

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS**

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IN RE YASMIN AND YAZ (DROSPIRENONE) : 3:09-md-02100-DRH-PMF
 MARKETING, SALES PRACTICES AND
 RELEVANT PRODUCTS LIABILITY : MDL No. 2100
 LITIGATION :
 ----- :
 ----- Judge David R. Herndon

This Document Relates To:

PLAISANCE v. BAYER CORP., et al No. 3:09-cv-20108-DRH-PMF

**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO
DEFENDANT’S MOTION TO STRIKE OR DISMISS CLASS ALLEGATIONS**

NOW INTO COURT, through undersigned counsel, comes Plaintiff, Cindy Plaisance, who moves this Honorable Court to deny Defendant Bayer Corporation’s (“Bayer”), Motion to Strike or Dismiss Class Allegations for the reasons set forth below:

I. INTRODUCTION

Plaintiff, Cindy Plaisance, files this opposition to Defendant Bayer’s Motion to Strike or Dismiss Class allegations on the basis that the complaint meets all of the relevant requirements of Rule 23(b)(3) and the adequacy requirement of Rule 23(a) so as to allow the claims to proceed. Defendant’s allegation that the claim is simply a placeholder to obtain *American Pipe* tolling are simply another slap in the face to the many nationwide claimants who share commonality and the applicable requirements of numerosity, typicality, predominance, adequacy of representation and superiority. Defendant’s Motion to strike makes several allegations that not only attempt to wipe the slate of this class action but appear to attempt to state that no class actions can be handled by an MDL court. To the contrary, as proposed in the First Amended Class Action Complaint, a Nationwide class can be successfully asserted. Alternatively, separate

classes can be defined within each state's laws. Plaintiff further asserts that should this Court deem her inappropriate for a national class, that a Louisiana class be established naming her as class representative as well as separate class certification schedule and hearings be set allowing these classes' voices to be heard for all of the injured parties whether separated by state or on a nationwide basis.

As set forth below, this Court may certify this class consistent with Rule 23 jurisprudence by unitary application of the law of one state. As a U.S. corporate citizen, Bayer can and should not only be expected to be brought into court, but to be held accountable and required to defend itself against claims from all persons in the United States. In so doing, the superiority of the class device would become manifest. Likewise, a trial of the litigation applying unitary law would be manageable so as to achieve the greater purpose of this MDL.

II. FACTUAL BACKGROUND

Cindy Plaisance is a 44 year old female (DOB:4/29/66) residing in Louisiana. Her physician, Dr. Eugenio C. Labadio, prescribed her Yaz as a birth control method in May of 2006. Cindy Plaisance suffered a deep vein thrombosis in her left leg the same summer requiring hospitalization for well over a week and continued blood thinner treatment. Sadly enough her injury is substantially identical to hundreds of other women nationwide.

III. ARGUMENT

Class certification of these claims will advance the purposes behind FRCP Rule 23 as they are designed to streamline litigation by avoiding duplicative proofs creating efficient use of court and legal resources where common issues amongst members exist. See *Jenkins v. Raymark Industries*, 782 F.2d 468, 471 (5th Cir. 1986). Use of the class action mechanism has been increasingly acknowledged as necessary and proper in a variety of circumstances. See e.g. *In re*

Amchem Products Inc. v. Windsor, 521 U.S. 591, 625 (1997). Specifically, the Supreme Court recognized that “even mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement.” *Id.*

This action presents an appropriate case for class treatment. Hundreds of complaints seeking relief for personal injury claims have been filed in federal courts across the country and transferred to this Court. The proposed class will allow the federal and state judicial systems to conserve precious resources and avoid hearing many of these cases all of which are based on substantially the same nexus of operative facts and legal claims on a repeated basis.

A. The Prerequisites of Rule 23 are Met and the Class Should be Certified.

The class must first satisfy the four threshold requirements of Rule 23(a). Those requirements are: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. If these prerequisites are met, together with one of the three provisions of Rule 23(b), a court must certify the suit as a class action, without examining the underlying merits of the claims. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). The party seeking class certification bears the burden of showing that all of the criteria are met. *See Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). However, the threshold for meeting these criteria, *e.g.*, commonality, is not particularly stringent. In all instances, the “district court maintains substantial discretion in determining whether to certify a class.” *Smith v. Texaco, Inc.*, 394, 403 (5th Cir. 2001).

As explained below, the proposed Class satisfies the criteria of the applicable provisions of Rule 23(a).

1. Membership Of The Class Is So Numerous And Geographically Diverse That Joinder Of All Members Is Impracticable.

Rule 23(a)(1) requires that the class be “so numerous that joinder of all members is

Impracticable.” There is “no magic minimum number that breathes life into a class,” and a plaintiff’s “lack of knowledge of the exact number of persons” in the class is not a bar to certification. *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 509 (S.D.N.Y. 1996)(quotations omitted). “Plaintiffs may rely on reasonable inferences drawn from the available facts in order to estimate the size of the class.” *Id.* “To meet this requirement, the class representatives need show only that it is difficult or inconvenient to join all members of the class.” *Smith*, 263 F.3d at 405.

The numerosity requirement is plainly met in this case. Not surprisingly, the MDL docket is replete with approximately 500 personal injury complaints. Under these circumstances, the numerosity condition has readily been satisfied.

2. There Are Numerous Questions Of Law And Fact Common To The Class

Rule 23(a)(2) requires that there be “questions of law or fact common to the class.” The threshold for satisfying the commonality prerequisite is “not high.” *Jenkins v. Raymark Industries*, 782 F.2d 468, 472 (5th Cir. 1986). The rule does not require that all questions of law and fact be common to the class, but only that some questions of law or fact be present, and that such questions of law or fact are shared by the members of the prospective class. *Id.* In general, the element is satisfied whenever “there is at least one issue, the resolution of which will affect all or a significant number of the putative class members.” *Mullen v. Treasure Chest Casino*, 186 F.3d 620, 625 (5th Cir. 1999); *Lighthouse v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997); *Smith*, 263 F.3d at 405. Numerous courts have found commonality where, as here, all class members seek to resolve the issue of whether the product at issue was defective and caused the plaintiffs’ harm.

3. The Claim Of The Representative Plaintiff Is Typical Of The Claims Of The Class

Rule 23(a)(3) requires that the representative plaintiff's claim be "typical" of those of other class members. The test for typicality, like the test for commonality, is "not demanding." *Mullen*, 186 F.3d at 625; *Forbush v. J.C. Penney*, 994 F.2d 1101, 1106 (5th Cir. 1993); *Shipes v. Trinity Industries*, 987 F.2d 311, 316 (5th Cir. 1993). The typicality requirement seeks to assure that the interests of the individuals are aligned with the common questions affecting the class as a whole, and is satisfied when the representative's claims for relief arise from the same course of conduct that gives rise to the claims of the other class members and are based upon the same legal or remedial theories. See *In re American Medical Systems*, 75 F.3d 1069, 1075 (6th Cir. 1996) ("Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct.")

With respect to the claims and issues sought to be certified, the claims of the representative Plaintiff for the class is typical of the claims of other members of the class. Each members' claim arises from the same course of events, as described in the Complaint. The typicality requirement of Rule 23(a)(3) is therefore satisfied.

4. The Representative Plaintiffs And Counsel Will Fairly And Adequately Protect The Class.

Rule 23(a)(4) requires that the class representatives "fairly and adequately protect the interests of the class." "The 'adequacy' requirement looks at both the class representatives and their counsel." *Jenkins*, 782 F.2d at 472. Where the named plaintiff's interests are identical to the interests of the absent class members and experienced counsel represent the class, courts routinely find the adequacy requirement is fulfilled. *Mullen*, 186 F.3d at 625-26. Both prerequisites of adequacy of representation are met in this case.

The Class Plaintiff has retained counsel who are experienced and qualified to prosecute this action. These counsel, appointed to the PSC by this Court, have conscientiously and vigorously represented Plaintiffs and the interests of the proposed Class, and will continue to do so. These counsel have successfully prosecuted numerous complex class and mass tort actions throughout the United States, and have extensive experience in the successful prosecution of pharmaceutical litigation.

The proposed representative Plaintiff is an appropriate class representative because there is no antagonism or conflict of interest between her and the members of the class she seeks to represent. Ms. Plaisance took the drug at issue and suffered significant injury caused by her ingestion of the drug. The interests of the representative Plaintiff are coextensive with the interests of the members of the class they seek to represent in that they share the same objective – proving Defendants’ wrongful conduct and establishing Defendants’ liability.

Accordingly, all the requirements of Rule 23(a) have been satisfied.

B. This Class Action Also Fulfills All Of The Requirements Of Rule 23(b)(3).

Plaintiff’s claims should be certified pursuant to Rule 23(b)(3), because “questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” Fed.R.Civ.P. 23(b)(3).

Rule 23(b)(3) requires the presence of two factors: 1) whether common questions of law or fact predominate over questions affecting individuals only, and 2) whether a class action is the superior method of adjudicating the controversy. These questions are obviously related, and, therefore, courts finding that common questions predominate normally will find that a class action is also the superior method of resolving the case.

1. Common Questions Of Law And Fact Predominate.

There exists a significant number of common issues of fact and law in this case. In order to fulfill the requirement that common questions predominate, “common issues must constitute a significant part of the individual cases. *Mullen*, 186 F.3d at 626, *quoting, Jenkins*, 782 F.2d at 472. Common questions of law and fact predominate in this case because the primary focus of this suit is the behavior of Bayer in manufacturing and marketing Yaz, Yasmin, and/or Ocella. In sum, because the allegations of the Complaint and the potential proof at trial show the predominance of common issues, and because considerations of efficiency, economy and fairness weigh in favor of class, treatment, the predominance tests is satisfied for each of plaintiff’s claims.¹

2. The Class Action Is Superior To Other Available Methods For The Fair And Efficient Adjudication Of This Controversy.

Rule 23(b)(3) also requires that a class action be “superior to other available methods for the fair and efficient adjudication of the controversy.”

As stated previously, under Rule 23(b)(3), the resolution of the predominance question normally determines whether the class procedure will be superior to other methods of adjudication. *See, e.g., Roper v. Conserve, Inc.*, 578 F.2d 1106, 1112-13 (5th Cir. 1978), *aff’d on other grounds sub. nom., Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, *rehearing denied*, 446 U.S. 947 (1980). The alternatives to certifying this case under Rule 23 are patently inferior to the class action mechanism. These alternatives include: the test case, joinder, intervention, consolidation and individual actions. No other method of adjudication provides the efficiency and conservation of judicial and private resources better than a class action. This suit is manageable as a class action and no other superior method of adjudication of the class exists,

¹ To the extent individual issues remain after trial on the common issues, these issues can be addressed in subsequent proceedings. *See Jenkins, supra.*

and this suit should be allowed to proceed to a class certification hearing. Therefore, this action meets the requirements of Rule 23(b)(3).

C. Defendant's Motion Is Premature.

Lastly, this Motion to Strike is premature as there are several states with Yaz suits filed, several of which may have class actions filed within them. These state court actions would provide both adequate representation for various state issues raised by defendants as well as alleviating duplication of effort in other courts of the same class issues.

IV. CONCLUSION

For the reasons set forth above, this Court should deny Defendant's Motion to Strike or Dismiss Class Allegations.

Dated: November 24, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2010, I electronically filed the forgoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

/s/ Daniel E. Becnel, Jr.