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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BEVERLY ROSE;
JACK G. ROSE,

Plaintiffs,

v.

MICHAEL NICCOLE, M.D.;
MENTOR WORLDWIDE, LLC,

Defendants.

Case No.: 22cv158-LL-WVG

**ORDER DENYING MOTION TO
FILE SUR-REPLY [ECF No. 12];**

**ORDER GRANTING MOTION TO
REMAND TO STATE COURT [ECF
No. 7];**

**ORDER DENYING WITHOUT
PREJUDICE FOR LACK OF
JURISDICTION MOTIONS TO
DISMISS [ECF Nos. 3, 5]**

Before the Court is Beverly Rose and Jack G. Rose (“Plaintiffs”) Motion to Remand (“Motion”). ECF No. 7. Plaintiffs filed the Motion on March 3, 2022, and Mentor Worldwide LLC (“Defendant” or “Mentor”) filed an Opposition to the Motion on March 17, 2022. ECF No. 10. Plaintiffs filed a Reply on March 24, 2022. ECF No. 11. On March 25, 2022, Defendant Mentor filed an Ex Parte Application for Leave to File a Sur-Reply. ECF No. 12. For the reasons set forth below, the Court **DENIES** Defendant’s Motion to file a Sur-Reply and **GRANTS** Plaintiffs’ Motion to Remand. The Court also **DENIES**

1 without prejudice for lack of jurisdiction Defendants’ pending Motions to Dismiss. ECF
2 Nos. 3, 5.

3 I. Background

4 Plaintiffs filed this action against Defendants Michael Niccole, M.D., Mentor, and
5 Does 1-100 in California Superior Court on November 4, 2021. ECF No. 1-3 (hereinafter
6 “Complaint”). The Complaint alleges that Mentor manufactured MemoryGel textured
7 breast implants (“MemoryGel Implants”) that caused Ms. Rose to develop breast implant-
8 associated anaplastic large cell lymphoma (“BIA-ALCL”). Complaint ¶ 1. The Complaint
9 also alleges that Dr. Niccole implanted Ms. Rose with the MemoryGel Implants in 1985.
10 *Id.* at ¶ 176. The Complaint asserts six causes of action against all Defendants for strict
11 product liability – failure to warn, strict product liability- manufacturing defect, negligence,
12 intentional misrepresentation and concealment, negligent misrepresentation and
13 concealment, and loss of consortium. *Id.* at ¶ 195-285.

14 On February 3, 2022, pursuant to 28 U.S.C. §§ 1332 and 1441, Defendant Mentor
15 removed Plaintiffs’ state court action based upon diversity of citizenship. ECF No. 1 at ¶
16 54. Mentor states in the Notice of Removal that although Plaintiffs and Defendant Dr.
17 Niccole are citizens of California, “Dr. Niccole’s citizenship may be disregarded and does
18 not defeat jurisdiction under 28 U.S.C. §§ 1332 and 1441(b) because . . . he is a sham
19 defendant and has been fraudulently joined for the sole purpose of attempting to destroy
20 diversity jurisdiction.” *Id.* at ¶ 11.

21 On February 25, 2022, this Court issued an Order to Show Cause Regarding Subject
22 Matter Jurisdiction to Plaintiffs and ordered them to respond to Mentor’s allegations in the
23 notice of removal regarding the fraudulent joining of Dr. Niccole. ECF No. 6. On March
24 3, 2022, Plaintiffs filed a Motion to Remand which addressed the issue of subject matter
25 jurisdiction. ECF No. 7. Accordingly, this Court vacated the Order to Show Cause hearing.

26 II. Legal Standard

27 “When a plaintiff files in state court a civil action over which the federal district
28 courts would have original jurisdiction based on diversity of citizenship, the . . . defendants

1 may remove the action to federal court.” *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996);
2 *see* 28 U.S.C. § 1441. Because the exercise of diversity jurisdiction necessarily involves
3 addressing matters that “intrinsicly belong[] to the state courts,” the party invoking
4 federal jurisdiction bears the burden of demonstrating that removal was proper.
5 *Indianapolis v. Chase Nat’l Bank*, 314 U.S. 63, 76 (1941); *Gaus v. Miles, Inc.*, 980 F.2d
6 564, 566 (9th Cir. 1992). The removal statutes are strictly construed, with doubts about the
7 propriety of removal resolved in favor of remand. *Id.*

8 Federal courts cannot exercise diversity jurisdiction where “a single plaintiff [is]
9 from the same State as a single defendant.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*,
10 545 U.S. 546, 553 (2005). But a plaintiff cannot destroy diversity by fraudulently joining
11 a “sham” defendant. *McCabe v. Gen’l Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987).
12 The burden of overcoming both the “strong presumption against removal jurisdiction” and
13 the “general presumption against fraudulent joinder” is a heavy one. *Hunter v. Philip*
14 *Morris USA*, 582 F.3d 1039, 1046 (9th Cir. 2009).

15 The Court can find fraudulent joinder only upon the removing party’s showing that
16 there is “no possibility that the plaintiff could demonstrate a viable claim” against the non-
17 diverse defendant. *Grancare, LLC v. Thrower by and through Mills*, 889 F.3d 543, 548-49
18 (9th Cir. 2018). That impossibility must be “obvious according to the settled rules of the
19 state.” *Id.* at 549 (quoting *McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir.
20 1987)). If the removing party’s argument relies on ambiguous or unsettled questions of
21 law, the claim’s non-viability is not obvious, so any such questions must be resolved
22 against the removing party. *See id.*; *see also Macy v. Allstate Property and Cas. Ins. Co.*,
23 220 F. Supp. 2d, 1116, 1117-18 (N.D. Cal. Sept. 11, 2002) (citing *Good v. Prudential*, 5 F.
24 Supp. 2d 804, 807 (N.D. Cal. 1998)).

25 Demonstrating “no possibility that the plaintiff could demonstrate a viable claim” is
26 a higher bar than showing that the complaint fails to state a claim under Fed. R. Civ.
27 12(b)(6). “Arguments [that] go to the sufficiency of the complaint ... do not establish
28 fraudulent joinder.” *Grancare*, 889 F.3d at 549, 552. Nor does that plaintiff need to respond

1 to such arguments by proposing a specific amendment – the burden remains on the
2 removing party to demonstrate that the plaintiff cannot cure the deficiency by amendment.
3 *See id.* at 550 (“[T]he district court must consider . . . whether a deficiency in the complaint
4 can possibly be cured by granting the plaintiff leave to amend.”) (emphasis added); *see*
5 *also Padilla v. AT&T Corp.*, 697 F.Supp.2d 1156 (C.D. Cal. 2009). “Fraudulent joinder
6 must be proven by clear and convincing evidence.” *Hamilton Materials, Inc. v. Dow Chem.*
7 *Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007).

8 **III. Discussion**

9 **A. Defendant’s Ex Parte Application for Leave to File a Sur-Reply**

10 Defendant’s Ex Parte Application to file a Sur-Reply in response to Plaintiffs’ Reply
11 to Mentor’s Opposition to Plaintiffs’ Motion to Remand is based on the contention that
12 Plaintiffs made “new arguments and previously undisclosed material facts in their reply
13 brief.” ECF No. 12 at 2. The Court will not consider any matters raised for the first time in
14 a reply brief. It is inappropriate to raise new matters in the reply because it deprives the
15 opposing party of an opportunity to respond. *See Zamani v. Carnes*, 491 F. 3d 990, 997
16 (9th Cir. 2007) (“The district court need not consider arguments raised for the first time in
17 a reply brief.”). Accordingly, Defendant’s Motion to file a Sur-Reply is **DENIED**.

18 **B. Plaintiffs’ Motion to Remand**

19 Plaintiffs argue that this Court should grant their Motion to Remand because
20 “Defendant Mentor has failed to satisfy its heavy burden of proving that Dr. Niccole is
21 fraudulently joined by clear and convincing evidence.” Motion at 8. Plaintiffs argue that
22 “[t]herefore, the Court cannot ignore the citizenship of Dr. Niccole.” *Id.* Defendant Mentor
23 opposes Plaintiffs’ Motion on the grounds that “Plaintiffs have not stated a viable claim
24 against Dr. Niccole” and that Plaintiff “cannot state a viable claim against Dr. Niccole.”
25 *Oppo.* at 5 (emphasis in original). Defendant Mentor states that “[a]ny cause of action for
26 professional negligence is barred by the applicable state of limitations set forth in
27 California Code of Civil Procedure Section 340.5.” *Id.* Defendant Mentor further states
28 that the “complaint unambiguously states that she was injured more than three years before

1 filing the Complaint and discovered the injury more than one year prior to filing the
2 Complaint, her claims are time-barred.” *Id.* Defendant argues that “no possible amendment
3 to the Complaint would allow her to escape the statute.” *Id.* Plaintiffs oppose this argument
4 in their Motion on the grounds that “Plaintiffs’ medical (Professional) negligence claim
5 [against Dr. Niccole] is not time-barred” because “[o]ne or more tolling doctrines may
6 apply” to Plaintiffs’ claims against Dr. Niccole, “and the statute of limitations would be
7 extended to account for the delay in discovering the new information.” Motion at 13-14.
8 Plaintiffs further argue that “Plaintiff has recently discovered new information that gives
9 rise to another form of professional negligence, namely failure to obtain informed consent,”
10 and that “Plaintiffs intend to amend their complaint to assert this additional claim against
11 Dr. Niccole.” *Id.*

12 “Indeed a court may find a defendant fraudulently joined if a statute of limitations
13 applies to the claim against the defendant.” *Cogswell v. Ford Motor Co.*, 2019 WL 410475,
14 at *2 (S.D. Cal. Feb. 1, 2019) (citing *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1320
15 (9th Cir. 1998). Here, however, the Court cannot conclude that Plaintiffs’ causes of action
16 against Dr. Niccole are *obviously* time-barred. *See Hamilton Materials, Inc.*, 494 F. 3d at
17 1206. Evaluating all factual allegations in the light most favorable to the Plaintiffs, this
18 Court concludes that Defendant Mentor has not shown that there is absolutely no possibility
19 that Plaintiffs can state a claim against Dr. Niccole. *See Diaz v. Allstate Ins. Group*, 185
20 F.R.D. 581, 586 (C.D. Cal. Oct. 14, 1998) (“In resolving the issue of [fraudulent joinder],
21 the court must further resolve all ambiguities in state law in favor of the plaintiffs.”).

22 The Plaintiffs submit their claims against Dr. Niccole could have been tolled under
23 the discovery rule. Motion 13-14. Plaintiffs also state that they intend to amend their
24 complaint to assert a failure to obtain informed consent claim against Dr. Niccole *Id.* at 14.
25 Defendant Mentor falls short of carrying its burden to demonstrate fraudulent joinder
26 because the “relevant question is whether it is possible for Plaintiffs to state a claim against
27 [Dr. Niccole], not whether the claim has been sufficiently pled.” *Cavale v. Ford Motor Co.*,
28 *et al.*, 2018 WL 3811727, at *3 (E.D. Cal. Aug. 2018); *see also Diaz*, 185 F.R.D. at 586

1 (“[M]erely showing that an action is likely to be dismissed against the defendant does not
2 demonstrate fraudulent joinder. ‘The standard is not whether plaintiffs will actually or even
3 probably prevail on the merits but whether there is a possibility that they may do so.’”)
4 (citation omitted). Given that Plaintiffs are permitted to amend their Complaint to correct
5 any deficiencies, this Court cannot conclude that Plaintiffs have no possibility of amending
6 their Complaint to allege a viable tolling theory.” *See Jimenez v. Ford Motor Co.*, 2018
7 WL 2734848, at *2 (C.D. Cal. June 5, 2018) (“[T]he defendant must establish that plaintiff
8 could not amend his complaint to add additional allegations correcting any deficiencies.”).
9 Accordingly, Defendant Mentor has failed to demonstrate fraudulent joinder.

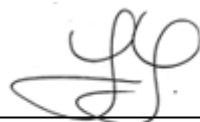
10 **IV. Conclusion**

11 For the reasons stated herein, Defendant Mentor’s Ex Parte Application for Leave
12 to File a Sur-Reply is **DENIED**. ECF No. 12. Additionally, Defendant Mentor has not met
13 its burden to show that Dr. Niccole is a sham defendant, and the Court must consider his
14 citizenship in determining whether there is complete diversity. The Court finds that
15 complete diversity is lacking because Defendant Dr. Niccole is a citizen of California as
16 are Plaintiffs. In light of this finding, Plaintiffs’ Motion to Remand is **GRANTED** and this
17 case is **REMANDED** to San Diego County Superior Court.

18 The pending Motions to Dismiss [ECF Nos. 3, 5] are **DENIED WITHOUT**
19 **PREJUDICE** for lack of jurisdiction. The Clerk of Court is directed to **CLOSE** this case.

20 **IT IS SO ORDERED.**

21 Dated: July 5, 2022



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23 Honorable Linda Lopez
24 United States District Judge
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