the defendants, but that either plaintiffs or defendants were improperly joined in the same action. This distinction is explained in *Osborn v. Metropolitan Life Ins. Co.*, 341 F. Supp. 2d 1123 (E.D. Cal. 2004), one of the cases replied on by Plaintiffs. *See id.* at 1126-27. Whether or not California federal courts would recognize "fraudulent misjoinder," *i.e.*, improper procedural joinder of parties, is irrelevant because Pfizer's removal does not rely on this argument. The remaining cases cited by Plaintiffs at page 18 (Section D) of their brief are inapposite for this same reason.

Plaintiffs wholly fail to address the argument made by Pfizer: Where a court could not assert personal jurisdiction over a plaintiff's claims against the defendant, that plaintiff's claim is not viable and should not be allowed to destroy diversity. Although the doctrine of fraudulent joinder is most frequently applied in the context of a fraudulently joined defendant, federal courts have recognized that plaintiffs can also be fraudulently joined. *See Taco Bell Corp. v. Dairy Farmers of Am., Inc.*, 727 F. Supp. 2d 604, 607 (W.D. Ky. 2010). As the *Taco Bell* court explained:

> There is no significant difference between fraudulent joinder of plaintiffs and fraudulent joinder of defendants. The primary purpose of fraudulent joinder is to ensure that plaintiffs do not avoid diversity jurisdiction by pleading illegitimate claims involving non-diverse parties. That purpose is fulfilled both where the plaintiff improperly sues non-diverse defendants against whom it has no viable claim and where the plaintiff joins additional non-diverse plaintiffs who have no viable claims.

Id. (footnote omitted); *accord Murray Energy Holdings Co. v. Bloomberg, L.P.*, 2016 WL 3355456, at *3 (S.D. Ohio June 17, 2016); *see also Villar v. Crowley Maritime Corp.*, 780 F. Supp. 1467, 1472-73 (S.D. Tex. 1992), *aff'd*, 990 F.2d 1489 (5th Cir. 1993); *Thomas v. Mitsubishi Motor N. Am., Inc.*, 436 F. Supp. 2d 1250, 1251 (M.D. Ala. 2006); *Martino v. Viacao Aerea Riograndense, S.A.*, 1991 WL 13886, at *2 (E.D. La. Jan. 25, 1991); *Nolan v. Boeing Co.*, 736 F. Supp. 120, 122 (E.D. La. 1990).

Accordingly, it is neither novel nor improper for personal jurisdiction to form the basis of a fraudulent joinder argument.

B. The Court Should Decide Personal Jurisdiction First

The United States Supreme Court held in *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), that where "a district court has before it a straightforward personal jurisdiction issue presenting no complex question of state law, and the alleged defect in subject-matter jurisdiction raises a difficult and novel question, the court does not abuse its discretion by turning directly to personal jurisdiction." *Id.* at 588. In this case, the relevant factors weigh in favor of deciding Pfizer's Motion to Dismiss for Lack of Personal Jurisdiction before deciding Plaintiff's motion to remand.

For the reasons discussed above, Defendant's fraudulent joinder arguments are premised on the lack of personal jurisdiction. Numerous courts have concluded that where fraudulent joinder is premised on the lack of personal jurisdiction, it is more appropriate to resolve personal jurisdiction first. For example, *In re Testosterone Replacement Therapy Products Liability Litigation Coordinated Pretrial Proceedings*, 164 F. Supp. 3d 1040 (N.D. Ill. 2016), the court explained that because the defendants' "subject matter jurisdiction argument depends upon their contention that the Court lacks personal jurisdiction . . . , the Court will necessarily confront the personal jurisdiction question regardless of the sequence in which it conducts the analysis." *Id.* at 1046. Accordingly, the court concluded that it would be more efficient to decide the defendants' motions to dismiss first. *See id.*

Similarly, in *In re Zofran (Ondansetron) Products Liability Litigation*, 2016 WL

2349105 (D. Mass. May 4, 2016), the court explained that resolution of the question of subject-matter jurisdiction necessarily involved an examination of the defendant's argument that non-diverse plaintiffs had been fraudulently joined, an argument that was based on the absence of personal jurisdiction. *See id.* at *2.[4]

Further, Pfizer's personal jurisdiction arguments are premised on a straightforward application of federal constitutional law. As Pfizer's motion to dismiss and supporting memorandum demonstrates, the question of whether this Court has personal jurisdiction over Pfizer as to the claims of the 15 out-of-state Plaintiff families, is a simple one: Personal jurisdiction is lacking because Pfizer is not a citizen of California and the claims of the out-of-state Plaintiff families have no connection to California. On the other hand, the subject matter jurisdiction inquiry would require a resolution of Plaintiffs' argument that it is improper to premise fraudulent joinder on a lack of personal jurisdiction. Though Defendants submit that it is proper for the reasons discussed in Section I, *supra*, there is no need for the Court to reach this question if it decides personal jurisdiction first.

Defendants recognize that in *R.J. v. Pfizer, Inc.*, No. 15-3285, Dkt. 5 (E.D. Pa. Nov. 17, 2015), this Court declined to reach the issue of personal jurisdiction and granted the plaintiffs' motion to remand. In doing so, this Court reasoned that "the question of whether or not a

[4] *See also In re Bard IVC Filters Prods. Liab. Litig.*, MDL No. 15-2641, ECF No. 3816, at 5 (D. Ariz. Oct. 28, 2016) (deciding motion to dismiss first, following the reasoning of *In re Testosterone*) (attached as Ex. A); *Addelson v. Sanofi S.A.*, 2016 WL 6216124, at *3 (E.D. Mo. Oct. 25, 2016) (same); *Evans*, 2014 WL 7342404, at *3 n.1 (S.D. Tex. Dec. 23, 2014) (noting that the court "would be required to consider the personal jurisdiction issue as part of its analysis on the motion to remand, anyway"); *Thomas*, 436 F. Supp. 2d at 1251-52 ("In this case, because the subject matter jurisdiction issue involves issues of in personam jurisdiction, the court finds it appropriate to consider the issue of personal jurisdiction first."); *Villar*, 780 F. Supp. at 1474 ("[T]he Court must necessarily address the personal jurisdiction question regardless of which motion is addressed first. Thus, judicial economy favors deciding the Motion to Dismiss at the outset."); *Martino v. Viacao Aerea Riograndense, S.A.*, 1991 WL 13886, at *2 (E.D. La. Jan. 25, 1991) ("In addressing the motion for remand first, the Court would initially have to determine the existence of personal jurisdiction over [defendant] in response to the fraudulent joinder claim because of the peculiar facts of this case."); *Nolan v. Boeing Co.*, 736 F. Supp. 120, 122 (E.D. La. 1990) ("[T]he usual case focuses directly and only on subject matter jurisdiction in the remand context. Here, however, personal jurisdiction begins to directly implicate the Court's remand authority.").

Missouri court may exercise personal jurisdiction over a non-resident defendant with regard to claims by nonresident plaintiffs that have been joined with claims by resident plaintiffs is unresolved and potentially complex." *See id.*, Dkt. 5 at 2. However, as discussed in Pfizer's Notice of Removal ¶¶ 52-56, since this Court decided *R.J.*, the post-*Daimler* jurisprudence has evolved, clarifying and greatly simplifying the personal jurisdiction question. Indeed, numerous courts have recognized that there is no personal jurisdiction over Pfizer under these circumstances,[5] or over other pharmaceutical manufacturers under similar circumstances.[6] (*See also* Pfizer's Mem. in Support of M. to Dism.)

In addition, in *R.J.*, this Court relied, in part, upon the decisions of the Eastern District of Missouri in *Clark v. Pfizer, Inc.*, 2015 WL 4648019 (E.D. Mo. Aug. 5, 2015) and *Parker v. Pfizer, Inc.*, 2015 WL 3971169 (E.D. Mo. June 30, 2015). However, in both those cases, the courts failed to address defendants' arguments that plaintiffs were *fraudulently joined* due to lack of personal jurisdiction and instead focused on *procedural misjoinder* of the plaintiffs. *See Clark*, 2015 WL 4648019, at *2; *Parker*, 2015 WL 3971169, at *4. More recently, a court within the Eastern District of Missouri, presented with the evolving case law on this issue, focused on the argument made here (fraudulent joinder due to the lack of personal jurisdiction) and held that is was appropriate to decide the defendant's motion to dismiss first. *See Addelson*, 2016 WL 6216124, at *3.

There is an additional reason why this Court should decide personal jurisdiction before subject matter jurisdiction. Pfizer's motion to dismiss raises an important issue of federal constitutional law – Pfizer's due process right not to be subjected to the coercive power of a State that lacks personal jurisdiction over Pfizer. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918 (2011). And, while this Court might ordinarily presume that Pfizer's

[5] *Bartholome v. Pfizer, Inc.*, 2016 WL 366795, at *1 (E.D. Mo. Jan. 29, 2016); *accord Barron v. Pfizer, Inc.*, 2015 WL 5829867, at *1 (E.D. Mo. Oct. 6, 2015).

[6] *Addelson*, 2016 WL 6216124, at *3; *In re Testosterone*, 164 F. Supp. 3d at 1048-49; *In re Zofran*, 2016 WL 2349105, at *5; *Beard v. SmithKline Beecham Corp.*, 2016 WL 1746113, at *2 (E.D. Mo. May 3, 2016).

motion to dismiss could be fairly heard by a California state court, that is not the case in light of a recent decision by the California Supreme Court.

In a 4-3 split decision, the California Supreme Court recently held that California courts could exercise specific jurisdiction over claims by non-resident plaintiffs who were joined in a single action with claims of resident plaintiffs. *See Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874 (Cal. 2016) (pet. for cert. filed Oct. 11, 2016). The decision of the California Supreme Court is neither binding on the federal courts, nor is it, as the dissent observed, "supported by specific jurisdiction decisions from the United States Supreme Court, [the California Supreme Court], or the lower federal and state courts." *Id.* at 896 (Werdegar, J., dissenting). As discussed in Pfizer's memorandum in support of its motion to dismiss, *Bristol-Myers* was wrongly decided. It is flatly inconsistent with a wealth of federal precedent since the U.S. Supreme Court decided *Goodyear* and *Daimler*. However, until it is overruled by the United State Supreme Court, a process that could take months if not years, state courts in California will be bound to follow it. Accordingly, unless this Court decides Pfizer's motion to dismiss for lack of personal jurisdiction, not only will Pfizer be denied the federal forum provided by Congress, its due process right not to be hailed into a foreign court that lacks both general and specific jurisdiction over the claims of the non-California plaintiffs will, in all likelihood, be denied.

Here, once the claims of the out-of-state Plaintiff Families are dismissed, determining whether subject-matter jurisdiction exists is straightforward: Complete diversity clearly exists between Pfizer, who is a citizen of Delaware and New York, and the remaining Plaintiff families, who are citizens of California. *Cf. In re Zofran*, 2016 WL 2349105, at *5 (denying motion to remand).

II. McKesson Was Fraudulently Joined

Because McKesson has been fraudulently joined, its citizenship should be ignored for purposes of determining both diversity jurisdiction and application of the forum defendant rule. *See, e.g., Moore v. Johnson & Johnson* 907 F. Supp. 2d 646, 662 (E.D. Pa. 2012). The

fraudulent joinder doctrine "represents an exception to the requirement that removal be predicated solely upon complete diversity." *In re Briscoe*, 448 F.3d at 215-16. "[J]oinder is fraudulent if 'there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant" ***or*** where there is "no real intention in good faith to prosecute the action against the defendant or seek a joint judgment.'" *Briscoe*, 448 F.3d at 216 (citation omitted). It is on this second ground that Pfizer focuses its opposition to remand. The Court may "'look beyond the face of the complaint for indicia of fraudulent joinder.'" *Id.* at 218.

A. Plaintiffs Have No Good Faith Intent to Pursue Their Claims Against McKesson

1. The Complaint Alleges No Material Facts Against McKesson

Plaintiffs' Complaint contains general allegations of conduct by "Defendants," but almost no allegations that are directed at McKesson in particular. Specifically, Plaintiffs have not alleged any fact – in either their Complaint or their motion to remand – from which it could be determined that McKesson actually distributed the Zoloft allegedly used by the Mother Plaintiff during her pregnancy. If Plaintiffs had any intention of making out a case against McKesson, they would have obtained the records from the pharmacy where each Mother Plaintiff bought Zoloft and established that McKesson actually distributed that Zoloft. Plaintiffs, however, do not even identify the pharmacy from which the Mother Plaintiffs allegedly purchased the Zoloft.

Through their omission of such vital facts, Plaintiffs make it impossible to determine from the face of the Complaint whether McKesson actually distributed the medicine at issue. Where there are multiple defendants in a personal injury case, the plaintiff is required to allege facts "explaining how [each defendant's] conduct caused or contributed to the injury." *Bockrath v. Aldrich Chemical Co.*, 21 Cal. 4th 71 (1999). Plaintiffs rely only on speculation that McKesson may have distributed the Zoloft ultimately used by the Mother Plaintiff because McKesson "was the single largest distributor of Pfizer's pharmaceutical products, including those products Pfizer sold in the state of California." (Compl. ¶ 48.) Plaintiffs also recite the conclusory – and intentionally vague – allegation that "upon information and belief, McKesson

supplied the Zoloft® pills ingested by Plaintiffs that caused injuries to the minor Plaintiffs." (Pls.' Mem. at 13.) But that allegation is mere speculation supported by no fact other than their general claim that McKesson was a major distributor of Zoloft.

Plaintiffs' lack of a good faith intention to pursue claims against McKesson is further illustrated by the fact that Plaintiffs' claims are targeted only at "Defendants" generally – rather than McKesson in particular. For example, in the section entitled "General Allegations," Plaintiffs make allegations only against Pfizer. (Compl. ¶¶ 59-83.) Thereafter, Plaintiffs make only general allegations regarding the "Defendants." (*See, e.g., id.* ¶¶ 84, 85, 124, 135.) Plaintiffs do not set forth any plausible allegation that would support this grouping of the distributor McKesson with the Pfizer Defendants who manufactured Zoloft and have responsibility for its labeling. Numerous courts have found that allegations directed at a general category of "defendants" cannot revive insufficient allegations against a fraudulently joinder defendant.[7]

Plaintiffs cannot – as they have attempted to do – join McKesson for purposes of defeating diversity jurisdiction in California simply by alleging that McKesson distributed Zoloft to some pharmacies. If this Court allows them to do so, then all plaintiffs who file cases in California can defeat Pfizer's right to remove merely by nominally identifying McKesson as the distributor in their complaints along with the qualifying phrase "information and belief" (as Plaintiffs here have done), including plaintiffs who never had any transaction or relationship with McKesson whatsoever. Such tactics are precisely the sort of procedural gamesmanship that the fraudulent joinder doctrine was meant to prevent. "As the Supreme Court long ago admonished, 'the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the

[7] *See, e.g., Badon v. RJR Nabisco Inc.*, 224 F. 3d 382, 391-92 (5th Cir. 2000); *Gomes v. Michaels Stores, Inc.*, 2006 WL 3079024, at *2 (E.D. Cal. Oct. 27, 2006); *Shah v. Wyeth Pharms., Inc.*, 2005 WL 6731641, at *3 (C.D. Cal. Jan. 18, 2005); *Banger ex rel. Freeman v. Magnolia Nursing Home, L.P.*, 234 F. Supp. 2d 633, 638 (S.D. Miss. 2002); *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 140 (S.D.N.Y. 2001).

Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction.'" *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 766 (11th Cir. 2010) (quoting *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907)).

2. The History of the Zoloft Litigation Makes Clear that Plaintiffs' Do Not Have a Good Faith Intent to Pursue its Claims Against McKesson

The long history of the Zoloft litigation, in particular in the California Coordinated proceeding, also demonstrates that Plaintiffs have "no real intention in good faith to prosecute the action against [a] defendant or seek a joint judgment." *In re Briscoe*, 448 F.3d at 216. Plaintiffs do not even address the extensive evidence that no plaintiff in any Zoloft birth defect litigation has ever evinced any intent to pursue its claims against McKesson whatsoever, and that McKesson is only ever joined as a defendant in these actions as a means to destroy diversity and prevent Pfizer's access to a federal forum.

Indeed, this Court recognized in the Avandia MDL that evidence of other plaintiffs' past failures to pursue their claims against McKesson as a distributor of Avandia was sufficient to find that McKesson was fraudulently joined. *See In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, No. 07-md-1871, 2014 WL 2011597, at *3 (E.D. Pa. May 15, 2014). In that case, the plaintiffs had named McKesson in hundreds of products liability cases on the sole basis that they were a distributor of Avandia. *Id.* at *2-3. But even though the cases had been pending for several years, no plaintiffs had pursued any discovery against McKesson, or evinced any intent to pursue their claims against it. *Id.*

As in *Avandia*, there is ample evidence that Plaintiffs have no good faith intent to pursue its claims against McKesson here. For example, despite the fact that McKesson distributed Zoloft in several states across the country, the only cases that have ever named McKesson as a defendant in a Zoloft birth defect litigation are those filed in California or have a California plaintiff. Furthermore, even though more than 147 individual plaintiff families have filed Zoloft birth defect cases naming McKesson as a defendant, no discovery has ever been propounded on McKesson.

Notably, the cases in California state court that name McKesson as defendant have been in active discovery for more than a year. Plaintiffs have propounded several document requests on Pfizer, made motions to compel discovery on Pfizer, and submitted expert designations, reports, and conducted expert depositions. None of this discovery and pre-trial activity, however, has focused or even touched upon McKesson's role in plaintiffs' claims.

B. A Pharmaceutical Medicine Distributor Cannot Be Held Liable for Failure to Warn

The Court should find that McKesson was fraudulently joined for the additional reason that "there is no reasonable basis in fact or colorable ground supporting the claim against [McKesson]." *Briscoe*, 448 F.3d at 216. In determining whether a complaint properly states a claim against a non-diverse defendant for purposes of fraudulent joinder, a court "must inquire whether the claim is 'plausible.'" *Roggio v. McElroy, Deutsch, Mulvaney & Carpenter*, 415 F. App'x 432, 433 (3d Cir. 2011) (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)). Here, Plaintiffs' claims are barred under California law by the learned intermediary doctrine and Comment k to section 402A of the Restatement (Second) of Torts. Pfizer acknowledges that this Court has previously rejected these arguments in prior motions to remand in this MDL and, therefore, while Pfizer does not waive these arguments, it makes them here for purpose of preservation.[8]

Plaintiffs' claims against McKesson are also preempted under federal law by *PLIVA v. Mensing*, 131 S. Ct. 2567 (2011), and *Mutual Pharmaceutical Co. v. Bartlett*, 133 S. Ct. 2466 (2013), both of which established that the doctrine of implied preemption applies directly to bar products liability claims against parties, like McKesson, who are prohibited by federal law from changing the warnings and characteristics of the products they sell. While Pfizer has also made this argument in prior oppositions to remand cases where McKesson was joined, the law on this issue has evolved since it was first considered by this Court. Most significantly, the U.S. Court

[8] Pfizer's argument is set forth in detail in Pfizer's Opposition to Plaintiffs' Motion to Remand [MDL Doc. No. 550].

of Appeals for the Sixth Circuit has explained that the preemption test under *Mensing* and *Bartlett* does not depend on a defendant's status as a generic manufacturer, but whether the defendant was prohibited from federal law from making the changes that plaintiffs contend are required by state law. *See Yates v. Ortho-McNeil-Janssen Pharms., Inc.*, 808 F.3d 281, 296-97 (6th Cir. 2015); *see also Batoh v. McNeil-PPC, Inc.*, 167 F. Supp. 3d 296, 321-22 & n.19 (D. Conn. 2016) (finding preemption where FDA regulations made it impossible for drug manufacturer to change a medicine's active ingredient without FDA approval); *Thompson v. Allergan USA, Inc.*, 993 F. Supp. 2d 1007, 1013 (E.D. Mo. 2014) (relying on *Bartlett* and finding that design-defect claims were preempted because "[d]efendants were unable, under federal law, to independently lower the volume in each vial of Restasis to be in compliance with the state duties alleged by [p]laintiff"). The reasoning of these cases applies equally to McKesson: Because federal law precludes McKesson from changing either the warnings or design of Zoloft, impossibility preemption precludes Plaintiffs' claims against McKesson. The only way McKesson could comply with both federal law and what Plaintiffs contend is required by state law would be not to distribute Zoloft. But the Supreme Court has made clear that impossibility preemption cannot be avoided by a "stop selling" theory of liability. *See Bartlett*, 133 S. Ct. at 2477 ("Our pre-emption cases presume that an actor seeking to satisfy both his federal- and state-law obligations is not required to cease acting altogether in order to avoid liability. Indeed, if the option of ceasing to act defeated a claim of impossibility, impossibility pre-emption would be 'all but meaningless.'"); *see also Yates*, 808 F.3d at 300 ("We reject this never-start selling rationale for the same reasons the Supreme Court in *Bartlett* rejected the stop-selling rationale of the First Circuit.").

Plaintiffs rely on *Hunter v. Philip Morris USA*, 582 F.3d 1039 (9th Cir. 2009), and cases citing *Hunter*, to assert that this Court may not consider federal preemption in a fraudulent joinder analysis because the preemption defense goes to the "merits" of the action as a whole. (Pls.' Mem. at 15.) Plaintiffs' argument misconstrues *Hunter*, which was based on application of the common defense rule. The common defense rule provides that a non-diverse defendant is not

fraudulently joined where the defense proffered by the removing defendant would dispose of the plaintiff's claims against *all defendants*, such that it addresses the merits of the action in general, rather than the propriety of joining a specific defendant. *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 571 (5th Cir. 2004). Accordingly, in *Hunter* the Ninth Circuit held that when "the preemption question requires an inquiry into the merits of the plaintiff's claims against *all defendants*," it "goes to the merits of the plaintiff's case" and cannot be considered in a fraudulent joinder analysis. 582 F.3d at 1045 (emphasis added). Unlike Pfizer, McKesson's preemption defense derives from the fact that *it is not the manufacturer* of Zoloft and, therefore, could not unilaterally change the label under federal regulations. Because McKesson's preemption defense is not common with Pfizer, this Court is not barred from considering it.

Further, this Court is not bound by Ninth Circuit law. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1176 (D.C. Cir. 1987) (Ginsburg, J.), *aff'd*, 490 U.S. 122 (1989). The Third Circuit has made clear that affirmative defenses may be considered when deciding whether a defendant is fraudulently joined. *See In re Briscoe*, 448 F.3d at 219. To be sure, a court should not engage in a "merits" determination in the sense that fraudulent joinder is not governed by the same standard as a motion to dismiss under Rule 12(b)(6). But that is true whether lack of viability derives from the nature of the claim asserted or due to an affirmative defense asserted by the defendant. The prohibition against merits determinations is satisfied so long as the court "confine[s] its inquiry to whether petitioners could make a colorable argument" to overcome the defendant's defense. *Id.* On the other hand, "[i]f a district court can discern, as a matter of law, that a cause of action is" is barred by an affirmative defense, "it follows that the cause fails to present even a colorable claim against the non-diverse defendant." *Id.*[9]

Finally, determining that McKesson has been fraudulently joined does not require this

[9] Other courts, such as court in *In re Plavix Products Liability & Marketing Litigation*, 2014 WL 4954654 (D.N.J. Oct. 1, 2014), have relied on inapposite cases holding that a defendant may not create *federal question* jurisdiction by pleading an affirmative defense of preemption. *See id.* at *8. Those cases are simply inapposite where jurisdiction is based on diversity and irrelevant to the question of whether a non-diverse defendant has been fraudulently joined.

Court to *extend* the holding of *Mensing* and *Bartlett*.[10] In *Mensing* and *Bartlett*, the Supreme Court set out a clear and unequivocal test for conflict preemption under the FDCA: Can the defendant change the label or design of a prescription medicine unilaterally, without first seeking FDCA approval. *See Yates*, 808 F.3d at 294. If the answer is "no," conflict preemption exists. And answering this question does not depend on a complex examination of disputed facts or extension of law. It requires only application of clear rules set out by the Supreme Court.

Here, the law is clear that McKesson had no ability to unilaterally change the label of Zoloft without violating federal law. Impossibility preemption, as set out in *Mensing* and *Bartlett*, clearly bars Plaintiffs' claims against McKesson.

C. Plaintiffs Do Not Plausibly Allege Distribution

Additionally, numerous courts have held that a pharmaceutical medicine distributor is fraudulently joined where the plaintiff cannot show that it supplied the particular pharmaceutical products used by the plaintiff. In *In re Rezulin Products Liability Litigation*, 133 F. Supp. 2d 272 (S.D.N.Y. 2001), for example, the court held that distributors of Rezulin were fraudulently joined where plaintiffs failed to allege that the distributors "sold or supplied Rezulin to plaintiffs." *Id.* at 291. The court explained that "[w]ithout drawing that connection, plaintiffs have no way of showing that the pharmacy defendants' acts proximately caused the alleged injuries." *Id.* Likewise, in *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liability Litigation*, 220 F. Supp. 2d 414 (E.D. Pa. 2002), the court held that pharmacies were fraudulently joined where plaintiffs' complaints contained only "general statements levied against all defendants, which most properly can be read as stating claims against drug manufacturers" and were "devoid of specific allegations against the pharmacies." *Id.* at 424.[11]

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[10] For this reason, the other cases that Plaintiffs rely on, such as *D.A. ex rel. Wilson v. McKesson Corp.*, 2014 WL 202738 (E.D. Cal. Jan. 17, 2014), were wrongly decided.

[11] *See also Salisbury v. Purdue Pharma, L.P.*, 166 F. Supp. 2d 546, 550 (E.D. Ky. 2001); *Johnson v. Parke-Davis*, 114 F. Supp. 2d 522, 524 (S.D. Miss. 2000); *Aronis v. Merck & Co.*, No. S-05-0486, 2005 WL 5518485, at *1 (E.D. Cal. May 3, 2005).

In determining whether a defendant has been fraudulently joined, a plaintiff's "mere assertion of 'metaphysical doubt as to the material facts [is] insufficient to create an issue if there is no basis for those facts.'" *Legg v. Wyeth*, 428 F.3d 1317, 1323 (11th Cir. 2005) (alteration in original) (quoting *Badon v. RJR Nabisco, Inc.*, 224 F.3d 382, 393 (5th Cir. 2000)). For purposes of a fraudulent joinder analysis, a plaintiff is only entitled to have a question of fact resolved in his favor "when both parties have submitted evidence of contradictory facts." *Badon*, 224 F.3d at 394 (emphasis omitted). Federal courts "do not, however, in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts." *Id.* (emphasis omitted). The deficiencies in Plaintiffs' allegations against McKesson go far beyond unartful, ambiguous or technically defective pleading, rather, they entirely fail to set forth any facts whatsoever to support Plaintiffs' conclusions. Thus, they are not entitled to any such deference, and have no possibility of stating a plausible claim against McKesson. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Iqbal*, 129 S. Ct. at 1950 ("Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.").

Accordingly, Plaintiffs' joinder of McKesson was fraudulent and must be disregarded for purposes of diversity jurisdiction. *See Weber v. Dep't of Veterans Affairs*, 521 F.3d 1061, 1065 (9th Cir. 2008) (holding that plaintiffs must allege "'enough facts to state a claim to relief that is plausible on its face'").

CONCLUSION

For all the foregoing reasons, Pfizer respectfully requests that the Court deny Plaintiffs' Motion to Remand.

DATED: October 31, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which sends electronic notification of such filing to all CM/ECF participants, on the Master MDL docket and on the individual docket of this case.

Dated: New York, New York
October 31, 2016

/s/ *Mark S. Cheffo*
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