STATE OF WISCONSIN
SUPREME COURT

THE SEGREGATED ACCOUNT OF
AMBAC ASSURANCE CORPORATION
(the "Segregated Account"),

and

Appeal No. 2015AP1493

AMBAC ASSURANCE CORPORATION,
("Ambac")

Plaintiffs-Appellants,

v.

COUNTRYWIDE HOME LOANS, INC.,

Defendant-Respondent-Petitioner,

On Review of an Unpublished Decision by the Court of Appeals, District IV, 2015AP001493 (June 23, 2016), Reversing an Order of the Dane County Circuit Court, The Honorable Peter C. Anderson, Presiding

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AMICUS BRIEF OF WISCONSIN MANUFACTURERS AND COMMERCE ASSOCIATION AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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The Wisconsin Manufacturers and Commerce Association ("WMC") is dedicated to making Wisconsin the most competitive state in the nation to do business. WMC represents thousands of small, medium, and large employers in every sector of Wisconsin's economy, including the manufacturing, construction, health care, transportation, financial services, retail, mining, insurance, energy, and service sectors.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing 300,000 members and indirectly three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country, including Wisconsin.

The Chamber and WMC's members conduct business in many states, often outside their state of incorporation or principal place of business. They therefore have a substantial interest in the rules governing when a state's courts may subject a nonresident corporation to general personal jurisdiction.

Amici take no position on the underlying merits of this litigation; their interests are in securing meaningful and clear constitutional standards to limit general personal jurisdiction. This court can provide those, and avoid substantial costs on Wisconsin's economy, Chamber and WMC members, and Wisconsin's courts, by reversing the decision below.

ARGUMENT

May Wisconsin courts exercise general jurisdiction over out-of-state corporations simply because those corporations employ a registered agent in the State? No: not without violating the U.S. Constitution's Due Process protections.

Ambac primarily argues that having a registered agent in Wisconsin amounts to consent to general personal jurisdiction here. But this conflicts with the U.S. Supreme Court's controlling decision in *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014). While a simple rule of jurisdiction-by-registration might appear attractive, Due Process requires more. And in the long term, decisions such as the ruling below not only violate Constitutional principles—they inflict serious burdens on the business community, as well as Wisconsin's court system.

I. THE U.S. CONSTITUTION BARS WISCONSIN FROM EXERCISING GENERAL PERSONAL JURISDICTION OVER COUNTRYWIDE MERELY BECAUSE IT HAS A REGISTERED AGENT IN THE STATE.

"The Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal's authority to proceed against a defendant." *Goodyear Dunlop Tires Operations, SA. v. Brown*, 131 S.Ct. 2846, 2853 (2011). Under the canonical opinion in this area, *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), a state may exercise personal jurisdiction over an out-of-state defendant "if the defendant has certain minimum contacts with [the state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Daimler,* 134 S.Ct.

at 754. This limitation on courts' authority "protects [the defendant's] liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 471–72 (1985) (quoting *Int'l Shoe,* 326 U.S. at 319).

Applying these Constitutional principles, the Supreme Court has recognized "two categories of United States personal jurisdiction," *Daimler,* 134 S.Ct. at 754. First, central to this case, there is "general or all-purpose jurisdiction." *Goodyear,* 131 S.Ct. at 2851. General jurisdiction exists only "where a foreign corporation's 'continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it causes of action arising from dealings entirely distinct from those activities.'" *Daimler,* 134 S.Ct. at 754 (quoting *Int'l Shoe,* 326 U.S. at 318). The second form of personal jurisdiction, "specific jurisdiction," may be exercised when "the suit aris[es] out of or relate[s] to the defendant's contacts with the forum." *Id.* (quotation omitted). Appendix

The court below did not rely on specific jurisdiction; it held instead that Wisconsin courts have general personal jurisdiction over Countrywide. In doing so, it erred in a manner that would have unfortunate consequences beyond this case.

A. The court of appeals' decision conflicts with *Daimler*'s Due Process limits on general jurisdiction.

Under *Daimler*, a state has general jurisdiction over a corporation in only a narrow set of circumstances. General jurisdiction is limited to a state where the corporation is (1)

incorporated, or (2) headquartered, or (3) in the "exceptional" circumstance in which the State has become a "surrogate" for the company's place of incorporation or headquarters. *Daimler,* 134 S.Ct. at 756 & n.8. Under this rule, showing that a company maintains "substantial," "continuous," or "systematic" contacts with the forum state is insufficient to satisfy the requirements for general jurisdiction imposed by the Due Process Clause.

The court below rejected this binding federal precedent and opted to find general jurisdiction based solely on the common business practice of maintaining a registered agent pursuant to Wis. Stat. § 180.1507. Order at p.2. This was precisely the type of expansive assertion of general jurisdiction that the Supreme Court rejected in *Daimler.*

Daimler's holding is unambiguous: general jurisdiction over a corporation is virtually always restricted to its "place of incorporation and principal place of business." 134 S.Ct. at 760. This limit is necessary because of the profound consequences of general jurisdiction, which empowers a court to adjudicate "any and all claims" against a defendant, "wherever in the world the claims may arise." *Id.* at 751. General jurisdiction for that reason is available only where a defendant "is fairly regarded as at home." *Id.* at 760 (quotation omitted).

Individuals are "at home" in their place of "domicile." *Id.* Corporations may do business in many places, but they are only "at home" in either their place of incorporation or their principal place of business. *Id.* As the Court explained, "[g]eneral jurisdiction ... calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them." *Id.* at 762 n.20. It

is not enough for a state court to focus on business activity within the same state, let alone mere registration to do business; the relevant consideration must include the overall activity of the corporation.

The proof is in the *Daimler* Court's reasoning. The question was whether Daimler AG was subject to general jurisdiction in California. The *Daimler* plaintiffs argued general jurisdiction was available based on the contacts between Daimler's subsidiary MBUSA and California. 134 S.Ct. at 760. MBUSA had a regional headquarters in that State, had multiple other facilities there, was "the largest supplier of luxury vehicles to the California market," and made ten percent of its total nationwide sales of vehicles there. *Id.* at 752.

In rejecting the exercise of general jurisdiction, the Supreme Court did not examine whether these factors amounted to "continuous and systematic contacts"; instead, the Court found that standard irrelevant. The dispositive consideration was that "neither Daimler nor MBUSA is incorporated in California, nor does either entity have its principal place of business there." *Daimler,* 134 S.Ct. at 761.

The Court provided two principal reasons to support its bright-line rule. First, it noted that a corporation's place of incorporation and principal place of business, the two default forums for general jurisdiction, are "affiliations" that "have the virtue of being unique"—"that is, each ordinarily indicates only one place" and that location is "easily ascertainable." *Daimler,* 134 S.Ct. at 760. Because these two locations are easy to ascertain and entirely unique it avoids confusion and "afford[s] plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims." *Id.*

A broader rule based on normal business activities, moreover, "would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Daimler,* 134 S.Ct. at 761–62 (quoting *Burger King,* 471 U.S. at 472). This "[s]imple jurisdictional rule[]," *id.* at 760 (quotation omitted), provides the "predictability," Burger King, 471 U.S. at 471–72 (1985), and "foreseeability," *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980), that is necessary for an assertion of jurisdiction to satisfy the basic due process requirement of "fair play and substantial justice." *Daimler,* 134 S.Ct. at 754.

Second, the Court reasoned that the "simple rule" reflects the reality that "specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role" with respect to out-of-forum defendants. Id. at 755 (quoting *Goodyear,* 131 S.Ct. at 2854). As the "Court has increasingly trained on the relationship among the defendant, the forum, and the litigation"—i.e., specific jurisdiction—"general jurisdiction has come to occupy a less dominant place in the contemporary scheme." *Id.* at 758 (quotation omitted). It "is one thing to hold a corporation answerable for operations in the forum State, [but] quite another to expose it to suit on claims having no connection whatever to the forum State." *Id.* at 761 n.19.

Daimler offers only a limited exception to the general rule of jurisdiction if a state's relationship with the corporation is "exceptional." *Daimler,* 134 S.Ct. at 761 n.19. The Court gave critical guidance on what constitutes "exceptional" circumstances providing general jurisdiction in a forum outside the bright-line default. That standard is

satisfied when the forum has become "a surrogate" for the "place of incorporation or head office." *Id.* at 756 n.8 (quotation omitted). In *Daimler,* the Court cited *Perkins v. Benguet Consolidated Mining Co.,* 342 U.S. 437 (1952), as "the textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum." 134 S.Ct. at 755–56 (quotation omitted). *Perkins* involved truly "exceptional facts" where the corporate defendant's home forum, the Philippines, was occupied by the Japanese army during World War II, and the company moved its headquarters and corporate records to Ohio. *Id.* at 756 n.8. At the time of suit, Ohio was the company's "principal, if temporary, place of business." *Id.* at 756 (quotation omitted).

With such a high bar for "exceptional" circumstances, outside of *Perkins,* the Supreme Court has never again upheld general jurisdiction on this basis; instead, subsequent decisions all have rejected the assertion of general jurisdiction by states outside the corporation's state of incorporation or principal place of business. *See id.* at 756–58 (discussing cases). Mere registration to do business and maintaining a registered agent does not come anywhere close to satisfying this "exceptional" exception. If maintaining a registered agent—a common legal requirement to conduct business—were enough, then states could unilaterally circumvent the federal constitution's due process limitations on general jurisdiction merely by requiring maintenance of a registered agent as a condition of doing business.

In sum, the expansive general jurisdiction rule endorsed by the court below would expose the Defendant and other companies with national reach (including the

Chamber's Members), to lawsuits in Wisconsin from foreign plaintiffs for conduct that all occurred outside Wisconsin.

B. The decision below conflicts with *Daimler*'s constitutional rule.

The court of appeals rejected *Daimler* because it "fails to address head-on the topic of actual consent-to-personal-jurisdiction as set forth in *Punke* and *Hasley*." Order at p.7. This is mistaken. As outlined above, *Daimler*'s careful delineation of general jurisdiction contradicts any notion that a mere registered agent is sufficient to confer general jurisdiction. To the extent those cases create general jurisdiction based on the presence of a registered agent, they are in conflict with *Daimler;* to the extent the court of appeals below overstates the reach of those cases, it injects serious uncertainty into this fundamental jurisdictional matter.

Courts around the country have held that *Daimler*'s holding and rationale cannot be squared with the theory relied on below. See *Brown v. Lockeed Martin Corp.*, 814 F.3d 619, 640 (2d Cir. 2016) ("If mere registration and the accompanying appointment of an in-state agent ... sufficed to confer general jurisdiction by implicit consent, every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler*'s ruling would be robbed of meaning by a back-door thief."); *In re Zofran (Ondansetron) Products Liab. Litig.*, 1:15-CV-13760-FDS, 2016 WL 2349105, at *4 (D. Mass. May 4, 2016) (explaining that interpreting a registration statute to require consent to general jurisdiction "would be inconsistent with the Supreme Court's ruling in *Daimler*.") (attached at Appendix); *Keeley v. Pfizer Inc.*, 4:15-CV-00583-ERW, 2015 WL 3999488, at *4 (E.D. Mo. July 1, 2015) ("If following [registration] statutes creates jurisdiction, national companies would be subject to

suit all over the country. This result is contrary to the holding in *Daimler*...."(attached at Appendix); *Neeley v. Wyeth LLC,* 4:11-CV-0035-JAR, 2015 WL 1456984, at *3 (E.D. Mo. Mar. 30, 2015)(attached at Appendix); *Chatwal Hotels & Resorts LLC v. Dollywood Co.,* 90 F. Supp. 3d 97, 105 (S.D.N.Y. 2015); *AstraZeneca AB v. Mylan Pharm., Inc.,* 72 F. Supp. 3d 549, 557 (D. Del. 2014).

If indeed Wisconsin law has been to the contrary, those cases should be overruled. Alternatively, the Court could recognize that the court of appeals read *Punke* and *Hasley* more broadly than necessary. Neither case actually holds that mere registration creates general jurisdiction. *Punke v. Brodey* includes no federal constitutional analysis and makes no distinction between specific or general jurisdiction (and the former would more likely fit given the property forming the source of dispute was in Wisconsin). 17 Wis. 2d 9, 13-14, 115 N.W. 2d 601 (1962). Whatever *Punke* says about creating jurisdiction by service on an agent, it would be dicta since the court, in fact, rejected the claim of jurisdiction. *Id.* at 14, 16.

Hasley v. Black, Sivalls & Bryson, Inc., 70 Wis. 2d 562, 235 N.W. 2d 446 (1975), likewise does need not hold that registration is sufficient to confer general jurisdiction. In dicta, the case did list appointment of an agent for service as a relevant consideration under *International Shoe. Id.* at 582. But registration was not at issue in *Hasley,* and the passing description should not be interpreted as holding that mere registration, certainly after *Daimler,* is enough to create general jurisdiction. There is no need to interpret Wisconsin law as requiring consent to general jurisdiction based on mere registration. See *Genuine Parts Co. v. Cepec,* 137 A. 3d 123, 126, 137-47 (Del 2016) (Del. Apr. 18, 2016)

(interpreting Delaware registration statute to avoid conflict with *Daimler*).

The use of business registration to confer general jurisdiction would have additional grave Constitutional implications. The United States Supreme Court has long recognized that a state may not "requir[e] [a] corporation, as a condition precedent to obtaining a permit to do business within [a] State, to surrender a right and privilege secured to it by the Constitution." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S.Ct. 2586, 2596 (2013) (quotation omitted); *see also Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990) (it would be "constitutionally suspect" to subject a corporation to general jurisdiction as a consequence of registering to do business in the state).

II. ALLOWING GENERAL JURISDICTION ON THE BASIS OF HAVING A REGISTERED AGENT IN THE STATE WOULD HARM WISCONSIN.

The court of appeals' expansion of general jurisdiction beyond the bounds permitted by *Daimler* is not only unconstitutional, but also bad policy. Such a broad assertion of general jurisdiction would impose substantial costs on Wisconsin's economy and Wisconsin's courts. If not corrected, the lower court decision in this case will remove valuable predictability in personal jurisdiction rules.

First, if out-of-state companies doing business in Wisconsin were subject to general jurisdiction in this State for claims that arise anywhere in the world, many companies will simply choose not to invest here. Surveys consistently show the litigation environment is an important factor in key business decisions. *See, e.g.*, U.S. Chamber Institute for Legal

Reform, 2015 Lawsuit Climate Survey: Ranking the States at 3–4 (September 2015) (available at http://goo.gl/vsIfx1). This is especially true of non-U.S. companies. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008) (recognizing that with an expansive rule, "[o]verseas firms … could be deterred from doing business here").

Investment in the state is critical to continued economic growth. An October 2013 study found that foreign direct investment "supports a host of benefits in the United States, notably good jobs and innovation led by research and development investment." Dep't of Comm. & President's Counsel of Economic Advisers, "Foreign Direct Investment in the United States" at 11 (Oct. 2013) (available at https://www.whitehouse.gov/sites/default/files/2013fdi_report_-_final_for_web.pdf); *see also* Statement by President Obama on U.S. Commitment to Open Investment Policy (June 20, 2011) (foreign direct investment "create[s] well-paid jobs, contribute[s] to economic growth, boost[s] productivity, and support[s] American communities") (available at https://www.whitehouse.gov/the-press-office/2011/06/20/statement-president-united-states-commitment-open-investment-policy). Just as foreign direct investment benefits the United States economy, out-of-state investment benefits Wisconsin's economy.

Expanding the reach of personal jurisdiction, such that these companies may be sued in Wisconsin on any claim arising anywhere in the country, will provide a substantial incentive for these and other companies to avoid doing business with Wisconsin.

Second, Plaintiffs' effort to permit the assertion of general jurisdiction over companies doing business in the State would have an unfortunate but predictable effect on the

State's judiciary: courts would be burdened with cases that have nothing to do with Wisconsin and are filed here as the result of forum shopping. Of course, out-of-state companies are subject to specific jurisdiction when their "suit-related conduct ... create[s] a substantial connection with the forum State." *Walden v. Fiore,* 134 S.Ct. 1115, 1121 (2014). But the lower court did not rely on that doctrine, and unjustified expansion of general jurisdiction is not necessary to ensure that nonresident corporations may be held accountable for their in-forum conduct. Plaintiffs' expansive theory of general jurisdiction will significantly burden Wisconsin without providing any benefits to our State.

CONCLUSION

This Court must clarify the reach of Wisconsin's courts in light of the clear articulation of limited general jurisdiction in the Supreme Court's 2014 *Daimler* case. Having predictable jurisdictional rules that comport with Due Process requirements is critical not just in this case, but to courts, business, and individuals who will face the same threshold legal question in the future.

The court of appeals decision should be reversed.

Dated this 28th day of December, 2016.

Respectfully submitted,

s/ Kevin St. John

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CERTIFICATIONS

Certification as to Form and Length: I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief, not including the caption, tables of contents and authorities, signature blocks, and certification, is 2,990 words. It is produced with a minimum printing resolution of 200 dots per inch, 13 point body text (Garamond), and a maximum of 60 characters per line of body text.

Certificate of Compliance with Wis. Stat. § 809.19(12). I hereby certify that, in accordance with Wis. Stat. § 809.19(12), I have submitted an electronic copy of this brief and appendix, in a text-searchable PDF format that is identical in content and format to the printed form of the brief filed on this date.

Certificate of Service. I hereby certify that three copies of this brief, including the Appendix and this Certification, have been served on all opposing parties by U.S. Mail to their counsel of record:

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APPENDIX OF UNPUBLISHED CASES

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2016 WL 2349105
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United States District Court,
D. Massachusetts.

In re: Zofran (Ondansetron) Products Liability Litigation.
This Document Relates to:
Kierra Simmons, et al., v. Glaxosmithkline LLC, 1:15-cv-13760-FDS.

MDL No. 1:15-md-2657-FDS
|
Signed 05/04/2016

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION TO DISMISS AND PLAINTIFFS' MOTION TO REMAND

SAYLOR, United States District Judge

***1** This case is one of many consolidated in a multi-district litigation proceeding arising out of claims that the use of the drug Zofran (ondansetron) by pregnant women caused birth defects. Plaintiffs Kierra Simmons, Tia Hancock, Joanna Tyler, and Dawn Barchiesi originally filed suit in Missouri state court against defendant GlaxoSmithKline, LLC ("GSK") alleging that their use of Zofran during pregnancy caused congenital heart defects in their children. GSK removed the action to the United States District Court for the Eastern District of Missouri and moved to dismiss the claims of three of the plaintiffs for lack of personal jurisdiction. Plaintiffs moved to remand the case for lack of subject-matter jurisdiction due to a lack of complete diversity of citizenship among the parties. The Missouri state court stayed the case pending its transfer to this district by the Judicial Panel for Multidistrict Litigation for consolidation pursuant to 28 U.S.C. § 1407.

Plaintiffs have now renewed their motion to remand. GSK opposes remand on the ground that the Court should first decide the question of personal jurisdiction raised by its motion to dismiss before deciding the question of subject-matter jurisdiction. In the alternative, GSK contends that complete diversity exists based on the doctrines of fraudulent joinder and procedural misjoinder. For the following reasons, defendant's motion to dismiss the claims of plaintiffs Hancock, Tyler, and Barchiesi will be granted, and plaintiffs' motion to remand will be denied.

I. Background

Defendant GlaxoSmithKline, LLC manufactures the drug ondansetron under the brand name Zofran. Zofran was first approved in 1991 for the prevention of post-operative nausea and vomiting associated with anesthesia and for nausea and vomiting caused by radiotherapy and chemotherapy. In addition to those approved uses, GSK is alleged to have marketed Zofran "off-label" for pregnancy-related nausea and vomiting, commonly known as "morning sickness."

Plaintiffs in this multidistrict litigation allege that Zofran was in fact unsafe for use in pregnant women, and that *in utero* exposure to Zofran caused birth defects in children born to mothers who took the drug. This particular action involves the claims of four plaintiffs: Kierra Simmons, Tia Hancock, Joanna Tyler, and Dawn Barchiesi. All four plaintiffs bring eight counts against defendant GSK arising out of congenital heart defects suffered by their children and allegedly caused by the plaintiffs' use of name-brand Zofran during pregnancy.

The specific complaint at issue here was filed in state court in Missouri, removed to federal court, and then transferred to this MDL proceeding. Although filed in Missouri, the complaint asserts that only one of the four plaintiffs—Kierra Simmons—is a Missouri citizen. The complaint alleges that Tia Hancock is a citizen of Delaware; Joanna Tyler is a citizen of North Carolina; and Dawn Barchiesi is a citizen of Pennsylvania. All four have asserted similar and parallel product-liability claims against GSK, but those claims are otherwise unrelated.[1] GSK is a limited liability company with one member, GlaxoSmithKline Holdings, Inc., which is a Delaware corporation.[2]

II. Analysis

***2** By statute, federal district courts have original jurisdiction over civil actions between citizens of different states when the amount in controversy exceeds $75,000. 28 U.S.C. § 1332. "This statutory grant requires *complete* diversity between the plaintiffs and defendants in an action." *Picciotto v. Continental Cas. Co.*, 512 F.3d 9, 17 (1st Cir. 2008) (citing *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806); *Halleran v. Hoffman*, 966 F.2d 45,

47 (1st Cir. 1992)).

Plaintiffs contend that the case should be remanded to state court because the presence of a Delaware plaintiff (Hancock) and a Delaware defendant (GSK) means that there is not complete diversity between the parties. GSK, however, argues that the issue is not as straightforward as it appears. First, GSK contends that the Court should decide the issue of personal jurisdiction raised by its motion to dismiss before turning to the issue of subject-matter jurisdiction. Second, GSK contends that even if the Court first considers subject-matter jurisdiction, the doctrines of fraudulent joinder and procedural misjoinder preclude a finding that the parties are not diverse.

A. Order of Analysis

The initial question is which jurisdictional question should be decided first. When a party challenges both personal jurisdiction and subject-matter jurisdiction, there is no hard-and-fast rule dictating the order in which the district court must decide those issues. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584-88 (1999). In cases where subject-matter jurisdiction "involve[s] no arduous inquiry, ... both expedition and sensitivity to state courts' coequal stature should impel the federal court to dispose of that issue first." *Id.* at 587-88. However, if "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," then the court may address personal jurisdiction first. *Id.* at 588.

In this case, considerations of judicial economy strongly suggest resolving the issue of personal jurisdiction ahead of subject-matter jurisdiction. Resolution of the question of subject-matter jurisdiction necessarily involves an assessment of GSK's contention that the three non-Missouri plaintiffs were either fraudulently joined or procedurally misjoined. "[T]he possibility of fraudulent joinder can make the subject matter jurisdiction analysis 'rather complicated,' especially if the inquiry involves 'the more unusual question of 'fraudulent joinder' of a plaintiff."' *In re Testosterone Replacement Therapy Products Liab. Litig. Coordinated Pretrial Proceedings*, 2016 WL 640520, at *3 (N.D. Ill. Feb. 18, 2016) (quoting *Foslip Pharm., Inc. v. Metabolife Int'l, Inc.*, 92 F. Supp. 2d 891, 899 (N.D. Iowa 2000)). The application of the doctrine of procedural misjoinder involves similarly complicated questions of law. *See Cambridge Place Inv. Mgmt., Inc. v. Morgan Stanley & Co.*, 813 F. Supp. 2d 242, 246 (D. Mass. 2011) ("The [First Circuit] has not adopted or addressed the doctrine, and the only district courts within the First Circuit that have addressed the issue have declined to apply it.").[3] Both inquiries are made even more complicated where, as here, the alleged joinder deficiency is based not on the merits of the underlying claim, but on the ability of the Court to exercise personal jurisdiction over the defendant against whom the claim is made. Thus, the Court will first turn to GSK's contention that it is not subject to personal jurisdiction as to the claims of the three non-Missouri plaintiffs.

B. Personal Jurisdiction

***3** When a district court considers a motion to dismiss for lack of personal jurisdiction without first holding an evidentiary hearing, a *prima facie* standard governs its determination. *United States v. Swiss American Bank*, 274 F.3d 610, 618 (1st Cir. 2001). In conducting a *prima facie* analysis, the court is required to take specific facts affirmatively alleged by the plaintiff as true (whether or not disputed), construing them in the light most favorable to the plaintiff; the court, however, should not credit "conclusory allegations or draw farfetched inferences." *Ticketmaster–New York v. Alioto*, 26 F.3d 201, 203 (1st Cir. 1994). Although the court will construe the facts in the light most favorable to the plaintiff in a motion to dismiss, the plaintiff still has the burden of demonstrating each jurisdictional requirement. *See Swiss American Bank*, 274 F.3d at 618.

In a multidistrict litigation, a transferee court has personal jurisdiction over a defendant only if the transferor court would have had jurisdiction. *In re FMC Corp. Patent Litig.*, 422 F. Supp. 1163, 1165 (Jud. Pan. Mult. Lit. 1976) ("Following a transfer, the transferee judge has all the jurisdiction and powers over pretrial proceedings in the actions transferred to him that the transferor judge would have had in the absence of transfer."). "In determining whether a nonresident defendant is subject to its jurisdiction, a federal court exercising diversity jurisdiction is the functional equivalent of a state court sitting in the forum state." *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 290 F.3d 42, 51 (1st Cir. 2002) (quoting *Sawtelle v. Farrell*, 70 F.3d 1381, 1387 (1st Cir.1995)) (citation and internal quotation marks omitted). This case was transferred from United States District Court for the Eastern District of Missouri; therefore, this Court may exercise personal jurisdiction over a defendant only to the same extent that the state court in Missouri could have exercised such jurisdiction.

The exercise of personal jurisdiction over a defendant must be authorized by statute and be consistent with the due process requirements of the United States

Constitution. *Nowak v. Tak How Invs., Ltd.*, 93 F.2d 708, 712 (1st Cir. 1996). "A district court may exercise authority over a defendant by virtue of either general or specific jurisdiction." *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, 142 F.3d 26, 34 (1st Cir. 1998). A defendant may also consent to personal jurisdiction in a forum where jurisdiction would not otherwise exist. *See General Contracting & Trading Co., LLC v. Interpole, Inc.*, 940 F.2d 20, 22 (1st Cir. 1991).

1. General Jurisdiction

"A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (citing *International Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310 (1945)). The parties do not dispute that GSK's sole member, GlaxoSmithKline Holdings, Inc., is incorporated in Delaware and maintains its principal place of business there. The Supreme Court has indicated that a foreign corporation will be deemed "at home" based on its operations in a forum other than its formal place of incorporation or principal place of business only in an "exceptional case." *See Daimler AG v. Bauman*, 134 S. Ct. 746, 761 n.19 (2014) (internal citations omitted).

The complaint here contains no allegations suggesting that GSK's operations in Missouri are so "continuous and systematic" as to render this an "exceptional case"; rather, it appears that GSK simply markets and sells the product in Missouri, as it presumably does in the other 49 states. *See id.* at 761 ("[T]he exercise of general jurisdiction in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business ... [would be] unacceptably grasping.").

2. Consent to Jurisdiction

***4** Plaintiffs further contend that GSK is subject to general jurisdiction in Missouri because it has "consented" to that jurisdiction by appointing a registered agent for service of process in Missouri as required by statute. *See* Mo. Rev. Stat. § 351.586. The relevant portion of the Missouri statute for service on a foreign corporation provides:

> The registered agent of a foreign corporation authorized to transact business in this state is the corporation's agent for service of process, notice, or demand required or permitted by law to be served on the foreign corporation. ...

Mo. Rev. Stat. § 351.594. Courts that have considered the issue have reached differing conclusions, particularly in the Eastern District of Missouri. *Compare Keeley v. Pfizer Inc.*, 2015 WL 3999488 (E.D. Mo. Jul. 1, 2015) (no consent to personal jurisdiction based on Missouri statutes requiring appointment of registered agent), *and Neeley v. Wyeth LLC*, 2015 WL 1456984 (E.D. Mo. Mar. 30, 2015) (same), *with Chalkey v. SmithKline Beecham Corp.*, 2016 U.S. Dist. LEXIS 21462 (E.D. Mo. Feb. 23, 2016) (upholding personal jurisdiction based on consent), *and Trout v. SmithKline Beecham*, 2016 WL 427960 (E.D. Mo. Feb. 4, 2016) (same).

It nonetheless appears clear that such a finding would distort the language and purpose of the Missouri registration statute and would be inconsistent with the Supreme Court's ruling in *Daimler*, 134 S. Ct. 746. The recent opinion of the Second Circuit in *Brown v. Lockheed Martin Corp.* on this issue is persuasive:

> [Plaintiff's] interpretation of Connecticut's registration statute is expansive. It proposes that we infer from an ambiguous statute and the mere appointment of an agent for service of process a corporation's consent to general jurisdiction, creating precisely the result that the Court so roundly rejected in *Daimler*. It appears that every state in the union—and the District of Columbia, as well—has enacted a business registration statute. *See* Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 Cardozo L.Rev. 1343, 1363–65 & nn. 109 & 111–12 (2015) (listing statutes). States have long endeavored to protect their citizens and levy taxes, among other goals, through this mechanism. If mere registration and the accompanying appointment of an instate agent—without an express consent to general jurisdiction—nonetheless sufficed

> to confer general jurisdiction by implicit consent, every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler's* ruling would be robbed of meaning by a back-door thief.

814 F.3d 619, 640 (2d Cir. 2016). As with the Connecticut statute at issue in *Brown*, the Missouri statute does not mention consent to personal jurisdiction in Missouri courts at all, much less provide for explicit consent to personal jurisdiction for claims based on conduct and injuries arising outside of Missouri.[4] Accordingly, GSK did not consent to personal jurisdiction in Missouri by appointing a registered agent for service of process in the state.

3. Specific Personal Jurisdiction

***5** "Specific jurisdiction exists when there is a demonstrable nexus between a plaintiff's claims and a defendant's forum-based activities." *Massachusetts Sch. of Law*, 142 F.3d at 34 (citations omitted). The parties do not dispute that specific personal jurisdiction over GSK exists in Missouri for the claims brought by plaintiff Simmons, who is a Missouri resident.

However, "[q]uestions of specific jurisdiction are always tied to the particular claims asserted." *Phillips Exeter Acad. v. Howard Phillips Fund*, 196 F.3d 284, 289 (1st Cir. 1999) (citing *United Elec., Radio and Mach. Workers of Am. v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992) ("[T]he defendant's in-state conduct must form an 'important, or [at least] material, element of proof' in the plaintiff's case")). The complaint falls far short of establishing any nexus between the non-Missouri plaintiffs' claims and GSK's Missouri-based activities. Unlike plaintiff Simmons, the non-Missouri plaintiffs do not allege that they were prescribed Zofran in Missouri, took Zofran in Missouri, or that their children suffered injuries in Missouri. Nor do they allege any facts connecting the conduct of GSK in Missouri, if any, to their own claims. Thus, to the extent that the claims of the non-Missouri plaintiffs relate to GSK's conduct in Missouri, they do so "only in the abstract or by analogy." *In re Testosterone Replacement Therapy*, 2016 WL 640520, at *5. It is therefore clear that a Missouri court would not have specific personal jurisdiction over the claims brought by those out-of-state plaintiffs.[5]

4. Conclusion

Although the Court has specific personal jurisdiction over GSK for the claims brought by plaintiff Kierra Simmons, there is no basis for personal jurisdiction over GSK for the claims brought by the non-Missouri plaintiffs. Accordingly, GSK's motion to dismiss will be granted as to the claims of plaintiffs Tia Hancock, Joanna Tyler, and Dawn Barchiesi.

C. Subject-Matter Jurisdiction

With the dismissal of plaintiffs Hancock, Tyler, and Barchiesi, the only remaining plaintiff is Kierra Simmons. The parties do not dispute that she is a citizen of Missouri for diversity purposes, and, as noted, the parties also do not dispute that GSK is a citizen of Delaware. Thus, there is complete diversity among the parties and the Court therefore has subject-matter jurisdiction over the dispute. Plaintiff's motion to remand will be denied.[6]

III. Conclusion

For the foregoing reasons, defendant's motion to dismiss for lack of personal jurisdiction is GRANTED without prejudice as to the claims of plaintiffs Tia Hancock, Joanna Tyler, and Dawn Barchiesi. Plaintiffs' motion to remand is DENIED.

So Ordered.

All Citations

Slip Copy, 2016 WL 2349105

Footnotes

1 The four plaintiffs are joined pursuant to Rule 52.05 of the Missouri Rules of Civil Procedure, which permits the joinder of plaintiffs asserting claims "arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action."

2 The parties do not dispute that GSK is a citizen of Delaware for diversity purposes.

3 "[Q]uestions of law in MDL-transferred cases are governed by the law of the transferee court." *In re Fresenius Granuflo/Naturalyte Dialysate Products Liab. Litig.*, 76 F. Supp. 3d 321, 327 (D. Mass. 2015); *In re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171, 1174 (D.C. Cir. 1987).

4 As the *Brown* court noted, "The inclusion of this phrase ('permitted by law') and the omission of any specific reference to 'general jurisdiction,' to our reading, differentiates Connecticut's registration statute from others that have been definitively construed to convey a foreign corporation's consent to general jurisdiction." *Brown*, 814 F.3d at 637.

5 Although plaintiffs have not specifically requested that it do so, the Court declines to adopt the doctrine of pendent personal jurisdiction for the reasons outlined in *In re Testosterone Replacement Therapy*, 2016 WL 640520, at *5-6.

6 The presence of complete diversity following the dismissal of the non-Missouri plaintiffs makes it unnecessary for the Court to reach the issues surrounding defendant's argument that those plaintiffs' joinder was either fraudulent or procedurally improper.

End of Document

2015 WL 3999488
Only the Westlaw citation is currently available.
United States District Court,
E.D. Missouri,
Eastern Division.

Jennifer KEELEY and Jess Keeley, Plaintiffs,
v.
PFIZER INC., Defendant.

No. 4:15CV00583 ERW.
|
Signed June 1, 2015.
|
Filed July 1, 2015.

Attorneys and Law Firms

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Mark C. Hegarty, Shook and Hardy, LLP, Kansas City, MO, for Defendant.

MEMORANDUM AND ORDER

E. RICHARD WEBBER, Senior District Judge.

***1** This matter comes before the Court on Defendant Pfizer Inc.'s Motion to Dismiss [ECF No. 5].

I. BACKGROUND

Plaintiffs Jennifer Keeley ("Plaintiff Jennifer") and Jess Keeley ("Plaintiff Jess") initiated this lawsuit by filing a Petition in in the Circuit Court of St. Louis City on March 23, 2015. On April 6, 2015, Defendant Pfizer Inc. ("Defendant") removed the Petition to this Court pursuant to 28 U.S.C. §§ 1332 and 1441. On May 6, 2015, Defendant filed its pending Motion to Dismiss [ECF No. 5], for lack of personal jurisdiction. For purposes of this Motion to Dismiss, the Court accepts as true the following facts alleged in Plaintiff's Petition. *Great Rivers Habitat Alliance v. Fed. Emergency Mgmt. Agency*, 615 F.3d 958, 988 (8th Cir.2010).

Plaintiff Jennifer is Plaintiff Jess's natural mother [ECF No. 8]. Plaintiff Jess was born on March 23, 1995, in Columbus, Georgia. While Plaintiff Jennifer was pregnant with Plaintiff Jess, she took the prescription drug Zoloft®. Defendant is incorporated in Delaware with its principal place of business in New York. During the relevant time period, Defendant advertised, analyzed, assembled, compounded, designed, developed, distributed, formulated, inspected, labeled, manufactured, marketed, packaged, produced, promoted, processed, researched, tested, and sold Zoloft® in Georgia, Missouri, Pennsylvania, and throughout the United States. Defendant marketed, promoted, and sold Zoloft® throughout the United States, including St. Louis, Missouri.

Plaintiffs allege Plaintiff Jess was born with birth defects caused by Plaintiff Jennifer's ingestion of Zoloft® during pregnancy. Plaintiffs assert four counts against Defendant: Strict Products Liability, Defective Design (Count I), Strict Products Liability, Failure to Warn (Count II), Negligence (Count III), and Fraudulent Misrepresentation and Concealment (Count IV). Defendant now seeks to dismiss Plaintiffs' claims for lack of personal jurisdiction.

II. STANDARD

"A federal court may exercise jurisdiction over a foreign defendant only to the extent permitted by the forum state's long-arm statute and by the Due Process Clause of the Constitution." *Miller v. Nippon Carbon Co.*, 528 F.3d 1087, 1090 (8th Cir.2008) (internal quotations and citation omitted). Because the Missouri long-arm statute is construed as extending personal jurisdiction to the fullest extent permitted by the Fourteenth Amendment's Due Process Clause, *see J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 253 (Mo.2009), the Court's jurisdictional inquiry is limited to determining whether asserting personal jurisdiction over the defendant comports with due process.

Where personal jurisdiction is controverted, the party asserting jurisdiction bears the burden of establishing a prima facie case that jurisdiction exists. *Johnson v. Woodcock*, 444 F.3d 953, 955 (8th Cir.2006). Thus, "[t]o survive a motion to dismiss, the plaintiff must state sufficient facts in the complaint to support a reasonable inference that [the defendant] may be subjected to jurisdiction in the forum state." *Steinbuch v. Cutler*, 518 F.3d 580, 585 (8th Cir.2008) (internal citation omitted). "The plaintiff's 'prima facie showing' must be tested, not by the pleadings alone, but by the affidavits and exhibits

presented with the motions and opposition thereto." *Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1072–73 (8th Cir.2004) (internal quotations and citation omitted).

III. DISCUSSION

***2** Personal jurisdiction can be general or specific. *Daimler AG v.. Bauman*, 134 S.Ct. 746, 754 (2014). Specific jurisdiction refers to jurisdiction which "arises out of or relates to the defendant's contacts with the forum." *Id.* (citing *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414, n. 8 (1984) (internal quotations omitted). A court may assert general jurisdiction to hear "any and all claims against [a defendant] when their affiliations with the state are so continuous and systematic as to render them essentially at home in the forum State." *Id.* (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2851 (2011) (internal quotations omitted). Defendant asserts the Court lacks both general and specific jurisdiction.

A. General Jurisdiction

The Supreme Court has limited general jurisdiction for a corporation to its place of incorporation or principal place of business except in an "exceptional case." *Daimler*, 134 S.Ct. at 761, n. 19. In *Daimler*, Plaintiffs were Argentinian residents who brought suit in the United States District Court for the Northern District of California against a German corporation regarding actions of its Argentinian subsidiary in Argentina. *Id.* at 750–751. Plaintiffs claimed the District Court had jurisdiction over the lawsuit because of the California contacts of Mercedes–Benz USA, LLC, a subsidiary of the Defendant incorporated in Delaware with its principal place of business in New Jersey. *Id.* This subsidiary distributed vehicles to dealerships throughout the United States, including California. *Id.* The Court held Daimler is not "at home" in California and cannot be sued there for injuries attributable to conduct in Argentina. *Id.* Applying this holding, Plaintiffs have not alleged sufficient facts to establish general jurisdiction over Defendant.

Defendant is incorporated in Delaware and has a principal place of business in New York. Defendant is not incorporated in Missouri nor is its principal place of business here; thus, Plaintiff's only other option is to establish this is an exceptional case and they have not done so. The extent of Plaintiffs' allegations is Defendant marketed and sold Zoloft® in Missouri. These facts are much less than those alleged in *Daimler* and as the Supreme Court did not find personal jurisdiction in *Daimler*, it cannot be found here. Simply marketing and selling a product in a state does not make a defendant's affiliations with the state so "continuous and systematic as to render them essentially at home in the forum state." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2851 (2011).

Plaintiff cites to *Keeton v. Hustler Magazine, Inc.*[1] to support the proposition jurisdiction may be based on a defendant's continuous but limited general business in a state. However, in *Keeton*, the Supreme Court found specific jurisdiction over the defendant; it was not discussing general jurisdiction. 465 U.S. at 775–781 (discussion of minimum contacts between the defendant and forum state). The sale of products into the forum state may be germane to specific jurisdiction, but it does not create general jurisdiction. *Goodyear*, 131 S.Ct. at 2855. Plaintiffs have not established general jurisdiction over Defendant.

B. Specific Jurisdiction

***3** Defendant also asserts Plaintiffs have not established specific jurisdiction. Specific jurisdiction focuses on "the relationship among the defendant, the forum, and the litigation." *Walkden v. Fiore*, 134 S.Ct. 1115, 1121 (2014) (citing *Keeton*, 465 U.S. at 775). "The defendant's suit-related conduct must create a substantial connection with the forum State." *Id.* The focus is on the contacts a defendant creates with the state, not connections to a plaintiff or other third-parties who reside in the state. *Id* . at 1122. Specific jurisdiction can be found where a corporation's activities are continuous and systematic and give rise to the liabilities in the suit. *Daimler*, 134 S.Ct. at 761 (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945). The Eighth Circuit has identified five factors to establish a substantial connection with the forum state: (1) nature and quality of the contacts with the forum state, (2) quantity of the contacts, (3) relation of the cause of action to those contacts, (4) interest of the forum state in providing a forum for its residents, and (5) convenience of the parties. *Johnson v. Woodcock*, 444 F.3d 953, 956 (8th Cir.2006) (citing *Porter v. Berall*, 293 F.3d 1073, 1076 (8th Cir.2002)).

Plaintiffs do not allege any facts regarding the quality of the contacts with Missouri, the quantity of those contacts, or the relation of the cause of action to those contacts. Plaintiffs conclusively state Defendant made a contract or promise substantially connected with/or within Missouri, committed and conspired to commit tortious acts in Missouri, and owned, used, or possessed real estate in Missouri [ECF No. 8, ¶ 7]. Plaintiffs restated the Missouri long-arm statute but did not provide any facts to support these conclusions. *See* Mo.Rev.Stat. § 506.500. Simply

stating Defendant marketed, promoted, and sold Zoloft® in Missouri does not establish specific jurisdiction.

From the facts Plaintiff does allege, it is unclear how Defendant's contacts with Missouri relate to the cause of action in this suit. Plaintiff Jess was born in Georgia. There are no facts suggesting Plaintiff was prescribed the medication in Missouri, purchased the medication in Missouri, saw the advertisements in Missouri, or in any way was injured in Missouri. The inquiry into specific jurisdiction does not focus on Plaintiff's contacts with the forum state, but Plaintiff's injury must be connected to Defendant's contacts with the forum state. *Walden*, 134 S.Ct. at 1123. In *Keeton*, even though Plaintiff had little contact with New Hampshire, the Plaintiff suffered damages there. 465 U.S. at 776. Plaintiff's injuries in New Hampshire, along with Defendant's contacts with the state which caused the injury, formed the basis of specific jurisdiction. *Id.* That simply is not the case here. Plaintiffs have not alleged any facts to support a finding of specific jurisdiction. Under Plaintiffs' theory of jurisdiction, a national company could be sued by any resident of any state in any state. This does not comport with "traditional notions of fair play and substantial justice" as required by the Constitution. *Daimler*, 134 S.Ct. at 754 (citations omitted).

C. Consent to Personal Jurisdiction

***4** Plaintiffs contend Defendant has consented to jurisdiction in Missouri because Defendant is registered to do business in Missouri and has a registered agent in Missouri. Every foreign corporation is required to register with the Secretary of State and maintain a registered agent in the state to transact business in Missouri. Mo.Rev.Stat. §§ 351.572, 351.586 (2014). Many states have enacted similar statutes and national corporations are often registered in to do business in several states. If following these statutes creates jurisdiction, national companies would be subject to suit all over the country. This result is contrary to the holding in *Daimler* that merely doing business in a state is not enough to establish general jurisdiction. *Daimler*, 134 S.Ct. at 761–62. The Supreme Court found "[s]uch exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Id.* (internal quotations omitted). A defendant's consent to jurisdiction must satisfy the standards of due process and finding a defendant consents to jurisdiction by registering to do business in a state or maintaining a registered agent does not.[2] Thus, Defendant did not consent to jurisdiction.

Accordingly,

IT IS HEREBY ORDERED that Defendant Pfizer Inc.'s Motion to Dismiss [ECF No. 5] is **GRANTED.**

IT IS FURTHER ORDERED that Plaintiffs Jennifer Keeley and Jess Keeley's claims against Defendant Pfizer, Inc. shall be **DISMISSED, without prejudice.**

All Citations

Not Reported in F.Supp.3d, 2015 WL 3999488

Footnotes

1 465 U.S. 770 (1984).

2 Plaintiffs cite to *Knowlton v. Allied Van Lines, Inc.* which held a defendant consented to jurisdiction by designating an agent for service of process within the state. 900 F.2d 1196 (8th Cir.1990). In *Knowlton,* the Eighth Circuit was analyzing a Minnesota statute which required a foreign corporation to be subject service of process by service on a registered agent in the state. *Id.* at 1199. In contrast, the Missouri statutes requiring registration with the state and the maintenance of a registered agent do not mention service of process at all. Mo.Rev.Stat. §§ 351.572, 351.586. This distinction, along with the holding in *Daimler,* requires this Court to reject the proposition Defendants have consented to jurisdiction by registering with the State of Missouri and maintaining a registered agent within the state.

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United States District Court,
E.D. Missouri,
Eastern Division.

Dessie NEELEY, et al., Plaintiffs,
v.
WYETH LLC, et al., Defendants.

No. 4:ll–cv–00325–JAR.
|
Signed March 30, 2015.

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MEMORANDUM AND ORDER

JOHN A. ROSS, District Judge.

***1** This matter is before the Court on Defendants Barr Laboratories, Inc., Ban Pharamceuticals, LLC, Watson Pharma, Inc., and Watson Laboratories, Inc.'s (collectively, the "Generic Defendants") Motion for Reconsideration (Doc. 238). The Generic Defendants' request that the Court reconsider its ruling denying its motion to dismiss on lack of personal jurisdiction in light of the United States Supreme Court's decision in *Daimler v. Bauman*, —– U.S. ——, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014). The motion is fully briefed and ready for disposition. For the following reasons, the motion will be **GRANTED in part.**

I. Background

On July 30, 2013, the Court entered an amended order that, in relevant part, denied the Generic Defendants' Motions to Dismiss and found the Generic Defendants' contacts with Missouri sufficient to establish general jurisdiction. In so-doing the Court relied on the following contacts, grouped by entity: (1) Watson Pharma, Inc. is a foreign corporation, registered to do business in the state of Missouri, has a designated personal agent for personal service of process within the state of Missouri, distributed metoclopramide that was manufactured by Barr Laboratories, Inc., and has twelve current or former employees who live and/or work in Missouri; (2) Teva Pharmaceuticals USA, Inc. ("Teva"), the owner of the Barr entities and not a party to the lawsuit, is "the largest generic pharmaceutical company in the county" and it "would strain common sense to believe that Teva does not conduct substantial business and derive significant revenue in Missouri" (Doc. 211 at 12 (quoting Doc. 103 at 15)); and (3) Barr has employees who live and work in Missouri and Barr participates in the MissouriRx program ("MoRx") that provides prescription drugs to Missouri citizens. The Court determined that these contacts were sufficiently "continuous and systematic" as to render the Generic Defendants essentially "at home" in Missouri.

The Generic Defendants' now request the Court reconsider its order in light of *Daimler*. Specifically, relying on the *Daimler* case, the Generic Defendants assert that the only place general jurisdiction can be asserted over Generic Defendants is their places of incorporation and the places where their principal places of business are located.

Plaintiff, Harold Neeley, individually and on behalf of the Estate of Dessie Neeley, responds, asserting that *Daimler* did not alter the scope of general jurisdiction and this Court properly applied the general jurisdiction standard. Further, Plaintiffs argue that at least one of the moving defendants, Watson Laboratories, Inc., has consented to this Court's exercise of personal jurisdiction when it moved for an extension of time to file a responsive pleading in the original trial court. In the alternative, Plaintiff requests that the Court transfer the case pursuant to 28 U.S.C. § 1404(a) and 28 U.S.C. § 1406(a) to the District Court for the Eastern District of Kentucky.

II. Analysis

A. Standard of Review

***2** Rule 54(b) provides that "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties ... may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." "It is generally held that a court may amend or reconsider any ruling under Rule 54(b) to correct any clearly or manifestly erroneous findings of facts or conclusions of law." *Jones v. Casey's General Stores*, 551 F.Supp.2d 848, 854 (S.D.Iowa 2008) (citation omitted). The Court may also reconsider an interlocutory order because of a controlling or significant change in the law. *Trickey v. Kaman Industrial Technologies Corp.*, No. 1:09–CV–00026–SNJ, 2011 WL 2118578, at *2 (E.D.Mo. May 26, 2011). Here the Generic Defendants point to *Daimler*, decided January 14, 2014, as significant change in the law.

B. General Jurisdiction and *Daimler*

Prior to the Supreme Court's decision in *Daimler*, an inquiry into whether general jurisdiction could be exercised over out-of-state corporate defendants hinged on whether the corporation's contacts were so " 'continuous and systematic' as to render [it] essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, —— U.S. ——, ——, 131 S.Ct. 2846, 2851, 180 L.Ed.2d 796 (2011) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317, 66 S.Ct. 154, 90 L.Ed. 95 (1945)). In *Daimler*, the Supreme Court explained that

> *Goodyear* made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there. "For an individual, the paradigm forum for the exercise is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home."

134 S.Ct. at 760 (quoting *Goodyear*, 131 S.Ct. at 2853–54) (noting that a corporation's place of incorporation and principal place of business are paradigm forums for general jurisdiction). However, in *Daimler*, the Supreme Court clarified that "the exercise of general jurisdiction in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business would be unacceptably grasping." *Daimler*, 134 S.Ct. at 761 (internal citation omitted). The Supreme Court did "not foreclose the possibility that in an *exceptional* case a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be *so substantial and of such a nature to render the corporation at home in that State* ." *Id.* at 761 n. 19 (emphasis added). Though the *Daimler* decision does not "overrule[ ] nearly 6 decades of personal jurisdiction law" (Doc. 240 at 1), it does require a tighter assessment of the standard than perhaps was clear from Goodyear, a standard rarely addressed by the Supreme Court, such that this Court's reconsideration of its previous order is appropriate. *Id.* at 755 ("Our *post-International Shoe* opinions on general jurisdiction, by comparison, are few.")

***3** Given this tighter framework, the Court finds that the Generic Defendants are not subject to personal jurisdiction in Missouri. None of the Generic Defendants are incorporated in Missouri, nor do they have their principal places of business here. While a corporation is not "subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business," the contacts at issue in this case clearly do not rise to the level of an "exceptional case" as contemplated by the Supreme Court in *Daimler*. *Id.* at 761 n. 19.

Perhaps the most seemingly significant connections to Missouri are those of Watson Pharma Inc., specifically its registration in the state and its designation of a local registered agent. However, any foreign corporation transacting business[1] in the state of Missouri is required to register with the Secretary of State. MO.REV.STAT. § 351.572 (2014). Foreign corporations authorized to transact business in Missouri are also required to maintain a registered agent in the state. MO.REV.STAT. § 351.586 (2014). Therefore, to extend the Plaintiff's reasoning to its natural conclusion, every foreign corporation transacting business in the state of Missouri would be subject to general jurisdiction here. *Daimler* clearly rejects this proposition.

Barr's involvement in MoRx can similarly be rejected. MoRx is a state-run pharmacy assistance program that provides prescription drug assistance to Missouri citizens. MO.REV.STAT. § 208.782 (2014). Countless other manufacturers participate in this program and similar state-run programs around the country. MO.REV.STAT. § 208.786(3) (2014).[2] Participation in such a program does not rise to the level of a substantial contact as clarified in *Daimler* because, again, if it were to, each one of these manufacturers would be subjected to general jurisdiction in this state and many other states.

Teva's contacts also do not warrant attaching personal jurisdiction over Barr. Teva's revenue and extensive business dealings cannot be imputed to Barr and even if they were to be attributed to Barr, revenue or a course of dealing is not significant enough of a contact to subject

Barr to general jurisdiction in Missouri. Next, given the global nature of our economy and the ever increasing use of teleworking/telecommunication as a common means of conducting business, the employment of individuals physically located in the state of Missouri is immaterial. These individuals may currently be working on projects largely relating to other state or countries. Finally, to the extent that Plaintiff asserts that the Watson entities and Teva consented to this Court's jurisdiction, these were arguments that Plaintiff could have made before the Court at the time of the Motion to Dismiss. As such, it is not proper for the Court to address them on a Motion to Reconsider.

Therefore, similar to *Daimler,* if the Generic Defendants' activities sufficed to allow adjudication of this case in Missouri, the same would presumably be true in many other states. Thus, the Court concludes that it does not have personal jurisdiction over the Generic Defendants.

C. Severance and Transfer

***4** Plaintiff asserts, pursuant to both § 1406(a) and § 1404(a), that the interest of justice requires that the case be transferred to the District Court for the Eastern District of Kentucky, rather than dismissed.

Section § 1406(a) authorizes the transfer of a case "laying venue in the wrong ... district." While section 1406 is traditionally seen as a mechanism to correct errors in venue selection, it "has commonly been cited by courts as authorizing an interdistrict transfer to cure a want of personal jurisdiction over a defendant in the transferor district." *Federal Home Loan Bank of Boston v. Ally Financial, Inc.,* Civil Action No. 11–10952–GAO, 2014 WL 4964506, at *3 (D.Mass.2014) (collecting cases). *See also Thompson v. Ecological Science Corp.,* 421 F.2d 467, 470 n. 4 (8th Cir.1970) ("Even if personal jurisdiction had not been obtainable in Arkansas, a transfer under 28 U.S.C. § 1406 might have been a preferable alternative to dismissal.") In this case, absent personal jurisdiction over the Generic Defendants, venue is also no longer proper. 28 U.S.C. § 1391(b). Therefore the Court may transfer the case against the Generic Defendants pursuant to § 1406(a).

Plaintiff urges the Court to transfer the claims against the remaining defendants pursuant to section 1404(a). Section 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." In determining whether to transfer a case pursuant to § 1404(a), the Court is directed to review three factors: (1) the convenience of the parties; (2) the convenience of the witnesses; and (3) the interests of justice. *Terra Intern., Inc. v. Mississippi Chemical Corp.,* 119 F.3d 688, 691 (8th Cir.1997). The Generic Defendants assert that Plaintiff has failed to address the first two factors of 1404(a) and that Plaintiff should not be rewarded for procedural errors, namely filing in the incorrect forums, which have elongated this matter. Plaintiff addressed the first two prongs, albeit in his sur-reply, arguing that the Defendants are not any more inconvenienced by a transfer to Kentucky than they would if they were litigating in Missouri, and that Plaintiff lives in Kentucky, as do many of the fact witnesses in this case, including Mrs. Neeley's prescribing and treating physicians.

The Court finds that factors one and two weigh in favor of transfer. It does not appear that a transfer to Kentucky would inconvenience the Defendants any more than maintaining an action in Missouri, but it would be significantly more convenient for Plaintiff, who lives in Kentucky. Furthermore, many of the witnesses, including Mrs. Neeley's prescribing and treating physicians live in Kentucky.

The third factor also strongly supports transfer. The Court agrees that this case has been long-standing; it has been pending for nearly five years. However, the Court finds that this fact weighs in support of a transfer of the entire case to the appropriate district. "The efficient use of judicial resources and the benefit all parties will receive from preventing unnecessary duplication of time, effort and expense weigh heavily in favor of transfer." *May Dept. Stores Co. v. Wilansky,* 900 F.Supp. 1154, 1166 (E.D.Mo.1995) (Shaw, J.).

III. Conclusion

***5** Accordingly,

IT IS HEREBY ORDERED that Motion for Reconsideration (Doc. 238) is **GRANTED in part.** The Clerk of the Court is directed to transfer this case to the District Court for the Eastern District of Kentucky.

All Citations

Not Reported in F.Supp.3d, 2015 WL 1456984

Footnotes

1 Although a finding of what "transacting business" is to be determined by the facts of each case, Section 351.572.2 lists activities which do not constitute "transacting business" within the meaning of Section 351.572.1. *See Ozark Employment Specialists, Inc. v. Beeman,* 80 S.W.3d 882, 891 (Mo.Ct.App.2002). They include:
(1) Maintaining, defending, or settling any proceeding;
(2) Holding meetings of the board of directors or shareholders or carrying on other activities concerning internal corporate affairs;
(3) Maintaining bank accounts;
(4) Maintaining offices or agencies for the transfer, exchange, and registration of the corporation's own securities or maintaining trustees or depositories with respect to those securities;
(5) Creating or acquiring indebtedness, mortgages, and security interests in real or personal property;
(6) Securing or collecting debts or enforcing mortgages and security interests in property securing the debts;
(7) Conducting an isolated transaction that is completed within thirty days and that is not one in the course of repeated transactions of a like nature;
(8) Transacting business in interstate commerce.

2 *See also* MO. DEP'T OF SOC. SERVS., *Participating Pharmaceutical Manufacturers,* http://www.morx.mo.gov/pages/manufacturers.htm (last visited January 9, 2015). *See, e.g.,* DEL.CODE ANN. Tit. 16, § 3002B (2014); 405 IND. ADMIN. CODE 8–1–1 (2014).