Case No. 16-2524

United States Court of Appeals for the Eighth Circuit

ELAINE ROBINSON, et al.,

Plaintiffs-Appellees,

versus

PFIZER INC.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Missouri (Jackson, J.)
Case No. 4:16-cv-00439-CEJ

RESPONSE OF DEFENDANT-APPELLANT PFIZER INC. TO MOTION TO DISMISS APPEAL

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PRELIMINARY STATEMENT

This is an appeal from an order awarding sanctions in the form of attorneys' fees under 28 U.S.C. § 1447(c) against Defendant-Appellant Pfizer Inc. for the removal of this multi-plaintiff pharmaceutical products liability action to the Eastern District of Missouri. In the course of remanding this action to state court, the district court (Jackson, J.) granted Plaintiff-Appellees' motion for sanctions against Pfizer under section 1447(c) for making jurisdictional arguments that it determined were not "objectively reasonable." Plaintiffs thereafter filed a request for attorneys' fees with an accounting of their time in support of the award, seeking $14,800. The Court granted that request in part, awarding $6,200. Plaintiffs then provided wire information so that Pfizer could pay the award. Only after Pfizer filed its notice of appeal did Plaintiffs assert, in a misplaced attempt to moot this appeal, that Plaintiffs would no longer seek payment in satisfaction of the award. That effort is futile and Plaintiffs' motion to dismiss should be denied.

This Court must vacate the district court's sanctions award unless it finds that Pfizer "lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). To execute that review, this Court must "*undertake a de novo examination* of whether the remand order was legally correct." *Dahl v. Rosenfeld*, 316 F.3d 1074, 1077 (9th Cir. 2003) (quotation omitted, emphasis added). Thus, the merits of Pfizer's removal are before the Court on this appeal.

Plaintiffs' purported satisfaction of judgment as to the fee award does not deprive this Court of jurisdiction to undertake its review of whether the remand

order was correct and could support sanctions under section 1447(c). In addition to the district court's statements that it ordered an award of attorneys' fees because Pfizer supposedly ignored "repeated admonishments" rejecting its removal theories and thus "lacked an objectively reasonable basis for seeking removal" (Pls.' Ex. D, Order at 9), it is well established that an attorneys' fees award under section 1447(c) is a form of sanctions. A leading decision of this Court, which Plaintiffs fail to cite, confirms that appellate jurisdiction over a sanctions order is not mooted "merely because an adversary chooses not to collect the sanctions." *Perkins v. Gen. Motors Corp.*, 965 F.2d 597, 599 (8th Cir. 1992).

As *Perkins* and other authorities make clear, Pfizer can seek review of the underlying district court order regardless of Plaintiffs' disclaimer of the attorneys' fees they requested. Pfizer suffers a current injury to its reputation in the form of an order sanctioning its removal of this case based on jurisdictional grounds that Pfizer maintains are well supported, including by a decision of the Supreme Court in 2014, as well as decisions of other courts applying relevant federal and Missouri law. Pfizer's injury from the district court's sanctions order is redressable by this Court, and this appeal thus presents a live controversy. Plaintiffs' motion to dismiss should be denied.

Plaintiffs' motion is also untimely under this Court's rules. Eighth Circuit Rule 47A(b) requires that, absent good cause, an appellee must file any motion to dismiss for lack of jurisdiction within fourteen days of the docketing of the appeal. Plaintiffs moved to dismiss twenty days after docketing of the appeal and have not

attempted to show good cause for their delay. For this reason too, their motion should be summarily denied.

BACKGROUND

In this multi-plaintiff products liability action filed in Missouri state court, Plaintiffs are 64 unrelated women from 29 different states who allege that they developed type 2 diabetes as a result of taking Lipitor, a prescription medication made by Pfizer and approved by the FDA to lower cholesterol. Plaintiffs assert their claims against Pfizer, a citizen of New York and Delaware. (Pls.' Ex. A, Compl. ¶ 67.) Of the 64 Plaintiffs, 60 allege citizenship in states other than Missouri and six allege citizenship non-diverse from Pfizer (New York). (*Id.* ¶¶ 4-66.)

On March 31, 2016, Pfizer removed this action to the Eastern District of Missouri on several grounds, including based on a lack of personal jurisdiction over the claims of the out-of-state (and non-diverse) Plaintiffs as well as the procedural misjoinder doctrine. (Pls.' Ex. B.) Pfizer's personal jurisdiction arguments, which are based on the Supreme Court's landmark decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), have been accepted by district courts around the country as a basis for removal and have not been rejected by this Court.[1] Pfizer

[1] *See, e.g.*, *Aclin v. PD-RX Pharm. Inc.*, --- F. Supp. 3d ----, 2016 WL 3093246, at *5-8 (W.D. Okla. June 1, 2016); *In re Zofran (Ondansetron) Prods. Liab. Litig.*, 2016 WL 2349105, at *3-4 (D. Mass. May 4, 2016); *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, --- F. Supp. 3d ----, 2016 WL 640520, at *4-6 (N.D. Ill. Feb. 18, 2016); *Kraft v. Johnson & Johnson*, 97 F. Supp. 3d 846, 852-54 (S.D. W. Va. 2015); *Locke v. Ethicon Inc.*, 58 F. Supp. 3d

also moved to dismiss the claims of out-of-state plaintiffs due to lack of jurisdiction and sought to stay the case pending transfer to the Lipitor MDL pending in the District of South Carolina. (*See* Ex. 1, Mem. in Supp. of Mot. to Dismiss; Ex. 2, Mem. in Supp. of Mot. to Stay.)[2] Plaintiffs opposed Pfizer's motion to dismiss and filed a motion to remand in which they requested sanctions in the form of attorneys' fees under section 1447(c). (*See* Ex. 3, Mem. in Supp. of Mot. to Remand at 13.)

On April 29, 2016, the district court issued a Memorandum and Order denying Pfizer's motion to stay, granting Plaintiffs' motion to remand to state court, and granting Plaintiffs' request for sanctions in the form of attorneys' fees and costs under section 1447(c). (Pls.' Ex. D, Order at 9-10.) Despite Pfizer's citation of many decisions from other district courts accepting its removal arguments, including in cases removed from Missouri state courts, the district court held that "defendant lacked an objectively reasonable basis for seeking removal" because Pfizer purportedly ignored "repeated admonishments" from the courts in the Eastern District of Missouri rejecting those arguments in other cases. (*Id.* at 9.) In granting Plaintiffs' request for sanctions in the form of attorneys' fees under section 1447(c), the district court provided Plaintiffs "five days from the date of this order to submit documentation of the costs and expenses they reasonably

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757, 761-65 (S.D. Tex. 2014); *Evans v. Johnson & Johnson*, 2014 WL 7342404, at *5-6 (S.D. Tex. Dec. 23, 2014).

[2] All Exhibits are attached to the supporting declaration of Mark S. Cheffo, submitted herewith.

incurred as a result of defendant's removal in support of their request for attorney fees and costs under 28 U.S.C. § 1447(c)." (*Id.* at 9-10.)

On May 4, 2016, Plaintiffs timely filed a request for fees totaling $14,800 and submitted itemized bills of their time in support. (Ex. 4, Plaintiffs' Fee Submission.) On May 19, 2016, the district court granted that request in part and entered an award against Pfizer in the amount of $6,200. (Pls.' Ex. E, Award at 4.)

On May 20, 2016, Pfizer timely filed a notice of appeal. (*See* Notice.) On the same day, Plaintiffs provided instructions to Pfizer for making a wire transfer of $6,200 to their account. (Ex. 5, Email from Jayme Brunkhorst to Craig Harrington (May 20, 2016).)

This Court docketed the appeal on June 2, 2016, and it has issued a briefing schedule. On June 16, 2016, Plaintiffs unilaterally filed a purported "satisfaction of judgment" in the district court in which they disclaimed a monetary interest in the fee award. (Pls.' Ex. G.) On June 22, 2016, a month after the appeal was filed and twenty days after docketing, Plaintiffs filed the instant motion to dismiss.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVIEW THE AWARD

This Court has jurisdiction to review the district court's order "find[ing] that plaintiffs are entitled to just costs and actual expenses because defendant lacked an objectively reasonable basis for seeking removal." (Pls.' Ex. D, Order at 9.)

A. A Fee Award Under Section 1447(c) Is a Reviewable Final Order

The district court had jurisdiction to award attorneys' fees as a sanction for improper removal under 28 U.S.C. § 1447(c). *See Bryant v. Britt*, 420 F.3d 161,

165 (2d Cir. 2005) (collecting cases). This Court now has jurisdiction under 28 U.S.C. § 1291 to review that ruling. An order granting remand under 28 U.S.C. § 1447 is generally not reviewable on appeal. *See* 28 U.S.C. § 1447(d); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 342-52 (1976), *abrogated in part on other grounds by Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996). At the same time, it is well settled that appellate courts have "jurisdiction to review … [a] district court's grant of attorney's fees and costs" under 28 U.S.C. § 1447(c) because it "is a final order subject to review under 28 U.S.C. § 1291." *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006).

This Court's review, therefore, is limited to determining "whether the district court properly awarded costs and attorney's fees" as a sanction for improper removal. *Durham*, 445 F.3d at 1250. "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). Thus, this Court can and should consider the merits of the district court's remand order as part of its determination of whether it was "just" to award costs and fees under this standard. *Id.* at 138, 141.

"[T]o determine whether a [fee award] was erroneous," this Court "*must undertake a de novo examination* of whether the remand order was legally correct." *Dahl v. Rosenfeld*, 316 F.3d 1074, 1077 (9th Cir. 2003) (quotation omitted, emphasis added). "[A]n award of attorneys' fees based on a legally erroneous remand order constitutes an abuse of discretion." *Legg v. Wyeth*, 428

F.3d 1317, 1320 (11th Cir. 2005); *accord Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (addressing Rule 11 sanctions).

Thus, "the propriety of the defendant's removal continues to be central in determining whether to impose fees," as well as in reviewing a decision to impose such sanctions. *Miranti v. Lee*, 3 F.3d 925, 928 (5th Cir. 1993). Courts of appeals have thus reversed and vacated sanctions under 28 U.S.C. § 1447(c) based on the determination that the district court's remand order was erroneous. *See, e.g.*, *Legg*, 428 F.3d at 1322, 1325; *Roxbury Condo. Ass'n, Inc. v. Anthony S. Cupo Agency*, 316 F.3d 224, 227-28 (3d Cir. 2003); *Miranti*, 3 F.3d at 928-29; *Durham*, 445 F.3d at 1250, 1254; *Dahl*, 316 F.3d at 1079. Likewise, this Court has affirmed the denial of a request for sanctions under 28 U.S.C. § 1447(c) where it "conclude[d] that removal was not improper." *Convent Corp. v. City of N. Little Rock, Ark.*, 784 F.3d 479, 481 (8th Cir. 2015). This Court therefore has jurisdiction to review and reverse the district court's fees award on the ground that Pfizer's removal was legally proper.

B. A Fee Award Under Section 1447(c) Constitutes a Sanction

The district court's award of fees against Pfizer under section 1447(c) is a sanctions order that Pfizer has standing to appeal. This Court has acknowledged that fee awards under section 1447(c), like awards under Rule 11 and 28 U.S.C. § 1927, are examples of "sanctions … expressly authorized by federal laws intended to protect the integrity of the judicial process." *Dakota, Minn. & E. R.R. Corp. v. Schieffer*, 715 F.3d 712, 712 (8th Cir. 2013) (citing *Wells Fargo Bank W., Nat'l Ass'n. v. Burns*, 100 F. App'x 599 (8th Cir. 2004)). And in *Johnson v. AGCO*

Corp., 159 F.3d 1114 (8th Cir. 1998), this Court likewise noted that plaintiff "asked for sanctions in the district court pursuant to Fed. R. Civ. P. 11(c) and 28 U.S.C. § 1447(c)." *Id.* at 1116. This Court's treatment of section 1447(c) awards as a form of sanctions is consistent with that of its sister courts.[3]

Section 1447(c) serves as a basis for sanctions on improper litigation conduct. The Supreme Court held in *Martin* that one of the purposes of this

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[3] *See, e.g.*, *Unanue-Casal v. Unanue-Casal*, 898 F.2d 839, 843 (1st Cir. 1990); *In-Touch Mgmt. Sys., Inc. v. Gothelf*, 182 F.3d 900, 1999 WL 376081, at *1 (2d Cir. 1999) (table); *Brown v. Brown*, 977 F.2d 571, 1992 WL 266856, at *1 (4th Cir. 1992) (table) ("The district court may assess sanctions when denying a removal petition."); *In re Crescent City Estates, LLC*, 588 F.3d 822, 831 (4th Cir. 2009) ("Where an attorney's decision to remove *is* particularly blameworthy, courts do not need § 1447(c) to impose sanctions."); *LaGrotte v. Simmons Airlines, Inc.*, 250 F.3d 739, 2001 WL 274124, at *3 (5th Cir. 2001) (table) ("[W]e do have jurisdiction over the district court's order of sanctions finding bad-faith removal and imposing costs and attorney fees under § 1447(c)."); *MidSouth Bank, N.A. v. McZeal*, 463 F. App'x 308, 309 (5th Cir. 2012) (district court granted "request for removal sanctions under 28 U.S.C. § 1447(c) after finding that [defendant] lacked an objectively reasonable basis for removal"); *Taylor v. Currie*, 208 F. App'x 401, 2006 WL 3690371, at *1 (6th Cir. 2006); *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 332 (6th Cir. 2007) ("Removal absent an objectively reasonable basis may also subject an attorney to the imposition of sanctions …."); *Lundahl v. Home Depot, Inc.*, 594 F. App'x 453, 454 (10th Cir. 2014) (plaintiff "requested sanctions … under 28 U.S.C. § 1447(c) and Fed. R. Civ. P. 11 based on their wrongful removal"). Although the Seventh Circuit previously held "that § 1447(c) is not a sanctions rule," but rather "a fee-shifting statute," *Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407, 410 (7th Cir. 2000), the Supreme Court specifically rejected that view in *Martin*. *See* 546 U.S. at 137-38. The Seventh Circuit has since acknowledged that section 1447(c) is a sanctions provision. *Franke v. Cana Invs., LLC*, 333 F. App'x 106, 107 (7th Cir. 2009) ("Franke should count himself lucky that the district judge did not award attorneys' fees, or other sanctions, under 28 U.S.C. § 1447(c)."); *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 813 (7th Cir. 2015) ("[F]rivolous removal leads to sanctions, potentially including fee-shifting, see 28 U.S.C. § 1447(c).").

provision was "to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party," and thus "turn[s] on the *reasonableness* of the removal." 546 U.S. at 140-41 (emphasis added). That purpose is consistent with provisions that permit courts to award sanctions for litigation conduct that "unreasonably and vexatiously" multiplies proceedings, 28 U.S.C. § 1927, and for litigation that is "presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." Fed. R. Civ. P. 11(b)(1).[4] Yet because the removal statute was also enacted "to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied," *Martin*, 546 U.S. at 140, it is important for the courts of appeals to be able to review such sanctions and determine whether removal was lawful.

Finally, the district court record here reinforces that the order below constitutes a sanction. Plaintiffs claimed that Pfizer's "actions here were done in bad faith and served only to delay the administration of justice and waste the Court's time and resources." (Ex. 3, Mem. in Supp. of Mot. to Remand at 14.) Seeking an expression of "'the displeasure of a district court whose authority has been improperly invoked,'" Plaintiffs accordingly requested an award of attorneys' fees that would redress Pfizer's alleged "pattern of procedural abuse and continued

[4] The Senate Report accompanying the enactment of section 1447(c) explained that the provision was intended to work in tandem with Rule 11: section 1447(c) "ensures that a substantive basis exists for requiring payment of actual expenses incurred in resisting an improper removal," while Rule 11 "can be used to impose a more severe sanction when appropriate." 134 Cong. Rec. S16284-01 (Oct. 14, 1988).

disregard for binding Eighth Circuit precedent and, more importantly the time and resources of this District." (*Id.*) The district court accepted these arguments and concluded that in light of "repeated admonishments and remands to state court" by courts in the Eastern District of Missouri, Pfizer "can no longer argue that its asserted basis for seeking removal to federal court in these circumstances is objectively reasonable." (Pls.' Ex. D, Order at 9.) The district court thus granted Plaintiffs' request by expressing its displeasure and by awarding attorneys' fees and costs under section 1447(c). (*Id.* at 9-10.) This ultimate determination by the district court constitutes an appealable award of sanctions.

C. A Disclaimer of Monetary Interest Does Not Moot Sanctions

Plaintiffs contend that they have now unilaterally disclaimed a monetary interest in the sanctions award they pursued and obtained under section 1447(c) and that, as a result, "Pfizer's appeal is moot because neither this Court nor any other can grant Pfizer any effective relief and the appeal can have no practical effect." (Mot. at 7.) Yet the law instructs that Plaintiffs are wrong, and they fail to cite the relevant Eighth Circuit precedent on this point of law.

In *Perkins*, this Court expressly held that it does not lose appellate jurisdiction to review a sanctions award "merely because an adversary chooses not to collect the sanctions." *Perkins*, 965 F.2d at 599. In *Perkins*, after the district court imposed Rule 11 sanctions on the plaintiff, the parties settled and jointly moved to vacate the sanctions order. *Id.* at 598. This Court rejected the plaintiff's contention that the parties' agreement mooted the plaintiff's appeal of the sanctions order, explaining that while parties "are entitled to bargain with adversaries to drop

a motion for sanctions, … they cannot unilaterally bargain away the court's discretion in imposing sanctions and the public's interest in ensuring compliance with the rules of procedure." *Id.* at 600. So, too, here. Plaintiffs' unilateral and belated decision not to collect the award of fees does not vacate the underlying district court opinion and order, which stands as a sanctions decision against Pfizer to its continuing harm.

Similarly, this Court has held that a party subject to sanctions may appeal based on the injury from the court's determination that the party has violated the law, even absent monetary harm. *U.S. ex rel. Farmers Home Admin. v. Nelson*, 969 F.2d 626 (8th Cir. 1992). In *Nelson*, this Court considered whether it had appellate jurisdiction to review "an adjudication that [a federal agency] was in violation of federal law" by violating an automatic stay in bankruptcy where that ruling ultimately did not alter the rights or status of the parties in the underlying bankruptcy proceeding. *Id.* at 629. This Court explained that "[c]learly this is very much a live issue insofar as the [agency] is concerned," since the finding of "violation of federal law is indeed a sanction, and one that the [the agency] should be permitted to seek to reverse on appeal." *Id.* That injury could "be redressed by a favorable judicial decision … revers[ing] the determination that the [agency] violated federal bankruptcy law." *Id.* (quotation omitted). Thus, a justiciable controversy may exist even though "'the adjudication of the rights of the litigants may not require the award of process or the payment of damages.'" *Id.* (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937)). Here also, that Pfizer

may not be required to pay the award does not deprive it of standing to challenge the district court's sanction.

Decisions from other courts of appeals are in accord. For example, the Third Circuit, citing *Perkins*, has held that a financial settlement between parties "did not moot the appeals" from a sanctions order "because the Appellants experienced (and continue to experience) reputational harm." *Grider v. Keystone Health Plan Cent., Inc.*, 580 F.3d 119, 133 (3d Cir. 2009); *accord Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 542-43 (3d Cir. 2007). Likewise, the Second Circuit has held that where "the parties have entered into a voluntary agreement not to collect a monetary sanctions award," a sanctioned attorney had standing to appeal based on reputational harm and because he was not party to the agreement. *Agee v. Paramount Commc'ns, Inc.*, 114 F.3d 395, 399 (2d Cir. 1997).

The Fifth Circuit has concluded that "monetary penalties or losses are not an essential for an appeal" of sanctions, since the contrary view would suggest that a nominal fine is more important than, for example, "a finding and declaration by a court that counsel is an unprofessional lawyer prone to engage in blatant misconduct." *Walker v. City of Mesquite, Tex.*, 129 F.3d 831, 832 (5th Cir. 1997). Here also, the district court's determination that Pfizer's removal of this action was not "objectively reasonable," despite the numerous authorities Pfizer cited that have accepted identical arguments, is of far greater importance than the $6,200 award Plaintiffs have unilaterally and belatedly elected to forego.

As Plaintiffs recognize, and as their own cases note, a satisfaction of judgment may be held to moot an appeal only if no "other issues remain." (*Id.* at 8

(citing *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 333 (1980)).) Here, the issue of whether Pfizer's conduct was sanctionable under section 1447(c) remains, notwithstanding Plaintiffs' disclaimer of interest. Pfizer "experienced (and continue[s] to experience) reputational harm" as a result of the sanctions order. *Grider*, 580 F.3d at 133. A decision on the propriety of that order would therefore not, as Plaintiffs suggest, be "an advisory opinion as to whether [Pfizer] had a reasonable basis for its removal." (Mot. at 8.) Rather, reversal by this Court would provide a remedy for Pfizer's injury by vacating the district court's finding that this action was wrongfully removed in knowing violation of the law and contrary to "repeated admonishments" of the district court. (Pls.' Ex. D, Order at 9 (emphasis added).) This appeal presents a live controversy suitable for this Court's decision, and Plaintiffs' motion to dismiss should therefore be denied.

II. PLAINTIFFS' MOTION TO DISMISS IS UNTIMELY

Plaintiffs' motion to dismiss is also untimely under Eighth Circuit Rule 47A(b), which provides that, "[e]xcept for good cause or on the motion of the court, a motion to dismiss based on jurisdiction must be filed within fourteen days after the court has docketed the appeal." Here, Pfizer filed its notice of appeal on May 20, 2016 (Ex. 6), and the Court docketed the appeal on June 2, 2016. Plaintiffs did not file their purported "satisfaction of judgment" in the district court until June 16 (Pls.' Ex. G), and they did not move to dismiss this appeal until June 22—twenty days after the appeal was docketed and a full month after the appeal was filed.

Plaintiffs do not attempt to—and cannot—show good cause for their untimely motion, which springs from an abrupt reversal of course unsuccessfully attempting to divest this Court of jurisdiction. Plaintiffs' motion should be summarily denied.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion to dismiss this appeal for lack of jurisdiction should be denied.

Dated: July 1, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document via electronic mail, to the following non-CM/ECF participants:

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