UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

(609) 989-2182

CHAMBERS OF
FREDA L. WOLFSON
UNITED STATES DISTRICT JUDGE

Clarkson S. Fisher Federal Building
& U.S. Courthouse
402 East State Street
Trenton, New Jersey 08608

July 22, 2014

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RE: Hood *ex rel.* State of Mississippi v. Bristol Myers Squibb Co., *et al.*
Civ. Action No.: 13-5910
MDL No. 2418

Counsel:

In this case, Plaintiff Jim Hood, Attorney General of the State of Mississippi ("Plaintiff" or the "State"), brings a *parens partiae* action against Defendant Bristol Myers Squibb Co. ("Defendant" or "BMS"), pursuant to the Mississippi Consumer Protection Act ("MCPA"), alleging that BMS unfairly, falsely and deceptively labeled and promoted the prescription drug Plavix to consumers. Plaintiff moves for remand of this matter, a member case in the *In re Plavix* Multidistrict Litigation ("MDL") assigned to me. This is not Plaintiff's first remand attempt,

however; indeed, Plaintiff moved for remand before the transferor court, a district court in the Northern District of Mississippi. *See Hood v. Bristol-Myers Squibb Co.*, No. 12-179, 2013 U.S. Dist. LEXIS 90540 (N.D. Miss. Jun. 27, 2013) ("*Hood*"). That court denied remand on two separate grounds: 1) federal jurisdiction exists under the Class Action Fairness Act ("CAFA"); and 2) diversity jurisdiction exists because Mississippi is a nominal party. Thereafter, *Hood* was transferred to this Court by the MDL Panel.

On February 26, 2014, in another companion case, *West Virginia v. Bristol-Myers Squibb Co.*, No. 13-1603, 2014 U.S. Dist. LEXIS 24026 (D.N.J. Feb. 26, 2014) ("*West Virginia*"), this Court held that in a *parens patriae* suit, West Virginia was the real party in interest when it brought consumer fraud claims against BMS, pursuant to West Virginia's Consumer Credit Protection Act. Moreover, this Court, relying on recent Supreme Court precedent in *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014), concluded that *parens patriae* suits brought by state attorney generals are generally not removable as "class actions" under CAFA. Indeed, my decision in *West Virginia* involved identical legal issues concerning federal jurisdiction as those addressed by the *Hood* court, albeit, I reached the opposite conclusion in favor of remand.

Based upon this Court's *West Virginia* decision, Plaintiff moves for remand here and asks this Court to reconsider the decision made by the transferor court. In response, Defendant opposes Plaintiff's request, however, BMS acknowledges that "if this Court were writing on a blank slate, it would likely remand [*Hood*] as it did in [*West Virginia*]." Def. Letter dated April 10, 2014, p.1. Defendant insists that principles of comity prevent this Court from changing the outcome of this motion; that is, I must defer to the transferor court's decision to deny remand, even if I disagree with its holding. While I note that normally, a transferee court should give deference to a transferor

court's decision, I find, here, circumstances permit me under the exceptions to the law of the case doctrine to grant remand.

Indeed, nothing in the text of 28 U.S.C. 1407, the statutory provision governing MDLs, addresses whether a transferee judge can vacate or modify an order of the transferor judge. *See Bellevue Drug Co. v. Caremarks PCS (In re Pharm. Benefit Managers Antitrust Litig.)*, 582 F.3d 432, 440 (3d Cir. 2009). According to the Third Circuit, " [a] court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would make a manifest injustice." *Id.* at 439 (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988)). This proposition is also known as the law of the case doctrine. In that connection, however, the law of the case doctrine "does not preclude a court from revisiting its own decisions or one of a coordinate court where (1) new evidence is available or (2) a supervening new law has been announced." *Id.* (Internal citations and quotations omitted). More importantly, the Third Circuit has definitively stated that a transferee judge "has the discretion to reconsider an issue and should exercise that discretion whenever it appears that a previous ruling [from a transferor judge], even if unambiguous, might lead to an unjust result." *Id.* (citations omitted).

At the outset, I note that since the *Hood* decision, the Supreme Court rendered its ruling in *AU Optronics*, wherein the Court found that CAFA jurisdiction is generally not appropriate in *parens partiae* suits. *AU Optronics Corp.*, 134 S. Ct. at 736. There is no dispute here that based on that decision this Court would not have CAFA jurisdiction over this case, and that this supervening law would justify changing *Hood* in this context.

Similarly, an exception to law of the case doctrine applies to the issue of diversity jurisdiction. Briefly, in order to determine that a state is the real party in interest in a *parens patriae* suit, the Court must examine whether the state is pursuing a quasi-sovereign interest, while suing on behalf of its citizens. *See Pennsylvania v. Porter*, 659 F.2d 306, 328 (3d Cir. 1981); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257-58 (1972). A quasi-sovereign interest is generally either a direct injury to the state, or to the general public so that "no one individual has legal standing to sue." *Commonwealth of Pennsylvania v. National Association of Flood Insurers*, 520 F.2d 11, 22 (3d Cir. 1975). In that regard, it is "well accepted that a state is the real party in interest when it brings a claim for civil penalties because such awards add only to the state's coffers rather than any individual's bank account." *West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 447 (E.D. Pa. 2010); *Connecticut v. Levi Strauss & Co.*, 471 F. Supp. 363, 372 (D. Conn. 1979). Moreover, this Court has stated that injunctive relief alone supports the position that the State is the only real party in interest. *West Virginia ex rel. McGraw v. Comcast Corp.*, 705 F. Supp. 2d 441, 447 (E.D. Pa. 2010) ("Courts have universally accepted the notion that a state is the real party in interest when it brings a claim for injunctive relief because such a remedy protects both current and prospective consumers . . . ."). Indeed, the law in this context is not dissimilar in the Fifth Circuit. *See Hood,* 2013 U.S. Dist. LEXIS 90540 at *13-14; *see Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 430 (5th Cir. 2008); *Jim Hood ex rel. Miss. v. JP Morgan Chase & Co.*, 737 F.3d 78, 88 (5th Cir. 2013).

Similar to the plaintiff in *West Virginia*, Plaintiff, here, seeks damages for injunctive relief, civil penalties, and disgorgement in equity. Based on these remedies, the *Hood* court evaluated who would ultimately benefit from this case, i.e., the State or private consumers, to determine the real

party in interest. Undertaking that review, the court first found that the MCPA does not allow the state to collect damages on behalf of consumers, *see Hood,* 2013 U.S. Dist. LEXIS 90540 at *30, and therefore, no civil penalties or disgorgement in equity could be distributed amongst individuals. Second, the court held that the statute requires that "every private action must be maintained in the name of and for the sole use and benefit of the individual person," *Id.* at 15, which means that only the private citizens who were named plaintiffs could benefit from these remedies. Third, the court found that the remedy of injunctive relief sought was a "compelling argument that the state is the only real party in interest" as it is proper for a *parens patriae* plaintiff to request such relief. *Id*. at *14. It would appear from these findings that the transferor court should have found that the state was the only real party in interest. And, in fact, those are the same reasons why this Court found that the state was the real party in interest in *West Virginia*. However, the transferor court, nevertheless, held that because the language used in the original complaint "indicate[d] that the injury complained of was suffered by the user or purchaser consumer," the state was a nominal party in suit. *Hood,* 2013 U.S. Dist. LEXIS 90540 at *17-18. I disagree because the transferor court's focus limited on the language of the pleadings which is not dispositive of the jurisdictional questions raised here. Consequently, such a misplaced reliance on the pleadings necessarily requires that I exercise my discretion to correct the outcome in order to avoid an unjust result. *See In re Pharm. Benefit Managers Antitrust Litig.*, 582 F.3d at 440.

In support of its decision, the transferor court cited to multiple sections of the Complaint, which essentially allege that injury complained of by the State was suffered by the individual consumers. *See, e.g.*, Pl.'s Compl. ¶ 5.32 ("Defendants . . . . continue to choose[] to put their corporate profits ahead of patients' safety . . . . "); *id*. ¶ 5.35 ("In short, Defendant's bilked

purchasers including Mississippi patients, their insurers, public healthcare providers, public entities, and government payors, including Plaintiff, out of hundreds of millions of dollars . . . ."); *id.* ¶ 6.5 ("Defendants disseminated false and misleading information to the public, including Mississippi doctors and citizens, regarding the health risks associated with Plavix®."); *id.* ¶ 7.2 ("causing Defendants to receive a financial windfall from the State and from Mississippi consumers"). The transferor court then reasoned that because the State alleges that the State and individual consumers suffered injuries as a result of Defendant's business practices, the public – individual consumers and purchases – is the real party in interest. But, that is not the law; in order for the state to bring a *parens partiae* suit, the state must "allege injury to a sufficiently substantial segment of its population." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982). In fact, those allegations in the Complaint pertaining to public injury are precisely the types of harm the State must aver in order to sustain a *parens partiae* action. As I have indicated, a state may sue on behalf of its citizens as *parens patriae* only when the interests of a group of citizens are at stake. *West Virginia*, 2014 U.S. Dist. LEXIS 24026 at *10. Thus, the pleadings in the Complaint in this regard clearly accomplish that goal. It is erroneous, then, to find that the State is a nominal party when it seeks to vindicate a public wrong, which is the very essence of a *parenes partiae* action.

Moreover, the State, here, has clearly articulated quasi-sovereign interests, as identified by the transferor court: the civil penalties which the state seeks only flows to the state for its benefit as authorized by the MCPA, *see Missouri, K. & T. Ry. Co. of Kansas v. Missouri R. & Warehouse Comm'rs*, 183 U.S. 53, 59 (1901) ("It may be fairly held that the State is such [a] real party [in interest] when the relief sought is that which enure to it alone, and in its favor the judgment or decree, if for the plaintiff, will effectively operate"); and the remedy of injunctive relief supports the

conclusion that the State is the only real party in interest. *See Comcast*, 705 F. Supp. 2d at 447 ("Courts have universally accepted the notion that a state is the real party in interest when it brings a claim for injunctive relief because such a remedy protects both cur-rent and prospective consumers . . . ."). My conclusion regarding Mississippi's quasi-sovereign interests in this context is further supported by a district court's decision in *In Re Standard & Poor's Rating Agency Litig.*, No. 13-2446, 2014 U.S. Dist. LEXIS 76163 (S.D.N.Y. June 3, 2014). In that case, in finding that the state of Mississippi is the real party in interest when bringing a *parenes partiae* action pursuant to the MCPA, that court disregarded the *Hood* court's reasoning to the contrary. *Id.* at *73-79. Simply, the purpose of Mississippi's Complaint here is to protect the State's citizens and uphold the integrity of its law. Accordingly, Mississippi – the sole named plaintiff – is the real party in interest in this case; Mississippi citizens, by contrast, are neither named parties nor real parties in interest. It follows that the parties are not completely diverse, and the case must be remanded. *Id.* at *82.

ORDERED that Plaintiff's motion for remand is **GRANTED**;

ORDERED that this case is transferred to the Northern District of Mississippi, Aberdeen Vicinage, for the purposes of remanding this matter to the Mississippi Circuit Court of Chickasaw County.

SO ORDERED.

Sincerely yours,

/s/ Freda L. Wolfson
FREDA L. WOLFSON
United States District Judge