Not Reported in F.Supp.2d, 2000 WL 33180833 (E.D.Mich.), 2000-2 Trade Cases P 73,112
(Cite as: 2000 WL 33180833 (E.D.Mich.))

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United States District Court, E.D. Michigan, Southern Division.
In re CARDIZEM CD ANTITRUST LITIGATION.
No. 99-MD-1278.

Sept. 21, 2000.

ORDER

EDMUNDS, J.

GOLDMAN, Magistrate J.

***1** For the reasons stated on the record at the hearing held on September 18, 2000, Plaintiffs' Motion to Compel Documents Produced in Biovail Litigation [D/E No. 180] is granted. IT IS ORDERED that Defendants shall produce for inspection all categories of documents deemed contested and uncontested in the September 15, 2000 joint submission.

The parties are hereby informed that any objections to this order must be filed with the district court within ten days after entry, pursuant to Rule 72(a), Federal Rules of Civil Procedure.

ORDER NO. 17

MEMORANDUM OPINION AND ORDER GRANTING IN PART AND CONDITIONALLY GRANTING IN PART STATE LAW PLAINTIFFS' MOTION FOR LEAVE TO AMEND THEIR FIRST AMENDED COORDINATED CLASS ACTION COMPLAINTS

This matter comes before the Court on State Law Plaintiffs' ("Plaintiffs") motion to amend their first amended coordinated class action complaints, brought pursuant to Fed.R.Civ.P. 15(a). Plaintiffs seek leave to amend their coordinated complaints so as to: (1) add to the Michigan action, with Charles Zuccarini and Aetna U.S. Healthcare, Inc. ("Aetna") as named Plaintiffs, common law unjust enrichment claims on behalf of a nationwide class that includes all persons who conferred benefits upon Defendants through payments or co-payments to pharmacies and mail-order services in the United States for Cardizem CD and Cartia XT (individuals and third-party payers like Aetna); [FN1] and (2) amend the class definitions to include end payers (like Aetna) who paid mail order pharmacies (Defendants do not object to this clarification) and to exclude retail pharmacies (Defendants do object to this). The amended classes are now defined to include only end payers; i.e., consumers and third party payers. Retail pharmacies remain as named Plaintiffs in the Alabama, California and New York actions, but the amended coordinated complaints expressly exclude from the alleged classes "entities which purchased Cardizem CD or Cartia XT for resale."

FN1. At the September 18, 2000 hearing, Plaintiffs stated that they were no longer seeking leave to amend so as to assert, in the Michigan action, state antitrust/consumer protection claims brought on behalf of consumers and third party payers in Arizona, Florida, Kansas, Maine, New Jersey, New Mexico, North Dakota, Pennsylvania, South Dakota and West Virginia.

This Court is not persuaded by Defendants' arguments of undue delay, prejudice, futility, or other impropriety and thus GRANTS Plaintiffs' motion to add, in the Michigan action, common law unjust enrichment claims on behalf of a nationwide class. The Court will allow additional discovery or briefing needed to respond to Plaintiffs' pending motion for class certification and will amend its Scheduling Order accordingly.

As to Plaintiffs' proposed amendment deleting retail pharmacies from its class allegations, this Court

concludes that Fed.R.Civ.P. 23(e) is implicated. Accordingly, its GRANT of Plaintiffs' motion to amend its class definition to exclude retail pharmacies is CONDITIONED upon Plaintiffs' showing that the scope, content, and timing of their notice proposal adequately protects the interests of this putative class. The Court's decision to Grant is held in abeyance pending resolution of this issue.

I. Standard for Rule 15 Amendments

"Rule 15(a) of the Federal Rules of Civil Procedure explicitly states that leave to amend a pleading should be 'freely given when justice so requires.' Fed.R.Civ.P. 15(a). The Supreme Court has interpreted this statement to mean that, '[i]n the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc. - the leave sought should, as the rules require, be 'freely given." ' *Hahn v. Star Bank*, 190 F.3d 708, 715 (6th Cir.1999) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)), *cert. denied.* 120 S.Ct. 1423 (2000). "In general, the Sixth Circuit is 'very liberal' in permitting amendments." *United States ex rel American Textile Mfrs. Inst., Inc. v. The Limited. Inc .*, 179 F.R.D. 541, 550 (S.D.Ohio 1998), *aff'd.* 190 F.3d 729 (6th Cir.1999).

II. Analysis

A. Amendment to the Michigan Action

***2** In January of this year, the Court considered the parties' proposals for class discovery. It was decided that the Court would use an exemplar approach in the State Law Plaintiffs' class actions and Michigan was chosen as the exemplar state. At that time, the Michigan action asserted an unjust enrichment claim on behalf of a state-wide class and asserted antitrust and/or consumer protection claims solely under Michigan law. Plaintiffs now seek leave to amend their consolidated complaints so as to add to the Michigan action unjust enrichment claims on behalf of a nationwide class. Defendants oppose Plaintiffs' motion arguing that the proposed amendment is untimely, prejudicial, futile, and otherwise improper. This Court is not persuaded by Defendants' arguments.

1. Claims of Undue Delay and Prejudice

Defendants contend that the Court should deny leave to amend because Plaintiffs' delay in bringing their July 21, 2000 motion is "unexplained and inexcusable"; i.e., it is brought over one year after the state law actions were transferred to this Court for MDL proceedings and too close to class discovery and briefing deadlines on Plaintiffs' motion for class certification which is set to be heard on November 20, 2000. "Delay alone, however, does not justify the denial of leave to amend. Rather, the party opposing a motion to amend must make some significant showing of prejudice to prevail." *Security Ins. Co. of Hartford v. Kevin Tucker & Assoc., Inc.*, 64 F.3d 1001, 1009 (6th Cir.1995). "Delay that is neither intended to harass nor causes any ascertainable prejudice is not a permissible reason, in and of itself to disallow an amendment of a pleading[.]" *Id.* (quotations and citations omitted). The Court finds that Defendants have not made a showing that Plaintiffs' delay was intended to harass and now examines whether the delay will cause Defendants any ascertainable prejudice.

Defendants argue that, if granted, the amendments will unfairly prejudice them by expanding the claims asserted in the Michigan exemplar action thus forcing Defendants to incur the expense and inconvenience of additional discovery and preparation so as to adequately respond to Plaintiffs' pending motions for class certification. Defendants further argue that the proposed amendment will unfairly prejudice them by forcing them to defend parallel unjust enrichment claims in the Michigan action as well as other actions consolidated here and actions pending in the Kansas and Florida state

courts. Plaintiffs respond that the Defendants have not shown that substantial prejudice will result from their proposed amendment because the expanded unjust enrichment claim is virtually identical to the claims that this Court has already sustained against Defendants' Rule 12(b)(6) motions in its Order No. 12, and the Court has not yet set a final discovery cutoff date in this action. This Court agrees with Plaintiffs.

Defendants have not shown that any real prejudice will result if the amendment is allowed; i.e., there is no showing that their ability to defend is prejudiced because of Plaintiffs' delay. *See Hageman v. Signal L.P. Gas, Inc.*, 486 F.2d 479, 484 (6th Cir.1973); *United States v. Marsten Apartments, Inc.*, 175 F.R.D. 257, 264 (E.D.Mich.1997). This is not a situation where leave to amend is sought on the eve of trial after the discovery period has long passed. *See United States v. Midwest Suspension and Brake*, 49 F.3d 1197, 1202 (6th Cir.1995) (affirming the denial of the defendant's motion to amend its answer because the defendant's undue delay in filing its motion one month before trial and 18 months after discovery had been completed would unduly prejudice the plaintiff who had relied on the defendant's previous answer and would have to undertake a "new and expensive round of discovery" to rebut the new claim shortly before trial).

***3** As the Sixth Circuit has observed, it would be error to deny leave to amend when "the rejection would preclude plaintiff's opportunity to be heard on the merits of facts which are well known to the parties and which were pleaded at the outset ..." *Moore v. City of Paducah*, 790 F.2d 557, 562 (6th Cir.1986). *Accord*, *Hageman*, 486 F.2d at 484 (affirming grant of leave to amend where the defendant "was aware of the fact situation upon which the amended complaint was based"). Defendants here are well aware of the fact situation upon which the additional unjust enrichment claims are based. The Court fully intends to consider and accommodate any need Defendants have for additional discovery or briefing.

Defendants' complaint that they will be prejudiced by the increased burden and costs associated with defending these additional claims is to no avail. Numerous courts have rejected similar arguments, observing that " 'the adverse party's burden of undertaking discovery, standing alone, does not suffice to warrant denial of a motion to amend a pleading." ' *Midwest Suspension*, 49 F.3d at 1202 (quoting *United States v. Continental III. Nat'l. Bank & Trust Co. of Chicago*, 889 F.2d 1248, 1255 (2d Cir.1989) and citing *Janikowski v. Bendix Corp.*, 823 F.2d 945, 951-52 (6th Cir.1987) (where the court observed that "[t]he proper remedy for subjecting [the defendant] to duplicative discovery would be to require the amending party to bear a portion of the additional expense"). Defendants have not shown that they must expend significant additional resources to adequately respond to Plaintiffs' pending motion for class certification or to defend against the additional claims and have not shown that the amendment, if allowed, will significantly delay the resolution of this dispute. *See Phelps v. McClellan*, 30 F.3d 658, 662-63 (6th Cir.1994).

Defendants further complain that they will be prejudiced if the amendment is allowed, not because delay in seeking the amendment prejudices their ability to defend against the additional claims, but rather because it will force Defendants to defend the same unjust enrichment claims in the Michigan action that are raised in the Alabama, California, District of Columbia, Illinois, Minnesota, New York, North Carolina, Tennessee and Wisconsin actions consolidated here and in the Kansas and Florida state courts actions not consolidated here. Defendants fail, however, to explain how they will be prejudiced, and simply saying it does not make it so.

2. Futility and Arguments of impropriety and Circumvention

"A proposed amendment is futile if the amendment could not withstand a Rule 12(b)(6) motion to dis-

miss." *Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 420 (6th Cir.2000). Defendants' arguments that they can successfully oppose certification of the broader class in the proposed amended Michigan action do not satisfy the Sixth Circuit's test for futility. *Id.* at 421.

***4** Defendant Andrx's arguments that Plaintiffs' motion to amend somehow improperly circumvents (1) an inquiry into subject matter jurisdiction; (2) the provisions of 28 U.S.C. § 1407; or (3) the holding in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), similarly miss the point. Andrx does not argue that the Court will be divested of its diversity jurisdiction if the amendment is allowed. *See Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991) (where the Court observed that "diversity jurisdiction, once established, is not defeated by the addition of a nondiverse party to the action"). Likewise, Andrx does not argue that there is no supplemental jurisdiction over the nationwide class claims by virtue of this Court's jurisdiction over the Michigan action. It does not argue that Plaintiffs' motion should be denied as futile because subject matter jurisdiction is lacking. Rather, it argues that Plaintiffs' motion should be denied because the proposed amendment "seeks to avoid an inquiry into subject matter jurisdiction." Andrx Resp. at 8. Andrx, however, does not provide the Court with any authority where a Rule 15(a) motion for leave to amend has been denied for this reason. Defendant Andrx's arguments for denial based on Plaintiffs' alleged improper circumvention of the provisions of 28 U.S.C. § 1407 and the decision in *Lexecon* fail for similar reasons. They do not address Rule 15(a) 's standards for denying leave; i.e., futility, and they lack supporting authority.

In sum, Defendants' complaints of undue delay, prejudice, futility, and other impropriety do not support a denial of Plaintiffs' motion for leave to amend under Rule 15(a). Accordingly, Plaintiffs' motion to add, in the Michigan action, common law unjust enrichment claims on behalf of a nationwide class is granted.

B. Amendment to Class Definition

Plaintiffs also seek to amend the class definitions in their coordinated complaints so as to exclude retail pharmacies thus including only end payers; i.e., consumers and third party payers. "Separate classes of retail pharmacies located in Indirect Purchaser States which have purchased Cardizem CD or Cartia XT for resale to individual users" is deleted from the class description in the proposed amended complaints. Retail pharmacies remain as named Plaintiffs in the Alabama, California and New York actions, but the amended coordinated complaints expressly exclude from the alleged classes "entities which purchased Cardizem CD or Cartia XT for resale."

HMRI does not argue that Defendants will be prejudiced by the proposed amendment.[FN2] Rather, HMRI argues that Plaintiffs' proposed amendment deleting retail pharmacies from its class allegations may prejudice absent class members (in New York, California, and Alabama) and thus implicates Fed.R.Civ.P. 23(e). Rule 23(e) provides that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." HMRI further asserts that, before this Court can grant Plaintiffs' motion, Plaintiffs must show that (1) absent retail pharmacy class members who may have relied on class allegations in Plaintiffs' complaints and abstained from filing their own actions in reliance thereon will not be prejudiced by the proposed amendment, and (2) there is no need to notify them or otherwise protect their interests. This Court agrees that Rule 23(e) is implicated here.

> FN2. Defendant HMRI does not argue that the proposed amendment is untimely or that Defendants will be prejudiced by this proposed amendment to Plaintiffs' class

> definition. As HMRI admits, Defendants had ample notice of this revised class definition. At the January 2000 hearing on class discovery proposals and in their briefs, Plaintiffs clarified that they would not be seeking class certification for retail pharmacies. Also, in their motions for class certification filed on December 10, 1999, Plaintiffs define the Michigan Class as follows: "All persons and entities who or which have paid and/or co-paid pharmacies in Michigan for Cardizem CD and Cartia XT dispensed pursuant to doctors' prescriptions" during the Conspiracy and Monopolization Class Periods. The retail pharmacy allegations, however, remained in the State Law Plaintiffs' consolidated first amended complaint (filed on October 22, 1999) and are deleted for the first time in the proposed amended complaint.

***5** Plaintiffs initially responded that they were merely redefining their class definitions, that Rule 23(e) was not implicated here and, even if it was implicated, notice to putative retail pharmacy class members was not required to protect their interests. They explained that the decision to redefine the class was made by counsel, after discovery and investigation, and in consultation with the individual plaintiff pharmacies, to avoid any potential atypicality that might arise from the inclusion of retail pharmacies which, it was determined, do not incur the same type or extent of injury as end payers. They further explained that notice was not required because there was no indication that any pharmacies had relied upon the complaints in these actions to withhold actions of their own and, in fact, many of the major chain pharmacies in the United States were already before the Court in these consolidated actions.

At the September 18, 2000 hearing, Plaintiffs retreated from this position, agreed that Rule 23(e) is implicated here, agreed that some form of notice is required, but raised a question as to its timing. Plaintiffs argued the interests of the putative retail pharmacy class would be adequately protected if they received notice at the same time other notices are disseminated regarding class certification. This Court agreed to allow Plaintiffs an opportunity to provide it with further briefing on this Rule 23(e) notice issue and to address the Court's concern that Plaintiffs' notice proposal ensures adequate time under the relevant statutes of limitations for absent class members to file other actions.

This Court's conclusion that Plaintiffs' motion implicates Rule 23(e) finds support in the following authority. Rule 15(a), unlike Rule 41(a)(1), is not made expressly subject to the provisions of Rule 23(e). *See* 5 *Moore's Federal Practice*, § 23.81[4] at 23-334 (Matthew Bender 3d ed.). Nonetheless, the courts "have found that Rule 15(a) amendments of complaints to delete class allegations are subject to the court approval and notice requirements of Rule 23(e) in two situations." (1) "[w]hen [the] 'amendment' dismissing class allegations results from a compromise with [the] defendant"; and (2) "[w]hen absent class members may have relied on the class action in refraining from filing individual actions." *Id.* at 23-334-35. The second situation is at issue here.[FN3]

> FN3. That this Court has not yet considered the class certification motions does not remove this matter from the scope of Rule 23(e). "[C]ourts generally have agreed that actions filed as class suits are within the scope of Rule 23(e) even though they have not been formally certified ..." C. Wright, A. Miller & M. Kane, 7B *Federal Practice and Procedure* § 1797 at 347 (West 2d ed.1986). *See Anderberg v. Masonite Corp.*, 176 F.R.D. 682, 688 (N.D.Ga.1997) ("Most other courts that have addressed the issue have concluded that Rule 23(e)'s requirements do apply to precertification dismissals and settlements of class action complaints").

"When a class action lawsuit has received publicity,

it 'is altogether possible ... that some class members, choosing to rely on this lawsuit as their means of redress, have decided not to file separate actions. Consequently, permitting this amendment without notice could result in an unwitting forfeiture of their rights." ' *Id.* at 23-335 (quoting *Yaffe v. Detroit Steel Corp.*, 50 F.R.D. 481, 483 (N.D.III.1970)). This is true because when a class action complaint is filed the statute of limitations is tolled for absent class members, but "the time begins to run again if the district court refuses to certify the case as a class action." *Glidden v. Chromalloy American Corp.*, 808 F.2d 621, 627 (7th Cir.1986) (citing *American Pipe & Construction Co. v. Utah* [1974-1 TRADE CASES ¶ 74,862], 414 U.S. 538, 561 (1974)). "The voluntary dismissal of the class component of a suit also must restart the time. Yet if the absent class members do not receive notice under Rule 23(e) that their champion has abdicated, they will not learn that it is necessary to file suit to protect their own interests. By the time they learn that the representative has given up on the class action, it may be too late; so even if the representative should win his own case, the other members of the class may be left out in the cold." *Glidden*, 808 F.2d at 627. *See also McArthur v. Southern Airways, Inc.*, 556 F.2d 298, 303 (5th Cir.1977), *vacated in its entirety, but on other grounds*, 569 F.2d 276, 277 (5th Cir.1978) ("Dismissal of the class suit without notice may result in the absentee class members' losing their claims entirely if they subsequently fail to file individual claims since the statute of limitations begins to run again upon dismissal of the class claim").

***6** As the courts have observed, "[t]his reliance interest can become a danger when the filing of a class action complaint receives attention by the news media." *Anderberg v. Masonite Corp.*, 176 F.R.D. 682, 689 (N.D.Ga.1997). On the other hand, if there is no evidence that absent class members have learned of the case and no publicity surrounds the action, then it is not likely that this "reliance interest" has developed. "If no reliance interest were likely to have developed, then it would be unnecessary to inform the absent proposed class members that they may no longer rely on the class action to vindicate their rights." *Sikes v. American Tel. and Tel. Co.*, 841 F.Supp. 1572, 1580 (S.D.Ga.1993), Accordingly, even though Rule 23(e) may be implicated, and the potential for prejudice to absent class members may exist, the Court must make further inquiry to ascertain what notice, if any, is necessary to protect the interests of the putative class members.

Courts considering Rule 23(e)'s notice provisions have refused to adopt an absolute rule requiring notice to every potential class member every time class allegations are voluntarily amended or dismissed. *See Glidden*, 808 F.2d at 627; *Anderberg v. Masonite Corp.*, 176 F.R.D. at 689 (where the court expressed "grave doubts about adopting any reading of Rule 23(e)'s notice provision that requires its absolute application to every case simply because the complaint may include class action allegations"). Rather, the courts have adopted a functional approach to Rule 23(e)'s application; i.e., "if there is no evidence of any prejudice to absent class members, then courts have consistently found that notice to the absent class members is not required." *Anderberg*, 176 F.R.D. at 689.

A recent decision from the United States District Court for the Northern District of Georgia illustrates these principles. In *Anderberg v. Masonite Corp.*, the court considered whether Rule 23(e) applies when a plaintiff seeks to amend away nationwide class allegations prior to certification of a class under Rule 23(c)(1). It concluded that Rule 23(e) does apply to "precertification dismissals and settlements of class actions" and further concluded that the functional approach to notice would be adopted when applying Rule 23(e). 176 F.R.D. at 690. Acknowledging that "absent class members may have a reliance interest in the dismissal of the class action" and that "[t]his reliance interest can become a danger when the filing of a class action complaint receives attention by the news media", the court concluded that no notice was required here under

Rule 23(e) because there was no evidence that this reliance interest was prejudiced. The plaintiffs had supplied the court with "an affidavit indicating that an extensive search of electronic news databases did not reveal any references to this case." *Id.* Accordingly, the court granted the plaintiffs' motion to amend their complaint to delete the nationwide class allegations without requiring any notice. *Id.*

***7** This Court finds the reasoning in *Anderberg* persuasive and likewise "has grave doubts about adopting any reading of Rule 23(e)'s notice provision that requires its absolute application to every case simply because the complaint may include class action allegations." *Id.* at 689. Accordingly, this Court will similarly apply a functional approach to Rule 23(e)'s notice provision. As the *Glidden* court observed, "Rule 23(e) calls for notice 'in such manner as the court directs.' When notice would be a fruitless yet costly gesture, Rule 23(e) - read in light of Rule 1 - does not compel the parties to incur pointless expense." *Glidden,* 808 F.2d at 627.

Having said that, this Court finds that the potential for prejudice to the putative retail pharmacy class is present here. These consolidated actions have received publicity, both nationally and in the areas where the suits were initially filed. *See* HMRI Resp., Ex. D, copies of articles discussing California, Alabama, and Michigan actions. Moreover, the web site of co-lead counsel for State Law Plaintiffs, Lowey Dannenberg, has, until recently, represented that the class actions pending in this Court were brought on behalf of "purchasers of Cardizem CD, ... including pharmacists." HMRI Resp., Ex. B, Lowey Dannenberg web pages. Thus, prior to granting Plaintiffs motion to amend, Plaintiffs must show this Court that the scope, content, and timing of their notice proposal adequately protects the interests of the putative retail pharmacy class. Accordingly, this Court's GRANT of Plaintiffs' motion to amend its class definition to exclude retail pharmacies is CONDITIONED upon Plaintiffs' satisfaction of this requirement. The Court's decision to Grant is held in abeyance pending resolution of this issue.

III. Conclusion

For the foregoing reasons, this Court GRANTS Plaintiffs' motion to add, in the Michigan action, common law unjust enrichment claims on behalf of a nationwide class. The Court also GRANTS Plaintiffs' motion to amend so as to delete retail pharmacies from its class allegations CONDITIONED on Plaintiffs' showing that the scope, content, and timing of their notice proposal adequately protects the interests of this putative class. The Court's decision to Grant is held in abeyance pending resolution of this issue.

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