IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

ROCHANDA HAWKINS,

Plaintiff,

v.

BOEHRINGER INGELHEIM PHARMACEUTICALS, INC.; PFIZER INC.; SANOFI US SERVICES INC; GLAXOSMITHKLINE, LLC; WALGREEN CO.; WALGREENS BOOTS ALLIANCE, INC.; AND JOHN DOES 1 THROUGH 100 INCLUSIVE,

Defendants.

Case No.

NOTICE OF REMOVAL OF ACTION PURSUANT TO 28 U.S.C. §§ 1332, 1441, AND 1446

DEMAND FOR JURY TRIAL

DEFENDANTS BOEHRINGER INGELHEIM PHARMACEUTICALS, INC., PFIZER INC., SANOFI US SERVICES INC., AND GLAXOSMITHKLINE, LLC NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1332, 1441, and 1446, Defendants Boehringer Ingelheim Pharmaceuticals, Inc., Pfizer Inc., Sanofi US Services Inc., and GlaxoSmithKline LLC (collectively, the "Removing Defendants") hereby give notice of removal of this action, *Hawkins v. Boehringer Ingelheim Pharmaceuticals, Inc., et al.*, Case No. 2020L009784, from the Circuit Court of the State of Illinois in and for Cook County to the United States District Court for the Northern District of Illinois.

INTRODUCTION

1. This action is one of hundreds of related lawsuits filed against manufacturers and sellers of Zantac (ranitidine), an antacid medication, alleging that the medication causes various cancers. On February 6, 2020, the Judicial Panel on Multidistrict Litigation ("JPML") created a Multidistrict Litigation ("MDL") in the Southern District of Florida before Judge Robin Rosenberg for pretrial coordination of cases like this one "in which plaintiffs allege that they developed cancer

as a result of NDMA formed from Zantac." *In re Zantac (Ranitidine) Prods. Liab. Litig.*, 2020 WL 582134, at *2 (J.P.M.L. 2020). To date, over 700 actions comprising nearly 2,500 plaintiffs have been transferred to the Zantac MDL.

2. On September 11, 2020, Plaintiff filed this Complaint in the Circuit Court of the State of Illinois in and for Cook County against the Removing Defendants, which had manufactured or sold Zantac over various time periods. The thrust of the allegations in the Complaint—like in countless cases already pending in the MDL—is that Plaintiff ingested over-the-counter ("OTC") "Zantac/ranitidine products" and, as a result, developed cancer—in this case kidney cancer. Compl. ¶¶ 4, 93-96. The Removing Defendants are not citizens of Illinois for diversity purposes. *See id.* ¶ 69. A copy of the Complaint is attached as **Exhibit A**.

3. Plaintiff also names Illinois-based pharmacies as defendants in an effort to destroy diversity jurisdiction. Specifically, the Complaint includes Walgreen Co. and Walgreens Boots Alliance, Inc. (the "Retailer Defendants") as named defendants. *Id.* ¶¶ 10-11. The Retailer Defendants are alleged to be citizens of Illinois for diversity purposes. *Id.*

4. As further explained below, the Retailer Defendants are fraudulently joined in this action because—on its face—Plaintiff's Complaint fails to allege any viable cause of action against them, and therefore their citizenship must be ignored for purposes of assessing whether diversity jurisdiction exists.

5. Plaintiff cannot state a viable strict products liability or breach of warranty claim against the Retailer Defendants because such claims are preempted by federal law. The Retailer Defendants lack the legal authority under U.S. Food and Drug Administration ("FDA") regulations to unilaterally alter Zantac's government-approved labeling or to design the product differently, and consequently, they cannot be liable in strict liability. *See, e.g.*, *PLIVA, Inc. v. Mensing*, 564

U.S. 604, 618 (2011) ("If the Manufacturers had independently changed their labels to satisfy their state-law duty [to attach a safer label], they would have violated federal law."); *Mut. Pharm. Co. v. Bartlett*, 570 U.S. at 475 ("[S]tate-law design-defect claims that turn on the adequacy of a drug's warnings are pre-empted by federal law under [*Mensing*]."). Both *Mensing* and *Bartlett* apply with equal force to foreclose any breach of warranty claims against the Retailer Defendants. *Wagner v. Teva Pharm. USA, Inc.*, 840 F.3d 355, 358 (7th Cir. 2016).

6. Plaintiff's strict liability claims against the Retailer Defendants are also precluded by the Illinois "innocent seller statute," which bars strict liability claims against the sellers of products. 735 Ill. Comp. Stat. 5/2-621. Because Plaintiff cannot show that the Retailer Defendants "participated in the design or manufacture of the product," "had actual knowledge of [any] defect in the product," or "created the defect in the product," the Retailer Defendants cannot be liable under a strict liability theory. *Clay v. Philip Morris USA Inc.*, No. 18-cv-03549, 2018 WL 11198356, at *2 (N.D. Ill. Nov. 6, 2018).

7. Plaintiff's negligence claims cannot be viable because they are premised on the Retailer Defendants' alleged failure to discover defects in ranitidine products they sell, but this would have required the Retailer Defendants to test every product they sold to uncover the alleged presence of NDMA. Under Illinois law, a seller cannot be "compelled to look for defects" in products that it does not manufacture by performing "special tests," as Plaintiff would have required them to do. *Kirk v. Stineway Drug Store Co.*, 187 N.E.2d 307, 313 (Ill. App. Ct. 1963); *Rahn v. Gerdts*, 455 N.E.2d 807, 810-11 (Ill. App. Ct. 1983) (holding that retailer is not under "any duty to generally inspect and discover defects").

8. Finally, because Plaintiff cannot establish any underlying strict liability, negligence, or breach of warranty claim against the Retailer Defendants, Plaintiff's unjust

enrichment claims necessarily fail. *Martis v. Grinnell Mut. Reinsurance Co.*, 905 N.E.2d 920, 928 (Ill. Ct. App. 2009); *Mulligan v. QVC, Inc.*, 888 N.E.2d 1190, 1200 (Ill. Ct. App. 2008).

9. Because the Retailer Defendants are fraudulently joined, federal jurisdiction over this action is proper based on complete diversity between Plaintiff and all properly joined defendants.

JURISDICTION

10. The Removing Defendants remove this action on the basis of diversity jurisdiction pursuant to 28 U.S.C. §§ 1332, 1441, and 1446 and the doctrine of fraudulent joinder.

11. This Court has subject matter jurisdiction under 28 U.S.C. § 1332(a) because: (1) there is complete diversity between Plaintiff and the properly joined Defendants; (2) the amount in controversy exceeds $75,000, exclusive of interest and costs; and (3) all other requirements for removal have been satisfied.

BASIS FOR REMOVAL

I. THERE IS COMPLETE DIVERSITY BETWEEN PLAINTIFF AND THE PROPERLY JOINED PARTIES.

12. Plaintiff is a citizen of Illinois. Compl. ¶ 5.

13. The properly joined defendants are all citizens of states other than Illinois. *See id.* ¶¶ 6-9.

14. Defendant Boehringer Ingelheim Pharmaceuticals, Inc. is a corporation organized under the laws of Delaware with its principal place of business in Ridgefield, Connecticut. *Id.* ¶ 6. Boehringer Ingelheim Pharmaceuticals, Inc. is, therefore, a citizen of Delaware and Connecticut.

15. Defendant Pfizer Inc. is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York, New York. *Id.* ¶ 7. Pfizer Inc. is, therefore, a citizen of Delaware and New York.

16. Defendant Sanofi US Services Inc. is a corporation organized under the laws of Delaware with its principal place of business in Bridgewater, New Jersey. *Id.* ¶ 8. Sanofi US Services Inc. is, therefore, a citizen of Delaware and New Jersey.

17. Defendant GlaxoSmithKline LLC is a limited liability company organized under the laws of Delaware. Its sole member is GlaxoSmithKline Holdings (America) Inc., a corporation organized under the laws of Delaware with its principal place of business in Wilmington, Delaware. GlaxoSmithKline LLC is, therefore, a citizen of Delaware. *See* Attachment to Corp. Disclosure Statement, *In re Zantac (Ranitidine) Prods. Liab. Litig.*, MDL No. 2924, Dkt. 43-1. GlaxoSmithKline LLC is, therefore, a citizen of Delaware.

18. Defendants Does 1 through 100 are sued under "fictitious names." *Id.* ¶ 13. Therefore, their citizenship must be ignored for purposes of determining the propriety of removal. *See* 28 U.S.C. § 1441(b)(1) ("In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded.").

19. Because Plaintiff is a citizen of Illinois and the properly joined defendants are citizens of states other than Illinois, complete diversity exists between Plaintiff and the properly joined defendants. *See* 28 U.S.C. §§ 1332, 1441.

II. THE RETAILER DEFENDANTS ARE FRAUDULENTLY JOINED

20. The Retailer Defendants are fraudulently joined, and their Illinois citizenship should therefore be disregarded in determining whether the case is removable.

21. A defendant is fraudulently joined and its presence in the lawsuit is ignored for purposes of determining diversity where "the claim against the nondiverse defendant is utterly groundless." *Walton v. Bayer Corp.*, 643 F.3d 994, 999 (7th Cir. 2011); *see also Schwartz v. State Farm Mut. Auto. Ins. Co.*, 174 F.3d 875, 878 (7th Cir. 1999) (finding that a defendant is

fraudulently joined if "there exists no 'reasonable possibility that a state court would rule against the [in-state] defendant'") (quoting *Poulos v. Naas Foods, Inc.*, 959 F. 2d 69, 73 (7th Cir. 1992)); *Clay*, 2018 WL 11198356, at *1 ("[T]the district court must ask whether there is any reasonable possibility that the plaintiff could prevail against the non-diverse defendant." (internal quotation marks omitted)).

22. Here, the Retailer Defendants are fraudulently joined because Plaintiff does not plead a cognizable strict liability, negligence, breach of warranty, or unjust enrichment action against them.

23. Specifically, the Retailer Defendants are fraudulently joined because: (1) they are not liable as mere sellers of ranitidine products; (2) they could not have unilaterally changed an FDA-approved label or altered the highly regulated innovation processes of ranitidine products, and the claims against them are accordingly preempted; and (3) they did not have a duty to independently test the ranitidine products, and thus they cannot be liable to the Plaintiff under theories of negligence, breach of warranty, or unjust enrichment.

A. Plaintiff's Strict Liability and Breach of Warranty Claims Are Preempted

24. Plaintiff's strict liability claims and breach of warranty claims are preempted by federal law.

25. In *Mensing* and *Bartlett*, the Supreme Court held that claims involving an FDA-approved product are preempted under federal law when a defendant cannot unilaterally satisfy state-law duties without FDA's prior approval. *Mensing*, 564 U.S. at 623–24 ("[W]hen a party cannot satisfy its state duties without the Federal Government's special permission and assistance, which in turn is dependent on the exercise of judgment by a federal agency, that party cannot ***independently*** satisfy those state duties for pre-emption purposes." (emphasis added)); *Bartlett*, 570 U.S. at 475 ("[S]tate-law design-defect claims that turn on the adequacy of a drug's warnings

are pre-empted by federal law under [*Mensing*].") In *Mensing*, the Supreme Court announced this preemption principle in the context of product liability actions against manufacturers of generic drugs. 564 U.S. at 610. The manufacturers argued that, under federal drug regulations, they are "prevented . . . from independently changing their generic drugs' safety labels." *Id.* at 617. Consequently, they asserted, holding them liable under state law for failure to "adequately and safely label their products," would directly conflict with labeling requirements under federal law. *Id.* The Supreme Court agreed: Because generic manufacturers are unable to comply with both state and federal law, state failure-to-warn claims against generic drug manufacturers must be preempted. *Id.* at 618–620, 614 ("If the Manufacturers had independently changed their labels to satisfy their state-law duty [to attach a safer label], they would have violated federal law.").

26. Similarly, in *Bartlett*, the Court found that because generic manufacturers are "unable to change [a drug's] composition as a matter of both federal law and basic chemistry," state-law design-defect claims are preempted as well. 570 U.S. at 475. As the Seventh Circuit has recognized, "[a]lthough *Mensing* and *Bartlett* dealt with failure to warn and design defect claims . . . federal courts have extended their rationale to similar state law claims," including breach of implied warranty and breach of express warranty claims. *Wagner*, 840 F.3d at 358.

27. The same preemption analysis that the Supreme Court articulated in *Mensing* and *Bartlett* bars claims against pharmaceutical distributors or retailers that stand even further removed than generic manufacturers from the ability to change drug labeling or alter drug chemistry that FDA has approved. Federal law requires that a generic drug have the same active ingredients, route of administration, dosage form, strength, and labeling as the brand-name drug. 21 U.S.C. §§ 355(j)(2)(A)(ii)-(v). Thus, only the brand-name manufacturer who submits the New Drug Application (the "NDA") can alter the design or labeling of the drug—not the Retailer Defendants

who are not, and never were, the holders of the Zantac NDA. As a result, under the settled preemption principles articulated in *Mensing* and *Bartlett*, "there exists no 'reasonable possibility that a state court would rule against" the Retailer Defendants and hold them liable under Plaintiff's strict liability theories. *Schwartz*, 174 F.3d at 878 (internal quotation marks omitted).

B. Plaintiff's Strict Liability Claims Are Barred by the Illinois "Innocent Seller Statute"

28. Plaintiff's strict products liability claims against the Retailer Defendants under failure-to-warn and design defect theories are barred by Illinois law—specifically Section 5/2-621 of the Illinois Distributor Statute (the "innocent seller statute"). This statute can be the basis for a finding of fraudulent joinder. *See Clay*, 2018 WL 11198356, at *2 (rejecting plaintiff's argument that the innocent seller statute cannot be the basis for a finding of fraudulent joinder as contrary to the fraudulent joinder test adopted in *Poulos v. Naas Foods*, 959 F.2d 69 (7th Cir. 1992)).

29. The "purpose" of the innocent reseller statute "is to allow a defendant whose sole liability results from its role as a member in the chain of distribution of an allegedly defective product, who has not been shown to have created or contributed to the alleged defect or had knowledge of the defect, to get out of a product liability action at an early stage." *Murphy v. Mancari's Chrysler Plymouth, Inc.*, 887 N.E.2d 569, 576 (Ill. App. 2008).

30. Thus, under the innocent seller statute, a plaintiff is precluded from bringing a claim under a theory of strict liability unless the plaintiff can show that the defendant "(1) participated in the design or manufacture of the product, (2) had actual knowledge of the defect in the product, or (3) created the defect in the product." *Clay*, 2018 WL 11198356, at *2; *accord Xiaofa Shi v. Am. Honda Motor Co.*, 2011 WL 5403618, at *2 (N.D. Ill. Nov. 8, 2011) (denying remand where reseller did not "exercise[] any control over the design or manufacture" of the product, "[have] actual knowledge of the defect," or "create[] the defect"); *Inman v. Daimler-Chrysler Corp.*, 2000

WL 283016, at *4 (N.D. Ill. Mar. 9, 2000) (same). Plaintiff cannot show that any of these exceptions apply here.

31. First, Plaintiff acknowledges in her party-specific allegations that the Retailer Defendants did not participate in the manufacture or design of ranitidine products, stating that Walgreen Co. only ever "***sold*** Zantac and/or ranitidine-containing drugs" and Walgreens Boots Alliance, Inc. only "***purchased*** ranitidine and ***repackaged and/or relabeled it***." Compl. ¶¶ 11-12. This is confirmed by a recent affidavit submitted by Walgreen Co. in another pending matter, stating unequivocally that Walgreen Co. was not involved in the design or manufacture of ranitidine whatsoever. June 8, 2020 Aff. of Carissa Castonzo ("Castonzo Aff."), at ¶ 5, 15-19. (**Exhibit B**).[1] Moreover, although the Complaint includes boilerplate allegations that Walgreen Co. and Walgreens Boots Alliance, Inc. were "engaged in the business of testing, developing, designing, manufacturing, marketing, selling distributing, and/or promoting Zantac products," *e.g.*, Compl. ¶¶512, 612, those conclusory, contradicting allegations "need not be accepted as true." *Dix v. United States*, No. 09-CV-6349, 2010 WL 2607262, at *7 (N.D. Ill. June 24, 2010) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

[1] In "determining whether fraudulent joinder has occurred," a court "is not limited by the allegations of the parties' pleadings but may pierce the pleadings and consider summary judgment-type evidence such as affidavits and deposition testimony." *Veugeler v. General Motors Corp.*, 1997 WL 160749, at *2 (N.D. Ill. Apr. 2, 1997) (internal quotation marks omitted); *Gross v. FCA US LLC*, 2017 WL 6065234, at *5 (N.D. Ill. Dec. 7, 2017); *see also Badon v. R J R Nabisco Inc.*, 224 F.3d 382, 393 (5th Cir. 2000) (holding that a court may pierce the pleadings to examine affidavits and other summary judgment-type evidence even if the petition facially states a claim against an in-state defendant); *Clay*, 2018 WL 11198356, at *2 (considering similar affidavits submitted by the retailer defendants and finding that the retailer defendants had no involvement in the design, manufacture, labeling, or packaging of the cigarettes at issue).

32. Second, Plaintiff's Complaint does not allege specific facts indicating that the Retailers Defendants had actual knowledge of the purported defect in the ranitidine products they sold. Plaintiff's mere allegations that the Retailer Defendants "knew or should have known" about the alleged defects do not "support[] the claim that [the Retailer Defendants] had actual knowledge." *Clay*, 2018 WL 11198356, at *2. That Plaintiffs' "should have known" of an alleged defect is "insufficient under [Illinois] law" to demonstrate that a reseller had "actual knowledge of a defect in order to be held liable." *Ungaro v. Rosalco, Inc.*, 948 F. Supp. 783, 786 (N.D. Ill. 1996). Thus, Plaintiff's conclusory allegations are insufficient to "establish[] that there is a reasonable probability that [Retailer Defendants] would be held strictly liable." *Clay*, 2018 WL 11198356, at *2; *see also Int'l Bd. of Teamsters Local 734 Health & Welfare Tr. Fund v. Philip Morris, Inc.*, 1998 WL 242130, at *5 (N.D. Ill. May 8, 1998), *aff'd*, 196 F.3d 818 (7th Cir. 1999) ("Because the references to the distributor defendants are so sketchy, it is unnecessary to analyze the elements of each of the plaintiffs' ten counts and conclude the plaintiffs have no reasonable chance of success . . . because the only allegations directed at the distributor defendants are wholly conclusory . . . ."). Indeed, as confirmed in the affidavit of Walgreen Co. submitted in connection with other pending Zantac-related litigation, Walgreen Co. did not have actual knowledge of any defect in the ranitidine products they sold, repackaged, or relabeled. Castanzo Aff. at ¶ 21.

33. Third, Plaintiffs' cannot demonstrate that the Retailer Defendants "created the defect in the product." *Clay*, 2018 WL 11198356, at *2. Plaintiff alleges defects in both the design and labeling of the ranitidine products that the Retailer Defendants sold. *See* Compl. ¶¶ 518, 545, 618, 645. For those ranitidine products that the Retailer Defendants merely resold, they clearly did not control or have the ability to change the design or labeling of the products. But even as to the generic ranitidine products that the Retailer Defendants are alleged to have "purchased,"

"repackaged," and/or "relabeled," the Retailer Defendants did not control or have the ability to change the design or labeling of those products. As previously discussed, federal law requires that generic versions of a drug have the same active ingredients, route of administration, dosage form, strength, and labeling as the brand-name drug, and therefore only the Zantac NDA holders—not the Retailer Defendants—could have altered the design or labeling of the ranitidine products that the Retailer Defendants allegedly purchased, repackaged, or relabeled. 21 U.S.C. §§ 355(j)(2)(A)(ii)-(v).[2]

34. Finally, to the extent Plaintiff argues that the Retailer Defendants are strictly liable because they "failed to follow proper procedures regarding the shelf life, expiration, proper storage, heat, light, and/or other conditions of transport or storage of the drug," Compl. ¶¶ 518(j), 618(j), such a claim is not recognized under Illinois law. Under Illinois law, strict liability claims are limited to design defect, manufacturing defect, and failure-to-warn claims. *Kelso v. Bayer Corp.*, 398 F.3d 640, 642 (7th Cir. 2005). In other words, "[t]o prevail in a strict liability action, a plaintiff must demonstrate that her injuries resulted from an unreasonably dangerous or defective condition which existed at the time the product left the manufacturer's control." *Wheeler v. Chrysler Corp.*, No. 98 C 3875, 2000 WL 263887, at *2 (N.D. Ill. Mar. 1, 2000). Failure to properly store an otherwise non-defective product is not recognized under any theory of strict liability because it does not implicate the design, manufacture, or warnings associated with the product. Instead, such claims sound in negligence and, as set forth below, also fail.

[2] Plaintiffs' allegation that the alleged failure to warn was not limited to the ranitidine products' labeling does not save this claim. Compl. ¶¶ 546, 573, 646, 673. The term "labeling" under FDA regulations is broad and includes "all labels and other written, printed, or graphic matter." 21 U.S.C. § 321(m); see also 21 C.F.R. § 1.3 (same). Thus, all materials disseminated by pharmaceutical distributors about a drug's risks and benefits, including promotional and other materials, must be "consistent with and not contrary to . . . the approved or permitted labeling." 21 C.F.R. § 201.100(d)(1); 73 Fed. Reg. 2848, 2850 n.3 (2008) ("Federal law governs not only what information must appear in labeling, but also what information may not appear.").

35. Thus, Plaintiff's strict liability claims are barred by Section 5/2-621(a).

C. Plaintiff's Negligence Claims Against the Retailer Defendants Fail

36. There is no possibility that Plaintiff will prevail on her negligence claim against the Retailer Defendants because, under Illinois law, a seller of a product does not have a duty to investigate or test products it sells for unforeseen risks.

37. The Complaint asserts that in January 2020, an FDA-certified pharmaceutical testing laboratory called Emery Pharma submitted a citizen petition to FDA warning that its tests indicated that NDMA accumulates in ranitidine products exposed to elevated temperatures. *See* Compl. ¶ 83. It further alleges that subsequent FDA testing revealed that NDMA levels could increase even under normal storage conditions. *Id.* ¶ 85.

38. The thrust of the Complaint is that the Retailer Defendants were negligent for failing to independently determine and implement the "proper storage, shipping, and temperature specifications" for ranitidine products to avoid NDMA formation. *See, e.g.*, Compl. ¶¶ 75-81.

39. In order to hold the Retailer Defendants liable for failing to determine that the ranitidine products they sold degrade and form NDMA when stored at particular temperatures or lengths, Plaintiffs would need to demonstrate that the Retailer Defendants had a duty to investigate and test those products. But Illinois law does not recognize such a duty; Illinois law is clear that a seller is under no duty "to inspect every article he sells" and cannot be "compelled to look for defects" in products that it does not manufacture by performing "special tests." *Kirk v. Stineway Drug Store Co.*, 187 N.E.2d 307, 313 (Ill. App. Ct. 1963); *Rahn v. Gerdts*, 455 N.E.2d 807, 810-11 (Ill. App. Ct. 1983) (holding that retailer is not under "any duty to generally inspect and discovery defects"). *Cf. Burgess v. Montgomery Ward & Co.*, 264 F.2d 495, 497 (10th Cir. 1959) (holding that it would be "completely unreasonable to expect the shopkeeper to perform the

inspection or test which would have revealed to an expert the defect in the ladder rail"); *Ziglar v. E. I. Du Pont De Nemours & Co.*, 152, 280 S.E.2d 510, 514 (N.C. App. 1981) (holding that retailer of inherently dangerous toxic substance was under no duty to detect or remedy hidden defect); *Odum v. Gulf Tire & Supply Co.*, 196 F. Supp. 35, 36 (N.D. Fla. 1961) ("a retailer or wholesaler is not under a duty to inspect manufactured articles of a complex nature for defects which are latent"); *Meyer v. Rich's Inc.*, 12 S.E.2d 123, 123 (Ga. App. 1940) (a seller of men's suits had no duty to analyze the suit chemically and was therefore not liable for buyer's injuries caused by poisonous dye and chemicals in suit).[3]

40. To find Plaintiff's negligence claim against the Retailer Defendants viable would require imposing an untenable and impermissible duty on every Illinois retailer who sells OTC medications—which, by under, 21 CFR § 211.132, they receive in sealed tamper-resistant packaging—to conduct their own independent, specialized testing to verify the safety of every lot of every OTC medication stocked on their shelves. As the court in *Kirk* recognized, "[t]oo great a burden would be placed upon [a seller], if [it] were compelled to look for defects by special tests." *Kirk*, 187 N.E.2d at 313.

41. Yet that is precisely the duty that Plaintiff seeks to impose. Stability testing of pharmaceutical products involves a complex set of procedures that require considerable cost, time, and scientific expertise. Under federal regulations, for instance, a manufacturer must submit a written protocol that includes, *inter alia*, sample size and test intervals based on statistical criteria for each attribute examined; storage conditions for samples retained for testing; specific test

[3] Plaintiffs' conclusory and unsupported allegation that the Retailer Defendants failed to follow their own "established practices and procedures" to store the products presupposes that the Retailer Defendants owed a duty to investigate and test the products to learn that they could potentially form NDMA through certain storage conditions. Only if they had conducted such testing and investigation could formation of NDMA be a foreseeable risk of deviating from established storage practices.

models; testing of the drug product in the same container-closure system as that in which the drug product is marketed; and testing of the drug product at the time of dispensing as directed in the labeling. 21 C.F.R. § 211.166(a)(1)-(5). Such testing must include an adequate number of batches at various storage conditions as defined in the protocol. *Id.* § 211.166(b). Pharmaceutical companies often contract with a Contract Manufacturing Organization to conduct the stability testing. Such testing can cost anywhere from $40,000 to $60,000 per product. *See* PCI Synthesis, How to Know When to Toss Your Prescription Drug or Refrigerate It (June 28, 2017), *available at* https://www.pcisynthesis.com/how-to-know-when-to-toss-your-prescription-drug-or-refrigerate-it/.

42. Under Plaintiff's theory, not only the named Retailer Defendants but also "mom and pop" grocery or convenience stores throughout the State would be required to conduct detailed scientific investigations of the pharmaceutical products they offer for sale. Nor would Plaintiff's novel theory be limited to the circumstances here—testing of storage conditions for pharmaceuticals; rather, in order to avoid liability, retailers would have to conduct extensive testing of ***all*** of their products to discover any latent dangers and warn consumers against them. *See Burgess*, 264 F.2d at 497 ("Montgomery Ward is operating a retail store, not a testing laboratory. If [it] were obliged to test this [allegedly defective] ladder for structural strength, so is the operator of every retail store in the villages which dot the Kansas prairies."). This is not what the law demands of retailers who sell OTC pharmaceutical products, or any other common product for that matter.

43. The Complaint therefore states no cognizable negligence claim against the Retailer Defendants under Illinois law.

D. Plaintiff's Unjust Enrichment Claims Against the Retailer Defendants Fail

44. Because all of Plaintiff's other claims against the Retailer Defendants fail, Plaintiff's unjust enrichment claims must also fail.

45. Plaintiff alleges that the Retailer Defendants were unjustly enriched "as a result of [their] wrongful conduct" with respect to the marketing and promotion of ranitidine medications. Compl. ¶¶ 605, 705.

46. Under Illinois law, "[a] claim of unjust enrichment 'is not a separate cause of action that, standing alone, will justify an action for recovery.'" *Siegel v. Shell Oil Co.*, 612 F.3d 932, 937 (7th Cir. 2010) (quoting *Martis v. Grinnell Mut. Reinsurance Co.*, 905 N.E.2d 920, 928 (Ill. Ct. App. 2009)). When the underlying claims are "deficient, a claim for unjust enrichment" also fails. *Id.*; *see also Mulligan v. QVC, Inc.*, 888 N.E.2d 1190, 1200 (Ill. Ct. App. 2008).

47. Because Plaintiff states no viable underlying claim, there is no reasonable possibility that a court would uphold her unjust enrichment claims.

III. THE AMOUNT-IN-CONTROVERSY REQUIREMENT IS SATISFIED

48. Plaintiff's claims also satisfy the amount in controversy requirement set forth in 28 U.S.C. § 1332(a).

49. "[A] defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554 (2014). "[T]he defendant's amount-in-controversy allegation should be accepted when not contested by the plaintiff or questioned by the court," and "[e]vidence establishing the amount is required by § 1446(c)(2)(B) only when the plaintiff contests, or the court questions, the defendant's allegation." *Id.* at 553–54.

50. Plaintiff seeks several categories of damages, including compensatory damages, and punitive damages for every count. *See* Compl., ¶¶ 530, 551, 569, 586, 601, 610, 630, 651, 669, 686, 701, 710.

51. The Complaint includes forty-two causes of action, and alleges that Plaintiff's use of ranitidine caused Plaintiff to "develop kidney cancer." *Id.* ¶ 4.

52. Recently, in denying remand, a court of the Ninth Circuit found that the amount in controversy was met in a Zantac-related case similarly alleging a cancer injury and seeking compensatory and punitive damages. There, the Court held that even applying a "conservative estimate," the allegations "on their face" established that the amount in controversy was met. Order, *Brooks v. Sanofi*, No. 2:20-cv-565, ECF 13, at 6-7 (D. Nev. Apr. 13, 2018).

53. Courts have similarly found that allegations of serious injury in products liability actions, such as those Plaintiff makes here, support an inference that the amount-in-controversy requirement has been met. *See Mullaney v. Endogastric Sols. Inc.*, No. 11-62056-CIV, 2011 WL 4975904, at *2 (S.D. Fla. Oct. 19, 2011) (inferring that amount in controversy requirement was met where plaintiff alleged that he underwent "surgical intervention that required additional life saving medical treatment" and suffered "serious, permanent and disabling injuries"); *see also In re Yasmin & Yaz (Drospirenone) Mktg. Sales Practices & Prod. Liab. Litig.*, 692 F. Supp. 2d at 1040 ("Given the severe and ongoing nature of the injuries alleged, the Court finds that it is plausible and supported by the evidence that the amount in controversy has been established."); *McCoy by Webb v. General Motors Corp.*, 226 F. Supp. 2d 939, 941 (N.D. Ill. 2002) ("In the parlance of product liability suits . . . [c]ourts have routinely held that when plaintiffs allege serious, permanent injuries and significant medical expenses, it is obvious from the face of the complaint that the plaintiffs' damages exceed the jurisdictional amount . . . .").

54. Finally, in the hundreds of personal injury cases pending in the Zantac MDL, each plaintiff either expressly claims damages in excess of $75,000 or has impliedly done so by filing a lawsuit in federal court and invoking federal diversity jurisdiction. Over 150 plaintiffs in these cases allege that they have been diagnosed with kidney/renal cancer, the type of cancer alleged here. *See, e.g.*, *Francis v. Boehringer Ingelheim Pharm., Inc.*, 9:20-cv-80361 (S.D. Fla.); *Payne v. Boehringer Ingelheim Pharm., Inc.*, 9:20-cv-80376 (S.D. Fla.). Like those cases, this case meets the requirements for federal diversity jurisdiction.

55. Based on Plaintiff's allegations, the amount in controversy exceeds $75,000, exclusive of interest and costs.

IV. PROCEDURAL REQUIREMENTS OF REMOVAL ARE SATISFIED

56. This Notice of Removal is timely filed pursuant to 28 U.S.C. § 1446(b). Defendant Sanofi US Services Inc. was served with the Complaint on October 1, 2020. Defendant GlaxoSmithKline was served with the Complaint on October 2, 2020. Defendants Boehringer Ingelheim Pharmaceuticals, Inc. and Pfizer Inc. were served with the Complaint on October 9, 2020.

57. The Northern District of Illinois is the federal judicial district encompassing the Circuit Court of the State of Illinois in and for Cook County, where this suit was originally filed. Venue is therefore proper in this district under 28 U.S.C. §§ 84(a) and 1441(a).

58. Removal pursuant to 28 U.S.C. § 1441(a) requires that "all defendants who have been properly joined and served must join in or consent to the removal of the action." 28 U.S.C. § 1446(b)(2)(A).

59. Defendants Walgreen Co. and Walgreens Boots Alliance, Inc. consent to this removal. The unidentified defendants Does 1-100 are likewise not required to consent to removal.

See In re Pradaxa (Dabigatran Etexilate) Prods. Liab. Litig., 2013 WL 656822 at *2 n. 10 (citing case law holding that "in the petition for removal; the consent of nominal or formal parties is not necessary").

60. The Removing Defendants are providing Plaintiff with written notice of the filing of this Notice of Removal as required by 28 U.S.C. § 1446(d).

61. Pursuant to 28 U.S.C. § 1446(d), Removing Defendants are filing a copy of this Notice of Removal with the Clerk of the Circuit Court of the State of Illinois in and for Cook County.

62. Pursuant to 28 U.S.C. § 1446(a), copies of all process, pleadings, orders and other papers filed in the state court action—as available from the state court docket or otherwise made available to GSK at the time of filing this Notice—are attached hereto as **Exhibit A**.

63. If any question arises regarding the propriety of the removal of this action, the Removing Defendants respectfully requests the opportunity to present a brief and be heard at oral argument in support of removal.

64. No previous application has been made for the relief requested herein.

65. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332 because this is a civil action in which the amount in controversy exceeds $75,000, exclusive of interest and costs, and is an action between citizens of different states.

V. DEMAND FOR JURY TRIAL

66. The Removing Defendants hereby demand a separate jury trial on all claims and issues so triable.

WHEREFORE, the Removing Defendants give notice that the matter bearing Case No. 2020L009784 pending in the Circuit Court of the State of Illinois in and for Cook County is

removed to the United States District Court for the Northern District of Illinois, and requests that this Court retain jurisdiction for all further proceedings in this matter.

Dated: November 2, 2020

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