UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: FLUOROQUINOLONE PRODUCTS LIABILITY LITIGATION	MDL No. 2642 (JRT)
THIS DOCUMENT RELATES TO: *Jennifer Akman v. Bayer Health Care Pharmaceuticals, Inc., Cobalt Laboratories, Inc. AKA Cobalt Laboratories LLC,* and *Actavis Pharma Co.* Case No. 0:17-cv-00260-JRT.	**MEMORANDUM OPINION AND ORDER GRANTING JUDGMENT ON THE PLEADINGS AND GRANTING LEAVE TO AMEND THE COMPLAINT** Master Docket Case No. 0:15-md-02642

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Defendants Cobalt Laboratories and Actavis Pharma, succeeded by Teva Canada, manufacturers of generic ciprofloxacin, filed a Motion for Judgment on the Pleadings asking the Court to dismiss Plaintiff Jennifer Akman's case because her claims under District of Columbia law are preempted by federal law. Plaintiff Akman argues that her claims, related to injuries caused by ciprofloxacin, are not preempted and, in the alternative, asks for leave to amend. The Court finds that Akman's D.C. law claims based

on Generic Defendants' failure to update their pharmaceutical product information to match FDA-approved warnings are not facially preempted by federal law. But because Akman has not pleaded sufficient allegations or explanations of the source of her claims under D.C. law, the Court will grant Akman leave to amend her complaint.

BACKGROUND

In November 2013, Plaintiff Jennifer Akman was prescribed Cipro or its generic equivalent, ciprofloxacin. (Notice of Removal, Ex. A ("Compl.") ¶ 15, Jan. 17, 2017, Docket No. 1-1.) Akman stopped taking the medication within 24 hours because of a severe adverse reaction. (Compl. ¶ 16.) Akman continues to suffer nerve damage and other injuries from the medication. (*Id.* ¶ 18.)

On November 15, 2016, Akman filed a Complaint against Bayer Healthcare Inc., Bayer Corporation,[1] Cobalt Laboratories, Inc. AKA Cobalt Laboratories LLC ("Cobalt"), and Actavis Pharma Company, succeeded by Teva Canada ("Teva"), in the Superior Court of the District of Columbia (the "Initial Complaint"). (*Id.* ¶¶ 5–14.) Defendants Cobalt and Teva (collectively, "Generic Defendants"), are manufacturers of generic pharmaceutical products, including ciprofloxacin. (*Id.* ¶ 13–14.) Akman alleges that, on August 15, 2013, the FDA issued an updated warning about the risk of peripheral neuropathy from use of Cipro and ciprofloxacin, but Generic Defendants had not updated their labels and other

[1] The Bayer Defendants were dismissed from the case pursuant to a stipulation of dismissal on November 9, 2019. (Order Stip. Dismissal, Nov. 19, 2019, Docket No. 28.)

product information in compliance with the August 2013 mandate at the time Akman was prescribed ciprofloxacin in November 2013. (*Id.* ¶¶ 53–55; *see also id.* ¶¶ 95, 102, 121.)

The case was removed to the U.S. District Court for the District of Columbia on January 17, 2017, (Notice of Removal, Jan. 17, 2017, Docket No. 1), and then transferred to the District of Minnesota on January 27, 2017 to be consolidated for pretrial proceedings as part of *In re: Fluoroquinolone Products Liability Litigation,* Multi-District Litigation No. 2642 (the "Fluoroquinolone MDL"). (Notice of Transfer, Jan. 27, 2017, Docket No. 14.) Generic Defendants filed Answers on February 6, 2017. (Answer by Actavis, Feb. 6, 2017, Docket No. 19; Answer by Cobalt, Feb. 6, 2017, Docket No. 20.)

On February 27, 2017, Akman filed an Amended Complaint by completing the Fluoroquinolone MDL Short Form Complaint, which incorporates the allegations of the MDL Master Complaint ("Short Form Complaint"). (Am. Compl. ¶¶ 1, 15–16, Feb. 27, 2017, Docket No. 21.) In her Short Form Complaint, Akman alleged that she was injured by generic ciprofloxacin and that D.C. law supports her generics-related claim. (*Id.* ¶ 8.)

On July 31, 2020, Generic Defendants filed a Motion for Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c), arguing that Akman failed to state a claim against them. (Mot. J. Pleadings, Jul. 31, 2020, Docket No. 29.) Akman asks the Court to grant leave to amend if the Court finds that the allegations pleaded in the Initial Complaint are insufficient to support her failure to update theory. (Pl.'s Mem. Opp. at 13, Aug. 21, 2020, Docket No. 34.)

DISCUSSION

I. STANDARD OF REVIEW

When evaluating the merits of a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), the Court applies the same legal standard that applies to a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Ashley County v. Pfizer, Inc.*, 552 F.3d 659, 665 (8th Cir. 2009). As such, to survive a motion for judgment on the pleadings, a complaint must contain sufficient factual allegations to state a plausible claim for relief. *See Clemons v. Crawford*, 585 F.3d 1119, 1124 (8th Cir. 2009). A court accepts as true all facts pleaded by the nonmoving party and draws all reasonable inferences from the pleadings in favor of that party. *Id.* Without more, merely reciting the elements of a cause of action is insufficient, and legal conclusions asserted in the complaint are not entitled to the presumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

A party may amend its pleading by leave of court, which "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a)(2). Amendment of pleadings is to be liberally allowed. *Thompson–El v. Jones*, 876 F.2d 66, 67 (8th Cir. 1989). Thus, "absent a good reason for denial—such as undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of amendment—leave to amend should be granted." *Id.*

II. ANALYSIS

A. Operative Complaint

As an initial matter, the parties dispute whether the Court should consider the allegations in Akman's Initial Complaint since she had to file the Short Form Complaint after the case was transferred to the Fluoroquinolone MDL. Cases consolidated for multi-district litigation pre-trial proceedings ordinarily retain their separate identities. *Gelboim v. Bank of America Corp.*, 574 U.S. 405, 413 (2015). The individual pleadings do not merge if the master complaint is "not meant to be a pleading with legal effect," but rather is "only an administrative summary of the claims brought by all the plaintiffs." *Id.* at 413 n.3 (citation omitted). Additionally, "a court presiding over an MDL must take steps to ensure that efficiency does not trump fundamental fairness and that the desire for certainty does not deprive any individual party of substantive rights." *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-MC-2543, 2015 WL 3619584, at *1 (S.D.N.Y. June 10, 2015).

In this MDL, the Court has issued pretrial orders ("PTO") explaining that the short form complaint and incorporated master complaint should be filed rather than standalone complaints. Pretrial Order 1 states that "the [Plaintiffs' Steering Committee] also shall file . . . a Short Form Complaint, which shall be an abbreviated form that Plaintiffs will complete in lieu of filing standalone complaints." (PTO 1 at § 12.B, Feb. 12, 2016, MDL No. 15-2642, Docket No. 76.) Pretrial Order 3 likewise states that "[t]here

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