UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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TEAMSTERS LOCAL 404 HEALTH SERVICES & INSURANCE PLAN,

Petitioner,

-against-

15-cv-4666 (LAK)

KING PHARMACEUTICALS, INC., et al.,

Respondents.

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MEMORANDUM AND ORDER

LEWIS A. KAPLAN, *District Judge.*

Petitioner commenced this proceeding in New York Supreme Court, New York County.[1] The petition did no more than request disclosure, pursuant to N.Y. CPLR § 3102(c), "to better frame, and particularize its [as yet unfiled] antitrust action against Respondents King Pharmaceuticals, Inc., Meridian Medical Technologies, Inc., and Pfizer, Inc."[2] It was accompanied by an affidavit of counsel that asserted that an agreement among the respondents and others, the discovery of which is the object of the state court proceeding, "likely violate[s] federal and state antitrust statutes, as well as state consumer protection laws, because [it] prevent[s] or delay[s] generic entry, thereby depriving consumers of a less expensive alternative while forcing them to

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1 As will appear, the matter is characterized under New York law as a "special proceeding" as distinguished from an "action." *See, e.g., Bryan v. Am. West Airlines,* 405 F. Supp.2d 218, 219 (E.D.N.Y. 2005); N.Y. CPLR § 103(b).

2 DI 1-2.

purchase the higher priced branded product."[3] It further asserts that the agreement "constitutes a violation of Section 1 of the Sherman Act, 15 U.S.C. §1 , and Section 340 of the Donnelly Act, N.Y. Gen. Bus. Law § 340" as well as monopolization in violation of Sherman Act § 2.[4] Nevertheless, there is no suggestion that any action alleging violation of any state or federal antitrust or other laws has been commenced in any court.

Respondents removed the proceeding to this Court. In their own words, they "assert two bases for removing this action: (1) this Court has "'federal question' jurisdiction over this action under 28 U.S.C. §§ 1331, 1338(a); and (2) . . . diversity jurisdiction under 28 U.S.C. § 1332."[5] As for the former, they contend that the petition raises claims under the federal antitrust and patent laws.[6] As for the latter, they contend that petitioner is headquartered in Massachusetts and that respondents all are citizens of states other than Massachusetts.

Petitioner moves to remand for lack of removal jurisdiction.[7] The motion will be granted.

Federal Question Jurisdiction Is Lacking

First, federal question jurisdiction does not exist here.

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3 *Id.* at ECF p. 7.

4 *Id.* at ECF p. 13.

5 DI 1 ¶ 17.

6 *Id.* ¶¶ 19-20.

7 DI 12.

Section 1331 of the Judicial Code confers federal question jurisdiction on district courts over "all civil actions arising under the Constitution, laws, or treaties of the United States."[8] Section 1338(a) in relevant part confers jurisdiction over civil actions "arising under any Act of Congress relating to patents."[9] In most circumstances, an action "arises under" a federal statute only if the plaintiff will prevail on one construction of the federal statute and fail on another.[10] And that is not so in this case. While the petition indicates that it seeks disclosure "to better frame, and particularize [petitioner's anticipated] . . . action," the availability of the disclosure it seeks – and disclosure is the only relief it seeks in this matter as distinct from some other lawsuit petitioner might bring – depends upon the construction of N.Y. CPLR § 3102(c), not any federal statute.

To be sure, the Supreme Court has held that federal question jurisdiction in some circumstances may exist with respect to a state law claim where resolution of the state law claim turns on a question of federal law.[11] But only where, among other things, resolution of the state law issue *necessarily* would require resolution of a federal issue.[12] And that is not so here, as the

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8 28 U.S.C. § 1331.

9 *Id.* § 1338(a).

10 *See Levitt v. FBI*, 70 F. Supp. 2d 346, 348 (citing *Osborne v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 822 (1824)).

11 *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005).

12 *E.g., In re Lehman Bros. Secur. and ERISA Litig.*, No. 09-md-2017, 2012 WL 983561, at *6-*8 (S.D.N.Y. Mar. 22, 2012).

question whether to allow disclosure here certainly could be decided without reference to any construction of the patent or antitrust laws.[13]

Respondents Have Not Sufficiently Alleged Complete Diversity of Citizenship

Nor does the notice of removal allege facts that, if true, would establish the requisite complete diversity of citizenship.

As an initial matter, the notice of removal, which says no more than that petitioner is a welfare benefit plan (as distinguished from a corporation or some other form of entity), seems to assume that the citizenship of the petitioner would be governed by the same rule applicable to corporations. But that is incorrect. Section 1332(c), which determines the citizenship of corporations, applies only to corporations, not (with an exception not here relevant) to other types of entities.[14] In any case, the notice of removal alleges only that petitioner is headquartered in Massachusetts but does not allege that it is organized under the law of any state, much less which state. Accordingly, even if the corporate rule applied, the failure to allege the state of "incorporation" would be fatal to the diversity claim.

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13 For example, one prominent commentator on New York practice has stated that disclosure should not be allowed if a complaint can be drawn without it. DAVID D. SIEGEL, NEW YORK PRACTICE § 352, at 545 (3d ed. 1999); *see also* WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE: CPLR § 3102:15 n.2 (citing cases denying pre-complaint discovery on the grounds that plaintiffs had sufficient facts to make out complaint without discovery). That at least arguably is the situation here.

The Court is aware of the cases *Dublin Worldwide Prods. (USA), Inc. v. Jam Theatricals, Ltd.*, 162 F. Supp. 2d 275, 278 (S.D.N.Y. 2001) and *Christian, Klein, & Cogburn v. Nat'l Ass'n of Sec. Dealers, Inc.*, 970 F. Supp. 276, 278 (S.D.N.Y. 1997), but respectfully disagrees, essentially for the reasons explained above.

14 *E.g.*, *Carden v. Arkoma Assocs.*, 494 U.S. 185, 187-91 (1990).

That said, it appears that an employee benefit plan under ERISA, which the petitioner well may be, is an express trust and, in that event, that the citizenship of its trustees would control, at least in this circuit.[15] Hence, it perhaps is theoretically possible that the failure of the notice of removal adequately to allege the requisite complete diversity of citizenship could be cured by amendment, at least if such an amendment (which perhaps would require somehow adding the individual trustees as petitioners) were possible and would be timely. But it is unnecessary to get into those complexities.

Respondents Have Not Alleged that None of Them Is A Citizen of New York

Section 1441(b)(2) of the Judicial Code[16] forecloses removal based solely on diversity of citizenship if any defendant is a citizen of the state in which the removed action was brought. The notice of removal in this case does not allege that none of the three removing respondents is a citizen of New York. Accordingly, even if respondents sufficiently had alleged the existence of complete diversity (or could do so in an amended notice of removal), remand nevertheless would be required because they have not sufficiently alleged subject matter jurisdiction. Moreover, the notice of removal very strongly suggests that they could not do so.[17]

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15 15 JAMES WILLIAM MOORE ET AL., MOORE'S FEDERAL PRACTICE § 102.57[6] (3d ed. 2015).

16 28 U.S.C. § 1441(b)(2).

17 Certainly it suggests that at least Pfizer Inc. is a citizen of New York by virtue of the presence here of its principal place of business.

I note that the notice of removal alleges that Pfizer has "a principal place of business" in New York, whereas the Judicial Code provision determining corporate citizenship, 28 U.S.C. § 1332(c)(1), makes a corporation a citizen of the State, in which it has "its principal place of business," as well as of the state of its incorporation if that is different.

Conclusion

For the foregoing reasons, petitioner's motion to remand this action to the Supreme Court of the State of New York is granted. The clerk shall close the case.

SO ORDERED.

Dated: February 24, 2016

Lewis A. Kaplan
United States District Judge

Accordingly, a company has only one principal place of business. For Pfizer, that state appears to be New York. Pfizer's SEC filings historically have listed New York as the location of its principal executive offices. It has alleged in pleadings in this Court that "its principal place of business" is here. Thus, it is unlikely that it would attempt to claim otherwise.

To be sure, Pfizer announced in November 2015 that it had entered into a definitive merger agreement with Allergan plc pursuant to which (1) Pfizer will combine with and "under" Allergan, (2) Allergan will be renamed Pfizer plc, and (3) Pfizer plc would have its "global operational headquarters" in New York and its "principal executive offices" in Dublin. Press release (available at https://www.premierbiopharmaleader.com/en/media/press-releases/pfizer-and-allergan-to-combine/) (last visited Feb. 23, 2016). The critical point, however, is that jurisdiction is determined as of the commencement of the action, which in this instance occurred when the notice of removal filed last June. *Hallingby v. Hallingby,* 574 F.3d 51, 56 (2d Cir. 2009). The proposed merger, whatever its present status, therefore is immaterial to the jurisdictional analysis.