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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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DAVID BARBIERI, GAIL BARBIERI,
Plaintiffs,

Civ. No. S-09-3132 FCD/EFB

v.

MEMORANDUM AND ORDER

FORD MOTOR COMPANY, AUTOLIV,
INC., KEY SAFETY SYSTEMS, and
DOES 1-100,

Defendants.

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This matter is before the court on plaintiffs David Barbieri and Gail Barbieri's (collectively "plaintiffs") motion for leave to file a first amended complaint in order to join non-diverse defendants pursuant to Federal Rules of Civil Procedure ("FRCP") Rule 15(a)(2). Defendant Ford Motor Company ("Ford") opposes this motion arguing, inter alia, that plaintiffs' motion is brought for the sole purpose of destroying diversity jurisdiction and that the court should deny the motion pursuant to its discretionary powers under 28 U.S.C. § 1447(e). For the reasons

1 set forth below,¹ plaintiffs' motion for leave to amend their
2 complaint to join Harold Ford is GRANTED.²

3 **BACKGROUND**

4 This matter arises out of injuries sustained to plaintiff
5 David Barbeiri during a car collision in Sacramento, California
6 on September 13, 2007. On October 29, 2008, plaintiffs filed a
7 suit in Sacramento Superior Court against the State of
8 California, the Department of Transportation, the County of
9 Sacramento, the City of Sacramento and the City of Rancho
10 Cordova, seeking damages for injuries allegedly sustained in the
11 car collision. (Ex. A to Decl. of Mia O. Hernandez in Supp. of
12 Def.'s Opp'n ("Hernandez Decl."), filed Feb. 26, 2010.) The
13 complaint alleged that the negligent construction, maintenance,
14 operation, control and design of the highway allowed another
15 vehicle to drift off road and travel down an embankment where it
16 struck David Barbeiri's 2001 Ford Taurus head-on. (Id.) As a
17 result of this dangerous condition, Mr. Barbeiri suffered
18 injuries including right frontal intraparechymal hemorrhage,
19 right periorbital and front pneumocephalus, multiple facial
20 fractures, including nasal, orbital and ethmoid fractures, post-
21 traumatic seizures, multiple rib fractures, right fifth digit
22 laceration, and nose laceration. (Id.)

23
24 ¹ Because oral argument will not be of material
25 assistance, the court orders the matter submitted on the briefs.
E.D. Cal. L. R. 230(g).

26 ² Plaintiffs also concurrently filed a motion to remand.
27 Because, for the reasons set forth *infra*, the motion for leave to
28 amend is granted, which destroys the basis for diversity
jurisdiction, plaintiffs' separate motion to remand is DENIED as
MOOT.

1 On September 2, 2009, plaintiffs filed a separate suit in
2 Sacramento Superior court for damages resulting from the same
3 accident. (Ex. B to Hernandez Decl.) Plaintiffs' complaint
4 alleges claims for strict liability, negligence, and breach of
5 warranty against defendants Ford, the manufacturer of the Ford
6 Taurus, Autoliv ASP, Inc. ("Autoliv"), the manufacturer of the
7 airbag module, and Key Safety Systems, Inc. ("Key Safety"), the
8 manufacturer of the seat belt pretensioner. (Id.) It does not
9 set forth any claim against Harrold Ford ("Harrold Ford"), the
10 California dealership from which plaintiffs purchased the used
11 2001 Ford Taurus. (Id.) The complaint alleges substantially the
12 same injuries as the complaint against the state but also
13 includes non-economic injuries. (Id.)

14 On October 13, 2009, defendant Ford answered plaintiffs'
15 state court complaint and filed a Notice of Removal to this
16 court. (Hernandez Decl. ¶ 2.) On October 16, 2009, the court
17 remanded the case to Sacramento Superior Court as Ford failed to
18 demonstrate an amount in controversy that exceeded \$75,000.00.
19 (Ex. C to Hernandez Decl.)

20 On October 20, 2009, Ford served written discovery on
21 plaintiffs in state court seeking a statement of damages from
22 plaintiff. (Ex. D to Hernandez Decl.) Also, Ford contacted
23 plaintiffs and suggested that the parties stipulate to an amount
24 in controversy for less than \$75,000.00. (Hernandez Decl. ¶ 6.)
25 Plaintiffs did not provide a statement of damages and did not
26 stipulate that the amount in controversy was less than
27 \$75,000.00. (Id. ¶ 7.) Based on the materials received from
28 plaintiffs, including medical bills in excess of \$200,000.00,

1 Ford removed the case a second time on November 12, 2009. (Id.)

2 In the interim, on October 26, 2009, plaintiffs noticed the
3 deposition of the person most knowledgeable at Harrold Ford.

4 (Decl. of Scott Righthand in Supp. of Pl.'s Mot. ("Righthand
5 Decl."), filed Dec. 14, 2009, ¶ 10.) After it was continued at

6 the request of Harrold Ford, the deposition of William Bergaus, a
7 parts and service director at Harrold Ford for the past 11 years,
8 was taken on November 16, 2009. (Id. ¶¶ 10-11.) Plaintiffs

9 claim that this deposition was the first time they discovered
10 information that indicated Harrold Ford was negligent. (Id. ¶

11 11.) Specifically, plaintiffs claim to have discovered that
12 Harrold Ford negligently inspected the used 2001 Taurus before
13 reselling it and misrepresented that the vehicle had undergone
14 specific diagnostic tests when, in fact, it had not. (Id.)

15 Based on the facts discovered at the deposition, plaintiffs claim
16 there was sufficient basis upon which to add Harrold Ford as a
17 defendant. On December 14, 2009, plaintiffs filed a Motion for
18 Leave to File First Amended Complaint, which included a proposed
19 First Amended Complaint. (See Ex. E to Righthand Decl.)

20 **ANALYSIS**

21 Ford argues that plaintiffs' attempted amendment should not
22 be permitted under 28 U.S.C. § 1447(e). Specifically, Ford
23 contends that Harrold Ford is not needed for just adjudication,
24 that plaintiffs would not be barred by any statutes of
25 limitations and would be able to bring this claim in state court,
26 that plaintiffs inexplicably delayed in bringing this claim, and
27 that plaintiffs' motives in bringing the claim against Harrold

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1 Ford are based solely on defeating jurisdiction and not the
2 result of any evolution of the case.

3 Under FRCP 15(a)(2), the court should "freely give leave" to
4 amend a complaint "when justice so requires." However, this
5 permissive standard does not apply "if a plaintiff seeks to amend
6 a removed complaint in a manner that would destroy diversity . .
7 . . ." Clinco v. Roberts, 41 F. Supp. 2d 1080, 1082 (C.D. Cal.
8 1999). "To apply a permissive standard in this situation would
9 allow a plaintiff to improperly manipulate the forum of an
10 action." Chan v. Bucephalus Alternative Energy Group, LLC, No.
11 08-04537, 2009 WL 1108744 at *3 (N.D. Cal. Dec. 19, 2009)
12 (quoting Clinco, 41 F. Supp. 2d 1080, 1086-87). When this
13 situation arises, the court has full discretion to evaluate the
14 motion pursuant to 28 U.S.C. § 1447(e). Clinco, 41 F. Supp 2d at
15 1082; Newcombe v. Adolf Coors Co., 157 F.3d 686, 691 (9th Cir.
16 1998).

17 Under 28 U.S.C. § 1447 (e), "[i]f after removal the plaintiff
18 seeks to join additional defendants whose joinder would destroy
19 subject matter jurisdiction, the court may deny joinder, or
20 permit joinder and remand the action to State court." The court
21 generally applies a five factor test in determining whether to
22 permit joinder under 28 U.S.C. § 1447 (e). These factors
23 include:

24 (1) Whether the party sought to be joined is needed for
25 just adjudication and would be joined under [FRCP]
26 19(a); (2) whether the statute of limitations would
27 prevent the filing of a new action against the new
28 defendant should the court deny joinder; (3) whether
there has been unexplained delay in seeking joinder; (4)
whether the joinder is solely for the purposes of
defeating federal jurisdiction; (5) the strength of the
claims against the new defendant.

1 Clinco, 41 F. Supp. 2d at 1082 (citing Schwarzer, et al.,
2 California Practice Guide: Federal Civil Procedure Before Trial ¶
3 2:1078 (2002)); Chan, 2009 WL 1108744 at *3; Boon v. Allstate
4 Ins. Co., 229 F. Supp. 2d 1016, 1020; see also IBC Aviation
5 Servs., Inc. v. Compania Mexicana de Aviacion, S.A. de C.V., 125
6 Supp.2d 1008, 1011 (N.D. Cal. 2000).

7 **1. Just Adjudication**

8 Under FRCP 19(a), joinder of a party is required if the
9 court cannot accord complete relief among existing parties or if
10 disposition of the action in the person's absence would impair
11 or impede the person's ability to protect their interest or leave
12 an existing party subject to otherwise inconsistent obligations.
13 "Although courts consider whether a party would meet [FRCP] 19's
14 standard for a necessary party, amendment under § 1447(e) is a
15 less restrictive standard than for joinder under [FRCP] 19." IBC
16 Aviation Servs., Inc., 125 F. Supp. 2d at 1011-12. Rather,
17 "Congress gave the courts broad discretion to allow joinder, even
18 though remand may result." Righetti v. Shell Oil Co., 711 F.
19 Supp. 531, 535 (N.D. Cal. 1989) (noting that "[s]uch discretion
20 is inconsistent with the more restrictive approach under Rule
21 19"). "Thus, courts have held that the first factor favors
22 joinder and remand 'when failure to join will lead to separate
23 and redundant actions,' but not when 'defendants are only
24 tangentially related to the cause of action or would not prevent
25 complete relief.'" Chan, 2009 WL 1108744 at *3 (quoting Boon,
26 229 F. Supp. 2d at 1022).

27 In this case, plaintiffs proposed First Amended complaint
28 alleges non-economic damages against all defendants. Pursuant to

1 California Civil Code § 1431.2, "[i]n any action for property
2 damage [or] personal injury . . . the liability of each defendant
3 for non-economic damages shall be *several only* and shall not be
4 joint." (Emphasis added). The statute defines non-economic
5 damages as, "subjective, non-monetary losses including, but not
6 limited to, pain, suffering, inconvenience, mental suffering,
7 emotional distress, loss of society and companionship, loss of
8 consortium, injury to reputation and humiliation." Id. Because
9 plaintiffs' allegations relating to defects with the car
10 implicate all defendants, the jury could find that Harrold Ford
11 was partially or wholly liable for non-economic damages. Because
12 parties are not jointly liable, plaintiff may be unable to
13 receive full relief in Harrold Ford's absence. At minimum,
14 plaintiffs will be forced to try an action, which arises out of
15 the same accident and alleging the same defects in the vehicle,
16 in two separate proceedings in two separate forums.

17 Defendant Ford's reliance on Lopez v. General Motors Corp.
18 for the proposition that only a manufacturer is needed to receive
19 full relief in an automobile products liability case is
20 misplaced. 697 F.2d 1328 (9th Cir. 1983) Lopez was decided in
21 1983, when the law provided that a defendant was jointly and
22 severally liable for all economic and non-economic damages.
23 However, California Civil Code § 1431.2 was codified in 1986. As
24 such, the court's holding in Lopez is unpersuasive to the court's
25 analysis in this case. Further, even if Harrold Ford is not a
26 necessary party to plaintiffs' action under the strict standards
27 of FRCP 19(a), plaintiffs have sufficiently demonstrated that
28 /////

1 Harrold Ford is more than tangentially related to their claims
2 for relief under § 1447.

3 Therefore, this factor favors allowing plaintiffs' to amend
4 their complaint to join Harrold Ford.

5 **2. Statute of Limitations**

6 In evaluating whether it should allow amendment that would
7 destroy diversity, courts must consider whether the statute of
8 limitations would prevent the filing of a new action against the
9 new defendant. Clinco, 41 F. Supp. 2d at 1082-83. There is a
10 two year statute of limitations in California for injuries caused
11 by negligence. Cal. Civ. Proc. Code § 335.1 (West 2006). Here,
12 plaintiffs' accident took place on September 7, 2007, over two
13 years ago. Plaintiffs contend they only recently discovered the
14 facts giving rise to the claim against Harrold Ford and also may
15 make a Doe amendment to their pending state law claim against the
16 State of California. As such, they assert that equitable tolling
17 should apply. However, this is a question of fact that would
18 require resolution by the adjudicating court on evidence not
19 currently before this court. See Zhang v. Saks Inc., No. 09-
20 4447, 2009 WL 5125815 at *4 (N.D. Cal. Dec. 21, 2009)
21 (considering the plaintiff's arguments for equitable tolling in §
22 1447 analysis).

23 Further, even if a state court action might be possible, it
24 would require plaintiffs to litigate essentially the same issues
25 in two forums. This would be a waste judicial resources and risk
26 inconsistent results. See IBC Aviation Servs., 125 F. Supp. 2d
27 at 1012 (considering the waste of judicial resources and risk of
28 inconsistent results even though a state court action against the

1 new defendant might be possible). Therefore, this is a neutral
2 factor that does not weigh in favor or against plaintiffs'
3 amendment.

4 **3. Unexplained Delay**

5 "When determining whether to allow amendment to add a
6 nondiverse party, courts consider whether the amendment was
7 attempted in a timely fashion." Clinco, 41 F. Supp. 2d at 1083
8 (citing Lopez, 697 F.2d 1328, 1332). In evaluating the timeliness
9 of an attempted amendment, courts have not set forth a
10 dispositive time limit. IBC Aviation Servs, Inc., 125 F. Supp.
11 2d at 1012 (holding that a delay of two months after filing the
12 initial complaint and five weeks after removal was "timely" and
13 "not unreasonable"); see Zhang, 2009 WL 5125815 at *4 (holding
14 that a delay of four and a half months was "minimal"). Rather,
15 courts look to the procedural posture of the case. Lopez, 697
16 F.2d at 1332 (holding that a delay of six months after removal
17 and eight months after the filing of the complaint was
18 unreasonable where the plaintiff sought amendment four days prior
19 to a summary judgment hearing).

20 In this case, plaintiffs filed their motion to amend three
21 months after they filed their initial complaint and one month
22 after removal. No scheduling order has been issued in this
23 action nor dispositive motions filed. Therefore, this factor
24 favors allowing plaintiffs' to amend their complaint to join
25 Harrold Ford.³

26
27 ³ Defendant's argument that the court should measure the
28 time period from the time plaintiffs filed their complaint
against the State of California - approximately a year before
this complaint was filed - is not compelling. Defendants rely

1 **4. Motive for Joinder**

2 "[T]he motive of a plaintiff seeking the joinder of an
3 additional defendant is relevant to a trial court's decision to
4 grant the plaintiff leave to amend his original complaint."
5 Clinco, 41 F. Supp. 2d at 1083 (quoting Desert Empire Bank, 623
6 F.2d 1371, 1376 (9th Cir. 1980)). In evaluating a plaintiff's
7 motives, courts have considered whether the plaintiff sought to
8 add a non-diverse defendant only after the case was removed to
9 federal court. Clinco, 41 F. Supp. 2d at 1083; Bonner v. Fuji
10 Photo Film, 461 F. Supp. 2d 1112, 1120 (N.D. Cal. 2006).
11 However, at least one court has noted that the timing of the
12 motion is not dispositive and "decline[d] to impute improper
13 motive to Plaintiff simply because Plaintiff [sought] to add a
14 non-diverse defendant post removal." IBC Aviation Servs., 125 F.
15 Supp. 2d at 1012 (noting that "[s]uspicion of diversity
16 destroying amendments is not as important now that § 1447(e)
17 gives the courts more flexibility" because the congressional
18 intent of § 1447(e) was to undermine the doctrine of some courts
19 to view diversity destroying amendments with suspicion); see
20 Chan, 2009 WL 1108744 at *5 (holding that plaintiff did not have
21 an improper motive even though amendment was sought after
22 removal).

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25 solely on Lopez to support this argument. However, in Lopez, the
26 court measured the time period from when the action was removed,
27 even though the claims was brought six years after the date of
28 the accident, a complaint had been previously filed, and a
settlement had been reached with another defendant. Lopez, 697
F.2d at 1330, 1332. As such, Lopez does not support defendant's
position.

1 Here, plaintiffs' amendment was filed after the case had
2 been removed to this court. However, plaintiffs began their
3 investigation of Harrold Ford while the case was in state court.
4 Specifically, plaintiffs noticed the person most knowledgeable at
5 Harrold Ford on October 23, 2009 approximately three weeks before
6 the case was removed. Plaintiffs were unable to take the Harrold
7 Ford's deposition until November 12, 2009, the day this case was
8 removed. The factual basis of plaintiffs amendment and joinder
9 originates from this deposition. Cf. Clinco, 41 F. Supp. 2d at
10 1083 (finding improper motive where "one could justifiably
11 suspect that [the plaintiff's] amendment of the complaint was
12 caused by the removal, rather than an evolution of the case").
13 Thus, as there is some indication that plaintiffs were seeking to
14 join Harrold Ford before the case was removed to federal court,
15 this factor is neutral or, at most, weighs only marginally in
16 favor of denying plaintiffs' amendment.

17 **5. Strength of Claim Against New Defendant**

18 In evaluating amendments under 1447 (e), courts consider
19 whether the claims that form the basis of the amendment are
20 meritorious. IBC Aviation Servs., 125 F. Supp. 2d at 1012-13.
21 In making this determination courts consider whether the claims
22 are potentially valid. Id. (finding this factor weighed in favor
23 of amendment where the "[p]laintiff may have valid claims");
24 Zhang, 2009 WL 5125815 at *6 (finding this factor weighed in
25 favor of amendment because plaintiff could "state a legal
26 claim"); Chan, 2009 WL 1108744 at *5-6 (holding that this factor
27 weighed in favor of amendment because "plaintiff's claims against
28 [defendant] are potentially valid").

1 In this case, plaintiffs state a potentially valid claim for
2 negligent misrepresentation against Harrold Ford in their
3 proposed amended complaint. Specifically, plaintiffs allege that
4 Harrold Ford represented to plaintiffs, before they purchased the
5 2001 Ford Taurus, that the vehicle was safe. Plaintiffs allege
6 that Harrold Ford designed and regimented a 115 point inspection
7 of the vehicle and that this inspection was both inadequate and
8 improperly conducted. Also, plaintiffs specifically allege that
9 as a result of the deficient inspection of the safety systems
10 plaintiffs suffered injuries. These allegations establish a
11 potentially valid claim for negligent misrepresentation. Thus,
12 this factor weighs in favor of amendment.⁴

13 **CONCLUSION**

14 Taking into account the § 1447(e) factors, the court
15 concludes that the totality of the circumstances weighs in favor
16 of allowing plaintiffs to amend their complaint and join Harrold
17 Ford as a non-diverse defendant. Accordingly, plaintiffs' motion
18 for leave to amend their complaint to join Harrold Ford is
19 GRANTED. Because such joinder destroys diversity jurisdiction,
20 that the action is REMANDED to the Superior Court of California
21 in and for County of Sacramento.

22 IT IS SO ORDERED.

23 DATED: March 31, 2010.



24
25 FRANK C. DAMRELL, JR.
UNITED STATES DISTRICT JUDGE

26
27 ⁴ Plaintiffs also allege claims of negligence and breach
28 of warranty against Harrold Ford. Because the court has found
one of plaintiffs' claims is meritorious under this factor, the
court need not evaluate the merits of the other two claims.