

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT BLUEFIELD

KATHERINE BROWNING,  
Personal Representative of  
the ESTATE OF SUSAN COBB,

Plaintiff,

v.

CIVIL ACTION NO. 1:09-0440

ALZA CORPORATION, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

Pending before the court is plaintiff's motion for leave to amend the complaint to add Dr. Jeffrey S. Trump as a defendant. This motion is GRANTED for the reasons set forth below.

Background

On March 6, 2009, plaintiff Katherine Browning filed this action in the Circuit Court of McDowell County. In her complaint, plaintiff alleges that Susan Cobb's use of a Sandoz fentanyl patch, obtained from a prescription written by Dr. Trump in March 2007, caused her death on March 26, 2007. The following entities were named as defendants in the lawsuit: ALZA Corporation, the designer and manufacturer of the patch; Sandoz Inc., the marketer and distributor of the patch; Fruth Pharmacy, Inc., also alleged to be a distributor and marketer of the patch; and John Does 1-25.

On April 24, 2009, ALZA and Sandoz removed the case to this

court on the basis of diversity of citizenship. In so doing, they contended that Fruth Pharmacy had been fraudulently joined to defeat diversity.

Dr. Trump was not named as a defendant in the original lawsuit because plaintiff had not yet complied with the notice and other statutory prerequisites under West Virginia law. Plaintiff has now allegedly complied with those prerequisites to filing suit and the instant motion to amend followed.

#### Analysis

Rule 15(a) of the Federal Rules of Civil Procedure permits a party to amend its pleading "once as a matter of course at any time before a responsive pleading is served . . . [o]therwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." In Foman v. Davis, 371 U.S. 178, 182 (1962), the United States Supreme Court noted that amendment under Rule 15(a) should be freely given absent "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 amendment, etc." Counsel for defendants ALZA and Sandoz informed the court that it would not be filing a response in opposition to the motion to amend because it lacked a good faith basis for doing so.

After a review of the record, the court concludes that there has been no undue delay, bad faith, or dilatory motive on the part of the plaintiff in filing her motion to amend. Furthermore, defendants would not suffer undue prejudice nor is it clear such an amendment would be futile. Therefore, plaintiff has established that she is entitled under Rule 15(a) to amend the complaint.

According to 28 U.S.C. § 1447(e), "[i]f after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." The addition of Dr. Trump would destroy diversity if it is determined that Fruth Pharmacy was fraudulently joined.\* However, given the court's finding that plaintiff has shown good cause to allow amendment of her complaint, the court will remand this case to the Circuit Court of McDowell County.

#### Conclusion

Plaintiff's motion to amend is hereby **GRANTED** and this case is **REMANDED** to the Circuit Court of McDowell County, West Virginia.

The Clerk is directed to send certified copies of this Memorandum Opinion and Order to all counsel of record and to the

---

\* Since filing the motion to amend, plaintiff has also filed a motion to remand in which she argues that Fruth Pharmacy was not fraudulently joined.

Clerk of the Circuit Court of McDowell County.

**IT IS SO ORDERED** this 20th day of May, 2009.

ENTER:

A handwritten signature in cursive script that reads "David A. Faber". The signature is written in black ink and is positioned above a solid horizontal line.

David A. Faber

Senior United States District Judge