UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE: NUVARING PRODUCTS LIABILITY LITIGATION	)	MDL Case No. 4:08 MD-01964-RWS
CATALINA CASTRO,	)	Civil Action No. 4:14-cv-01329-RWS
Plaintiff,	)	
VS.	)	
ORGANON, et al.	)	**PLAINTIFF'S MOTION TO REMAND**
Defendants.	)	

PLAINTIFF'S MOTION TO REMAND

TO THE HONORABLE JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION:

COMES NOW Plaintiff, Catalina Castro, (hereinafter "Plaintiff") and files this her Motion for Remand pursuant to 28 U.S.C. § 1447(c), and moves this Honorable Court for an order remanding this action to the 197th Judicial District Court of Cameron County, State of Texas, on the grounds that removal was improper. In support of this Motion, Plaintiff would respectfully show unto this Honorable Court as follows:

I. INTRODUCTION

1. On June 11, 2014, suit was filed against Organon USA, Inc. (hereinafter "Organon") and other defendants by the filing of an Original Petition in the 197th Judicial District Court, Cameron County, Texas, Cause No. 2014DCL3846-C.

2. In the state court action, Plaintiff Catalina Castro alleges that on or about June 16, 2012, she suffered from a cerebral vascular accident (stroke) as a direct and proximate result from the use of NuvaRing®. (See Plaintiff's Original Petition, Exhibit "A".) Plaintiff filed suit against the manufacturers of NuvaRing® as well as Plaintiff's treating nurse practitioner. The Defendants named in the Original Petition are Organon USA, Inc., Organon Pharmaceuticals USA, Inc., Organon International, Inc., (N/K/A Organon Pharmaceuticals USA, Inc., LLC), NV Organon; AKZO Nobel NV; Schering-Plough Corporation, Schering Corporation, Merck & Company, Inc., (collectively "the Drug Defendants") and Lisa L. Rudd, N.P. Plaintiff alleges claims against the Drug Defendants for negligence, design, defect, manufacturing defect, failure to warn, misrepresentation, breach of warranty, and deceptive trade practices. Plaintiff alleges negligence and failure to warn against Defendant Lisa L. Rudd, N.P.

3. Plaintiff is a citizen of the State of Texas. See Original Petition attached hereto as Exhibit "A".

4. Organon USA, Inc. is a New Jersey corporation with its principal place of business in New Jersey.

5. Defendant Organon International, Inc. is a Delaware for-profit corporation with its principal place of business in New Jersey.

6. Defendant Organon Pharmaceuticals USA, Inc. is a foreign corporation authorized to and actually transacting business in the State of Texas with its principal place of business in New Jersey.

7. Defendant NV Organon is a foreign corporation with its principal place of business in The Netherlands.

8. Defendants Organon USA, Inc., Organon International, Inc., and N.V. Organon will be referred to collectively hereinafter as "Organon" or "Organon Defendants".

9. Defendant AKZO NOBEL NV is a global Fortune 500 Company incorporated and existing under the laws of The Netherlands

10. Defendant Schering-Plough Corporation (hereinafter, "Shering-Plough") is a New Jersey corporation conducting business in the State of Texas.

11. Defendant Schering Corporation (hereinafter "Schering") is a Texas corporation with its principal place of business in New Jersey.

12. Defendant Merck & Company, Inc. (hereinafter "Merck") is a New Jersey corporation with its principal place of business in the State of New Jersey.

13. Defendant Lisa L. Rudd, N.P., (hereinafter "Defendant Rudd, N.P.") is a medical practitioner in the State of Texas. Defendant Rudd, N.P. filed her Answer on July 22, 2014. A citation for service upon Defendant Rudd, N.P. was prepared by the Cameron County District Clerk on June 23, 2014. (See Citation attached as Exhibit "B"). Several unsuccessful attempts were made to effect service upon Defendant Rudd, N.P. Defendant Rudd, N.P. was subsequently served on July 16, 2014.

14. This action should be remanded to state district court for the reasons set forth below.

II. THE LAW OF "REMOVAL" AND "REMAND"

15. Federal courts possess limited jurisdiction, which jurisdiction is defined by the Constitution and by statute. *B., Inc. v. Miller Brewing* Co., 663 F.2d 545, 548 (5th Cir. 1981). It is well-settled that the removing party bears the burden of showing that the removal was proper. *Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988). This burden extends to

demonstrating the jurisdictional basis for removal. *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 365 (5th Cir. 1995).

16. The removal statutes are to be strictly construed against removal, and doubts as to removability are resolved in favor of remanding the case to state court. See *Acuna v.Brown & Root, Inc.*, 200 F.3d 335, 339 (5th Cir. 2000).

III. ARGUMENT

A. The Texas Defendant

The initial filing of this cause of action sought damages from Defendant Rudd, N.P. for (1) medical negligence and (2) failure to obtain informed consent. (See Exhibit "A".) Additionally, Plaintiff's Petition also seeks damages from the Drug Defendants for various causes of action relating to the birth control device, NuvaRing®. (See Exhibit "A".)

Defendant, Rudd, N.P. was and is a resident of the State of Texas with a principal place of business in Brownsville, Texas. Further, at the time of the incidents giving rise to the cause of action which serves as the basis of this lawsuit, Plaintiff was a patient under the care and treatment of Defendant Rudd, N.P. *Id.* at p. 7. Defendant Rudd, N.P. was practicing medicine in the State of Texas.

Thus, complete diversity under 28 U.S.C. §1332 does not exist. Plaintiff respectfully requests that this Honorable Court enter an Order remanding this case to its proper venue of the 197th Judicial District Court, Cameron County, Texas.

B. Based on her pleadings, Plaintiff has established a cause of action against the Texas medical defendant in this case.

In *Smallwood v. Illinois Central Railroad Company*, 385 F.3d 568 (5th Cir. 2004), the court explained:

The starting point for analyzing claims of improper joinder must be the statutes

> authorizing removal to federal court of cases filed in state court. The federal removal statute, 28 U.S.C. §1441(a), allows for the removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." Subsection (b) specifies that suits arising under federal law are removable without regard to the citizenship of the parties; all other suits are removable "only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." To remove a case based on diversity, the diverse defendant must demonstrate that all of the prerequisites of diversity jurisdiction contained in 28 U.S.C. §1332 are satisfied. Relatedly, a district court is prohibited by statute from exercising jurisdiction over a suit in which any party, by assignment or otherwise, has been improperly or collusively joined to manufacture federal diversity jurisdiction. As Professor Wright has noted:
>
> > "[T]he Federal courts should not sanction devices intended to prevent the removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction."
>
> Given this focus, we have recognized two ways to establish improper joinder: "(1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court." Only the second way is before us today, and we explained in Travis v. Irby that the test for fraudulent joinder is whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant. To reduce possible confusion, we adopt this phrasing of the required proof and reject all others, whether the others appear to describe the same standard or not.

Id., at pp. 572-74 [footnotes omitted].

Under ***Smallwood***, the removing defendants must carry the legal burden to demonstrate that diversity jurisdiction in fact exists in this action. To carry that burden, the Drug Defendants must demonstrate that there is no possibility of recovery by Catalina Castro against Defendant Rudd, N.P. To conclude that the Drug Defendants have carried this burden, this Honorable Court must conclude that there exists no reasonable basis to predict that the Plaintiff could recover against Defendant Rudd, N.P.

In order to support its removal, the Drug Defendants undertake a strategic nuance in

support of its argument that there is no basis upon which relief might be granted in favor of Catalina Castro against Defendant Rudd, N.P. First, the Drug Defendants specifically argue that Defendant Rudd, N.P. is improperly joined in this case. Defendants' Notice of Removal, p. 6.

The petition alleges claims against Defendant Rudd, N.P. arising from her direct involvement in the medical care, prescribing NuvaRing® to Plaintiff. The essence of the petition asserted by Catalina Castro is that Defendant Rudd, N.P. improperly exposed her to an unreasonable risk of harm by prescribing NuvaRing®. This ultimately led to Catalina Castro suffering a stroke.

At trial, a jury will presumably be asked whether the decision to prescribe NuvaRing® to Catalina Castro was a proper decision. Doubtlessly, there will be arguments regarding what information was made available by whom and to whom. To imagine that all of this will unfold devoid of any involvement of the medical professional who prescribed NuvaRing® to Catalina Castro is unimaginable. Thus, the Drug Defendants have utterly failed to establish that there is no possibility of recovery by Plaintiff from Defendant Rudd, N.P. Based on this, its arguments asserting fraudulent joinder of Defendant Rudd, N.P. in this case must fail.

Based on clearly established Texas law, all of the defendants are proper party defendants for claims of injury and damages. Defendant Rudd, N.P. is an integral part of the chain of events leading to Plaintiff's injuries and damages. Thus, complete diversity is destroyed, requiring remand to state court. For the Drug Defendants to suggest, as it does, that the claims in this case do not arise from the same series of transactions and occurrences is disingenuous.

The party invoking removal jurisdiction bears a heavy burden. *Rodriguez v. Sabatino*, 120 F.3d 589, 591 (5th Cir. 1997), cert. denied, 523 US 1072, 140 L.Ed.2d 665 (1998). For the defendants "to prove that non-diverse parties have been fraudulently joined in order to defeat

diversity, the removing party must demonstrate either 'outright fraud in the plaintiffs' recitation of the jurisdictional facts,' *Burden v. General Dynamics Corp.*, 60 F.3d 213, 217 (5th Cir. 1995), or that 'there is absolutely no possibility that the plaintiffs will be able to establish a cause of action against the in-state defendant in state court.'" *Cavalini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 259 (5th Cir. 1995); see also *B., Inc.*, 663 F.2d at 549; *Keating v. Shell Chemical Co.*, 610 F.2d 328 (5th Cir. 1980); *Garden Apts.*, 391 F.2d at 177; *Parks v. New York Times Co.*, 308 F.2d 474, 478 (5th Cir. 1964), cert denied 376 U.S. 949, 84 S. Ct. 964, 11 L.Ed.2d 969 (1964).

In evaluating a claim of fraudulent joinder, all of the factual pleadings in the plaintiffs' state court petition are reviewed in the light most favorable to the plaintiff. *Green v. Amerada Hess Corp.*, 707 F.2d 201, 205-06 (5th Cir. 1983), cert. denied, 464 US 1039 (1984). The court is not to "determine whether the plaintiffs will actually or even probably prevail in the merits of the claim but look only for the possibility that the plaintiff may do so." *Burden*, 60 F.3d at 216. The removing defendant must bear the burden of demonstrating that this action is properly before the court. *B., Inc. V. Miller Brewing Co.*, 663 F.2d 545 (5th Cir. 1981); see also, *Village Fair Shopping Co. V. Sam Broadhead Trust*, 588 F.2d 431 (5th Cir. 1978); *Ray v. Bird and Son & Asset Realization Co., Inc.*, 519 F.2d 1081 (5th Cir. 1975). Similarly, where "fraudulent joinder" is alleged, the burden rests upon the removing party to prove the fraud. *B., Inc.*, 663 F.2d at 549; *Yawn v. Southern Railway Co.*, 591 F.2d 312 (5th Cir. 1979). The removing party must do so by clear and convincing evidence. *Rogers v. Modern Woodmen of America*, 1997 WL 206757, *2 (N.D. Miss. 1997).

In summary, the removing defendants do not appear to have provided any evidence whatsoever of outright fraud. In fact, they admit that this is not the case in their own pleadings.

Only unsubstantiated misrepresentations of Plaintiff's petition are made, in an effort to dupe the Court into summarily disregarding the citizenship of the treating nurse practitioner. Thus, the only question remaining is whether the Drug Defendants have demonstrated that there is no possibility the Plaintiff would be able to establish a cause of action against Defendant Rudd, N.P.

> If there is even a possibility that a state court would find a cause of action stated against any one of the named in-state defendants on the facts alleged by the plaintiff, then the federal court must find that the in-state defendants have been properly joined, that there is incomplete diversity, and that the case must be remanded to the state courts.

B., Inc., 663 F.2d at 550 (emphasis added) (other citations omitted). In analyzing whether such a possibility of a claim exists, all disputed questions of fact and all ambiguities in controlling state law are to be resolved in favor of the non-removing party. *Carriere v. Sears Roebuck & Co.*, 893 F.2d 98, 100 (5th Cir. 1990). It is not required of this Court to reach the merits of whether such a cause of action will actually, or even probably, prevail. *Burden v. General Dynamics Corp*., 60 F.3d 213, 217 (5th Cir. 1995).

The Drug Defendants allege that since Plaintiff makes specific allegations against them of fraud, misrepresentation, negligence, and breach of warranty, among others, that any cause of action against Defendant Rudd, N.P. cannot be legitimate, and that these causes of action are conflicting. As previously discussed, not only is this untrue, it is substantially devoid of common sense or reason when analyzed according to Texas law. It is entirely possible, if not probable, that in addition to the malicious and egregious conduct by the Drug Defendants, legitimate causes of action can be proven against Defendant Rudd, N.P. for her negligent acts or omissions, separate and distinct from the conduct of the Drug Defendants.

C. Defendant Rudd, N.P. did not consent to the Notice of Removal.

Defendant Rudd, N.P. did not consent to Notice of Removal as required by 28 U.S.C.

§1441(b). In support for its argument that consent was not required, Defendants cite, *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1261 n. 9. (5th Cir. 1988). Defendants then claim that this footnote stands for the proposition that, "unserved Defendants need not consent to removal." Defendants' Notice of Removal pg 2, n 1. However, what the 5th Circuit actually stated was, "Defendants (**at least those not citizens of the foreign state**) who are unserved when the removal petition is filed, need not join in. *Getty Oil*, 851 F.2d at 1261, n.9 (emphasis added). The omitted parenthetical is significant because, while the 5th Circuit, in dicta, states that unserved, non-citizen joinder may not be necessary, it is silent as to whether non-served citizens of the forum state, such as Defendant Rudd, N.P., must join in the removal.

Defendants also cite *Carrs v. AVCO Corp.*, 2012 WL 1945629 (N.D. Tex. 2012) and *Evans v. Rare Coin Wholesalers, Inc.*, 2010 WL 595653 (E.D. Tex. 2010) for the proposition, i.e. that since Defendant Rudd, N.P. was not served, then her citizenship need not be considered for removal. However, Defendants fail to apprise the Court of a published opinion from the Southern District of Texas, the District to which Plaintiff's case was removed, which holds the opposite. In *Grizzly Mountain Aviation, Inc. v. McTurbine, Inc.*, 619 F.Supp. 282 (S.D. Tex. 2008) the Defendant removed a case to federal court arguing that the Texas Defendant was: 1) fraudulently joined; and 2) at the time of removal, the Texas Defendant had not been served. In fact, at the time of the hearing on the Motion to Remand, the Texas Defendant had still not been served. *Grizzly Mountain*, 619 F.Supp.2d at 282, n.1. Defendants argued, as they do in this case, that the unserved Defendant citizenship could be ignored. The Court found this argument unpersuasive, "whether or not [Defendant] was properly served by Plaintiffs at time of removal, section 1441(b) still bars removal because of [Defendant's] Texas citizenship. See *Pecherski v. Gen. Motors Corp.*, 636 F.2d 1156, 1160 (8th Cir. 1981). ("Despite the 'joined and served'

provision of section 1441(b), the prevailing view is that the mere failure to serve a defendant who would defeat diversity jurisdiction does not permit a court to ignore that defendant in determining the propriety of removal."); *Hinkle v. Norfolk S. Ry. Co.*, 2006 WL 2521445, at *2 (E.D.Mo. Aug. 29, 2006) (same); *Oxendine v. Merck and Co., Inc.*, 236 F.Supp.2d 517, 525 (D.Md.2002) (same); *Preaseau v. Prud. Ins. Co. of Am.*, 591 F.2d 74, 78 (9th Cir.1979) ("this court has specifically rejected the contention that s 1441(b) implies that service is the key factor in determining diversity"); *Vogel v. Dollar Tree Stores, Inc.*, 2008 WL 149234, at *3 (E.D.Cal. Jan. 14, 2008) ("Where federal jurisdiction is predicated on diversity of citizenship, neither §§1441(a) and 1332 nor existing precedent allow this court to superficially find diversity by ignoring the citizenship of unserved defendants.") *Id.*

The Court went on to discuss the split of authority on this issue. Courts are essentially split on whether or not Section 1441(b) requires service of the in-state defendant to preclude removal under the statute. See, e.g., *Yocham v. Novartis Pharm. Corp.*, 2007 WL 2318493, at *3 (D.N.J. Aug. 13, 2007) (holding that Section 1441(b) did not bar removal where the in-state defendant had not been served as of the date of removal); *Waldon v. Novartis Pharm. Corp.*, 2007 WL 1747128, at *3 (N.D.Cal. June 18, 2007) (same). However, all ambiguities must be resolved in favor of remand, and in this case it appears that Kaman was engaging in forum manipulation in its extremely quick removal of the case. See *Manguno*, 276 F.3d at 723 ("[a]ny ambiguities are construed against removal because the removal statute should be strictly construed in favor of remand."). *Id. Grizzly Mountain Aviation, Inc. v. McTurbine, Inc.*, 619 F. Supp. 2d 282, 286 (S.D. Tex. 2008). Clearly, as held in *Grizzly Mountain*, Defendant Rudd, N.P.'s citizenship should not be ignored. Further, Defendants readily admit they never attempted to obtain the consent of Defendant Rudd, N.P. to the removal. Accordingly, Defendants'

removal was improper to 28 U.S.C. §1441(b).

WHEREFORE, PREMISES CONSIDERED, Plaintiff Catalina Castro prays that this Honorable Court, upon review of her Motion for Remand, grant said Motion in its entirety and enter an Order remanding this cause to the 197th Judicial District Court of Cameron County, State of Texas, and for such other and further relief to which she may be entitled.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF CONFERENCE

I certify that on August 7, 2014, I conferred with Julie Hardin/Curtis Waldo, Counsel for the Drug Defendants, who indicated that they oppose this motion.

/s/ *Kathryn Snapka*
Kathryn Snapka

I certify that on August 8, 2014, I conferred with Charles Sweetman, Counsel for Defendant Rudd, N.P., who indicated that he could not confirm whether or not he opposes this motion at this time.

/s/ *Kathryn Snapka*
Kathryn Snapka

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiff's Motion to Remand has been forwarded to counsel for Defendants by electronic mail this 8th day of August, 2014.

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