

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| In Re Lorazepam & Clorazepate Antitrust Litig. | MDL Docket No. 1290 (TFH/JMF) Misc. No. 99mc0276 (TFH) |
| Blue Cross Blue Shield of Minnesota, Blue Cross Blue Shield of Massachusetts, and Federated Mutual Insurance Company, Plaintiffs, v. Mylan Laboratories, Inc., et al., Defendants. | Civ. No. 02-1299 (TFH) |
| Health Care Service Corporation, Plaintiffs, v. Mylan Laboratories, Inc., et al., Defendants. | Civ. No. 01-2646 (TFH) |

**Plaintiffs' Joint Motion to Dismiss Claims
and for Order for Remittitur**

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Pursuant to the Court's October 24, 2012 Memorandum and Order (Dkt. Nos. 1037 and 1038) and Rule 21 of the Federal Rules of Civil Procedure and for the reasons stated below and in the attached documents, Plaintiffs Blue Cross Blue Shield of Minnesota, Blue Cross Blue Shield of Massachusetts, and Health Care Service Corporation hereby respectfully move the Court to dismiss without prejudice the claims of the self-funded customers listed in Exhibits 1-3 to the 1/14/13 Declaration of Justin McLean.

Plaintiffs additionally move for remittitur of the judgments in the amount of damages and prejudgment interest attributable to these claims as described herein.

Introduction

Pursuant to this Court's Order of October 24, 2012, Plaintiffs¹ move to dismiss the claims of each of the self-funded customers for which Plaintiffs have not provided proof of diversity jurisdiction. These self-funded customers are listed in Exhibits 1-3 attached to the 1/14/13 Declaration of Justin McLean. Plaintiffs also move for a remittitur of the damages attributable to each of these claims.

¹ This pleading is submitted on behalf of Blue Cross Blue Shield of Minnesota, Blue Cross Blue Shield of Massachusetts, and Health Care Service Corporation, who will be referred to as Plaintiffs. Plaintiff Federated Mutual Insurance Company is not involved in the issues currently before this Court.

I. Background

In previous motions to this Court, Plaintiffs have requested dismissal of the claims of self-funded customers for whom they are unable to establish sufficient proof of diversity of citizenship and have asked for a remittitur of damages attributable to each of these claims. In the October 24, 2012 Order denying these motions without prejudice, this Court ordered the parties to engage in a limited discovery period, and then ordered that Plaintiffs “file a motion to dismiss and for remittitur of damages attributable to the dismissed customers dismissing any nondiverse self-funded customers over whom this court lacks subject matter jurisdiction.” (Dkt. Nos. 1037 at 17-18, 1038.) The Court’s October 24, 2012 Order also requested that Plaintiffs move to amend their Complaint to “aver the jurisdictional facts necessary to establish diversity jurisdiction for self-funded customers over whom they allege this Court has subject matter jurisdiction” and, “provide competent proof of the principal place of business for the corporate self-funded customers over whom they allege this Court has subject matter jurisdiction.” (Dkt. No. 1037 at 18.)²

As Plaintiffs informed the Court in June 2011, Plaintiffs’ damages expert included the claims of 1387 self-funded customers that were presented to the jury at trial.³ The damages presented by Plaintiffs’ expert

² Plaintiffs are providing this proof in the form of declarations attached as exhibits to their Motion to Amend, filed contemporaneous with this motion.

³ In June 2011, the Plaintiffs provided lists containing 1403 names of self-funded customers to the Court, but 16 of those customers were listed twice. *See* 1/14/13 Diekmann Declaration, ¶¶ 6-7 (explaining original BCBS-MN list had ten duplicates; original BCBS-MA list had two

(and subsequently awarded by the jury) included claims for 384 BCBS-MA self-funded customers, 787 BCBS-MN self-funded customers, and 216 HCSC self-funded customers. In accordance with the Court's October 24, 2012 Order, Plaintiffs have now put all 1387 of these claims into one of two groups: (1) the "diverse" group, and (2) the "dismissal/remittitur" group.

By their proposed amended complaints, Plaintiffs seek to amend their complaints to aver that this Court has diversity jurisdiction over the claims of 612 self-funded customers. *See* Proposed Fourth Amended Complaint, Proposed Third Amended Complaint, Exhs. A1 (listing 419 self-funded customers); A2 (153 self-funded customers); B1 (40 self-funded customers). Plaintiffs seek to dismiss the claims of 775 self-funded customers. *See* McLean Decl. Exhs. 1 (listing 231 self-funded customers of BCBS-MA); 2 (368 self-funded customers of BCBS-MN); 3 (176 self-funded customers of HCSC).

A. The "Diverse" Group

The first group of claims includes those belonging to self-funded customers that are diverse to all Defendants. For the corporate self-funded customers that are diverse to Defendants, Plaintiffs are submitting declarations regarding facts concerning their principal place of business. (*See* Exhs. 1 and 2 to 1/14/13 Carroll Declaration and Exh. 1 to 1/14/13 Tisch Declaration attached to Plaintiffs' Joint Motion for Leave to File Amended Complaints.) As noted in the Plaintiffs' Joint

duplicate names); *see* 1/14/13 Zimmerman Declaration, ¶ 6 (explaining original HCSC list had four duplicates).

Motion for Leave to File Amended Complaints (“Motion to Amend”) filed contemporaneous with this motion, the “diverse” group of claims belongs to the self-funded customers listed on Exhibits A1 and A2 to the Proposed Fourth Amended Complaint of Plaintiffs Blue Cross Blue Shield Massachusetts, Blue Cross Blue Shield Minnesota and Federated Mutual Insurance Company (“Fourth Amended Complaint”) and those listed on Exhibit B1 to the Proposed Third Amended Complaint of Plaintiff Health Care Service Corporation (“Third Amended Complaint”).

B. The “Dismissal/Remittitur” Group

The second group of claims, the dismissal/remittitur group, includes those claims belonging to self-funded customers that are non-diverse to at least one of the Defendants. It also includes the claims of all the corporate self-funded customers for whom Plaintiffs have not provided declarations regarding their principal place of business (even though such self-funded customers are indeed diverse to the Defendants). In addition, the dismissal/remittitur group includes the claims of certain self-funded customers for whom Plaintiffs were unable to ascertain sufficient information to make a citizenship determination. Finally, the dismissal/remittitur group includes the claims of certain public entity self-funded customers for which the cost of providing discovery would outweigh the potential recovery for such customers.

II. Motion to Dismiss

Plaintiffs hereby move to dismiss without prejudice under Rule 21 the claims of the self-funded customers listed on Exhibits 1-3 of the 1/14/13 Declaration of Justin McLean. As explained above, each of the

self-funded customers listed on these Exhibits is either not diverse to all Defendants, or has been placed in this group because Plaintiffs have another reason as to why they are not making an averment of diversity jurisdiction or providing a proffer with respect to that self-funded customer.

Because Plaintiffs have not established diversity of citizenship for the self-funded customers listed in Exhibits 1, 2, and 3 to the McLean Declaration, they hereby move the Court to dismiss without prejudice the claims of the self-funded customers on these lists pursuant to Rule 21. *See* Fed. R. Civ. P. 21 (“The court may also sever any claim against a party.”); *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 836 (1989); *LeBlanc v. Cleveland*, 248 F.3d 95, 98-99 (2d Cir. 2001); *Long v. District of Columbia*, 820 F.2d 409, 417 (D.C. Cir. 1987); *Rice v. Sunrise Express*, 209 F.3d 1008, 1016 (7th Cir. 2000) (“It is within the district court’s broad discretion whether to sever a claim under Rule 21.”)

III. Motion for Remittitur

For each of the claims Plaintiffs are moving to dismiss, Plaintiffs also seek a remittitur for those amounts of the judgment attributed to those claims. At trial, Dr. Saha of Analysis Group, presented evidence of Plaintiffs’ damages. Afternoon Tr. 5/12/05 at 42; PEX 5002. The jury awarded Plaintiffs precisely the amounts Dr. Saha calculated. PEX 5002 (chart of Plaintiffs’ respective damages); Dkt. 875 at 3 (verdict form). After trial, this Court granted the parties’ request for a remittitur of the damages attributable to the claims of five self-funded customers that had opted out of the ratification procedure but were inadvertently included in the damages award. *See* Dkt. 943 at 9-10, 12-14. To assess this remittitur

amount in 2005, Dr. Saha individually calculated the damages attributed to claims of each of these opt-out customers. *See* Dkt. 898-2 at Ex. D (Saha declaration and exhibits showing remittitur calculations and amounts). In preparing his expert opinion on damages, Dr. Saha was assisted by Justin McLean, also with Analysis Group. *See* 1/14/13 McLean Decl. ¶ 1. Mr. McLean not only worked closely with Dr. Saha but indeed even testified during discovery in this matter. *Id.* As the Court is aware, Dr. Saha is no longer with Analysis Group, but for the current remittitur calculations, Mr. McLean has been able to apply the same methodology that Dr. Saha used for the remittitur calculations in 2005. *Id.*, ¶ 4.

Plaintiffs provided Mr. McLean with the list of the self-funded customers in the dismissal/remittitur group as set forth above. *See* 1/14/13 McLean Decl. ¶ 2. Mr. McLean was then able to assess the individual damages attributable to each self-funded customer on the list following the methodology Dr. Saha used in 2005. *Id.*

Pursuant to Mr. McLean's calculations, the total amount attributable to the claims of these self-funded customers is as follows:

| Plaintiff | Compensatory Damages for Self-Funded Customers for Whom Diversity has not been Established |
|-----------|--|
| BCBS-MA | \$ 929,743 |
| BCBS-MN | \$ 553,271 |
| HCSC | \$ 162,653 |

The amount of the damages for each of these was trebled according to the applicable state law. Dkt. 943 at 20-27. Thus, the remittitur amounts after the applicable trebling methodology for each Plaintiff's judgment is calculated as follows:

| Plaintiff | Compensatory Remittitur Trebled Pursuant to State Law |
|-----------|---|
| BCBS-MA | \$ 6,508,201 |
| BCBS-MN | \$ 1,659,813 |
| HCSC | \$ 487,959 |

In addition, Plaintiffs BCBS-MA and BCBS-MN were awarded pre-judgment interest on their compensatory damages award. Dkt. 999.⁴ The amount of the prejudgment interest attributed to the remittitur amounts is as follows:

| Plaintiff | Prejudgment Interest Remittitur |
|-----------|---------------------------------|
| BCBS-MA | \$ 778,014.78 |
| BCBS-MN | \$ 129,495.73 |

See Zabel 1/14/13 Decl. ¶¶ 4-5.

⁴ HCSC did not seek pre-judgment interest, and thus seeks no remittitur of prejudgment interest amounts.

Therefore, the total remittitur sought for each Plaintiff, including the compensatory damages attributable to the claims of self-funded customers for whom diversity could not be established, together with the amount of the willfulness trebling and pre-judgment interest associated with those compensatory amounts, is as follows:

| Plaintiff | Total Remittitur Requested |
|-----------|----------------------------|
| BCBS-MA | \$ 7,286,215.78 |
| BCBS-MN | \$ 1,789,308.73 |
| HCSC | \$ 487,959.00 |

Dated: January 14, 2013

Respectfully submitted,

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