

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

In re: BAYCOL PRODUCTS LITIGATION

MDL No. 1431  
(MJD)

This Document also relates to:

Lois Anderson v. Bayer AG et al.,

Civil No. 02-3582

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This matter is before the Court upon Plaintiff's motion to remand, or in the alternative, for joinder of parties. Bayer Corporation ("Bayer") opposes the motion, arguing that this Court has diversity jurisdiction over Plaintiff's claims.

Background

Plaintiff originally filed her Complaint in the Circuit Court of Warren County, Mississippi. In her Complaint, she alleges that she was prescribed Baycol, and suffered injuries as a result. She asserts claims against Bayer AG, Bayer Corporation and Bayer Pharmaceutical Division, as well as a claim of failure to obtain informed consent against her physician, Dr. Abdul Bahro, M.D. The Complaint alleges, and the parties do not dispute, that the Bayer defendants are not citizens of Mississippi, for purposes of

determining diversity jurisdiction. The Complaint also alleges that Dr. Bahro is a resident of Warren County, Mississippi. In his Answer to the Complaint, however, Dr. Bahro states that he is a citizen of Syria. Dr. Bahro further asserts that he has not yet received a green card granting him permanent residency status from the INS. Dr. Bahro Affidavit, ¶ 3.

Bayer asserts that prior to receiving Dr. Bahro's Answer, it had no knowledge that Dr. Bahro was a resident of Syria. But within thirty days of receiving Dr. Bahro's Answer, Bayer removed this action to federal court pursuant to 28 U.S.C. § 1446(b).

After the matter was removed, Plaintiff moved to remand on the basis that complete diversity of citizenship does not exist. Shortly thereafter, Plaintiff filed a motion to amend her Complaint to add Dr. Bahro's employer as a defendant. Prior to ruling on the motions, this matter was transferred to the District of Minnesota by the Judicial Panel on Multidistrict Litigation ("JPMDL"). Plaintiff now renews her motion to remand and to join Dr. Bahro's employer.

#### Plaintiff's Motion For Remand

Remand to state court is proper if the district court lacks subject matter jurisdiction over the asserted claims. 28 U.S.C. § 1447(c). In reviewing a motion to remand, the court must resolve all doubts in favor of a remand to state court, and the party opposing remand has the burden of establishing federal jurisdiction by a preponderance of the evidence. In re Business Men's Assurance Co. of America, 992 F.2d 181, 183 (8<sup>th</sup> Cir. 1983)(citing Steel Valley Auth. v. Union Switch & Signal Div., 809 F.2d 1006, 1010 (3<sup>rd</sup> Cir. 1987) cert. dismissed 484 U.S. 1021 (1988)).

## 1. Citizenship of Dr. Bahro

Plaintiff argues that for purposes of determining diversity of citizenship, Dr. Bahro is a citizen of Mississippi. Bayer argues, however, that Dr. Bahro is a citizen of Syria, and has not been granted permanent resident in the United States. Thus, for purposes of determining diversity jurisdiction, Dr. Bahro is deemed a citizen of Syria, not Mississippi.

Title 28 U.S.C. § 1332(a) provides that, for purposes of determining the existence of diversity jurisdiction, “an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.” The parties disagree as to proper interpretation of this statutory provision. Plaintiff argues that Dr. Bahro should be considered an alien whose permanent residence is in the state of Mississippi because he owns a home and pays property taxes in Mississippi, he is licensed to practice medicine in Mississippi, and has a Mississippi driver’s license. Plaintiff further argues that when § 1332(a) was amended to add the statutory provision at issue here, it was Congress’ intent to limit diversity jurisdiction in the federal courts. Thus, finding that Dr. Bahro is a citizen of Mississippi is consistent with Congress’ intent.

Bayer, on the other hand, argues that for Dr. Bahro to be considered an alien admitted to the United States for permanent residence, the court should refer to Dr. Bahro’s alien’s official immigration status. Bayer argues that this interpretation has been adopted in other jurisdictions, while Plaintiff’s interpretation has yet to be adopted by any court. For example, in Foy v. Schantz, Schatman & Aaronson, P.A., 108 F.3d 1347, 1349 (11<sup>th</sup> Cir. 1997) the Eleventh Circuit held that only those aliens that have received permission from the INS to remain permanently in this country are permanent residents

under § 1332(a). Id. See also, Kato v. County of Westchester, 927 F. Supp. 714, 715-716 (S.D.N.Y. 1996); Arai v. Tachnibana, 778 F. Supp. 1535, 1539-1540 (D. Hawaii 1991). The court further rejected the case-by-case approach supported by the Plaintiff in this case.

The permanent resident alien provision of § 1332(a) was adopted in 1988 as part of the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642. This act was “clearly designed to improve federal court administration and efficiency.” Singh v. Daimler-Benz AG, 9 F.3d 303, 307 (3<sup>rd</sup> Cir. 1993)(discussing legislative history). Given this goal, we find it highly unlikely that, as appellee contends, Congress intended the federal courts to engage in a fact-intensive, case-by-case analysis to determine whether each individual alien litigant, regardless of his official immigration status, actually intended to reside permanently in the United States.

Id., at 1349. In addition, as noted by the court in Arai, supra, the only portion of the legislative history pertaining to this provision indicates that it was added to eliminate suits between citizens of a state and an alien permanently residing in that same state.

Id. at 1540. This is consistent with Plaintiff’s argument that the amendment to § 1332(a) was added to narrow diversity jurisdiction. However, referring to an alien’s official immigration status to determine whether he/she is a permanent resident is not contrary to a congressional intent to narrow diversity jurisdiction, and it promotes judicial economy by avoiding a case-by-case approach.

The case cited by Plaintiff in her brief does not support her interpretation. In Saadeh v. Farouki, 107 F.3d 52 (D.C.Cir. 1997) the issue before the court was whether diversity jurisdiction existed between a non-resident alien and a resident alien, without a citizen of a state on either side of the litigation. That issue is not a concern here. There is no discussion in the Saadeh opinion that is contrary to the court’s holding in Foy; that

to determine whether an alien is a permanent residence, the court should refer to the alien's official immigration status.

Accordingly, the Court finds that the proper interpretation of § 1332(a) requires the Court to refer to Dr. Bahro's official immigration status. Because Dr. Bahro did not have a green card at the time this action was filed, he was not an alien admitted to the United States for permanent residence. Therefore, there is complete diversity among the parties.

## 2. Timeliness of Removal Petition.

Plaintiff further argues that the notice of removal was not timely. It is Plaintiff's position that Dr. Bahro was the first served defendant; having been served the Summons and Complaint on December 11, 2001. By failing to file a notice of removal on or before January 11, 2002, Plaintiff argues that Dr. Bahro waived his right to remove and is precluded from joining in Bayer's Notice of Removal which was filed February 13, 2002. In support, Plaintiff relies on cases from the Fifth Circuit such as Brown v. Demco, Inc., 792 F.2d 478 (5<sup>th</sup> Cir. 1986) and Doe v. Kerwood, 969 F.2d 165, 169 (5<sup>th</sup> Cir. 1992).

Bayer responds that its notice of removal was timely because it was filed within thirty days of receiving notice that Dr. Bahro was a citizen of Syria. Pursuant to 28 U.S.C. § 1446(b):

if a case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable . .

Bayer argues that Dr. Bahro's Answer qualifies as "other paper" from which it may first

be ascertained that the case is removable. They further argue that as Dr. Bahro's Answer was filed on January 17, 2002, and the Notice of Removal was filed on February 13, 2002, such Notice was timely filed, relying on Jernigan v. Ashland Oil Inc., 989 F.2d 812, 815 (5<sup>th</sup> Cir.) cert. denied, 510 U.S. 868 (1993)(finding that thirty day notice under § 1446(b) measured from receipt of whatever writing , such as an answer, constitutes first notice).

Initially, the Court notes that it is not bound by Fifth Circuit law when applying federal law relative to a remand motion. "When analyzing questions of federal law, the transferee court should apply the law of the circuit in which it is located." In re: TMJ Litigation, 97 F.3d 1050, 1055 (8<sup>th</sup> Cir. 1996)(citing In re Korean Air Lines Disaster, 829 F.2d 1171, 1176 (D.C.Cir. 1987) aff'd 490 U.S. 122 (1989)). See also, In re Bridgestone/Firestone, Inc. v. Ford Motor Company, 129 F. Supp.2d 1202 (S.D. Indiana 2001)(finding that remand and removal are procedural issues that are governed by federal law.)

The Eighth Circuit provides that "later served defendants . . . had thirty days from the date of service on them to file a notice of removal with the unanimous consent of their co-defendants, even though the first-served defendants did not file a notice of removal within thirty days of service on them." Marano Enterprises of Kansas v. Z-Teca Restaurants, L.P., 254 F.3d 753, 757 (8<sup>th</sup> Cir. 2001). In so ruling, the Eighth Circuit acknowledged and rejected the Fifth Circuit rule as described in Brown v. Demco, Inc., 792 F.2d 478 (5<sup>th</sup> Cir. 1986). Id. at 755. The better rule, and the one consistent with Eighth Circuit law, is that provided in the Jernigan opinion. That is, where removal is

not proper based on the initial pleading, the thirty day time period to remove commences on the date the defendant first receives notice of the basis for removal, irregardless of whether the first served defendant filed a notice of removal within thirty days. Accordingly, Bayer's Notice of Removal was timely filed.

### 3. Joinder of Dr. Bahro's Employer

Plaintiff, in the alternative, requests joinder of Dr. Bahro's employer, River Region Medical System, Inc. ("River Region"). Plaintiff asserts that River Region is vicariously liable for the negligent acts of Dr. Bahro committed within the scope of his employment while treating Plaintiff. As River Region is a Mississippi corporation, joinder would destroy diversity jurisdiction.

When a plaintiff seeks to amend the complaint by adding a non-diverse defendant, the court has discretion to either permit or deny such joinder. See, 28 U.S.C. § 1447(e)<sup>1</sup>. Typically, a motion to amend a complaint is governed by Rule 15(a) of the Federal Rules of Civil Procedure, which provides that leave to amend "should be freely given when justice so requires." However, when amending the complaint will defeat diversity jurisdiction, the court instead should take the following into account: 1) the extent to which the purpose of the amendment is to defeat federal jurisdiction; 2) whether the plaintiff has been dilatory in seeking the amendment; 3) whether plaintiff will be significantly injured if the amendment is not allowed; and 4) any other factor bearing on the equities. Hensgens v. Deere & Company, 833 F.2d 1179, 1182 (5<sup>th</sup> Cir.

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<sup>1</sup>The statute provides: "If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State courts." 28 U.S.C. § 1447(e).

1987).

Based on the totality of the circumstances in this case, the Court finds that Plaintiff seeks to join Dr. Bahro's employer for the sole purpose of defeating jurisdiction. This is evidenced by the fact that Plaintiff did not initially assert a claim of vicarious liability against River Region in the Complaint and that the joinder motion was not made until after the Notice of Removal was filed. Plaintiff argues that River Region was not initially named because she did not know of its identity, but Plaintiff could have asserted the claim against a fictitious defendant.

The Court further finds that by denying joinder, Plaintiff has not demonstrated that she will be prejudiced. She may proceed to litigate her claims against Dr. Bahro in this jurisdiction, and no showing has been made that Plaintiff would not be able to recover on any judgment but for the joinder of River Region.

IT IS HEREBY ORDERED that Plaintiff's Motion for Remand, or in the Alternative, for Joinder is DENIED.

Date:

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Michael J. Davis  
United States District Court