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# SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ~~HON. CAROL EDMEAD~~ Justice PART 35

Index Number : 102561/2007

JORDAN, ZACHARY B.

VS

PFIZER INC.

Sequence Number : 001

DISM ACTION/INCONVENIENT FORUM

INDEX NO. _____

MOTION DATE 6/6/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

**Cross-Motion:** ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED

JUL 24 2007

NEW YORK
COUNTY CLERK'S OFFICE

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion to dismiss the complaint is granted; and it is further

ORDERED that defendant serve a copy of this decision and order upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/17/07

J.S.C.

HON. CAROL EDMEAD

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ZACHARY B. JORDAN,

Index No. 102561-2007

Plaintiff,

-against-

PFIZER, INC.,

Defendant.

---x

DAVID J. IRVINE and BARBARA F. IRVINE, h/w,

Index No. 102562-2007

Plaintiffs,

-against-

PFIZER, INC.,

Defendant.

---x

RALPH A. KOHR, III and ARLENE S. KOHR, h/w,

Index No. 119163-2006

Plaintiffs,

-against-

PFIZER, INC.,

Defendant.

---x

GARY P. SCHNEIDER and PATTI SCHNEIDER, h/w,

Index No. 119164-2006

Plaintiffs,

-against-

PFIZER, INC.,

Defendant.

---x

MICHAEL G. JACKSON and CINDY T. JACKSON, h/w,

Index No. 119165-2006

Plaintiffs,

-against-

PFIZER, INC.,

Defendant.

---x

**HON. CAROL ROBINSON EDMEAD, J.S.C.**

MEMORANDUM DECISION[1]

Viagra: A controversial male virility enhancer and treatment of erectile dysfunction, has had a tumultuous existence since its inception to date. These five actions continue the controversy over one of its alleged side effects: ischemic optic neuropathy, a degenerative eye disease that leads to a loss of vision.

Each of the five male plaintiffs in the captions noted above reside in states outside of New York, and allege that he developed and was diagnosed with having a form of ischemic optic neuropathy as a result of taking Viagra. Defendant, Pfizer, Inc. ("defendant") now seeks to dismiss each of the complaints filed by the plaintiffs on the ground of *forum non conveniens*.

Factual Background

Parties[2]

Defendant, Pfizer, Inc., ("defendant") is the manufacturer of Viagra. Viagra was developed in England, and pre-clinical testing of the drug occurred in both England and France. The clinical trials were conducted by the defendant's research facility in Connecticut, where proposed warnings and contraindications, as well the New Drug Application for Viagra were prepared. While defendant has offices and plants throughout the U.S. and the world, defendant's principal place of business is located in New York.

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[1] The Court wishes to thank its summer interns, Derek Musa, Fordham Law School Class of 2009 and Bisola Daramola, New York Law School Class of 2009, for their assistance in the preparation of this decision.

[2] This Memorandum Decision addresses each of the motions filed by defendant to dismiss the complaints filed in five, separate and unconsolidated actions. These motions are decided collectively for purposes of this decision only.

Zachary B. Jordan is a resident of Arizona where he was prescribed Viagra by Drs. Ryan Lawrence and Alfonso Ruggiero, both with practices in Arizona. Jordan continued use of the drug while on vacation in San Francisco. He sought treatment, consultation and an examination for his eye condition by Dr. Lawrence and Drs. Jeffery Gitt, Gary Mackman, J. Michael Powers, Anthony M. DeBeus, Michael Epstein, Pamela Williams, Daniel Lucas, and Dan Leber, all of whom practice in Arizona, with the exception of Dr. Leber who no longer has an office practice.

David Irvine is a resident of Vancouver, Washington, a "suburb" of Portland, Oregon. He was prescribed Viagra by Dr. Tom Harbison in Oregon and obtained the prescription from an Oregon pharmacy. He alleges that he took Viagra, usually at home, from approximately February 4, 2002 until June 1, 2005. He was treated for his eye condition by Drs. Steve Wagner and Lauer Andreas, both of Oregon.

Ralph A. Kohr, III, is a resident of Pennsylvania. He was provided clearance to use Viagra by Dr. Mazhar Khan and given samples and prescribed Viagra by Dr. Anne C. Kanter, both with practices located in Pennsylvania. He sought treatment for his eye condition by Drs. Jane Fortay, Spage M. Yee, Eric L. Sigman, and Francis Brescia, who each maintain practices in Pennsylvania.

Gary Schneider is a resident of Brillion, Wisconsin. He was prescribed Viagra by Dr. James R. Burns, located in Wisconsin and his prescription was filled by a Wisconsin pharmacy. He alleges that he took Viagra "[a]t home" from approximately January 29, 2003 until July 2005. He was treated for his eye condition by Drs. Wesley R. Meyer and John P. Rosculet, both of Wisconsin.

Michael G. Jackson is a resident of Muncie, Indiana. He was prescribed Viagra by Dr.

Charles Dinwiddie, Jr. in Indiana, where his prescription was also filled. He alleges that he took Viagra "[u]sually at home and at times while on vacation" from approximately November 28, 2000 until June 22, 2005. His loss of vision began while on vacation in the Bahamas. He was treated for his eye condition by doctors at the Government Clinic in Abaco, Bahama, by Drs. Iley Neely and W. Scott Thompson, both of Florida, and by Drs. Ajit K. Tiwari and Jeffrey S. Rapkin, both of Indiana.

Motion

In support of its motion to dismiss, defendant contends that the circumstances of this case point to trial in plaintiffs' respective home states.

Defendant argues that private interests strongly support dismissal of these actions. All plaintiffs have at all relevant times been residents of their respective home states. They were each prescribed Viagra and filled their prescriptions in those states. Further, plaintiffs each ingested Viagra primarily in their respective home states, essentially where they received medical treatment for the injuries claimed.

Further, all the physicians who treated the plaintiffs are key witnesses in this case and are all located outside of New York, placing them outside the reach of New York's compulsory process. Defendant argues that because the testimony of these physicians will be necessary for deciding liability as well as damages, its ability to present its defenses will be prejudiced if these physicians cannot be required to testify at trial.

According to defendant, it is unlikely that out-of-state doctors would voluntarily come to New York to testify at trial; however, in the event that they did, the patients of such physicians would lose the services of their personal physicians during that time. Defendant also argues that

plaintiffs' home states are more convenient for plaintiffs themselves. Also, since the key events relating to the development of Viagra took place outside New York, many of defendant's witnesses would not be in the present forum even if the case were tried in New York. Finally, to avoid any prejudice to the plaintiffs in the event these cases are dismissed and re-filed in the plaintiffs' respective home states, the defendant will stipulate that (1) the defendant will make any New York employee who could have been subpoenaed reasonably available for trial and (2) the statute of limitations will be deemed to have been tolled during the time that this action was pending in New York.

Additionally, defendant argues that public interests strongly support dismissal. First, New York has no substantial interest in undertaking the public burdens of trying cases by out-of-state residents based on injuries sustained out-of-state. There is a presumption that personal injury actions such as these should be tried in a forum where the alleged injuries occurred. The underlying events in these cases occurred primarily in foreign jurisdictions. There is no reason why a New York court and jury should have to hear claims of out-of-state residents involving medical treatment and ingestion of a drug outside New York.

And, defendant argues that plaintiffs' home states have greater public interests in hearing plaintiffs' claims so that these localized controversies can be decided locally. These cases involve injuries to plaintiffs in their respective home states, which require the expenditure of resources in those locations. They also involve the prescription of Viagra by doctors in those jurisdictions. Those courts, respectively, have strong interests in evaluating the risks and benefits of Viagra under the facts of each case. Also, the availability of a suitable alternate forum is not an issue because the plaintiffs could assert the same claims in their respective home states that

they assert here.

Finally, plaintiffs' claims will likely be governed by the laws of their respective home states. Defendant argues that the likelihood that non-New York law will apply is another public interest factor favoring dismissal.

In opposition, plaintiffs contend that the defendant's motion is premature and unsupported by evidence, and that discovery is needed in order to determine the merits of the motion.

Plaintiffs argue that defendant will not be prejudiced by having to litigate this case in New York and there is no prejudicial inconvenience resulting from the location of plaintiffs' treating physicians. Courts recognize videotaped depositions as a well-established method of presenting testimony from a treating physician. In any event, this factor does not override plaintiff's choice of forum, especially since defendant failed to provide any basis to support its assertion that plaintiffs' physicians would not testify in New York. Furthermore, plaintiffs also argue that their treating physicians are not key witnesses. This case will focus on the design, manufacture, and labeling of Viagra. Thus, the testimony of the treating physicians would likely be uncontested and is well suited for presentation by videotape deposition. In addition, since New York is the home to both the defendant and defendant's counsel, discovery of defendant's documents and the deposition of its witnesses are easily accommodated.

Plaintiffs further contend that New York courts will not be burdened, because one party is a citizen of New York and the claims are ordinary product liability claims that are routinely handled by New York courts. In addition, New York courts, which have sophisticated case management procedures for mass tort litigations, have previously adjudicated mass tort cases

where the plaintiffs were out-of-state citizens.

Furthermore, defendant failed to demonstrate that no substantial nexus exists between New York and the claims in this case. Although the development and pre-clinical testing of Viagra occurred outside of New York, personnel at defendant's New York headquarters might have overseen the development process and made key decisions regarding that process, about which defendant's motion is silent.

Finally, New York courts are fully capable of applying foreign law.

In reply, defendant argues that plaintiffs' misstate the legal standard, which requires that the non-resident plaintiffs demonstrate special circumstances which warrant the retention of the action in New York.

Moreover, defendant asserts that the availability of videotaped depositions does not change the analysis, in that they are no substitute for live testimony. There is a strong interest in having key witnesses, in this case physicians, testify in person. Defendant argues that if the action remains in New York, the jury will have no opportunity to hear live testimony and personally assess the credibility and demeanor of any of plaintiffs' physicians. Further, defendant will have no opportunity to obtain additional testimony from these physicians at trial to rebut plaintiffs' own live testimony.

Defendant notes that plaintiffs do not dispute that Viagra was prescribed and taken in their respective home states, that their medical treatments occurred in their respective states, or that trials in their respective states would be convenient to them. Further, caselaw does not require that defendant demonstrate that treating physicians will not appear for trial in another state. And, plaintiffs do not claim that they will be prejudiced by dismissal of their actions.

Defendant also notes that physicians would not likely volunteer to fly hundreds of miles for a trial in another state, and since they are not within defendant's control, promises to appear would be unenforceable.

Although personnel in defendant's New York headquarters might have overseen Viagra's development, defendant argues the instant cases have near identical facts as prior cases involving Viagra which were dismissed on grounds of *forum non conveniens*. Defendant also points out that although some of defendant's New York employees have knowledge relevant to the instant cases, plaintiffs in a pending federal Viagra Multi-District Litigation ("MDL") have taken the depositions of defendant's employees who are located in England. The MDL proceeding in Minnesota is well along in the process of resolving the threshold issue of whether Viagra can cause ischemic optic neuropathy. Thus, defendant argues, trying the instant case in New York would unnecessarily and inefficiently duplicate the efforts of the MDL litigation.

Analysis

The common law doctrine of *forum non conveniens*, now codified in CPLR 327(a), "permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere" (*Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478-479 [1984]; *Grizzle v. Hertz Corp.*, 305 A.D.2d 311, 761 N.Y.S.2d 163 [1st Dept 2003]; *Sambee Corp. v. Moustafa*, 216 A.D.2d 196, 198, 628 N.Y.S.2d 664, 665 [1st Dept 1995]). On a motion to dismiss based upon *forum non conveniens*, the burden is on the moving defendant to demonstrate relevant private or public interest factors that militate against the selected forum (*Reid v. Ernst & Young Global Ltd.*, 13 Misc.3d 1242, 831 N.Y.S.2d 362 [N.Y.Sup.,2006] *citing Bank Hapoalim (Switzerland) Ltd. v. Banca Intesa S.p.A.*, 26 A.D.3d 286,

810 N.Y.S.2d 172 [1st Dept 2006] *citing Islamic Republic of Iran v. Pahlavi,* 62 N.Y.2d 474, 479, 478 N.Y.S.2d 597 [1984], *cert. denied* 469 U.S. 1108, 105 S.Ct. 783 [1985]). Among the factors courts consider when deciding a motion to dismiss on the ground of *forum non conveniens* are: (1) the burden on New York courts; (2) the lack of an alternate forum; (3) the fact that the transaction giving rise to the action occurred in a foreign jurisdiction; (4) the residency of the parties; (5) the location of a majority of the witnesses and (6) the potential hardship to the defendant (*Islamic Republic of Iran v. Pahlavi,* 62 N.Y.2d 474, *supra; Bank Hapoalim (Switzerland) Ltd. v. Banca Intesa S.p.A.*, 26 A.D.3d 286, *supra; Grizzle v. Hertz Corp.*, 305 A.D.2d 311, *supra*). No one factor is controlling (*Islamic Republic of Iran v. Pahlavi*, *supra*).

*Burden on New York Courts*

New York courts "should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York" (*Silver v. Great Amer. Ins. Co.,* 29 N.Y.2d 356, 361, 328 N.Y.S.2d 398, 278 N.E.2d 619). As discussed below, the present dispute has no substantial nexus to New York. And, unlike New York, each of the plaintiffs' respective home states have an interest in determining whether pharmaceuticals which were marketed and distributed in such states were appropriately tested and labeled (*see e.g., Bewers v. American Home Prods.*, 99 AD2d 949, 950 [1st Dept 1984]). Such determinations should be made in accordance with the substantive laws by the courts of such states (*id.*). Thus, although New York courts *may* apply foreign law, it would constitute an undue burden on New York courts to apply foreign law in these actions.

*Lack of an Alternate Forum*

The record indicates that an alternate forum is available to each of the plaintiffs. Defendant has agreed to produce its New York witnesses for pretrial discovery and trial in each of the plaintiffs' jurisdictions.[3] It is undisputed that plaintiffs' disputes may be adjudicated in each of the plaintiffs' respective home states. Thus, although not dispositive, the presence of an alternate forum in each of the plaintiffs' respective home states militates in favor of dismissal of this action.

*Situs of Action*

Although the clinical trials occurred in Connecticut, each plaintiff was prescribed and obtained their respective prescriptions in their home states. Furthermore, each of the plaintiffs ingested Viagra, for the most part, in their home states, where they received almost all of their treatment. Since the key facts giving rise to plaintiffs' injuries, and the injuries were sustained in plaintiffs' respective home states, such factors militate in favor of dismissal of these actions.

*Residency of the parties*

Although the defendant's principle place of business is located in New York, none of the five plaintiffs resides in New York. Though not dispositive, the fact that each of the plaintiffs' residence is located outside the forum state is a factor that militates against retention of New York County as the forum (*Reid v. Ernst & Young Global Ltd.*, 13 Misc.3d 1242, *supra citing*

[3] It appears that by agreeing to stipulate to produce relevant New York employees for trial in each of plaintiffs' respective home states, defendant also agrees to accept service of process in of this litigation in each of such states. Otherwise, each of the plaintiffs' residences would not qualify as an alternate forum for this litigation, thereby militating against dismissal of the actions. In any event, on a motion to dismiss on the ground of forum non conveniens, jurisdiction over the defendant is presumed (*Shin-Etsu Chemical Co., Ltd. v. 3033 ICICI Bank Ltd.*, 9 A.D.3d 171, 777 N.Y.S.2d 69 [1st Dept 2004]).

*Waterways Ltd. v. Barclays Bank PLC,* 174 A.D.2d 324, 327, 571 N.Y.S.2d 208 [1st Dept 1991]).

*Location of Witnesses*

Again, the plaintiffs and their treating physicians reside outside of New York. Although the executive offices of the defendant are located in New York, defendant agrees to produce such witnesses for depositions and for trial in each of plaintiffs' respective home states. Further, the key events relating to the development of Viagra arguably took place in locations outside of New York. As to such employees who are necessary for depositions and/or trial, such witnesses can also be made available for depositions and the trial in the plaintiffs' respective home states.

*Potential Hardship to the Defendant*

*Videotaped-Depositions*

Defendant's claim of hardship, in large part, rests upon the limitations of video-taped depositions.

Pursuant to CPLR § 3117, "[a]t trial or upon the hearing of a motion . . .the deposition of any person may be used by any party for any purpose against any other party who was present or represented at the taking of the deposition . . . provided the court finds . . . that the witness is . . . out of the state" (CPLR § 3117 [a] [3] [ii]). The deposition of medical physicians "may be used by any party without the necessity of showing unavailability or special circumstances" (CPLR § 3117 [a] [4]). CPLR § 3113 [b] was amended by judicial conference, as of September 1, 1977, to provide that deposition "testimony shall be recorded by stenographic *or other means*, subject to such rules as may be adopted by the appellate division in the department where the action is pending" (emphasis added). Uniform Court Rules explicitly governing videotaped recording of

civil depositions were added on January 1, 1986 (22 NYCRR § 202.15). These rules provide, *inter alia*, that depositions authorized under the CPLR and pursuant to CPLR § 3113 [b] may be taken "by means of simultaneous audio and visual electronic recording" (22 NYCRR § 202.15 [a]). Further, "all rules generally applicable to examinations before trial shall apply to videotaped recording of depositions" (22 NYCRR § 202.15 [b]).

The First Department has long admitted the use of videotaped deposition testimony of out-of-state witnesses at trial (*see Tokarczyk v St. Barnabas High School*, 118 A.D.2d 519, 519 [1st Dept 1986]). "The use of videotaped evidence is becoming more commonplace in civil trials, especially those involving medical witnesses" (*Kane v Her-Pet Refrigeration, Inc.*, 181 A.D.2d 257, 265 [2d Dept 1992]; *see* CPLR § 3117 [a] [4]). The Court recognizes that present videotaping techniques can replicate the experience of viewing a witness live in the courtroom by providing jurors with high-quality pictures and sound (*Kvetan v Employers Contract Services of Miami*, 1996 U.S. Dist. LEXIS 9298, *17 [SDNY, July 3, 1996]). "Video technology permits the trier of fact to observe the witness's demeanor as well [as] listen for oral clues to the individual's credibility" (*Id.*). Thus, videotaped depositions of out-of-state witnesses are accurate substitutes for live appearances at trial (*Adams v Key Tronic Corp.*, 1996 U.S. Dist. LEXIS 12114, *14 [SD NY, Aug. 14, 1996]).

"The only significant potential drawback of relying on videotaped testimony is that counsel cannot revise their examination to take account of unexpected developments at trial, but given the breadth of civil pre-trial discovery, the danger of such surprise is largely attenuated" (*Duncan v. International Business Machines*, 1996 U.S. Dist. LEXIS 18549, *15 [SDNY, December 12, 1996]; *Adams*, 1996 U.S. Dist. LEXIS 12114 at *15; *Kvetan v. Employers*

*Contract Services of Miami*, 1996 U.S. Dist. LEXIS 9298, *17 [SDNY, July 3, 1996]).

It is uncontested that all of the plaintiffs' treating physicians are located outside of New York, and thus, are beyond the subpoena power of the New York court. Thus, defendant's inability to present its defense by examination of plaintiffs' doctors at trial cannot be disputed. As such, video-taped depositions of plaintiffs' treating physicians would be warranted under the circumstances. However, notwithstanding the availability and facility of videotaping the physicians' depositions, the Court finds that cumulatively, the remaining factors weigh in favor of dismissal.

It is acknowledged that the cases on which defendant relies, such as *Nicholson v Pfizer, Inc.* (278 A.D.2d 143 [1st Dept 2000]), were dismissed on ground of *forum non conveniens,* but did not address whether the use of video-recording technology would assure that defendant had sufficient access to out-of-state physicians for discovery and trial purposes.[4] However, notwithstanding the ability of defendant herein to use video-taped depositions of plaintiffs' treating physicians at trial, the Court finds that this factor alone is insufficient to outweigh the remaining factors which militate against retaining jurisdiction over the instant cases. If all remaining factors weighed equally, the feasability of video-taped depositions would tip the scale in favor of retaining jurisdiction. However, this is not such a case.

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[4] In *Nicholson*, a New Jersey resident claimed that he suffered congestive heart failure as a result of ingesting Viagra during clinical trials of the drug. Plaintiff initially became ill and was hospitalized in Florida, and received further medical care upon his return to New Jersey. The plaintiff's physicians were located in New Jersey, beyond the reach of New York's subpoena power. The Court, without explication, held that dismissal of the action on the ground of *forum non conveniens*.

Conclusion

Therefore, upon weighing the aforementioned factors, the Court finds that dismissal of the instant five actions on the ground of *forum non conveniens* is warranted.

Accordingly, it is hereby

ORDERED that the motions to dismiss the complaints is granted; and it is further

ORDERED that defendant serve a copy of this decision and order upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: July 17, 2007

Hon. Carol Robinson Edmead, J.S.C.

Conclusion

Upon weighing the aforementioned factors, the Court finds that dismissal of the instant five actions on the ground of *forum non conveniens* is warranted.

Accordingly, it is hereby

ORDERED that the motions to dismiss the complaints is granted; and it is further

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Dated: July 17, 2007

Hon. Carol Robinson Edmead, J.S.C.