IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RUTH KENNON., Individually, and as Personal Representative of the Estate of JAMES KENNON, Deceased, Plaintiff, v. BRISTOL-MYERS SQUIBB CO. and PFIZER INC., Defendants.	C.A. No. 1:17-cv-612-LPS

DEFENDANTS BRISTOL-MYERS SQUIBB COMPANY AND PFIZER INC.'S ANSWERING BRIEF TO PLAINTIFF'S MOTION TO REMAND

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INTRODUCTION

Removal of this case was proper and Plaintiff's Motion to Remand should be denied.

There is complete diversity, and because Defendants properly removed the action before either Defendant was served, Plaintiff cannot rely on the forum defendant rule to justify remand. The forum defendant rule is a procedural exception to removal when a "properly joined *and served*" defendant resides in the forum. 28 U.S.C. § 1441(b) (2011) (emphasis added). Defendants removed this case before any forum defendant was served, so, as this Court has held, the rule does not apply by its plain language. *See Munchel v. Wyeth LLC*, Civ. A. No. 12-906, 2012 WL 4050072, at *3–4 (D. Del. Sept. 11, 2012); *Hutchins v. Bayer Corp.*, C.A. No. 08-640, 2009 WL 192468, at *11 (D. Del. Jan. 23, 2009). Nothing in Plaintiff's Motion compels this Court to diverge from its previous decisions.

Furthermore, the extraordinary circumstances of this case and likely transfer to the Eliquis MDL warrant the denial of Plaintiff's Motion to Remand. Plaintiff originally filed a complaint against these same Defendants alleging these same injuries in California state court. That case was removed to federal court. On February 7, 2017, the Judical Panel on Multidistrict Litigation ("JPML") created the Eliquis MDL, No. 2754, *In re Eliquis (Apixaban) Products Liability Litigation*, pending before Judge Denise L. Cote in the Southern District of New York. Plaintiff's case was tagged for transfer to the Eliquis MDL and subject to a Conditional Transfer Order ("CTO"). Then, on May 8, 2017, Judge Cote issued an 85-page Order dismissing with prejudice Plaintiffs' lead case in the proceeding. In her Order, Judge Cote held that Plaintiffs' claims were preempted in their entirety by federal law and that their claims also failed because the warnings in the Eliquis label were adequate as a matter of law. Shortly thereafter, Judge Cote issued an Order requiring all plaintiffs in the MDL (and all plaintiffs whose actions

subsequently were transferred to the MDL) to submit a response explaining why their claims should not be dismissed on the same basis. That response was due on May 23, 2017, the same day that Plaintiff voluntarily dismissed the original action and filed the instant action in Delaware state court.

Given these circumstances, Defendants properly removed the action to federal court before they were served, and tagged it for transfer back to the MDL. And, as detailed in Defendants' June 2, 2017 Motion to Stay (D.I. 6), Defendants respectfully request that this Court deny Plaintiff's Motion to Remand and stay this case pending the JPML's decision to transfer to the Eliquis MDL. Doing so will help preserve the integrity of the MDL Court's process, and prevent Plaintiff from undermining that process. Accordingly, consistent with the plain language of 28 U.S.C. § 1441(b), Defendants respectfully request that this Court deny Plaintiff's Motion to Remand.

I. BACKGROUND

A. Eliquis (apixaban)

Eliquis is a prescription anti-coagulant (blood thinner), which reduces the risk of blood clots by blocking a clotting factor known as Factor Xa, and which was developed and is marketed jointly by Bristol-Myers Squibb ("BMS") and Pfizer Inc. (Pfizer). Both BMS and Pfizer are incorporated under the laws of Delaware, and both have their principal place of business in New York. *See* Complaint, ¶¶ 11, 14 (D.I. 1-1).

In December 2012, FDA approved Eliquis to reduce the risk of stroke and blood clots in people who have atrial fibrillation, a type of irregular heartbeat that can cause blood clots and lead to a stroke. *See* Complaint, ¶¶ 17, 23 (D.I. 1-1). From the outset, the Eliquis label warned physicians that Eliquis "increases the risk of bleeding and can cause serious, potentially fatal,

bleeding." In March 2014 and August 2014, FDA approved Eliquis for additional uses and again approved the language quoted above on both occasions.

Plaintiff Ruth Kennon alleges that her husband James Kennon "regularly used" Eliquis for an unspecified amount of time before he suffered from "gastrointestinal bleeding and hematuria" and subsequently died on December 18, 2014. Complaint, ¶ 10 (D.I. 1-1).

B. Plaintiff's First Complaint

On November 10, 2016, Plaintiff first filed a complaint against Defendants for these same injuries in California state court. Defendants removed the case to federal court. After the JPML created the Eliquis MDL on February 7, 2017, Plaintiff's case was tagged for transfer to the MDL and subject to a CTO. The CTO was set for consideration on the JPML's May 25, 2017 docket, and on May 30, 2017, the JPML ordered all pending cases subject to those CTOs transferred to the Eliquis MDL.

Meanwhile, on May 8, 2017, Judge Cote, who is overseeing the Eliquis MDL, issued an 85-page Order dismissing with prejudice Plaintiffs' lead case in the proceeding. *Utts* Order (D.I. 7-1, Ex. R). In her Order, Judge Cote held that Plaintiffs' claims were preempted in their entirety by federal law and that the warnings in the Eliquis label were adequate as a matter of law. *Id.* The following day, Judge Cote issued an Order requiring all plaintiffs in the MDL (and all plaintiffs whose actions subsequently were transferred to the MDL) to submit a response explaining why their claims should not be dismissed on the same basis. May 9, 2017 Order (D.I. 7-1, Ex. S). That response was due on May 23, 2017,[1] the same day that Plaintiff voluntarily dismissed the original action, in an effort to avoid the MDL Court's jurisdiction. *Id.*

[1] For cases subsequently transferred to the MDL, Plaintiffs are required to file their submission within 14 days of transfer to the MDL.

C. Plaintiff's Second (Current) Complaint

On May 23, 2017, within 24 hours of dismissing her claim Plaintiff Ruth Kennon, citizen of Missouri, filed a Complaint in the Superior Court of the State of Delaware, New Castle County, alleging injuries caused by ingestion of Eliquis. On June 4, 2015, Defendants removed the action to this Court on the basis of diversity jurisdiction under 28 U.S.C. § 1332 and 28 U.S.C. § 1441. *See* Notice of Removal (D.I. 1). Defendants effectuated the removal before service was accomplished. *See* Memorandum ISO Motion to Remand (D.I. 4).

II. ARGUMENT

A. Removal Was Proper Under the Plain Language of Section 1441(b).

The "forum defendant" rule does not apply here because Defendants were not served at the time of removal. Under 28 U.S.C. § 1441(a), a defendant is entitled to remove a case to federal court where there is complete diversity and the amount in controversy exceeds $75,000. 28 U.S.C. §1332(a). The forum defendant rule, 28 U.S.C. § 1441(b), 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." (Emphasis added). Plaintiff admits that the parties are completely diverse. Nevertheless, Plaintiff invokes the forum defendant rule – a procedural exception to removal when a "properly joined ***and served***" defendant resides in the forum. 28 U.S.C. § 1441(b) (emphasis added).

Under the plain and unambiguous text of Section 1441(b), the forum defendant rule does not apply here. The plain language of the statute requires proper joinder *and* service of a forum defendant. When a statute is unambiguous, "the sole function of the court is to enforce the statute according to its terms." *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 313 (3d Cir. 2001); *see*

also Jimenez v. Quarterman, 555 U.S. 113, 118 (2009) ("It is well established that, when the statutory language is plain, we must enforce it according to its terms."). Even "the general rule that removal statutes are to be construed strictly is not sufficient to displace the plain meaning of [those statutes.]" *Boyer v. Wyeth Pharms., Inc.*, Civ. A. No. 12-739, 2012 WL 1449246, at *2 (E.D. Pa. Apr. 26, 2012) (citing *Delalla v. Hanover Ins.*, 660 F.3d 180, 189 (3d Cir. 2011)).

Indeed, this Court has applied the statute's plain language to uphold removal before service of a forum defendant. *See, e.g., Munchel*, 2012 WL 4050072 (denying remand where defendant properly removed before service); *Hutchins*, 2009 WL 192468 (same).[2] Other district courts in the Third Circuit likewise have upheld removal before service. *See, e.g., Westfield Ins. Co. v. Interline Brands, Inc.*, Civ. No. 12-6775, 2013 WL 1288194 (D.N.J. Mar. 25, 2013); *Valido-Shade v. Wyeth, LLC*, 875 F. Supp. 2d 474, 477–78 (E.D. Pa. July 11, 2012); *Boyer*, 2012 WL 1449246, at *2–3; *Banks v. Kmart Corp.*, Civ. A. No. 12-607, 2012 WL 707025, at *2 (E.D. Pa. Mar. 6, 2012); *Copley v. Wyeth, Inc.*, Civ. A. No. 09-722, 2009 WL 1089663, at *3 (E.D. Pa. Apr. 22, 2009). These decisions are in line with the plain language of the statute and also are in accord with courts across the country. *See, e.g., McCall v. Scott*, 239 F.3d 808, 813 n.2 (6th Cir. 2001); *Terry v. J.D. Streett & Co.*, No. 4:09 CV 01471, 2010 WL 3829201, at *1-2 (E.D. Mo. Sept. 23, 2010) (denying remand where only defendant was a resident of the state, and explaining that "[t]he text of § 1441(b), however, is clear, and this Court must apply the statute as it is written.").

This Court's opinion in *Hutchins* is representative of those cases that have properly enforced the statute's plain language to sustain removal before service, despite some of the very arguments Plaintiff makes here:

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[2] Defendants acknowledge that Judge Sleet previously remanded Eliquis cases similarly removed from Delaware state court. However, in light of the exceptional circumstances, Defendants believe that this Court should reach a different conclusion here.

> [H]aving assessed the conflicting principles implicated as well as the precedents that exist, I return to where I began: the language of § 1441(b). . . . The language of § 1441(b) is plain and unambiguous. It provides that a case in which there is diversity jurisdiction "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." Here, there is diversity jurisdiction and "none of the parties in interest properly joined and served as defendants is a citizen of" Delaware, "the State in which [this] action" has been brought.

2009 WL 192468 at *11.

More recently, this Court again applied the plain language of the statute in *Munchel v. Wyeth LLC*, 2012 WL 4050072, at *2–4. In doing so, this Court recognized a "reasonable disagreement among jurists who have considered the issue" but was compelled to adopt the plain meaning, in part, because recent Congressional amendments to the removal statutes as set forth in the Federal Courts Jurisdiction and Venue Clarification Act of 2011 affirmed Congressional intent to continue enforcement of the service requirement. *Id.* at *4.

In considering various amendments to the removal statute, Congress left intact the requirement that an in-forum defendant be "properly joined ***and*** served." 28 U.S.C. § 1441(b)(2) (emphasis added). Congress did not amend the language to delete the service requirement nor add language to require only that a forum defendant be "named" in the complaint. "[B]y retaining the 'properly joined and served language,' the amendment reinforces the conclusion that Congress intended for the plain language of the statute to be followed." *Munchel*, 2012 WL 4050072, at *4; *see also Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change") (internal quotation marks omitted). While other Courts cited by Plaintiff have ignored the plain language of the statute, including *Laugelle v. Bell Helicopter Textron, Inc.*, Civ. A. No. 10-1080, 2012 WL 368220 (D.

Del. Feb. 2, 2012) and *Stefan v. Bristol-Myers Squibb*, Civ. A. No. 13-1662, 2013 WL 6354588 (D. Del. Dec. 6, 2013), Plaintiff cites no cases that raise novel arguments. Accordingly, as this Court has concluded before, the plain and unambiguous language of the statute requires Plaintiff's Motion to Remand be denied.

B. Plaintiff's Policy Arguments in Favor of Remand Would Require this Court to Improperly Disregard the Plain Language of Section 1441(b).

Plaintiff's policy arguments do not provide justification to override the plain language of Section 1441(b). Plaintiff argues that permitting removal before service is inconsistent with the intent of the statute to limit removal to out-of-state defendants. *See* Memorandum ISO Motion to Remand, pp. 5-7 (D.I. 4). But the text of the statute itself is the best evidence of legislative intent, and it unequivocally requires the forum defendant to be served. Any other reading violates a "cardinal principle of statutory construction that a statute ought . . . to be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quotation marks and citations omitted); *Hutchins*, 2009 WL 192468, at *8 ("[W]e are obliged to give effect, if possible, to every word Congress used. . . . [Plaintiff's] position . . . read[s] the words 'and served' out of § 1441(b), rendering them superfluous.") (quotation marks and citations omitted).

Furthermore, Plaintiff's reliance on *Case of the Sewing Machine Cos.*, 85 U.S. 553 (1873) is misplaced. *See* Memorandum ISO Motion to Remand, p. 6 (D.I. 4). That case was decided in 1873, decades before Congress enacted the first version of the current removal statute with the "properly joined and served" language at issue. As another court recently observed about cases such as *Case of the Sewing Machine Cos.* that interpret outdated removal statutes, "the holdings of these cases can only be properly applied in light of the textual provisions they

interpreted and the specific questions presented for adjudication. Select quotations from the various cases cannot ... be blindly applied without regard to the context in which they were made." *In re Johnson & Johnson Cases*, 2015 WL 5050522, at *4 (C.D. Cal. Aug. 24, 2015). Thus, an isolated quotation from an 1870s-era case that was decided decades before the language at issue even was enacted does not override the plain language of the statute at issue.

Furthermore, there is nothing improper about Defendants asserting the removal rights that Congress provided them. *See, e.g., Bivins v. Novartis Pharms. Corp.*, Civ. No. 09-1087, 2009 WL 2496518, at *2 (D.N.J. Aug. 10, 2009); *Ripley v. Eon Labs Inc.*, 622 F. Supp. 2d 137, 141–42 (D.N.J. 2007). Indeed, if the statute were not enforced by its terms, plaintiffs could "game" the system by joining local defendants for purposes of defeating removal without ever serving them. *Westfield Ins. Co.*, 2013 WL 1288194, at *2. At bottom, the law must be applied consistently by its terms, which unambiguously support removal here.

C. The Court Should Not Give Deference To Plaintiff's Forum Shopping.

While it is true that "plaintiff's choice of forum is given deference," such deference is not unlimited. *See* Memorandum ISO Motion to Remand, at p. 3 (D.I. 4). Plaintiff chose to file this action in California and only elected to dismiss and re-file the case in Delaware after the MDL court issued an unfavorable ruling in the lead case in that proceeding. Plaintiff's claims have no connection to Delaware beyond the mere fact that Defendants are incorporated here. Plaintiff does not reside in Delaware, the claims arose outside of the state, and all of the relevant witnesses and documents are located elsewhere. Under these circumstances, the Court should not give deference to Plaintiff's blatant attempt to forum shop in an effort to avoid the MDL Court's jurisdiction.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court deny Plaintiff's Motion to Remand and stay this case pending the JPML's decision to transfer to the Eliquis MDL. Jurisdiction is proper here and denying Plaintiff's Motion to Remand will help give force to Judge Cote's process, ensure that the MDL Court's time and effort has not been wasted, and prevent this Court and the parties from expending resources litigating issues that can be more efficiently and consistently resolved in the Eliquis MDL.

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Dated: June 16, 2017

CERTIFICATE OF SERVICE

I, Gregory B. Williams, hereby certify that on this 16th day of June, 2017, a true and correct copy of Defendants' Bristol-Myers Squibb Company and Pfizer Inc.'s Answering Brief to Plaintiff's Motion to Remand was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following counsel of record:

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