

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION**

Theresa Dubose Harrison,

Plaintiff,

vs.

Bayer Corporation, Bayer Healthcare, LLC,
Bayer Pharmaceuticals Corporation, Bayer
Healthcare Pharmaceuticals, Inc., Berlex
Laboratories, Inc., Berlex, Inc., Bayer
Schering Pharma AG, and Bayer AG,

Defendants.

NOTICE OF REMOVAL

C.A. No.: _____

**TO: THE HONORABLE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF SOUTH CAROLINA, FLORENCE DIVISION**

Defendants Bayer Corporation, Bayer HealthCare LLC, and Bayer HealthCare Pharmaceuticals Inc., formerly known as Berlex, Inc., formerly known as Berlex Laboratories, Inc., on its own behalf and as successor by merger to Bayer Pharmaceuticals Corporation (“Bayer Defendants”), by and through undersigned counsel, hereby remove this action from the Darlington County Court of Common Pleas, State of South Carolina, to the United States District Court for the District of South Carolina, Florence Division, pursuant to 28 U.S.C. §§ 1332, 1441, and 1446. The removing defendants would show unto the Court as follows in support of this Notice of Removal:¹

1. Plaintiff Theresa Dubose Harrison filed this product liability action on June 21, 2010, in the Darlington County Court of Common Pleas, State of South Carolina, under Civil

¹ These removing defendants, by removing this case, do not enter an appearance for defendants Bayer Schering Pharma AG or Bayer AG, which have not been properly served with process.

Action No.: 2010-CP-16-0392. Plaintiff filed an Amended Complaint on July 20, 2010 and a Second Amended Complaint on July 26, 2010. *See* Exhibit A. Plaintiff asserts therein claims under theories of fraudulent concealment, strict products liability (defective manufacturing, design defect and defect due to inadequate warning), breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, negligent failure to warn, negligence, negligent misrepresentation, breach of express warranty and fraud.

2. Plaintiff's Second Amended Complaint alleges that Plaintiff Theresa Dubose Harrison ingested YAZ®, Yasmin®, and/or Ocella®, prescription combination oral contraceptives, and that in June 2006, she suffered serious menstrual clotting or blood clots in the uterus, which required an emergency hysterectomy and eventual removal of her gall bladder. *See* Plaintiff's Second Amended Complaint ("Plaintiff's Complaint"), ¶¶ 29, 68, 73, 83. Plaintiff further alleges that Theresa Dubose Harrison has sustained permanent injury with resulting economic damages, including medical expenses and other economic harm, as well as extreme mental anguish, depression, emotional distress, and pain and suffering. *See* Plaintiff's Complaint, ¶¶ 73, 74, 83. Plaintiff seeks against Defendants compensatory damages, punitive damages, and treble damages on all applicable causes of action, as well as pre-judgment and post-judgment interest, costs, expert fees, reasonable attorneys' fees and other relief. *See* Plaintiff's Complaint, p. 28, ¶¶ 1-6.

3. As more fully set forth below, this case is properly removed to this Court pursuant to 28 U.S.C. §§ 1332 and 1441 because the procedural requirements for removal are satisfied, and this is a civil action between citizens of different states in which the amount in controversy exceeds \$75,000, exclusive of interest and costs.

4. On October 1, 2009, the Judicial Panel on Multidistrict Litigation established MDL No. 2100, *In re Yasmin and YAZ (Drospirenone) Marketing, Sales Practices and Products Liability Litigation*, in the Southern District of Illinois to coordinate all federal marketing, sales practices, and products liability litigation involving Yasmin® and YAZ®. See Exhibit B. Chief Judge Herndon was assigned to preside over the MDL. The removing Bayer Defendants intend to identify this action as a potential "tag-along" to the MDL proceeding.

5. The removing Bayer Defendants submit this Notice of Removal without waiving any defenses to the claims asserted by Plaintiff or conceding that Plaintiff has pled claims upon which relief can be granted. Bayer Defendants specifically reserve the right to assert, if applicable, any and all defenses enumerated under Rule 12 of the Federal Rules of Civil Procedure or any other affirmative defenses, including those enumerated in Rule 8(c) of the Federal Rules of Civil Procedure, upon the filing of its responsive pleadings within the time allotted under the Federal Rules of Civil Procedure.

I. THE PROCEDURAL REQUIREMENTS FOR REMOVAL ARE SATISFIED.

6. Plaintiff's Summons and First Amended Complaint were formally served on Bayer Corporation, Bayer HealthCare LLC, Bayer HealthCare Pharmaceuticals Inc., and Bayer Pharmaceuticals Corporation on July 21, 2010, by way of certified mail to Corporation Service Company (CSC).² Therefore, this Notice of Removal, filed July 30, 2010, is timely under 28 U.S.C. § 1446(b) in that it is filed within thirty (30) days from the date on which the Bayer Defendants first received the Summons and Complaint. See also *Murphy Bros., Inc. v. Michetti*

² Undersigned counsel received a courtesy copy of Plaintiff's Second Amended Complaint from counsel for Plaintiff on July 28, 2010. None of the Bayer defendants have been formally served with the Second Amended Complaint, filed on July 20, 2010, at the time of filing this Notice of Removal. Moreover, none of the Bayer Defendants ever were served with Plaintiff's Original Complaint, which was filed on June 21, 2010.

Pipe Stringing, Inc., 526 U.S. 344, 354 (1999). The action was not commenced in state court more than one year before the date of removal.

7. Pursuant to 28 U.S.C. § 1446(a), copies of all process, pleadings, orders and other papers filed and properly served in the state court action are attached hereto as Exhibit A.

8. At the time of this filing, Bayer Schering Pharma AG and Bayer AG had not been properly served with the Summons and Complaint. Accordingly, consent from those entities is not required. *See, e.g., Branch v. Coca-Cola Bottling Co. Consol.*, 83 F. Supp. 2d 631, 633 (D.S.C. 2001) (all served defendants must consent to removal).

9. No further proceedings have taken place in the above-referenced action.

10. The United States District Court for the District of South Carolina, Florence Division, embraces the locality in which the state court action is now pending, and thus, this Court is a proper forum for this action pursuant to 28 U.S.C. §§ 90(a)(2) and 1441(a).

11. No previous application has been made for the relief requested herein.

12. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being served on Plaintiff's counsel and a copy is being filed with the Clerk of the Darlington County Court of Common Pleas, State of South Carolina.

13. This Notice of Removal is being signed pursuant to Rule 11 of the Federal Rules of Civil Procedure. A copy of the civil cover sheet is attached hereto.

14. If any question arises regarding the propriety of the removal of this action, the removing defendants respectfully request the opportunity to present a brief and an oral argument in support of the position that this case is removable.

II. REMOVAL IS PROPER BECAUSE THIS COURT HAS SUBJECT MATTER JURISDICTION PURSUANT TO 28 U.S.C. §§ 1332 AND 1441.

15. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332 because this is a civil action between citizens of different states in which the amount in controversy exceeds \$75,000, exclusive of interest and costs.

A. Complete Diversity of Citizenship Exists.

1. Plaintiff's Citizenship.

16. Plaintiff, upon information and belief, is a citizen of South Carolina. *See* Plaintiff's Complaint, ¶ 1 (alleging that Plaintiff Theresa Dubose Harrison is an adult resident of Darlington County, South Carolina).

2. Defendants' Citizenship.

17. Bayer Corporation is, and was when this action was served, an Indiana corporation with its principal place of business in Pennsylvania. *See* Plaintiff's Complaint, ¶ 2. Accordingly, Bayer Corporation is a citizen of Indiana and Pennsylvania for purposes of diversity jurisdiction. *See* 28 U.S.C. § 1332(c)(1) (for diversity of citizenship purposes, "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business").

18. Bayer HealthCare LLC is, and was when this action was served, a limited liability company whose sole member is (and was) Bayer Corporation. *See* Plaintiff's Complaint, ¶ 3. Accordingly, Bayer HealthCare LLC, like Bayer Corporation, is a citizen of Indiana and Pennsylvania for purposes of diversity jurisdiction. *See General Tech. Applications, Inc. v. Exro Ltda*, 388 F.3d 114, 121 (4th Cir. 2004) ("[A LLC] is an unincorporated association, akin to a partnership for diversity purposes, whose citizenship is that of its members").

19. Bayer HealthCare Pharmaceuticals Inc. is, and was when this action was served, a Delaware corporation with its principal place of business in New Jersey. *See* Plaintiff's Complaint, ¶ 6. Accordingly, Bayer HealthCare Pharmaceuticals Inc. is a citizen of Delaware and New Jersey for purposes of diversity jurisdiction.

20. Bayer Pharmaceuticals Corporation merged with and into Bayer HealthCare Pharmaceuticals Inc. effective January 1, 2008, and, prior to such merger, was a Delaware corporation with its principal place of business in Connecticut. *See* Plaintiff's Complaint, ¶ 4. Because diversity is measured at the time a suit is filed, *Freeport-McMoRan, Inc. v. K N Energy*, 498 U.S. 426, 428 (1991), the States of citizenship of Bayer Pharmaceuticals Corporation for diversity purposes are Delaware and New Jersey, the States of citizenship of Bayer HealthCare Pharmaceuticals Inc. *See Hoefflerle Truck Sales, Inc. v. Divco-Wayne Corp.*, 523 F.2d 543, 549 (7th Cir. 1975) ("after a foreign corporation merges into a Delaware corporation, the surviving corporation for diversity jurisdiction is a citizen of Delaware"); *Walton v. Bayer Corp.*, 692 F. Supp. 2d 1025, 1029 n.1 (S.D. Ill. 2010) (under Delaware law, "in the event of a merger, the separate existence of the constituent corporation ... ceases at the time of the merger and the constituent corporation's identity is absorbed into that of a new corporation or into the corporation with which it was merged"); *El Chico Rests., Inc. v. Aetna Cas. & Sur. Co.*, 980 F. Supp. 1474, 1482 (S.D. Ga. 1997) ("When one corporation is merged into another the citizenship of the survivor corporation governs for diversity purposes.").

21. Berlex Laboratories, Inc. was a Delaware corporation, which changed its name to Berlex, Inc. in 2003, which then changed its name again to Bayer HealthCare Pharmaceuticals Inc. in 2007. *See* Certificate of Amendment of Certificate of Incorporation of Berlex Laboratories, Inc.; Certificate of Amendment of Certificate of Incorporation of Berlex, Inc.

(Exhibit C); see also Plaintiff's Complaint, ¶¶ 10-11. Thus, Bayer HealthCare Pharmaceuticals Inc. is the same corporate entity as Berlex Laboratories, Inc. and Berlex, Inc., which means that the States of citizenship of Berlex Laboratories, Inc. and Berlex, Inc. for diversity purposes are Delaware and New Jersey, the States of citizenship of Bayer HealthCare Pharmaceuticals Inc. *See Freeport-McMoRan*, 498 U.S. at 428; *Hoefflerle*, 523 F.2d at 549; *Walton*, 692 F. Supp. 2d at 1029 n.1; *El Chico*, 980 F. Supp. at 1482.

22. Bayer Schering Pharma AG is a German corporation with its principal place of business in Germany. *See* Plaintiff's Complaint, ¶¶ 12-14. Thus, for diversity purposes, Bayer Schering Pharma AG is a citizen of Germany.

23. Bayer AG is a German corporation with its principal place of business in Germany. *See* Plaintiff's Complaint, ¶ 18. Thus, for diversity purposes, Bayer AG is a citizen of Germany.

B. The Amount in Controversy Requirement is Satisfied.

24. Although Plaintiff has not alleged a sum certain, it is apparent from the face of Plaintiff's Complaint that the amount in controversy in this product liability case substantially exceeds \$75,000, exclusive of costs and interest. Plaintiff's Complaint, p. 28, ¶¶ 1-6.

25. The Complaint alleges that Theresa Dubose Harrison suffered serious menstrual clotting or blood clots in the uterus, which required an emergency hysterectomy and eventual removal of her gall bladder. *See* Plaintiff's Complaint, ¶¶ 29, 68, 73, 83. Plaintiff further alleges that Theresa Dubose Harrison has sustained permanent injury with resulting economic damages, including medical expenses and other economic harm, as well as extreme mental anguish, depression, emotional distress, and pain and suffering. *See* Plaintiff's Complaint, ¶¶ 73, 74, 83.

26. The Complaint seeks compensation for compensatory damages, punitive damages, and treble damages on all applicable causes of action, as well as pre-judgment and post-judgment interest, costs, expert fees, reasonable attorneys' fees and other relief. *See* Plaintiff's Complaint, p. 28, ¶¶1-6.

27. Given the permanent, serious nature of the alleged injuries and the broad scope of damages requested, the Complaint plainly satisfies the jurisdictional amount requirement.

WHEREFORE, Defendants Bayer Corporation, Bayer HealthCare LLC, and Bayer HealthCare Pharmaceuticals Inc., formerly known as Berlex, Inc., formerly known as Berlex Laboratories, Inc., on its own behalf and as successor by merger to Bayer Pharmaceuticals Corporation, respectfully remove this action from the Darlington County Court of Common Pleas, State of South Carolina, to the United States District Court for the District of South Carolina, Florence Division, pursuant to 28 U.S.C. §§ 1332, 1441, and 1446. Should any question arise as to this removal, the removing defendants respectfully request an opportunity to provide briefing and an oral argument as to why removal is proper.

Respectfully submitted, this 30 day of July, 2010.

s/ Laura T. McDonald

Daniel B. White (Fed. ID No. 4612)
Laura T. McDonald (Fed. ID No. 9285)
GALLIVAN, WHITE & BOYD, P.A.
55 Beattie Place, Suite 1200
P.O. Box 10589
Greenville, SC 29603
(864) 271-9580
(864) 271-7502 (fax)
dwhite@gwblawfirm.com
lmcdonald@gwblawfirm.com

Attorneys for Defendants
Bayer Corporation, Bayer HealthCare LLC,
and Bayer HealthCare Pharmaceuticals Inc.,
f/k/a Berlex, Inc., f/k/a Berlex Laboratories,
Inc., on its own behalf and as successor by
merger to Bayer Pharmaceuticals
Corporation