IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

REBECCA L. AKE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. CIV-17-539-R**
	)	
CENTRAL UNITED LIFE INSURANCE CO., a foreign insurance company, and CAROL GATLIN, an Oklahoma resident,	)	
	)	
Defendants.	)	

ORDER

Before the Court is Plaintiff's Motion to Remand. Doc. 5. Defendant has responded. Doc. 6. For the reasons that follow, Plaintiff's Motion is GRANTED.

I. Background

Plaintiff Rebecca Ake filed this action against Defendants in the District Court of Oklahoma County, Oklahoma, on November 2, 2016. Nearly a decade before that, in July 1997, Defendant Central United Life Insurance Company ("Central United") issued an insurance policy to Ms. Ake. The policy provided for benefits if Ms. Ake or her spouse contracted cancer. When Ms. Ake's spouse contracted cancer, Central United refused to pay benefits under the policy. In response, Ms. Ake sued Central United for breach of contract and the duty to deal in good faith. She also has sued Central United's agent, Defendant Carol Gatlin, whom Ms. Ake alleges made fraudulent or at least negligent representations about the policy.

Citing diversity jurisdiction per 28 U.S.C. § 1332, Central United removed this action under 28 U.S.C. § 1441 on May 9, 2017. Ms. Ake moves to remand, arguing that Defendants have not established the requisite amount in controversy and that Defendant Carol Gatlin—an Oklahoma citizen like Ms. Ake—spoils complete diversity. Because the Court agrees that Ms. Gatlin's presence in this case destroys jurisdiction under 28 U.S.C. § 1332, it will remand the case to state court.

II. Diversity Jurisdiction under § 1332(a)

"The district courts of the United States . . . are courts of limited jurisdiction." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005) (quotes omitted). Diversity jurisdiction under 28 U.S.C. § 1332(a) requires that complete diversity exist between plaintiffs and defendants and that the amount in controversy exceeds $75,000, exclusive of interests and costs. Section § 1332(a) demands that the citizenship of all defendants must be different from the citizenship of all plaintiffs. *McPhail v. Deere & Co.*, 529 F.3d 947, 951 (10th Cir. 2008). "For purposes of diversity jurisdiction, a person is a citizen of a state if the person is domiciled in that state . . . [a]nd a person acquires domicile in a state when the person resides there and intends to remain there indefinitely." *Middleton v. Stephenson*, 749 F.3d 1197, 1200 (10th Cir. 2014). In regard to § 1332(a)'s amount in controversy requirement, that amount is simply "an estimate of the amount that will be put at issue in the course of the litigation." *McPhail*, 529 F.3d at 956 (10th Cir. 2008). It is the party invoking diversity jurisdiction, in this case Central United, who has the "burden of proving [diversity jurisdiction] by a preponderance of the evidence." *Middleton v. Stephenson*, 749 F.3d 1197, 1200 (10th Cir. 2014). The removing party may rely on, among other things,

affidavits, interrogatories or admissions in state court, and calculations from the complaint's allegations. *McPhail*, 529 F.3d at 954.

A. Amount in Controversy

So the first question, then, is whether Defendant Central United has established that this dispute meets § 1332(a)'s amount in controversy requirement—a sum greater than $75,000—by a preponderance of the evidence. *Id.* "The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed 'in good faith'." *Marchese v. Mt. San Rafael Hosp*., 24 Fed.Appx. 963, 964 (10th Cir. 2001) (citing *Horton v. Liberty Mut. Ins. Co*., 367 U.S. 348, 353 (1961)); *see also St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938) ("[U]nless the law gives a different rule, the sum deemed by the plaintiff controls if apparently made in good faith."). Once the party asserting federal jurisdiction has done that, the "*St. Paul Mercury* standard comes to the fore"—that is, "the case stays in federal court unless it is legally certain that the controversy is worth less than the jurisdictional minimum." *McPhail,* 529 F.3d at 954. In a sense, then, the burden shifts to the party seeking remand, who must then prove to a legal certainty that the amount in controversy is less than $75,000.

Here, the amount in controversy requirement is clearly met: Ms. Ake's Petition seeks "judgment against the Defendant or Defendants in a sum in excess of Seventy-Five Thousand Dollars . . . ." Doc. 1, Ex. 1, at 3. A "[p]laintiff cannot defeat jurisdiction by backtracking on [her] allegations." *Chen v. Dillard Store Servs., Inc*., 579 F.Appx. 618, 621 (10th Cir. 2014), which is precisely what Ms. Ake is attempting to do here by asserting,

for the first time, that the amount in controversy requirement is not satisfied. Her Petition says the opposite. This is not to say that a party moving to remand could never argue that the amount sought in the Petition does not fairly represent the amount in controversy. If that were the case, the party would have the burden of proving to a legal certainty that the amount in dispute is $75,000 or less. Ms. Ake, though, has not done that, and her conclusory allegations fail to carry her burden. Nor is the Court convinced otherwise by *Johnson v. Wal-Mart Stores, Inc*., 953 F. Supp. 351 (N.D. Okla. 1995), which Ms. Ake cites for the idea that when the amount sought is uncertain, Defendant will not have established the requisite amount in controversy. Ms. Ake, however, omits that in *Johnson* the plaintiff's petition sought damages "in excess of $10,000"—plainly less than § 1332(a)'s jurisdictional threshold. *Id.* at 353.

B. Diversity of Citizenship

The issue of diversity between the parties is a tad trickier. Again, under 28 U.S.C. § 1332(a) the citizenship of all defendants must be different from the citizenship of all plaintiffs. *See, e.g.*, *McPhail*, 529 F.3d at 951 (10th Cir. 2008). No one is disputing the alleged citizenship of the named parties. Plaintiff Ake is a citizen of Oklahoma. Defendant Central United is a citizen of Arkansas (its state of incorporation) and Texas (its principal place of business). What the parties dispute is whether Defendant Carol Gatlin, a citizen of Oklahoma, spoils diversity because she has not been properly served.

Central United's theory is this: once a plaintiff has filed a petition in Oklahoma state court, she has 180 days to serve a defendant with process. Okla. Stat. tit. 12, § 2004(I).[1] If she fails to serve "and the plaintiff cannot show good cause why such service was not made within that period, the action shall be deemed dismissed as to that defendant without prejudice." *Id*. Central United Argues that the 180-day period for Ms. Ake to serve Gatlin with summons and a copy of the Petition lapsed on May 1, 2017. Her failure to serve Gatlin within the six-month period thus shows that Ms. Ake fraudulently joined Ms. Gatlin for the sole purpose of spoiling diversity jurisdiction. And because a "defendant's right of removal cannot be defeated by a fraudulent joinder[,]", *see, e.g., Estes v. Airco Serv., Inc*., No. 11-CV-776-GKF-FHM, 2012 WL 1899839, at * 1 (N.D. Okla. May 24, 2012), this case has been properly removed to federal court.

Central United's argument tees up an uncomplicated question for the Court: does an unserved defendant's citizenship count for diversity purposes? Nearly every court has said yes. That is, even if a named defendant has not been properly served, that defendant can still spoil diversity. "[T]he law is clear that the citizenship of all named defendants, whether served with process or not, must be considered in determining whether complete diversity exists, thereby providing a jurisdictional basis for removal under 28 U.S.C. § 1441(a)." *Ott v. Consol. Freightways Corp. of Delaware*, 213 F. Supp. 2d 662, 664 (S.D. Miss. 2002). This rule comes from blackletter law requiring a court to "examine the face

[1] On removal, federal courts look to the law of the forum state, in this case Oklahoma, to determine whether service of process was properly made before removal. *See Wallace v. Microsoft Corp*., 596 F.3d 703, 706 (10th Cir. 2010).

of the complaint to determine whether a party has adequately presented facts sufficient to establish diversity jurisdiction." *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993). It follows, then, that "[d]iversity jurisdiction is determined by the face of the complaint, not by which defendants have been served." *Hunter Douglas Inc. v. Sheet Metal Workers Intern. Ass'n, Local 159*, 714 F.2d 342 (4th Cir.1983).

Given this, courts hold that the citizenship of a named, though unserved, defendant matters for diversity purposes. *See, e.g., Pecherski v. General Motors Corp*., 636 F.2d 1156, 1160 (8th Cir.1981) ("Despite the joined and served provision of section 1441(b), the prevailing view is that the mere failure to serve a defendant who would defeat diversity jurisdiction does not permit a court to ignore that defendant in determining the propriety of removal."); *Clarence E. Morris, Inc. v. Vitek*, 412 F.2d 1174, 1176 (9th Cir. 1969) ("[T]he existence of diversity is determined from the fact of citizenship of the parties named and not from the fact of service."); *Boulter v. Citi Residential Lending*, No. 10–350, 2011 U.S. Dist. LEXIS 3794, at *7, 2011 WL 128786 (E.D.Okla. Jan. 14, 2011) ("[D]iversity of each defendant must be considered prior to removal, whether or not each defendant has been served."); *Rushing v. Dan River, Inc.*, No. Civ. 1:00CV00395, 2000 WL 1456292, *2 (M.D.N.C. Sept.6, 2000) ("[R]egardless of whether an unserved resident defendant may be ignored in determining removability under 28 U.S.C. § 1441(b), the citizenship of all named defendants, whether served with process or not, must be considered in determining whether complete diversity exists,"); *In re Norplant Contraceptive Products Liability Litigation*, 889 F.Supp. 271, 274 (E.D.Tex.1995) ("Section 1441(b) ... did not change the removal requirement set forth in [*Pullman Co. v.*

Jenkins, 305 U.S. 534, 59 S.Ct. 347 (1939)] that a court, in determining the propriety of removal based on diversity of citizenship, must consider all named defendants regardless of service."); *Thigpen v. Cheminova, Inc.*, 992 F.Supp. 864, 871 (S.D. Miss.1997) (recognizing that "service of process [is] irrelevant in the initial determination of diversity"); *also see* 14B Charles Alan Wright et al., Federal Practice and Procedure § 3723 (4th ed.) ("A party whose presence in the action would destroy diversity must be dropped formally, as a matter of record, to permit removal to federal court. It is insufficient, for example, that service of process simply has not been made on a non-diverse party; the case may not be removed until that party actually has been dismissed from the case."). The Court of course realizes that the state court could dismiss Ms. Gatlin and Central United could remove, meaning that "plaintiff's victory on this remand is probably more fanciful than real, and will be short-lived." *Stamm v. Am. Tel. & Tel. Co.*, 129 F. Supp. 719, 721 (W.D. Mo. 1955). But the Court cannot brush aside the above authority requiring remand simply because Ms. Ake's victory may be fleeting. Here, the Plaintiff is not diverse from all Defendants. Ms. Ake and Ms. Gatlin are citizens of Oklahoma, making remand proper.

To be clear, a court can permit removal if a defendant was fraudulently joined or the defendant is merely a nominal party against whom no real relief is sought." *See, e.g., Pecherski v. Gen. Motors Corp.*, 636 F.2d 1156, 1161 (8th Cir. 1981). And no one is contending otherwise. But when reviewing allegations of fraudulent joinder, a Court must "give paramount consideration to the reasonableness of the basis underlying the state claim." *Filla v. Norfolk Southern Ry. Co.*, 336 F.3d 806, 810 (8th Cir. 2003); *see also Menz v. New Holland N. Am., Inc.*, No. 05-1739, 2006 WL 645908, at *2 (8th Cir. March 16,

2006) ("The common thread underlying the question whether a defendant has been fraudulently joined to defeat jurisdiction is reason.") (quotations omitted). Fraudulent joinder exists "when the circumstances do not offer any other justifiable reason for joining the defendant" other than to defeat jurisdiction. *Baeza v. Tibbetts*, No. 06-0407 MV/WPL, 2006 WL 2863486, at *1 (D.N.M. July 7, 2006).

It seems unlikely that Ms. Ake joined Ms. Gatlin solely to avoid federal court. Take the case that Central United cites for the blanket proposition that "other courts" have deemed that a failure to serve a party is sufficient for fraudulent joinder, *Johnson v. Tyson Fresh Meats, Inc.*, No. C-06-1002-LRR, 2006 WL 1004970 (N.D. Iowa Apr. 17, 2006). There the Court found fraudulent joinder not because one defendant had not been served per se, but because the plaintiff lacked any excuse for his failure to serve: "Plaintiff's failure to serve the Individual Defendants, even though Plaintiff knows who they are and works in the same building with them, is unreasonable." *Id.*, 2006 WL 1004970, at *4 (N.D. Iowa Apr. 17, 2006)

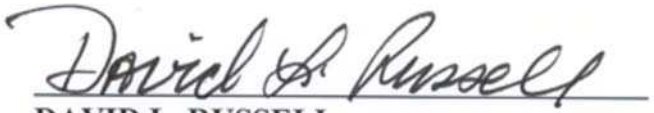
Here, the Court does not have any reason to believe that is the case. As Defendants have admitted, Ms. Gatlin was the agent who sold the insurance policy to Ms. Ake. *See* Response to Interrogatory, Doc. 1, Ex. 8, at 8. Nonetheless, Central United still insists that Ms. Gatlin's joinder was fraudulent. Plaintiff allegedly did not sign and notarize the affidavits indicating that she could not locate Ms. Gatlin until after Central United filed its Notice of Removal and the six-month period for service had expired. In fact, Central United says, the affidavits do not indicate whether Ms. Ake attempted to serve Ms. Gatlin prior to Central United's filing the Notice of Removal; and they do not indicate whether Ms. Ake

made any other attempts to serve Ms. Gatlin. Further, Central United argues, Ms. Ake could have always attempted to serve Gatlin by any other method allowed under Oklahoma law, such as service by a sheriff, by mail or publication, or by any other method approved by the state court.

Ms. Ake could have doubtless been more persistent in serving Ms. Gatlin. But Ms. Ake's failure to properly serve Gatlin does not mean Gatlin has been fraudulently joined. Joinder is fraudulent where "(1) plaintiff's jurisdictional allegations are fraudulent and made in bad faith; or (2) plaintiff has no possibility of recovery against the non-diverse defendant." *Dollison v. Am. Nat'l Ins. Co.*, No. 13-CF-100-CVE-FHM, 2013 WL 1944891, at *3 (N.D. Okla. May 9, 2013). Central United is not arguing there is no possibility of recovery against Ms. Gatlin. Instead, they argue this failure to serve shows fraudulent intent and bad faith. That seems a stretch. Ms. Ake's attempted service were undoubtedly imperfect and maybe even halfhearted. But Ms. Ake's attempt to sue the agent from whom she purchased the policy based on that agent's alleged misleading statements does not suggest fraud.

Plaintiff's Motion to Remand is therefore GRANTED.

IT IS SO ORDERED this 21st day of July 2017.



DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE