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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GAY HOSKINSON; ROBERT HOSKINSON;)
MICHAEL HOSKINSON, JR.; JAMES)
HOSKINSON; and CANDACE HOSKINSON,)
Plaintiffs,)
v.)
ALZA CORPORATION; SANDOZ, INC.;)
and DOES 1-100,)
Defendants.)

2:09-cv-03449-GEB-GGH
ORDER GRANTING MOTION TO
REMAND*

Plaintiffs move to remand this case to the Solano County Superior Court in California from which Defendant Sandoz, Inc. ("Sandoz") removed it, arguing that removal was improper under 28 U.S.C. § 1441(b). Whether the case should be remanded depends on the interpretation of the following language in 28 U.S.C. § 1441(b), known as the "forum defendant rule," which the parties dispute: "[an action based on diversity jurisdiction] shall be 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." 28 U.S.C. § 1441(b). Plaintiffs argue since Defendant Alza Corporation ("Alza")

* This matter is deemed suitable for decision without oral argument. E.D. Cal. R. 230(g).

1 is a citizen of California, the state in which this action was
2 brought, removal was improper. Defendants counter since forum
3 defendant Alza had not been served when Sandoz removed the case, §
4 1441(b) authorized removal if removal occurs before the forum
5 defendant is served. Plaintiffs rejoin, this interpretation of §
6 1441(b) would permit a defendant to remove a case before plaintiffs
7 have a sufficient opportunity to serve a forum defendant. (Plt.'s
8 Mot. to Remand 6:13-8:20.)

9 “The ‘properly joined and served’ language . . . [was] added
10 to § 1441(b) in 1948, [and] has widely been interpreted as reflecting
11 a Congressional intent to prevent the fraudulent joinder of forum
12 defendants in order to avoid removal.” Khashan v. Ghasemi, 2010 WL
13 1444884, at *2 (C.D. Cal.); see also Stan Winston Creatures, Inc. v.
14 Toys R Us, Inc., 314 F. Supp. 2d 177, 181 (S.D.N.Y. 2003) (“The
15 purpose of the ‘joined and served’ requirement is to prevent a
16 plaintiff from blocking removal by joining as a defendant a resident
17 party against whom it does not intend to proceed, and whom it does not
18 even serve”); Brown v. Organon USA Inc., 2008 WL 2625355, at *7-*8
19 (D.N.J. 2008) (same); Allen v. GlaxoSmithKline PLC, 2008 WL 2247067,
20 at *6 (2008) (same); DeAngelo-Shuayto v. Organon USA Inc., 2007 WL
21 4365311, at *3 (D.N.J. 2007) (same); In re Aradia and Zometa Prod.
22 Liab. Litig., 2007 WL 2905247, at *2 (M.D. Tenn. 2007) (same). When
23 Congress added the “properly joined and served” language to the
24 statute:

25 Congress could not possibly have anticipated the
26 tremendous loophole that would one day manifest
27 from technology enabling forum defendants to
28 circumvent the forum defendant rule by, inter alia,
electronically monitoring the state court dockets.
Thus, Congress would have had no thought to wording
the statute with this modern problem in mind.

1 Sullivan v. Novartis Pharm. Corp., 575 F. Supp. 2d 640, 645 (D.N.J.
2 2006); see also Brown, 2008 WL 2625355, at *7 ("From a pragmatic
3 standpoint, a literal application would allow defendants to avoid the
4 imposition of the forum defendant rule as long as they are monitoring
5 state dockets and avoiding service.").

6 In Clarence E. Morris, Inc. v. Vitek, 412 F.2d 1174, 1176
7 n.1 (9th Cir. 1969), the Ninth Circuit indicated how the "joined and
8 served" language in 28 U.S.C. § 1441(b) should be construed as
9 follows: "Occasional holdings that unserved codefendants can be
10 ignored in deciding removal petitions stem from the . . .
11 misassumption that 28 U.S.C. § 1441(b), by implication, expanded
12 removal jurisdiction to permit removal, despite want of diversity, if
13 a resident defendant whose presence would defeat diversity had not
14 been served." Therefore, notwithstanding the text of § 1441(b), which
15 states it applies only where the forum defendant has been served, the
16 Court departs from a literal interpretation here because "the
17 existence of diversity is determined from the fact of citizenship of
18 the parties named and not from the fact of service." Id. at 1176. A
19 case may be remanded under this principle upon the timely motion of a
20 plaintiff who did not have sufficient opportunity to effect service on
21 a forum defendant before removal.

22 Authorizing remand under such circumstances is consistent
23 with the purpose of § 1441(b) explained in Lively v. Wild Oats
24 Markets, 456 F.3d 933 (9th Cir. 2006), as follows:

25 Removal based on diversity jurisdiction is intended
26 to protect out-of-state defendants from possible
27 prejudices in state court. The need for such
28 protection is absent, however, in cases where the
defendant is a citizen of the state in which the
case is brought. Within this contextual framework,
the forum defendant rule allows the plaintiff to

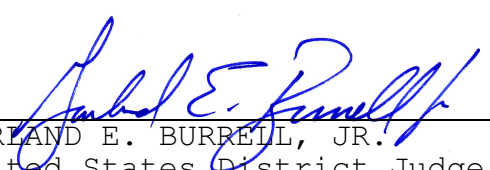
1 regain some control over forum selection by
2 requesting that the case be remanded to state
3 court.

4 Id. at 940 (citations omitted).

5 Here, Plaintiffs seek to return to the state forum they
6 selected since the case was removed before they had a sufficient
7 opportunity to serve the forum defendant. Sandoz removed this case a
8 mere two days after it was filed. Both Sandoz and Alza were
9 subsequently served within one month of Plaintiffs filing the
10 complaint, and there is no indication that either defendant was joined
11 solely for the purpose of defeating removal. Under these
12 circumstances, the removal was "at odds with the underlying purpose of
13 the [statute]." Commodity Futures Trading Comm'n v. P.I.E., Inc., 853
14 F.2d 721, 725-26 (9th Cir. 1988).

15 Since Sandoz removed this action before Plaintiffs had a
16 sufficient opportunity to serve the forum defendant, Plaintiffs
17 prevail on their remand motion. Therefore, this case is remanded to
18 the Solano County Superior Court in California.

19 Dated: June 30, 2010

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22 GARLAND E. BURRELL, JR.
23 United States District Judge
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