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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

DAVID R. TUCKER, et al.,
Plaintiffs,
v.
MCKESSON CORPORATION, et al.,
Defendants.

Case No: C 10-02981-SBA

**ORDER TO SHOW
CAUSE RE REMAND**

On June 8, 2010, Plaintiff David R. Tucker (“Plaintiff” or “Tucker”) commenced the instant wrongful death and products liability action in state court following the death of his wife, Michelle L. Tucker. Ms. Tucker died after ingesting allegedly defective morphine tablets manufactured and distributed by Defendants McKesson Corporation (“McKesson”), Ethex Corporation (“Ethex”), Ther-Rx Corporation (“Ther-Rx”), and K-V Pharmaceutical Company (“KV Pharmaceutical”) (collectively “Defendants”). Plaintiff brings this action on his own behalf and on behalf of his wife’s statutory beneficiaries. On July 7, 2010, Defendants removed the action on the basis of diversity jurisdiction. Dkt. 1.

Tucker is a resident of Indiana, and the decedent’s three children are residents of Wyoming and Michigan. Compl. ¶ 1; Defs.’ Notice of Removal ¶ 7. Defendant McKesson is a Delaware corporation with its principal place of business in California. Compl. ¶ 3; Defs.’ Notice of Removal ¶ 8. Defendants Ethex and Ther-Rx are Missouri corporations and are wholly owned subsidiaries of codefendant KV Pharmaceutical, a Delaware

1 corporation. Compl. ¶¶ 6-10; Defs.’ Notice of Removal ¶¶ 9-11. By stipulation of the
2 parties, McKesson was dismissed from this case on October 12, 2010. Order Dismissing
3 Def. McKesson, Dkt. 29.

4 The parties are now before the Court on defendants’ motion for change of venue,
5 pursuant to 28 U.S.C. § 1404(a). Dkt. 23. Before reaching the merits of Defendants’
6 motion, however, the Court is obligated to examine its subject matter jurisdiction. See
7 FW/PBS, Inc. v. City of Dall., 493 U.S. 215, 229 (1990); United Investors Life Ins. Co. v.
8 Waddell & Reed, Inc., 360 F.3d 960, 966-67 (9th Cir. 2004). The removal statute provides,
9 in pertinent part, that:

10 Any civil action of which the district courts have original
11 jurisdiction founded on a claim or right arising under the
12 Constitution, treaties or laws of the United States shall be
13 removable without regard to the citizenship or residence of the
14 parties. Any other such action 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.*

15 28 U.S.C. § 1441(b) (emphasis added); see Spencer v. U.S. Dist. Court, 393 F.3d 867, 870
16 (9th Cir. 2004). “[R]emoval statutes are strictly construed against removal.” Luther v.
17 Countrywide Home Loans Servicing, LP, 533 F.3d 1031, 1034 (9th Cir. 2008). “The
18 presumption against removal means that the defendant always has the burden of
19 establishing that removal is proper.” Moore-Thomas v. Alaska Airlines, Inc., 553 F.3d
20 1241, 1244 (9th Cir. 2009). As such, any doubts regarding the propriety of the removal
21 favor remanding the case. See Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992).


22 The diversity jurisdiction statute confers jurisdiction in cases where the parties are
23 citizens of different states and where the amount in controversy exceeds the sum of
24 \$75,000. 28 U.S.C. § 1332. Diversity jurisdiction is determined at the time of removal.
25 Grupo Dataflux v. Atlas Global Grp., L.P., 541 U.S. 567, 574 (2004). A corporation “is a
26 citizen of any State in which it has been incorporated and of the State where it has its
27 principal place of business.” 28 U.S.C. § 1332(c)(1). Therefore, McKesson, whose
28 principal place of business is in California, was a resident defendant in this case at the time

1 of removal. “It thus is clear that the presence of [a] local defendant at the time removal is
2 sought bars removal.” Spencer, 393 F.3d at 870 (citing 28 U.S.C. § 1441(b)). Less clear is
3 whether the subsequent dismissal of McKesson is sufficient to cure any defects in the
4 removal. Compare Infuturia Global Ltd. v. Sequus Pharmaceuticals, Inc., --- F.3d ---, 2011
5 WL 353214, at *3 (9th Cir. Feb. 7, 2011) (jurisdictional defect at the time of removal cured
6 by dismissal of diversity-destroying defendants) with Parrino v. FHP, Inc., 146 F.3d 699,
7 703 n.1 (9th Cir. 1998) (affirming judgment on merits after removal defect had been cured,
8 but stating that Caterpillar allows only the court of appeals, not the district court, to treat
9 such defects as cured), and Rudow v. Monsanto, No. C 99-4700 TEH, 2001 WL 228163, at
10 *3-4 (N.D. Cal. Mar. 1, 2001) (remanding action where court became aware that
11 jurisdiction did not exist at the time of removal, despite the fact that diversity was perfected
12 by stipulated dismissal of non-diverse defendant before remand); see also Vasura v.
13 ACandS, 84 F. Supp. 2d 531, 536 (S.D.N.Y. 2000). Accordingly,

14 IT IS HEREBY ORDERED THAT the parties are directed to show cause why the
15 instant action should not be remanded to state court for lack of removal jurisdiction. The
16 parties may respond to this Order by submitting a memorandum, not to exceed ten (10)
17 pages, by no later than February 25, 2011. The hearing on Defendants’ motion for change
18 of venue and the case management conference scheduled for February 15, 2011, are
19 VACATED, and the motion shall be held in abeyance pending the Court’s resolution of the
20 instant Order to Show Cause.

21 IT IS SO ORDERED.

22 Dated: February 10, 2011

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24 SAUNDRA BROWN ARMSTRONG
25 United States District Judge
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