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United States District Court, N.D. Alabama, Western Division.

Willie Anthony JONES, Sr., et al., Plaintiffs,
v.
DEPUY SYNTHES PRODUCTS, INC., et al.,
Defendants.

7:17-cv-01778-LSC
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Signed 11/20/2018

Attorneys and Law Firms

James B. Duncan, Jr., William Earl Bonner, David G. Wirtes, Jr., Steven L. Nicholas, Cunningham Bounds Crowder Brown & Breedlove LLC, Mobile, AL, for Plaintiffs.

David L. Ferrera, Nutter, McClennen & Fish LLP, Boston, MA, David Schmahmann, Brookline, MA, Joseph P.H. Babington, Philip Daniel Mahoney, Helmsing Leach Herlong Newman & Rouse PC, Mobile, AL, for Defendants.

Memorandum of Opinion and Order

L. Scott Coogler, United States District Judge

***1** Plaintiffs Willie Anthony Jones, Sr. ("Willie Jones") and Tracy Jones (collectively, "Plaintiffs") bring this action against Defendants Depuy Synthes Products, Inc., Depuy Synthes Sales, Inc., Medical Device Business Services, Inc., and Depuy Ireland Unlimited Company (collectively, "Defendants"), alleging Willie Jones suffered personal injuries arising from Defendants' ATTUNE total knee replacement system. Plaintiffs now seek to bring these claims on behalf of a nationwide class. Before the Court is Defendants' motion to strike pursuant to Federal Rule of Civil Procedure 12(f), or in the alternative, motion to strike class allegations pursuant to Federal Rules of Civil Procedure 12(f) and 23(d)(1)(D). (Doc. 24.) For the reasons set forth below, Defendants' motions are DENIED.

I. Background[1]

Defendants are all involved in the design, development, testing, manufacturing, marketing, distributing, and sale of the ATTUNE total knee replacement system. This knee replacement system consists of three components: a femoral component that is implanted into a patient's femur; a tibial baseplate component that is implanted into a patient's tibia; and a tibial insert that sits between the upper femoral component and lower tibial component. This case involves claims that the tibial baseplate component of the ATTUNE devices are defective. According to Plaintiffs, the cement used to secure the tibial baseplate often becomes loose, requiring patients to undergo painful revision surgery.

In February 2015, Plaintiff Willie Jones underwent knee replacement surgery at DCH Regional Medical Center in Tuscaloosa, Alabama where an ATTUNE total knee replacement system was inserted into his right leg. According to Plaintiffs, due to an aseptic loosening of the tibial base component, the knee replacement system failed twenty-one months after Jones's surgery. Jones was then required to undergo a revision surgery in November 2016. In their amended complaint, Jones and his wife Tracy bring claims against Defendants for negligence, wantonness, products liability, breach of warranty, and loss of consortium. Plaintiffs also seek to bring these claims on behalf of a nationwide class of individuals who have had implanted a Depuy ATTUNE total knee replacement system prior to January 1, 2018, and who suffered mechanical loosening of the device.

II. Motion to Strike Amended Complaint

A. Standard

A party may amend a pleading "as a matter of course within ... 21 days after serving it, or if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." Fed. R. Civ. P. 15(a)(1)(A), (B). After the time for amending as a matter of course has expired, "a party

may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2); *see Brown v. Johnson*, 387 F.3d 1344, 1349 (11th Cir. 2004) (holding that district court abused its discretion when it denied the plaintiff's motion to amend where plaintiff filed his motion before the district court dismissed his complaint and before any responsive pleadings were filed).

***2** A motion to strike is appropriate under Federal Rule of Civil Procedure 12(f) for "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). However, striking a pleading is a "drastic remedy" and should be limited to the most extreme of circumstances. *See Augustus v. Bd. of Public Instruction*, 306 F.2d 862, 868 (5th Cir. 1962).[2] "When there is no showing of prejudicial harm to the moving party, the courts generally are not willing to determine disputed and substantial questions of law upon a motion to strike." *Id.* at 868. Further, before granting a motion to strike, the Court must be convinced there are no questions of fact, that any questions of law are clear, and that under no set of circumstances could the matter succeed. *Id.*

B. Discussion

The last Defendant to file an answer to Plaintiffs' original complaint filed its answer on February 6, 2018. Plaintiffs then filed their amended complaint on March 5, 2018, which was more than 21 days later. Plaintiffs admit that they filed the first amended complaint more than 21 days after Defendants filed their last responsive pleading. However, Plaintiffs argue that the Court's Rule 16(b) scheduling order gives them implicit permission to amend their pleadings without leave of the Court until its December 31, 2018 deadline for amending pleadings.

The deadline for amending pleadings provided in the Court's scheduling order does not do away with Rule 15(a)'s requirements. As the Eleventh Circuit has recognized, different standards govern Rule 15(a) and Rule 16(b). *See Sosa v. Airprint Sys., Inc.*, 133 F. 3d 1417, 1419 (11th Cir. 1998) (stating that the court would first consider whether plaintiff demonstrated good cause under Rule 16(b) before it would consider whether the proposed amendment was proper under Rule 15(a)). Thus, a scheduling order deadline for amending pleadings does not provide plaintiffs permission to amend their pleadings, as a matter of course, more than twenty-one days after service of a defendant's responsive pleadings. As such, Plaintiffs' amendment to the complaint is allowable only under Rule 15(a)(2).

Before filing their amended complaint, Plaintiffs did not obtain Defendants' consent or leave of the Court as required by Rule 15(a)(2). However, in keeping with the liberal amendment standard set out in Rule 15(a), the Court will construe Plaintiffs' amended complaint as a motion to amend their complaint. When a party files a motion for leave to amend a pleading, "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Rule 15(a)(2) "contemplates that leave shall be granted unless there is a substantial reason to deny it." *Halliburton & Assocs., Inc. v. Henderson, Few & Co.*, 774 F.2d 441, 443 (11th Cir. 1985). Indeed, "[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 amendment, etc.—the leave sought should, as the rules require, be 'freely given.' " *McKinley v. Kaplan*, 177 F.3d 1253, 1258 (11th Cir. 1999) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

There is no substantial reason to deny Plaintiffs' implied motion to amend as to their individual claims. Plaintiffs filed their amended complaint well within the scheduling order's deadline for amendments, and there is no evidence that Plaintiffs have acted in bad faith. Moreover, there is no evidence that allowing Plaintiffs to amend their individual claims would unduly prejudice Defendants or be futile. Plaintiffs amended their complaint "to conform to the evidence discovered [and] to conform to the Parties agreement to voluntarily dismiss certain Defendants." (*See* Doc. 23 at 1.) Paragraphs 15–35 provide additional details surrounding the history of the ATTUNE Device. (*See id.* ¶¶ 15–35.) Paragraphs 36–53 include facts to support Plaintiffs' claims regarding mechanical loosening and Defendants' alleged awareness of the high number of failures of the ATTUNE device. (*See id.* ¶¶ 36–53.) Other added paragraphs include findings from studies on the ATTUNE Device and assertions that Defendants marketed the ATTUNE Device without adequately warning consumers of its defects. (*See id.* ¶¶ 54–70.) Defendants have not shown how allowing these amendments to Plaintiffs' individual claims would prejudice them. Furthermore, Plaintiffs have not added any additional causes of action to their complaint, and the substance of their claims have not changed. Therefore, Plaintiffs will be allowed to amend their complaint as to their individual claims, and Defendants' motion to strike

those claims is due to be denied.

III. Motion to Strike Class Allegations

A. Standard

***3** As an alternative to their motion to strike Plaintiffs' amended complaint, Defendants move to strike Plaintiffs' class allegations pursuant to Federal Rules of Civil Procedure 12(f) and 23(d)(1)(D). Under Rule 23(a), a class may be certified only if "(1) the class is so numerous that joinder of all members would be impracticable; (2) there are questions of fact and law common to the class; (3) the claims or defenses of the representatives are typical of the claims and defenses of the unnamed members; and (4) the named representatives will be able to represent the interests of the class adequately and fairly." *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1187–88 (11th Cir. 2003). These four prerequisites are generally known as "numerosity, commonality, typicality, and adequacy of representation." *Id.* at 1188.

Class actions that meet the requirements of Rule 23(a) may be certified under Rule 23(b)(1), (b)(2), or (b)(3). *See* Fed. R. Civ. P. 23(b). Plaintiffs seek to bring a class action under Rule 23(b)(3). (*See* Doc. 23 at 30–31.) In order to maintain a class under Rule 23(b)(3), the party seeking certification must prove "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Predominance requires that the issues raised by the class action "that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof." *Rutstein v. Avis Rent-A-Car Sys.*, 211 F.3d 1228, 1233 (11th Cir. 2000) (citations omitted).

Class certification may be denied where the inability to meet Rule 23's requirements are apparent from the face of the complaint. *See Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1309 (11th Cir. 2008) ("In some instances, the propriety *vel non* of class certification can be gleaned from the face of the pleadings."). However, "the parties' pleadings alone are often not sufficient to establish whether class certification is proper, and the district court will need to go beyond the pleadings and permit some discovery and/or evidentiary hearing to determine whether a class may be certified." *Id.* (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982)).

Here, the issue of class certification is before the Court not on a motion for class certification under Rule 23(c), but rather, on Defendants' motion to strike Plaintiffs' class allegations under Rules 12(f) and 23(d)(1)(D). Thus, the Court must initially address what standard governs Defendants' motion to strike. Although the Eleventh Circuit has previously upheld a district court order granting a motion to strike class allegations, it has never discussed the standard to apply when ruling on this type of motion. *See Griffin v. Singletary*, 17 F.3d 356, 361 (11th Cir. 1994).

Several district courts within this Circuit have interpreted Eleventh Circuit precedent as requiring motions to strike class allegations to be considered according to the "redundant, immaterial, impertinent, or scandalous" standard of Rule 12(f). *See, e.g.*, *Gill-Samuel v. Nova Biomedical Corp.*, 298 F.R.D. 693, 700 (S.D. Fla. 2014); *Sos v. State Farm Mut. Automobile Ins. Co.*, No. 6:17-cv-890-Orl-40KRS, 2018 WL 1866097, at *2 (M.D. Fla. March 12, 2018); *Cullars Family Timber Farm, LLLP v. Weyerhaeuser Co.*, CV 116-188, 2017 WL 7689146 at *6 (S.D. Ga. April 27, 2017). However, Defendants have not only moved to strike Plaintiffs' class allegations under Rule 12(f) but also under Rule 23(d)(1)(D), which provides that "[i]n conducting an action under this rule, the court may issue orders that ... require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly." Fed. R. Civ. P. 23(d)(1)(D).

***4** Taken together, the Court concludes that these two Rules allow the Court to strike Plaintiffs' class allegations only if it is clear from the face of the amended complaint that this case cannot be maintained as a class action. *See Goff v. LaSalle Bank, N.A.*, No. 09-cv-147-TMP-WMA, 2009 WL 10688475, at *3 (N.D. Ala. Sept. 16, 2009) ("When the unsuitability of a class treatment as to one or more issues is clear from the face of the complaint, and when entertaining a motion to strike does not 'mirror the class certification inquiry,' motions to strike those allegations may be properly filed and considered...."). Eleventh Circuit precedent suggests that granting such pre-certification motions is disfavored. *See Mills*, 511 F.3d at 1309 (finding motion to dismiss class allegations premature); *see also Huff v. N.D. Cass Co. of Ala.*, 485 F.2d 710, 713 (5th Cir. 1973) (en banc) (holding that class determinations "usually should be predicated on more

information than the complaint itself affords").

B. Discussion

Defendants argue that the Court should strike Plaintiffs' class allegations because they fail to meet the requirements to bring a class action under Rule 23. Specifically, Defendants argue that Plaintiffs' proposed class does not meet the commonality and typicality requirements of Rule 23(a), the superiority and predominance requirements of Rule 23(b)(3), and the personal jurisdiction requirements for nationwide class actions after the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773 (2017). Defendants also argue that Plaintiffs' class allegations cannot be maintained as a nationwide class because of significant variations in the applicable state law. The Court will address each argument in turn.

1. Rule 23(a) Requirements

Defendants argue that because the Plaintiffs' proposed class will turn on highly individualized facts related to injury and causation that it necessarily fails Rule 23(a)'s commonality and typicality requirements.[3] "Under the Rule 23(a)(2) commonality requirement, a class action must involve issues that are susceptible to class-wide proof." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1270 (11th Cir. 2009). Commonality is a relatively low threshold and should not be confused with the predominance inquiry—all that is required by Rule 23(a)(2) is that there be "at least one issue whose resolution will affect all or a significant number of the putative class members." *Williams v. Mohawk Indus.*, 568 F.3d 1350, 1355 (11th Cir. 2009). "That common contention ... must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). There is no requirement, however, that "all the questions of law and fact raised by the dispute be common." *Vega*, 564 F.3d at 1268.

Plaintiffs argue that the "central common issue in this case" is whether the ATTUNE knee replacement system is defective. (*See* Doc. 27 at 16.) They state that this "common issue can be resolved a single time for the benefit of putative class members and the defendants." (*Id.*) Plaintiffs further allege that there are two other issues that would be common to all proposed class members: (1) whether the ATTUNE defect causes mechanical loosening and a premature failure of the system and (2) whether as a result the class has suffered damages. (*See* Doc. 23 ¶ 78.)

It is premature for the Court to conclude that Plaintiffs cannot satisfy the commonality requirement of Rule 23(a)(2). Defendants cite to *In re Whirlpool Corporation Front-Loading Washer Products Liability Litigation*, 722 F.3d 838, 855 (6th Cir. 2013), for the proposition that personal injury cases involving medical devices cannot satisfy the commonality requirement because they implicate class members' "unique medical histories" and require individualized proof "concerning medical complications." However, unlike here, the plaintiffs attempting to certify the personal injury class discussed in *In re Whirlpool* never identified a common defect in the medical device at issue. *See In re Am. Med. Sys.*, 75 F.3d 1069, 1080 (6th Cir. 1996). Further, the Sixth Circuit found that commonality was lacking only after considering affidavits from doctors that there was no common complication associated with that particular medical device. *See id.* at 1081 n.15. Defendants have failed to show how questions surrounding whether a common defect that caused mechanical loosening was present in the ATTUNE devices would not be capable of class-wide resolution. It appears to the Court that the answer to this question could lead to the resolution of several issues surrounding Defendants' potential liability. Moreover, discovery may reveal other questions common to the class. Because the Court finds that this case may present at least some issues that are susceptible to class-wide proof, Defendants' motion to strike will not be granted on the grounds that it would be impossible for Plaintiffs' proposed class to satisfy the commonality requirement.

***5** Defendants also argue that Plaintiffs cannot meet the typicality requirement of Rule 23(a). "A class representative must possess the same interest and suffer the same injury as the class members in order to be typical under Rule 23(a)(3)." *Vega*, 564 F.3d at 1275 (citations omitted). Typicality and commonality have much in common, but whereas, "commonality refers to the group characteristics of the class as a whole," typicality "refers to the individual characteristics of the named plaintiff in relation to the class." *Id.* at 1275. In other words, "[t]ypicality measures whether a sufficient

nexus exists between the claims of the named representatives and those of the class at large." *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1322 (11th Cir. 2008) (citations omitted). A "factual variation will not render a class representative's claim atypical unless the factual position of the representative markedly differs from that of other members of the class." *Kornberg v. Carnival Cruise Lines*, Inc., 741 F.2d 1332, 1337 (11th Cir. 1984).

In the amended complaint, Plaintiffs state that their claims are typical of the claims of the other members of the proposed class because their claims arise from the same course of conduct as the claims of the other class members, the Plaintiffs and the members of the proposed class all suffered injuries caused by a common defect in the implanted knee system, and the Defendants do not have any defenses unique to Plaintiffs' claims that would make their claims atypical.

Besides their statement that the Plaintiffs' proposed class necessarily fails Rule 23(a)'s typicality requirement, Defendants do not explain how Plaintiffs' claims are atypical of the claims of the putative class members. Moreover, a determination of typicality is better suited for a ruling on a motion for class certification because at that stage the Court will have more information regarding the characteristics of the members of the proposed class. As the factual record has yet to be developed, it is difficult for the Court to determine whether or not there is a sufficient nexus between the claims of the Plaintiffs and those of the putative class members. Thus, the Court needs more information before it can decide whether Plaintiffs' claims are atypical, and it will not strike the class allegations on this basis.

2. Rule 23(b)(3) Requirements

Defendants also argue that because this case presents individualized questions related to injury and causation that the proposed class fails Rule 23(b)(3)'s predominance and superiority requirements. Specifically, they argue that to determine causation a jury would have to assess each class member's medical history and each implanting surgeon's conduct. Additionally, they argue that to decide Plaintiffs' warranty claims a jury would have to consider whether each surgeon was exposed to a warranty and what impact that had on his decision to implant the Attune device. Plaintiffs respond by arguing that striking the pleadings at this stage would not allow the action to evolve to account for concerns regarding predominance and superiority and that they may be able to resolve these potential problems through issue certification, which is allowed under Rule 23(c)(4).

Certification under Rule 23(b)(3) requires that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The predominance inquiry "is similar to the requirement of Rule 23(a)(3) that claims or defenses of the named representatives must be typical of the claims or defenses of the class." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 n.18 (1997) (citations omitted). However, "the predominance criterion is far more demanding." *Williams*, 568 F.3d at 1357. (quoting *Amchem Prods.*, 521 U.S. at 624). Predominance requires a "pragmatic assessment of the entire action and all the issues involved.... Where, after adjudication of the classwide issues, plaintiffs must still introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims, such claims are not suitable for class certification under Rule 23(b)(3)." *Id.* at 1357 (citations omitted). Additionally, a class action brought under Rule 23(b)(3) must be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). But as the Eleventh Circuit has explained, "lack of predominance, of course, effectively ensures that, as a substantive matter, a class action is almost certainly not [superior]." *Vega*, 564 F.3d at 1278 n.18.

***6** Defendants point to several district court decisions that have declined to certify proposed personal injury class actions due to lack of predominance and argue that personal injury classes, such as this one, necessarily fail the predominance inquiry. However, most of these cases were decided at the class certification stage where the courts had the ability to review evidence regarding whether individualized proof was necessary to establish liability. *See, e.g.*, *Haggart v. Endogastric Sols., Inc.*, Civil Action No. 10-346, 2012 WL 2513494, at *1 (W.D. Pa. June 28, 2012); *In re ConAgra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 698 (N.D. Ga. 2008); *Rink v. Cheminova, Inc.*, 203 F.R.D. 648, 652 (M.D. Fla. 2001). While many of the decisions cited by Defendants do note that personal injury claims are often unsuitable for class treatment, the class certification determinations made in those cases were based on the particular factual record developed through discovery. *See, e.g.*, *City of St. Petersburg v. Total Containment, Inc.*, 265 F.R.D. 630, 638 (S.D. Fla. 2010) (looking to evidence that some

FlexPipe failures were caused by factors other than plaintiffs' alleged defect to support finding that causation was not susceptible to class-wide proof); *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 68 n.45 (S.D.N.Y. 2002) (relying in part on expert testimony to determine that individual questions surrounding causation overwhelmed common issues). Before the Court determines whether this case may proceed as a class action, Plaintiffs should be afforded the same opportunity to develop a factual record as the plaintiffs in those cases.

Moreover, the Court declines to adopt the reasoning of the court in *In re Yasmin & Yaz (Drospirenone) Marketing, Sales Practices and Relevant Products Liability Litigation*, which is heavily relied upon by Defendants. In that case, the court granted the defendants' motion to strike class allegations where the plaintiff sought to bring a class action on behalf of individuals injured as a result of taking the prescription medicine YAZ and/or Yasmin. *See In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Relevant Prods. Liab. Litig.*, 275 F.R.D. 270, 271–72 (S.D. Ill. 2011). The court concluded that because the plaintiff's strict liability, negligence, warranty, and fraud claims would all turn on facts unique to each putative class member that predominance could not be satisfied. *See id.* at 276–77. The court reasoned that the causation elements of these claims would present individual questions regarding each class member's medical history, potential alternate causes for the alleged injury, and the specific doctors that prescribed the medicine. *See id.* The court also reasoned that the plaintiff's fraud and warranty claims were not suitable for class determination because those claims would turn on what particular representations were made to the putative class members. *See id.* at 277. Concluding that it was "obvious from the pleadings that no class action could be maintained," the court struck the class allegations from the plaintiff's complaint. *See id.* at 274.

The better approach is to let the parties litigate issues of predominance at the class certification stage where there will be a more fully developed factual record. After all, the pleadings alone are usually insufficient to allow the Court to make class certification determinations. *Mills*, 511 F.3d at 1309. The Court notes, however, that Defendants have pointed out several potential obstacles Plaintiffs face in satisfying the predominance requirement. Defendants have argued that the medical history of each putative class member, the behavior of each implanting surgeon, and what was communicated to each surgeon are all important factors in determining Defendants' liability to each potential class members. At the class certification stage, Plaintiffs will bear the burden of demonstrating how these individualized issues do not defeat predominance. Although Plaintiffs argue that Rule 23(c)(4)'s issue certification provision could be appropriate, they have not explained how certifying an issues class solely on the issue of defectiveness would further Rule 23's goals of promoting judicial efficiency. Moreover, many of the cases Plaintiffs cite that have approved issue classes did so only after determining that there were significant liability issues related to injuries common to all members of the class. *See, e.g.*, *In re Whirlpool*, 722 F.3d at 860–61; *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 41 (1st Cir. 2003). Here, Defendants argue that nearly every liability issue is individualized.[4] Certainly, before Plaintiffs will be allowed to utilize issue certification, they will need to demonstrate how resolution of "particular common issues 'would materially advance the disposition of the litigation as a whole.' " *Rink*, 203 F.R.D. at 669 (quoting *Emig v. Am. Tobacco Co.*, 184 F.R.D. 379, 395 (D. Kan. 1998)). As such, the presence of individualized factual questions may ultimately prevent Plaintiffs from being able to obtain class certification.[5]

3. *Bristol-Myers*

***7** Defendants also argue that Plaintiffs' class allegations should be struck because the Supreme Court's decision in *Bristol-Myers* bars federal courts from exercising specific personal jurisdiction over defendants with respect to class claims by non-residents of the forum state. Plaintiffs argue that the holding in *Bristol-Myers* does not apply to this case because it is limited to state court actions and the federalism concerns noted by the Supreme Court are not present. They also point to cases that have distinguished *Bristol-Myers* because it involved a mass tort action rather than a class action.

In *Bristol-Myers*, 86 California residents and 592 residents from 33 other states filed a mass tort action against Bristol-Myers Squibb Company ("BMS") in California state court for injuries allegedly caused by the drug Plavix. 137 S. Ct. at 1777–79. BMS, a Delaware corporation headquartered in New York, asserted that the California courts did not have personal jurisdiction over the claims of the non-residents injured by Plavix used and purchased in other states, and it moved to quash service of summons on those claims. *Id.* at 1778. The California Supreme Court disagreed and applied "a sliding scale approach to specific jurisdiction" under which it held that although California courts did not have general jurisdiction over BMS they could exercise specific

jurisdiction over the non-resident's claims. *Id.* The court reasoned that because BMS had extensive contacts with the state of California that "a less direct connection between BMS's forum activities and plaintiffs' claims" was required to establish specific personal jurisdiction. *Id.* at 1779.

The United States Supreme Court found that the California approach did not square with its personal jurisdiction precedent and held that California state courts could not exercise personal jurisdiction over the non-residents' claims against BMS. *See id.* at 1783–84. The Court emphasized that "[t]he mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims." *See id.* at 1781 (emphasis in original). The Court further reasoned that there must be "a connection between the forum and the specific claims at issue" and that personal jurisdiction is not established merely because a court may have personal jurisdiction over similar claims brought by different plaintiffs. *See id.* However, the Court did "leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court." *Id.* at 1784.

Defendants correctly note that the Fourteenth Amendment's Due Process Clause places the same limits on the exercise of personal jurisdiction in federal courts sitting in diversity as it does on state courts. *See Meier ex rel. Meier v. Sun Int'l Hotels, Ltd.*, 288 F.3d 1264, 1269 (11th Cir. 2002). As such, it is unlikely that *Bristol-Myers* only applies to state court actions or that its caveat that the Fifth Amendment's Due Process Clause may dictate a different result pertains to federal courts sitting in diversity.

Moreover, Plaintiffs' argument that the federalism concerns present in *Bristol-Myers* are not present in federal court is unavailing, and the two cases Plaintiffs cite in support of this position are clearly distinguishable. In *Sloan v. General Motors LLC*, the court concluded that because federal courts all represent the same sovereign the personal jurisdiction due process analysis, when federal courts exercise federal question jurisdiction, does not implicate the concerns of federalism and state sovereignty present in *Bristol-Myers.* 287 F. Supp. 3d 840, 859 (N.D. Cal. 2018). However, the court noted that it was not expressing any opinion as to how *Bristol-Myers* would apply in a diversity jurisdiction case such as this one. *See id.* at 859 n.2. Further, although the court in *In re Chinese-Manufactured Drywall Products Liability Litigation* was sitting in diversity, that case involved multi-district litigation where the court had already entered default judgments against the defendants contesting the court's jurisdiction over them. MDL No. 09-2037, 2017 WL 5971622, at *16 (E.D. La. Nov. 30, 2017). Additionally, that court did not distinguish *Bristol-Myers* solely based on its conclusion that "federalism concerns do not apply," but instead, listed other, more persuasive, reasons for why *Bristol-Myers* does not affect personal jurisdiction analysis in the class action context. *See id.* 12–19.

***8** Plaintiffs' reliance on the dicta in the Supreme Court's plurality opinion in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011), for the proposition that the personal jurisdiction requirements of federal and state courts do not entirely overlap is similarly misplaced. While the Court did note that "[f]or jurisdiction, a litigant may have the requisite relationship with the United States Government but not with the government of any individual State" to satisfy due process, it also stated that this "would be an exceptional case." *Id.* at 884. Further, in that case, the Court spoke in terms of the federal courts exercising personal jurisdiction over a foreign company purposely availing itself to the United States as a whole rather than any individual state. *See id.* at 885. The Court was in no way endorsing a different due process analysis for state courts and federal courts sitting in diversity. Thus, Plaintiffs overstate the difference between the personal jurisdiction analysis conducted by federal and state courts.

Nonetheless, the Court remains skeptical that *Bristol-Myers* requires it to strike Plaintiffs' proposed nationwide class. Neither the Eleventh Circuit nor any other Court of Appeals has addressed whether *Bristol-Myers* applies to the claims of unnamed putative class members in a proposed nationwide class. Relying on a line of cases mainly from the Northern District of Illinois, Defendants insist that its holding extends to class actions. These courts generally reason that the Fourteenth Amendment's due process requirements apply with equal force in the class action context so that *Bristol-Myers*'s holding precludes nationwide class actions from being brought in a forum that does not have personal jurisdiction over the claims of unnamed class members. *See, e.g.*, *Anderson v. Logitech*, Inc., No. 17 C 6104, 2018 WL 1184729, at *1 (N.D. Ill. Mar. 7, 2018); *Practice Mgmt. Support Servs., Inc. v. Cirque Du Soleil, Inc.*, 301 F. Supp. 3d 840, 862 (N.D. Ill. 2018); *DeBernardis v. NBTY, Inc.*, No. 17 C 6125, 2018 WL 461228, at *2 (N.D. Ill. Jan. 18, 2018). Defendants argue that any other interpretation of *Bristol-Myers* would violate the Rules Enabling Act, which provides that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any

substantive right." *See* 28 U.S.C. § 2072(b).

However, several other district courts have concluded that *Bristol-Myers* does not apply to the claims of unnamed putative class members. *See, e.g.*, *Sanchez v. Launch Tech. Workforce Sols., LLC*, 297 F. Supp. 3d 1360, 1369 (N.D. Ga. 2018); *Becker v. HBN Media, Inc.*, 314 F. Supp. 3d 1342, 1345 (S.D. Fla. 2018); *Knotts v. Nissan N. Am., Inc.*, File No. 17-cv05049 (SRN/SER), 2018 WL 4922360, at * 16 (D. Minn. Oct. 10, 2018). The Court agrees. Defendants have cited no case prior to *Bristol-Myers* that required plaintiffs bringing a nationwide class action to establish that the forum either had general jurisdiction over the defendant or specific jurisdiction over the claims of each member of the putative class. "The pre-*Bristol-Myers* consensus, rather, was that due process neither precluded nationwide or multistate class actions nor required [an] absent-class-member-by-absent-class-member jurisdictional inquiry." *Al Haj v. Pfizer Inc.*, 17 C 6730, 2018 WL 3707561, at *1 (N.D. Ill. August 3, 2018).

As noted by the court in *Sanchez*, there are material differences between mass actions, such as *Bristol-Myers*, *and class actions. See Sanchez*, 297 F. Supp. at 1365. In contrast to mass actions, where each plaintiff is a real party in interest, class actions are brought in a representative capacity. *See Falcon*, 457 U.S. at 155 ("The class-action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.' " (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979))). Thus, absent class members are not considered parties when determining whether there is complete diversity of citizenship, *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002), or whether the amount in controversy has been satisfied in diversity suits not brought under the Class Action Fairness Act ("CAFA"). *See Snyder v. Harris*, 394 U.S. 332, 341–342 (1969). This is justified by the need for ease of administration of class actions, which would be compromised if the courts had to independently assess whether each unnamed class member met the requirements for subject matter jurisdiction. *See Devlin*, 536 U.S. at 10. There is no reason why this rationale does not also apply for personal jurisdiction purposes.

***9** To be sure, personal jurisdiction is governed by constitutional due process principles while these diversity jurisdiction principles are governed by statute. However, Rule 23 contains procedural safeguards that adequately protect Defendants' due process rights. Contrary to Defendants' assertion, the certification procedures set forth in Rule 23 not only protect absent class members' due process rights but also the rights of defendants. For example, Rule 23(b)(3)'s superiority and predominance requirements "ensure that the defendant is presented with a unitary, coherent claim to which it need respond only with a unitary, coherent defense." *Sanchez*, 297 F. Supp. at 1366. Given the requirement that class claims be coherent, it would be far less burdensome for Defendants to come to this forum to litigate the putative class members' claims than it was for the defendants in *Bristol-Myers* who faced the possibility of each plaintiff bringing unique claims against them. Because Defendants must already come to this forum to litigate the Jones's claims and, potentially, the claims of an Alabama class, there would be little jurisdictional unfairness in requiring them to also come into the forum to litigate the claims of the putative nationwide class. The fact that the Court has specific jurisdiction over the Jones's claim also mitigates against the concerns of forum shopping expressed in *Bristol-Myers.* Thus, allowing the unnamed non-resident putative class members to bring claims against Defendants in this forum would not deprive Defendants of any substantive right in violation of the Due Process Clause or the Rules Enabling Act.

Moreover, the Supreme Court's own characterization of its holding in *Bristol-Myers* cautions against extending its reach to the claims of unnamed class members in nationwide class actions. The Court noted that its conclusion was a result of the "straightforward application ... of settled principles of personal jurisdiction." *Bristol-Myers*, 137 S. Ct. at 1783. It gave no indication that its ruling would apply to the claims of non-resident putative class members. Defendants' desired application of *Bristol-Myers* would create a sea change in class action jurisprudence. The Court doubts that a "straightforward application" of personal jurisdiction precedent would lead to such a result.

Finally, the Court agrees with Plaintiffs that it is at least premature to strike the proposed nationwide class on personal jurisdiction grounds. Due to the fact that Plaintiffs have yet to move for class certification, applying *Bristol-Myers* at this juncture would require the Court to undertake the nearly impossible task of conducting a specific jurisdiction analysis over parties not yet before it. *See Chernus v. Logitech, Inc.*, Civil Action No.: 17-673 (FLW), 2018 WL 1981481, at *8 (D. N.J. April 27, 2018) ("[T]o determine whether the Court has specific jurisdiction over Defendants with respect to the claims of the unnamed class members prior to class certification would put the proverbial cart before the horse."). By limiting Plaintiffs' class allegations to an Alabama only class, the Court may inadvertently exclude non-resident class members who do have sufficient contacts with Defendants in this forum to establish

specific jurisdiction. This is a risk that the Court is unwilling to take. Therefore, the Court will not strike Plaintiffs' class allegations on personal jurisdiction grounds.

4. Variations in State Law

Defendants finally argue that Plaintiffs' class allegations should be struck because significant variations in the state law applicable to Plaintiffs' claims defeat predominance and superiority. Plaintiffs respond by arguing that it is premature to find that variations in state law make class certification impossible and that sub-classes may be developed to account for these variations. Moreover, they argue that "nuanced differences in the negligence and product liability laws of various states only create an obstacle to certification if the differences are material." (Doc. 27 at 31.) They assert that because the predominate issue in this case is the existence of a defect that differences in state law might not create an obstacle to certification.

"A federal court sitting in diversity [applies] the conflict-of-laws rules of the forum state." *See Grupo Televisa, S.A. v. Telemundo Commc'ns Grp., Inc.*, 485 F.3d 1233, 1240 (11th Cir. 2007) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)). "Alabama law follows the traditional conflict-of-law principles of *lex loci contractus* and *lex loci delicti.*" *Precision Gear Co. v. Cont'l Motors, Inc.*, 135 So. 3d 953, 956 (Ala. 2013) (quoting *Lifestar Response of Ala., Inc. v. Admiral Ins. Co.*, 17 So. 3d 200, 213 (Ala. 2009)). Under the principle of *lex loci contractus*, courts apply the law of the state where the contract at issue was formed. *See id.* Similarly, the principle of *lex loci delicti* requires courts to apply "the law of the state where the injury occurred" for tort claims. *Id.* Thus, the class claims of negligence, wantonness, products liability, and loss of consortium will be governed by the laws of the states where each putative class member was implanted with the ATTUNE device. Moreover, the class claims for breach of express warranty, breach of implied warranty of fitness for a particular purpose, and breach of implied warranty of merchantability will also be governed by the laws of the states where the implantations occurred. *See Collins v. Davol, Inc.*, 56 F. Supp. 3d 1222, 1230 (N.D. Ala. 2014) (applying *lex loci contractus* to breach of warranty claims and concluding that the law of the state where medical device implanted governed those claims). Because Plaintiffs seek to certify a nationwide class, it is likely that the laws of all fifty states will be implicated.

***10** Defendants contend that certifying a nationwide class on the claims brought by Plaintiffs would be entirely unmanageable. With respect to Plaintiffs' negligence claims, Defendants note that some states apply the common law to negligence actions based on a products liability theory while in other states these claims are governed by statute. (*See* Doc. 24 at 32.) They also state that other aspects of Plaintiffs' negligence claims would necessarily vary from state to state. For example, some states recognize a contributory negligence defense but others apply comparative fault. Defendants also argue that because many states do not recognize the tort of wantonness Plaintiffs are precluded from bringing a wantonness claim on behalf of a nationwide class.[6]

With respect to Plaintiffs' claims under the Alabama Extended Manufacturing Liability Doctrine ("AEMLD"), Defendants point out that only class members injured in Alabama may recover under this statute. Moreover, they argue that variations in the products liability laws of each state make it impossible to certify a nationwide products liability class. *See Norwood v. Raytheon Co.*, 237 F.R.D. 581, 597–98 (W.D. Tex. 2006) (finding that strict products liability law differs among states with respect to elements plaintiffs must prove, evidence that may be considered, and the test for determining whether a product was unreasonably dangerous). Defendants also point to several decisions where courts have refused to certify nationwide classes alleging breach of express or implied warranty because the plaintiffs failed to demonstrate how differences in state law would not preclude predominance. *See, e.g.*, *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 726 (5th Cir. 2007); *Karhu v. Vital Pharms., Inc.*, No. 13-60768-CIV, 2014 WL 815253, at *8 (S.D. Fla. March 3, 2014); *Alligood v. Taurus Int'l Mfg., Inc.*, No. CV 306-003, 2009 WL 8387645, at *11 (S.D. Ga. March 4, 2009). Defendants cite dozens of cases that suggest that state law varies as to whether privity, reliance, and notice are required elements of express warranty claims. (*See* Doc. 36 at 35–37.) They cite several other cases that show that there are variations in state law governing implied warranty claims. Specifically, Defendants note that states differ as to whether vertical privity is required and as to what type of damages can be recovered. (*See id.* at 37–38.)

"In a multi-state class action, variations in state law may swamp any common issues and defeat predominance." *Klay v. Human, Inc.*, 382 F.3d 1241, 1261 (11th Cir. 2004) (quoting *Castano*, 84 F.3d at 741), *abrogated in part on other grounds by Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639 (2008). At the class certification stage,

"[t]he party seeking certification ... must ... provide an extensive analysis of state law variations to reveal whether these pose insuperable obstacles." *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1180 (11th Cir. 2010) (quoting *Cole*, 484 F.3d at 724). "The issue can only be resolved by first specifically identifying the applicable state law variations and then determining whether such variations can be effectively managed through creation of a small number of subclasses grouping the states that have similar legal doctrines." *Id.* (quoting *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017 (D.C. Cir. 1986)). If this analysis reveals that "a large number of different legal standards govern[ ] a particular claim," class certification will be impossible. *See Klay*, 382 F.3d at 1261.

***11** Here, the Court agrees with Plaintiffs that it is premature to determine that the state law variations identified by Defendants preclude certification of the proposed nationwide class. Typically, at the class certification stage, courts make determinations on whether differences in state law defeat predominance after being presented with complete fifty state surveys and full briefing on how these variations are material. *See Cole*, 484 F.3d at 725 (noting that both parties had provided the court with extensive catalogs of the applicable state law and an expert report on the effect of state law variations). Here, although Defendants have catalogued various differences among the applicable state law, their analysis falls short of a complete fifty state survey.[7] Other courts have denied similar motions to strike on the basis that they were premature. *See, e.g.*, *Wagner v. Gen. Nutrition Corp.*, No. 16-CV-10961, 2017 WL 3070772, at *9 (N.D. Ill. July 19, 2017); *In re Canon Cameras*, No. 05 Civ. 7233(JSR), 2006 WL 1751245, *1 (S.D.N.Y. June 23, 2006).

Moreover, although Defendants have demonstrated that there are differences in the state laws applicable to Plaintiffs' claims, this does not necessarily mean that Plaintiffs' claims cannot be maintained as a class action. For example, variations in state law may be accounted for through the creation of subclasses *See Klay*, 382 F.3d at 1262. While Defendants argue that the sheer number of state law variations they have identified indicates that subclasses will not solve Plaintiffs' predominance problem, the Court declines to make this determination until it is presented with Plaintiffs' trial plan at the class certification stage. At that time, it will have a better sense of whether some combination of subclasses could be workable. Thus, the Court concludes that it is premature to strike Plaintiffs' class allegations on the grounds that variations in state law would make it impossible for Plaintiffs to meet the class certification requirements.

IV. Conclusion

It is doubtful that Plaintiffs will be able to demonstrate that predominance is satisfied as it appears that the pain and suffering experienced by each putative class member will be individualized. However, the Court is not prepared at this time to find that at least certain claims brought by Plaintiffs cannot satisfy the predominance requirement. Thus, for the reasons stated above, Defendants' motions to strike Plaintiffs' amended complaint and class allegations (doc. 24) are DENIED. Plaintiffs' implied motion to amend complaint is GRANTED. Defendants will have leave to re-assert the arguments that support their motion to strike class allegations once Plaintiffs move for class certification. Defendants have ten (10) days from the date of this Order to answer Plaintiffs' amended complaint.

DONE and **ORDERED** on November 20, 2018.

All Citations

Slip Copy, 2018 WL 6431013

Footnotes

1 The background facts are taken exclusively from the allegations in the amended complaint. (Doc. 23.)

2 The Eleventh Circuit adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

3 Defendants do not argue that Plaintiffs' proposed class fails Rule 23(a)'s numerosity and adequacy of representation requirements. At this early stage, the Court will not question whether these two prerequisites can be met.

4 The courts are split as to whether issue classes under Rule 23(c)(4) may be certified unless the cause of action as a whole first

satisfies Rule 23(b)(3)'s predominance requirement. *Compare Castano v. Am. Tobacco Co.*, 84 F.3d 734, 345 n.21 (5th Cir. 1996) *with In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006). The Eleventh Circuit has yet to provide clear guidance as to which standard applies.

5 Defendants also argue that Plaintiffs' attempt to limit the class to individuals who experienced "mechanical loosening" makes the class unascertainable because determining class membership would require fact intensive inquiries into each putative class member's medical records, which is unmanageable. However, discovery may reveal that there is some administratively feasible way to determine class membership. Therefore, Plaintiffs' class allegations are not due to be struck on this basis.

6 Although the Defendants state that they are unaware of any state outside of Alabama that recognizes an independent claim of wantonness, the Court's own research has revealed that at least the states of Kansas and Missouri appear to recognize wantonness as a cause of action. *See Wagner v. Live Nation Motor Sports, Inc.*, 586 F.3d 1237, 1244–45 (10th Cir. 2009) (recognizing wanton conduct as a tort separate from negligence under Kansas law); *Harzfeld's, Inc. v. Otis Elevator Co.*, 116 F. Supp. 512, 514 (W.D. Mo. 1953) (concluding that under Missouri law "willful, wanton, and reckless conduct" is an independent cause of action).

7 Plaintiffs have made no attempt to survey the applicable state law. The Court recognizes that at least one other district court within this Circuit granted a motion to strike class allegations after the plaintiffs' failed to conduct an "extensive analysis" of applicable state law variations. *See Chilton Water Auth. v. Shell Oil Co.*, No. 98-T-1452-N, 1999 WL 1628000, at *8 n.43 (M.D. Ala. May 21, 1999). However, due to the Eleventh Circuit's reluctance to allow class certification determinations to be made prior to discovery, the Court concludes that Plaintiffs do not bear the burden of demonstrating sufficient commonality of state law at this stage.

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