

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT

SYLVESTER HEBRON, *et al.*,)
)
Plaintiffs,)
) Cause No. 1422-CC09740-01
v.)
) Division No. 16
ABBVIE INC., *et al.*,)
)
Defendants.)

ORDER

The Court has before it Defendants' Motion to Dismiss, Transfer, and Sever. The Court now rules as follows.

Plaintiffs bring this products liability case claiming injuries and damages caused by their use of AndroGel, a pharmaceutical testosterone replacement product.

Plaintiffs allege that Defendants manufactured, designed, and marketed AndroGel and failed to adequately warn physicians and the public about its harmful qualities. In particular, Plaintiffs allege that Defendants engaged in a fraudulent marketing scheme in which they falsely identified a nonexistent medical condition that AndroGel could be safely used to treat.

Defendants move to sever Plaintiffs' claims for improper joinder, to dismiss this case for lack of personal

jurisdiction, to dismiss this case for improper venue, and to dismiss this case on *forum non conveniens* grounds,

JOINDER

The permissive joinder of parties is governed by Rule 52.05(a). State ex rel. Nixon v. Dally, 248 S.W.3d 615, 616 (Mo. banc 2008). Rule 52.05(a) states as follows:

Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrences or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

"The policy of the law is to try all issues arising from the same occurrence or series of occurrences together." Bhagvandoss v. Beiersdorf, Inc., 723 S.W.2d 392, 395 (Mo. banc 1987); See also Bryan v. Pepper, 175

S.W.3d 714, 719 (Mo. App. S.D. 2005). Events arise out of the same series of transactions or occurrences when they have either a common scheme or design, or if all acts or conduct are connected with a common core, common purpose, or common event. Levey v. Roosevelt Federal Savings Association of St. Louis, 504 S.W.2d 241, 246 (Mo. App. 1973).

In this case, Plaintiffs allege that they were each damaged by the same wrongful conduct of the Defendants in research, design, testing, labeling, manufacture, packaging, marketing, distributing and selling AndroGel. All Plaintiffs allege they were harmed by Defendants' marketing campaign that falsely identified a nonexistent medical condition and all Plaintiffs allege they were harmed by Defendants' failure to adequately warn of the dangers of AndroGel. Plaintiffs' claims against Defendants arise out of the same basic injuries, same defects, same alleged duties, and same causes of action. The alleged events for which Plaintiffs seek damages arise out of the same common scheme or design, and are connected with a common core, common purpose, or common event. In addition, numerous questions of law and fact are common to Plaintiffs' claims herein, including what knowledge Defendants had as to the harmful nature of AndroGel and

whether they engaged in a scheme to create a nonexistent medical condition in order to market AndroGel.

The Court finds that Plaintiffs are properly joined under Rule 52.05(a) and their claims should not be severed.

PERSONAL JURISDICTION

When deciding on a motion to dismiss for lack of personal jurisdiction, the allegations of the petition must be given an intendment most favorable to the existence of the jurisdictional fact. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). Absent one of the traditional territorial bases of personal jurisdiction, presence, domicile or consent, a court may assert personal jurisdiction over a defendant only if certain minimum contacts between Missouri and the defendant are established. Bryant v. Smith Interior Design Grp., Inc., 310 S.W.3d 227, 232 (Mo. banc 2010).

"The sufficiency of the evidence to make a prima facie showing that the trial court may exercise personal jurisdiction is a question of law." Bryant, 310 S.W.3d at 231. When personal jurisdiction is contested, it is the plaintiff's burden to show "that defendant's contacts with the forum state were sufficient." Id. (citing Angoff v. Marion A. Allen, Inc., 39 S.W.3d 483, 486 (Mo. banc 2001)).

"A reviewing court evaluates personal jurisdiction by

considering the allegations contained in the pleadings to determine whether, if taken as true, they establish facts adequate to invoke Missouri's long-arm statute and support a finding of minimum contacts with Missouri sufficient to satisfy due process." Id.

"Missouri courts employ a two-step analysis to evaluate personal jurisdiction." Bryant, 310 S.W.3d at 231 (citing Conway v. Royalite Plastics, Ltd., 12 S.W.3d 314, 318 (Mo. banc 2000). "First, the court inquires whether the defendant's conduct satisfies Missouri's long-arm statute, section 506.500." Id. "If so, the court next evaluates whether the defendant has sufficient minimum contacts with Missouri such that asserting personal jurisdiction over the defendant comports with due process." Id.

Section 506.500.1 RSMo, Missouri's long-arm statute, reads as follows:

Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts:

(1) The transaction of any business within this state;

(2) The making of any contract within this state;

(3) The commission of a tortious act within this state;

(4) The ownership, use, or possession of any real estate situated in this state;

(5) The contracting to insure any person, property or risk located within this state at the time of contracting;

(6) Engaging in an act of sexual intercourse within this state with the mother of a child on or near the probable period of conception of that child.

"Section 506.500 is construed to extend the jurisdiction of the courts of this state over nonresident defendants to that extent permissible under the Due Process clause." Bryant, 310 S.W.3d at 232 (citing State ex rel. Deere v. Pinnell, 454 S.W.2d 889, 892 (Mo. banc 1970)).

"[E]xtraterritorial acts that produce consequences in the state, such as fraud, are subsumed under the tortious act section of the long-arm statute." Bryant, 310 S.W.3d at 232 (citing Longshore v. Norville, 93 S.W.3d 746, 752 (Mo. App. E.D. 2002)).

"The Due Process Clause of the Fourteenth Amendment requires that the defendant have minimum contacts with the

forum state so that maintenance of the suit does not offend traditional notions of fair play and substantial justice.” Peoples Bank v. Frazee, 318 S.W.3d 121, 128 (Mo. banc 2010). “In addition to proving that the defendant purposefully availed himself of the privilege of conducting activities within the forum, exercise of personal jurisdiction over a defendant with minimum contacts must be reasonable in light of the surrounding circumstances of the case.” Id. “This reasonableness depends on an evaluation of several factors.” Id. “A court must consider the burden on the defendant, the forum's interest in adjudicating the dispute, and the plaintiff's interest in obtaining convenient and effective relief.” Id. “Consideration must also go to the interstate judicial system's interest in obtaining the most efficient resolution of controversies and the shared interest of the several States in furthering fundamental substantive social policies.” Id.

“Personal jurisdiction can be general or specific.” Peoples Bank, 318 S.W.3d at 128 (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8-9, (1984)). “A court has general jurisdiction over a nonresident defendant if the defendant has continuous and systematic contacts with the forum not necessarily related

to the cause of action." Id.; See also Daimler AG v. Bauman, 134 S. Ct. 746, 751 (2014). "A court has specific jurisdiction over a non-resident defendant when the suit arises out of or is related to the defendant's contacts with the forum." Id.

In this case, this Court has specific personal jurisdiction over the Defendants. Defendants' alleged conduct satisfies Missouri's long-arm statute because their alleged tortious acts produced injury in the City of St. Louis and other parts of Missouri. Defendants have sufficient minimum contacts with Missouri which include the marketing, sale and distribution of AndroGel in Missouri. These contacts are reasonable in light of the circumstances because Defendants suffer little or no burden litigating in this forum, this forum is interested in adjudicating the dispute because it involves the injury of a City of St. Louis resident in the City of St. Louis, and Plaintiffs are interested in obtaining convenient and effective relief from a Court in a forum where one Plaintiff resides and in a state where several Plaintiffs reside and were injured by Defendants' alleged tortious activities.

Defendants cite no controlling precedent in support of their contention that jurisdiction should be considered as to the claims of individual Plaintiffs. Jurisdiction over

a defendant is based on the minimum contacts that the defendant has with the state, and not the contacts that plaintiffs have with the state. See Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779 (1984). Finally, Defendants' cannot rely on Daimler in support of their argument because the Supreme Court's ruling in Daimler was based on lack of general personal jurisdiction and not specific personal jurisdiction. 134 S. Ct. at 759.

In addition, the Court finds that Defendants have consented to the jurisdiction of this Court by maintaining a registered agent to accept the service of process in Missouri. See Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917); Railroad Co. v. Harris, 79 U.S. 65, 81 (1871); Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1197 (8th Cir. 1990); See also State ex rel. K-Mart v. Holliger, 986 S.W.2d 165, 166 (Mo. banc 1999).

VENUE

Venue in Missouri is determined solely by statute. State ex rel. Ford Motor Co. v. Manners, 161 S.W.2d 373, 375 (Mo. banc 2005); State ex rel. Linthicum v. Calvin, 57 S.W.3d 855, 857 (Mo. banc 2001).

Section 508.010.4 RSMo states:

Notwithstanding any other provision of law, in all actions in which there is any count alleging a tort and in which the plaintiff was first injured in the state of Missouri, venue shall be in the county where the plaintiff was first injured by the wrongful acts or negligent conduct alleged in the action.

The Missouri legislature has mandated that singular terms in its statutes should be construed as including their plural forms "unless there be something in the subject or context repugnant to such construction." State ex rel. BJC Health Sys. v. Neill, 121 S.W.3d 528, 530 (Mo. banc 2003). Section 508.010.4 should therefore be read as "venue shall be in the county where the plaintiff was [or plaintiffs were] first injured.. ."

The Court finds that venue is proper herein. Plaintiffs' claims are properly joined under Rule 52.05. These claims include those of Sylvester Hebron, a resident of the City of St. Louis who allegedly was first exposed to AndroGel in the City of St. Louis, only used AndroGel in the City of St. Louis and suffered a heart attack in the City of St. Louis as a result of this use. Accordingly, venue is proper in this case under Section 508.010.4 RSMo.

FORUM NON CONVENIENS

"The doctrine of forum non conveniens provides that notwithstanding proper jurisdiction and venue by the letter

of the statute, a trial judge has discretion to not exercise jurisdiction if the forum is seriously inconvenient for the trial of the action involved and if a more appropriate forum is available to the plaintiff.” Anglim v. Mo. P. R. Co., 832 S.W.2d 298, 302 (Mo. banc 1992); Moyers v. Moyers, 284 S.W.3d 182, 187 (Mo. App. E.D. 2009).

“The trial court should weigh six important, but non-exclusive, factors in making its decision: 1) the place where the cause of action accrued; 2) the location of witnesses; 3) the parties' residence; 4) any nexus with the place of suit; 5) the public factor of the convenience to and burden on the court; and 6) the availability of another court with jurisdiction that affords a forum for the plaintiff.” Moyers, 284 S.W.3d at 187. “Any additional factors considered and the weight assigned to each depend upon the circumstances of the particular case.” Id. “In addition to the foregoing factors, the trial court shall consider whether proceeding in Missouri would cause injustice by oppressing the defendant or place an undue burden on the court.” Id.

In considering a defendant's argument the Court must keep in mind that plaintiff's choice of a forum should not be disturbed except for “weighty reasons” and only if the

balance is strongly in favor of the defendant. Anglim, 832 S.W.2d at 302. The mere fact a plaintiff might choose a forum based on a perception that a particular venue has a more favorable jury pool does not constitute a basis for dismissal. Euton v. Norfolk & Western Railway Company, 936 S.W.2d 146, 154 (Mo. App. E.D 1996).

This forum is not seriously inconvenient for the trial of the action, and there is no forum more appropriate. None of the six factors weigh heavily in favor of dismissal. The cause of action accrued in part in the City of St. Louis. Many witnesses will be located in the City of St. Louis. Several of the parties in this case reside in the City of St. Louis and other Missouri counties. Sylvester Hebron was first injured in the City of St. Louis and several Plaintiffs were also first injured in Missouri. The Court finds no significant burden on this Court to try the matter here. Finally, Defendants have not shown the availability of another forum that would be more convenient to hear all of Plaintiffs' claims.

This Court will not refuse to exercise jurisdiction under a *forum non conveniens* theory.

Therefore it is Ordered and Decreed that Defendants'

Motion to Dismiss, Transfer, and Sever is hereby DENIED.

SO ORDERED:

Michael K. Mullen, Judge

Dated: _____