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7 **IN THE UNITED STATES DISTRICT COURT**
8 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
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10 GARY HALL, KEN ALLDRIN, LASER
11 THERAPY PRODUCTS WEST, INC., a
California Corporation,

CASE NO. CV F 08-1905 LJO SMS

12 Plaintiffs,

**ORDER ON MOTIONS TO REMAND AND
TRANSFER VENUE (Docs. 13, 19)**

13
14 vs.

15 LASER THERAPY PRODUCTS, LLC, and
J. ROD MCGINNIS,

16 Defendants.
17
18 _____/

19 **INTRODUCTION**

20 By notice on January 5, 2009, defendant Laser Therapy Products, LLC (“Laser Therapy”) moved
21 to transfer venue to the United States District Court, Middle District of Tennessee, pursuant to 28 U.S.C.
22 §1404 (a) (Doc. 13). On January 9, 2009, plaintiffs Gary Hall (“Dr. Hall”), Ken Alldrin (“Mr. Alldrin”),
23 and Laser Therapy Products West, Inc. (“Laser Therapy West”) (collectively “plaintiffs”) moved to
24 remand the action to Superior Court of California, County of Stanislaus, pursuant to 28 U.S.C. §1447(c).
25 Because Laser Therapy failed to carry the heavy burden to persuasion that plaintiffs fraudulently joined
26 defendant J. Rod McGinnis (“Dr. McGinnis”) to defeat subject matter jurisdiction, this Court finds that
27 subject matter jurisdiction is lacking, based on a lack of complete diversity of citizenship. Accordingly,
28 this Court GRANTS plaintiffs’ motion to remand and denies Laser Therapy’s motion to transfer.

1 **BACKGROUND**

2 **Factual History**

3 On May 17, 2006, Dr. Hall and Laser Therapy, a seller of medical lasers, entered into an
4 agreement (“Commission Agreement”). The Commission Agreement provided that Dr. Hall was to be
5 an “Exclusive Representative” for Laser Therapy’s K-Laser products in 13 states in the western United
6 States, including California. Pursuant to the Commission Agreement, Laser Therapy agreed to pay Dr.
7 Hall commissions on all sales in the exclusive territory. The Commission Agreement had an initial term
8 of three years.

9 Dr. Hall and Mr. Alldrin formed Laser Therapy West to distribute K-Laser products, in
10 accordance with the Commission Agreement. Laser Therapy West contracted with Dr. McGinnis to sell
11 K-Lasers in its territory. The Independent Salesperson Contractor Agreement (“Sales Agreement”)
12 provides that Dr. McGinnis is to sell four K-Lasers per quarter, and sets the commission Dr. McGinnis
13 shall receive from Laser Therapy West for his K-Laser sales.

14 Plaintiffs allege that Laser Therapy and Dr. McGinnis, “without excuse, have sold products in
15 Plaintiffs’ exclusive territory and/or provided sales leads in the exclusive territory to others.” Compl.
16 ¶14. Plaintiffs allege further that “McGinnis, an agent of Plaintiffs, has colluded with [Laser Therapy]
17 to divert sales leads and training opportunities in Plaintiffs’ exclusive territory to himself, and may have
18 secured sales for his own benefit, without accounting to Plaintiffs.” Compl. at ¶15. Plaintiffs assert the
19 following causes of action against Laser Therapy: breach of contract, accounting, injunctive relief, and
20 declaratory relief. Plaintiffs assert three causes of action against Dr. McGinnis: breach of fiduciary duty,
21 accounting, and injunctive relief.

22 **Procedural History**

23 Plaintiffs initiated this action in the Superior Court of the State of California, County of
24 Stanislaus (“Stanislaus County”) on September 26, 2008. Plaintiffs served Laser Therapy with the
25 complaint in this matter on November 10, 2008. Laser Therapy filed a cross-action against Mr. Hall in
26 Stanislaus County, then removed the action to this Court on December 10, 2008. Plaintiffs served Dr.
27 McGinnis with process on December 31, 2008.

28 Laser Therapy filed an proceeding against Dr. Hall on November 8, 2008 in the Chancery Court

1 for Williamson County in the State of Tennessee (“Williamson County”).¹ Laser Therapy served Dr.
2 Hall with that complaint on November 11, 2008. Mr. Hall removed that action to the United States
3 District Court, Middle District of Tennessee (“Tennessee District Court”) on December 8, 2008.

4 In the instant action, Laser Therapy moved to transfer venue to the Tennessee District Court and
5 plaintiffs, including Dr. Hall, moved to remand to Stanislaus County. In the Tennessee action, Dr. Hall
6 moved to transfer venue to this Court, while Laser Therapy moved to remand to Williamson County.
7 On January 30, 2009, while the instant motion to transfer venue was pending in this Court, the
8 Tennessee District Court granted Laser Therapy’s motion to remand, remanded the action to Williamson
9 County, and closed the action.

10 On February 3, 2009, the parties stipulated as follows: (1) Plaintiff Mr. Alldrin shall dismiss his
11 Complaint against Laser Therapy without prejudice either in this Court upon resolution of the
12 jurisdiction issues or in any court to which this matter may be transferred or remanded; (2) Laser
13 Therapy shall dismiss its cross-complaint against Dr. Call without prejudice; (3) Laser Therapy shall
14 withdraw its motion for judgment on the pleadings (Doc. 12); (4) Dr. Hall shall withdraw his motion
15 to dismiss the cross-complaint (Doc. 19); and (5) Dr. McGinnis shall file a responsive pleading no later
16 than February 17, 2009.

17 Having considered the parties’ memoranda in support, opposition, and reply to the instant
18 motions, this Court VACATES the February 10, 2009 hearing, pursuant to Local Rule 78-230(h), and
19 issues the following order.

20 **DISCUSSION**

21 **Motion to Remand**

22 **Standard of Review**

23 As the motion to remand challenges this Court’s jurisdiction, the Court considers this motion
24 first. A suit filed in state court may be removed to the federal court if the federal court would have
25 original subject matter jurisdiction over that suit. 28 U.S.C. 1441§(a). A motion to remand is the proper
26 procedure for challenging removal. Remand may be ordered for either lack of subject matter jurisdiction

27 ¹Laser Therapy’s counterclaims are identical to the claims in the complaint filed in Williamson County. Laser
28 Therapy stipulated to dismiss its counterclaims against Dr. Hall on February 3, 2009.

1 or any defect in the removal procedure. *See* 28 U.S.C. §1447(c). “Removal statutes are strictly
2 construed against removal.” *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979).
3 “[D]oubts about removal must be resolved in favor of remand.” *Osborn v. Metropolitan Life Ins. Co.*,
4 341 F.Supp.2d 1123, 1126 (E.D. Cal. 2004); *Boggs v. Lewis*, 863 F.2d 662, 663 (9th Cir. 1998).

5 **Subject Matter Jurisdiction**

6 Laser Therapy removed this action from Stanislaus County pursuant to 28 U.S.C. §1441 on the
7 grounds that this Court has jurisdiction on the basis of diversity of citizenship under 28 U.S.C. §1332.
8 This Court has subject matter jurisdiction over this matter only if the amount in controversy exceeds
9 \$75,00 and the action is between citizens of different states. 28 U.S.C. §1332(a)(1).

10 Plaintiffs argue that this Court lacks subject matter jurisdiction, because complete diversity
11 between the parties is lacking. The diversity jurisdiction statute “requires complete diversity of
12 citizenship; each of the plaintiffs must be a citizen of a different state than each of the defendants.”
13 *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001) (citing *Caterpillar Inc. v. Lewis*,
14 519 U.S. 61, 68 (1996)). The parties do not dispute the citizenship of the parties. Plaintiffs are citizens
15 of the state of California. Laser Therapy is a citizen of the state of Tennessee. Dr. McGinnis, like
16 plaintiffs, is a citizen of the state of California.

17 Dr. McGinnis’ presence in this action defeats diversity jurisdiction unless he was joined
18 fraudulently as a defendant. Laser Therapy acknowledges that Dr. McGinnis is alleged to be a citizen
19 of California, but argues that he “should be disregarded for purposes of determining jurisdiction”
20 because “he was named as a defendant only for the purpose of defeating diversity jurisdiction.” Compl.
21 at ¶¶ 5, 9. “[F]raudulently joined defendants will not defeat removal on diversity grounds.” *Ritchey v.*
22 *Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998). Laser Therapy, as the party seeking removal
23 to this Court, bears the burden to establish the existence of federal subject matter jurisdiction. *Wilson*
24 *v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921); *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir.
25 1992).

26 Joinder of a resident defendant is fraudulent where plaintiff “fails to state a cause of action
27 against a resident defendant, and the failure is obvious according to the settled rules of the state.”
28 *Mercado v. Allstate Ins. Co.*, 340 F.3d 824, 826 (9th Cir. 2003). The Court considers “whether there

1 was diversity jurisdiction based upon the initial pleading.” *Richey v. Upjohn Drug Co.*, 139 F.3d 1313,
2 1318 (9th Cir. 1998). But, “[w]hen fraudulent joinder is an issue...[the] defendant seeking removal to
3 the federal court is entitled to present facts showing the joinder to be fraudulent.” *Id.* (quoting *McCabe*
4 *v. General Foods Corp.*, 811 F.2d 1336, 1139 (9th Cir. 1987)). “There is a presumption against finding
5 fraudulent joinder, and defendants who assert that plaintiff has fraudulently joined a party carry a heavy
6 burden of persuasion.” *Plute v. Roadway Package Sys.*, 141 F. Supp. 2d 1005, 1007 (N.D. Cal. 2001).

7 Laser Therapy argues that plaintiffs’ claims fail because no special relationship existed between
8 plaintiffs and Dr. McGinnis to create liability. *See, Stanley v. Richmond*, 35 Cal. App. 4th 1070, 1086
9 (1995) (breach of fiduciary duty requires the existence of a fiduciary duty); *Kritzer v. Lancaster*, 96 Cal.
10 App. 2d 1, 7 (1950) (accounting requires a relationship between the parties or other circumstances that
11 in equity require an accounting). In arguing that no agency or fiduciary relationship existed between
12 plaintiffs and Dr. McGinnis, Laser Therapy points to several provisions of the Sales Agreement between
13 plaintiffs and Dr. McGinnis. The Sales Agreement: (1) classifies Dr. McGinnis as an “independent
14 contractor;” (2) provides explicitly that, “Contractor agrees that Contractor is not and shall not become
15 an ...agent..of Client which [sic] this Agreement is in effect;” (¶2.03); (3) allows Dr. McGinnis to
16 “represent, perform services for, and contract with as many non-competing additional clients, persons,
17 or companies...as Contractor...sees fit” (¶4.02); and (4) requires Dr. McGinnis to pay his own taxes
18 (¶2.04); use his own subcontractors (¶2.05); pay his own expenses (¶3.03); supply his own tools,
19 materials, and equipment (¶4.04); and liability insurance and workers’ compensation (¶¶4.05, 4.06).

20 For purposes of this motion, the Court’s inquiry is limited. The Court is not required to
21 determine whether Dr. McGinnis was plaintiffs’ agent (as plaintiffs allege), or whether no fiduciary
22 relationship existed (as Laser Therapy argues). Even though plaintiffs’ “claims may not succeed
23 ultimately...ultimate success is not required to defeat removal. Rather, there need be only a slight
24 possibility of a right to relief. Once the court identifies this glimmer of hope for the plaintiff, the
25 jurisdictional inquiry ends.” *Hartley v. CSX Transportation, Inc.*, 187 F.3d 422, 425-26 (4th Cir. 1999).
26 “The removing party must prove that there is absolutely no possibility that the plaintiff will be able to
27 establish a cause of action against the in-state defendant in state court.” *Cavallini v. State Farm Mutual*
28 *Auto Ins. Co.*, 44 F.3d 256, 259 (5th Cir. 1995).

1 While their arguments may not be victorious ultimately, plaintiffs have established that their
2 claims against Dr. McGinnis are colorable. First, a court may determine that Dr. McGinnis acted as
3 plaintiffs' agent. An agent is one who represents another, called the principal, in dealings with third
4 persons." Cal. Civ. Code §2295. "Before a person can be charged with a fiduciary obligation, he must
5 either knowingly undertake to act on behalf and for the benefit of another, or must enter into a
6 relationship which imposes that undertaking as a matter of law." *City of Hope Nat. Medical Center v.*
7 *Genentech, Inc.*, 43 Cal. 4th 375, 386 (2008). Plaintiffs contend that Dr. McGinnis acted as Laser
8 Therapy West's agent because he acted on behalf of Laser Therapy West in seeking customers for its
9 products and training its customers. Plaintiffs argue that Dr. McGinnis represented Laser Therapy West
10 as its agent while performing the duties pursuant to the Sales Agreement and knowingly entered into
11 such relationship when he entered into the Sales Agreement. Second, a court may also determine that
12 Dr. McGinnis owed a fiduciary duty even if he was not acting as plaintiffs' agent. Plaintiffs point out
13 that in *Hong Que, Inc. v. Luu*, 150 Cal. App. 4th 400, 414 (2007), the court held that "[t]he absence of
14 a representative capacity, however, does not necessarily excuse such a provider from any duty of loyalty;
15 an 'adviser may be subject to a fiduciary duty of loyalty even when the adviser is not acting as an
16 agent.'" (quoting Rest. 3d Agency §1.02, com. c). Thus, plaintiffs demonstrate that they have a
17 possibility of the right of relief against Dr. McGinnis.

18 Because plaintiffs demonstrate that there is a possibility that they can establish a cause of action
19 against Dr. McGinnis, Laser Therapy fails to persuade this Court that Dr. McGinnis was joined
20 fraudulently in this action. As Dr. McGinnis and plaintiffs are citizens of the state of California,
21 complete diversity is lacking. *Caterpillar Inc.*, 519 U.S. at 68. Without federal subject matter
22 jurisdiction, removal pursuant to 42 U.S.C. §1441 was improper. Accordingly, this Court must remand
23 this action to the state court whence it came. 28 U.S.C. §1447(c).²

24 **Attorneys Fees and Costs**

25 Plaintiffs request attorneys fees and costs against Laser Therapy for this motion. If removal is
26 found to be improper, a court that remands a case to state court may "require payment of just costs and

27 ²Because this Court lacks subject matter jurisdiction, the Court cannot consider Laser Therapy's motion to transfer
28 venue.

1 any actual expenses, including attorney fees, incurred as a result of the removal.” 28 U.S.C. §1447 (c).
2 “Absent unusual circumstances, courts may award attorney’s fees under 1447(c) only where the
3 removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an
4 objectively reasonable basis exists, fees should be denied.” *Martin v. Franklin Capital Corp.*, 546 U.S.
5 132, 141 (2005).

6 This Court finds that although removal was improper, Laser Therapy had an objectively
7 reasonable basis for seeking removal. The Sales Agreement between plaintiffs and Dr. McGinnis
8 explicitly provides that “Contractor agrees that Contractor is not and shall not become an...agent...of
9 Client which [sic] this Agreement is in effect.” (§2.03). Relying on that provision, Laser Therapy argued
10 that the parties knowingly chose not to create a principal-agent relationship. Laser Therapy’s argument
11 was reasonable. Laser Therapy’s argument, however, does not persuade the Court that plaintiffs’ failure
12 to state a cause of action against Dr. McGinnis was “obvious.” *Mercado*, 340 F.3d at 826. Accordingly,
13 plaintiffs’ request for attorneys’ fees and costs is denied.

14 **CONCLUSION and ORDER**

15 For the foregoing reasons, this Court:

- 16 1. GRANTS plaintiffs motion to remand (Doc. 19);
- 17 2. DENIES plaintiffs’ request for attorneys’ fees and cost;
- 18 3. DENIES as moot Laser Therapy’s motion to transfer venue (Doc. 13);
- 19 4. REMANDS this action to Stanislaus County; and
- 20 5. DIRECTS the clerk to close this action.

21
22 IT IS SO ORDERED.

23 **Dated: February 4, 2009**

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE