

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

RUTH KENNON, Individually and as
Personal Representative of the Estate of
JAMES KENNON(D),

Plaintiff

v.

BRISTOL-MYERS SQUIBB, et al.,

Defendants

C.A. NO: 1:17-cv-00612-GMS

**PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION TO REMAND TO STATE COURT**

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I. INTRODUCTION

This Memorandum of Points and Authorities is submitted in support of the Motion to Remand filed by Plaintiff, Ruth Kennon, individually and as personal representative of the Estate of James Kennon (either of whom is hereinafter referred to as “Plaintiff”), pursuant to 28 U.S.C. § 1447. Plaintiff requests remand to the Superior Court of the State of Delaware in and for New Castle County (“Superior Court”) on the grounds that this Court lacks subject matter jurisdiction over the matter. Defendants, Bristol-Myers Squibb and Pfizer, removed this action on May 25, 2017, under 28 U.S.C. §§ 1332, 1441, and 1446 from the Superior Court to the United States District Court for the District of Delaware.

As set forth more fully below, because Defendants are both citizens of Delaware, the forum defendant rule bars removal. (D.I. 1, p. 3, ¶ 10(d) and (e), Notice of Removal.) As such, Defendants failed to meet their burden of demonstrating the existence of federal jurisdiction. Defendants may not circumvent the forum defendant rule by prematurely removing the action prior to service of the Complaint. Thus, Plaintiff’s Motion to Remand should be granted.

II. STATEMENT OF FACTS

On May 23, 2017, Plaintiff filed a Complaint for Damages and Request for Jury Trial (“Complaint”) in Superior Court for injuries resulting from the use and exposure to a prescription drug, Eliquis. Plaintiff is a citizen of Missouri. (D.I. 1-1, p. 3, ¶ 10, Complaint.) Plaintiff’s Complaint alleges causes of action against Defendants Bristol-Myers Squibb and Pfizer, which are both incorporated under the laws of Delaware. (D.I. 1, p. 3 ¶ 10(d) and (e), Notice of Removal.) Plaintiff filed suit against Defendants jointly for the manufacture, distribution, marketing, promotion, and sale of Eliquis, to reduce the risk of stroke and embolism due to atrial fibrillation. (D.I. 1-1, p. 2, ¶ 2, Complaint.) Plaintiff suffered a hematuria, severe gastrointestinal

bleeding injury, and related pain and suffering. (D.I. 1-1, p. 3, ¶ 10, Complaint.) He subsequently died on December 18, 2014. (D.I. 1-1, p. 3, ¶ 10, Complaint.)

Plaintiff presently asserts eleven (11) causes of action arising from those injuries against all defendants: (1) Negligence; (2) Strict Liability; (3) Breach of Express Warranty; (4) Breach of Implied Warranties; (5) Fraudulent Misrepresentation; (6) Fraudulent Concealment; (7) Negligent Misrepresentation; (8) Fraud; (9) Violation of Consumer Protection Laws; (10) Wrongful Death; and (11) Survival Action. (D.I. 1-1, pp. 14-41, Complaint.) On May 25th, two days after the Complaint was accepted, Plaintiff's counsel sent the accepted documents to the Court for service. (Ex. A, Aff. of Lynn Hyde).

On the same day, only two days after Plaintiff's Complaint was filed, Defendants filed notice seeking removal of the case to federal court, before Plaintiff even had a possibility of getting the Complaint served in Delaware, which requires the Sheriff or a specially appointed person to serve the complaint once a writ is issued by the Court.¹ (D.I. 1, Notice of Removal.) Here, the writ had not yet issued. The time for service, 120 days, has certainly not passed. Plaintiff respectfully request that this Court immediately remand these actions to the Superior Court of Delaware, where it was legitimately filed in the forum of Plaintiff's choice.

III. ARGUMENT

A. Defendants have the burden of establishing the propriety of removal, which is strictly construed in favor of remand

A district court's first duty in every suit is to determine the existence of subject matter jurisdiction. *See Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 76-77 (3d Cir. 2003) (courts have an independent obligation to satisfy themselves of jurisdiction if it is in doubt). Further, "[i]t is

¹ See Delaware Superior Court Rules of Civil Procedure, Rule 4(a); *Laugelle v. Bell Helicopter Textron, Inc.*, Civ. A. 10-1080 (GMS), 2012 U.S. Dist. LEXIS 12907, at *12 (D. Del. Feb. 2, 2012).

axiomatic that federal courts are courts of limited jurisdiction, and as such, are under a continuing duty to satisfy themselves of their jurisdiction before proceeding to the merits of any case.” *Rutt v. Prudential Ins. Co. of Am.*, CIVIL ACTION NO. 96-3658, 1996 U.S. Dist. LEXIS 7132 (E.D. Pa. May 21, 1996). Therefore, federal courts should resolve questions of jurisdiction before reaching other threshold issues.

The party advocating for removal always bears the burden of demonstrating its propriety. *Frederico v. Home Depot*, 507 F.3d 188, 193 (3d Cir. 2007). *See also Steel Valley Auth. v. Union Switch and Signal Div.*, 809 F.2d 1006, 1010 (3d Cir. 1987) (“It remains the defendant’s burden to show the existence and continuance of federal jurisdiction”). Moreover, in keeping with legislative intent to limit removal from state courts, removal statutes are strictly construed and all doubts as to whether federal jurisdiction exists in a particular case should be resolved in favor of remand. *Abels v. State Farm Fire & Casualty Co.*, 770 F.2d 26, 29 (3d Cir. 1985).

Plaintiff requests remand for lack of federal jurisdiction because the forum Defendants’ purported removal is premised on the inaccurate proposition that they can side-step 28 U.S.C. § 1441(b), and is intended to cause undue delay and prejudice to Plaintiff. Under § 1447(c), this Court has the authority to immediately remand this action to Superior Court, where it was originally filed, and from where it was improperly removed.

B. Removal from state court by the forum Defendants violates 28 U.S.C. § 1441(b), also known as the forum defendant rule

The plaintiff is considered the master of his or her own claim. *Longo v. City of Philadelphia*, CIVIL ACTION No. 01-CV-2309, 2001 U.S. Dist. LEXIS 11506 (E.D. Pa. June 11, 2001). Therefore, the rule is that the plaintiff’s choice of forum is given deference. *Laugelle v. Bell Helicopter Textron, Inc.*, Civ. A. 10-1080 (GMS), 2012 U.S. Dist. LEXIS 12907, at *14 (D. Del. Feb. 2, 2012); *Stefan v. Bristol-Myers Squibb Co.*, Civil Action No. 13-1662-RGA,

2013 U.S. Dist. LEXIS 172008, at *4 (D. Del. Dec. 6, 2013). In other words, the plaintiff's right to choose the forum is greater than a defendant's right to remove; they are not equal.

Removal of this case prior to service is an improper attempt to circumvent 28 U.S.C. § 1441 because the removing Defendants are citizens of the forum state. Under 28 U.S.C. § 1441(a), a defendant may remove a case from a state court to federal district court if the federal courts have original jurisdiction over the case. Where the federal court's original jurisdiction is based on diversity, § 1441(b) imposes an additional condition known as the "forum defendant rule." The relevant statute provides:

A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

§ 1441(b)(2). Therefore, the presence of a local defendant at the time of removal is sought bars removal. *Laugelle v. Bell Helicopter Textron, Inc.*, Civ. A. 10-1080 (GMS), 2012 U.S. Dist. LEXIS 12907 (D. Del. Feb. 2, 2012); *Stefan v. Bristol-Myers Squibb Co.*, Civil Action No. 13-1662-RGA, 2013 U.S. Dist. LEXIS 172008 (D. Del. Dec. 6, 2013). This confines removal on the basis of diversity jurisdiction to instances where no defendant is a citizen of the forum state. *Global Transactions, LLC v. Global Spectrum Pico Pte., Ltd.*, No. 12-7208, 2013 U.S. Dist. LEXIS 31200, *5 (E.D. Pa. Mar. 6, 2013). Violations of the forum defendant rule constitute a defect to removal. *Id.*

In accordance with the forum defendant rule, removal of Plaintiff's case from Superior Court is defective because Bristol-Myers Squibb and Pfizer are citizens of the forum state, Delaware. Therefore, the forum defendant rule should preclude removal of these cases from state court. However, as Bristol-Myers Squibb did previously in *Stefan v. Bristol-Myers Squibb Co.*, Civil Action No. 13-1662-RGA, 2013 U.S. Dist. LEXIS 172008 (D. Del. Dec. 6, 2013),

Defendants herein removed before service of the Complaint could possibly be performed under Delaware rules of civil procedure.

Therefore, this Court has previously addressed this precise issue under identical circumstances, and found removal improper. *See Stefan v. Bristol-Myers Squibb Co.*, Civil Action No. 13-1662-RGA, 2013 U.S. Dist. LEXIS 172008 (D. Del. Dec. 6, 2013).² In *Stefan*, all of the defendants were citizens of Delaware for purposes of diversity. The plaintiff brought suit in Delaware Superior Court. Four days later, and prior to service of process, the forum defendants removed to this court. The plaintiff moved for remand based on the forum defendant rule, which the defendants argued did not apply because they were not served yet. *Stefan* at *2.

The *Stefan* Court held that “removal under § 1441(b) was improper,” and remanded to state court. *Id.* at *5. The court reasoned that “[d]iversity jurisdiction is intended to prevent the prejudice that an out of state defendant might be subject to when sued in state court . . . Where defendants are citizens of the forum state, no such prejudice is likely to exist, and so the forum defendant rule bars removal.” *Id.* at *3. Similarly, in *Laugelle v. Bell Helicopter Textron, Inc.*, Civ. A. 10-1080 (GMS), 2012 U.S. Dist. LEXIS 12907, at *10 (D. Del. Feb. 2, 2012), this Court held that “[i]n order to further the goals of the policy [of the forum defendant rule], it makes no difference when the forum defendant is joined: so long as there is a forum defendant, there is no concern that the state court or jury will be biased against the defendant.” Further, an interpretation of §1441(b) that allows for removal before forum defendants are served would foster non-uniform application of the federal rules. *Id.* at 12.

² Notably, since the same defendant in *Stefan* is a removing Defendant in Plaintiff’s Complaint, removal here at best demonstrates an attempt at gamesmanship that the forum defendant rule was enacted to prevent.

Other district courts in the Third Circuit have also held that the forum defendant rule is not predicated on how quickly a sheriff can effectuate service of process. In *Ayala-Castro v. GlaxoSmithKline (In re Avandia Mktg.)*, 624 F. Supp. 2d 396, 410 (E.D. Pa. 2009), the court rejected any construction of § 1441(b) that would allow an in-state defendant to side-step the restrictive purpose of the forum defendant rule by "racing to remove" before being served with process. The *Ayala-Castro* Court agreed with the comprehensive analysis of the question by Senior District Judge Debevoise of the District of New Jersey, in which he concluded in part, after exhaustive research into the relevant case law, language, and history of § 1441(b), that any "contention that removability should depend on the timing of service is absurd on its face, and could not have been intended by Congress." *Ayala-Castro*, 624 F. Supp. 2d at 410. *See, e.g., Sullivan v. Novartis Pharmaceuticals Corp.*, 575 F. Supp. 2d 640, 643 (D.N.J. 2008) (comprehensively analyzing language, purposes, and legislative history of 28 U.S.C. § 1441(b), "look[ing] beyond the language of the statute to avoid an absurd and bizarre result," and remanding action removed by un-served forum defendant).

Historically, the "joined and served language" was added to the removal statute in 1948. In the intervening period between the Judiciary Act of 1789 and the 1948 changes, the removal statute was modified several times. However, the United States Supreme Court never held throughout that period that a defendant sued in the state courts of its home state was entitled to remove a diversity action. Indeed, the Supreme Court expressly rejected this very argument: changes did not "purport to confer" a right to removal on a resident defendant in a diversity case. *Case of Sewing Mach. Co.*, 85 U.S. 553, 586, 21 L. Ed. 914 (1873). The Court believed that "it is a great mistake to suppose that any such right [to remove] is conferred by the [amended removal statute] where one or more of the plaintiffs or one or more of the petitioning defendants

[seeking removal] are citizens of the State in which the suit is pending, as the act is destitute of any language which can be properly construed to confer any such right unless all the plaintiffs or all the defendants are non-residents and join in the [removal] petition." *Id.* at 587.

The legislative history does reveal three crucial points. First, from the inception of the removal statute, a forum defendant has never been allowed to remove a diversity action. Secondly, there is no indication that Congress intended to change this long-standing rule with the addition of the "joined and served" language in 1948. Lastly, there is no suggestion anywhere in the legislative history that Congress intended service upon a forum defendant to affect a forum defendant's ability to remove an action.

Instead, the likely purpose behind inclusion of the "properly joined and served" language in § 1441(b) was to "prevent plaintiffs from defeating removal by joining a forum defendant whom they do not intend to serve." *Stefan v. Bristol-Myers Squibb Co.*, Civil Action No. 13-1662-RGA, 2013 U.S. Dist. LEXIS 172008, at *3 (D. Del. Dec. 6, 2013); *Stan Winston Creatures, Inc. v. Toys "R" Us, Inc.*, 314 F. Supp. 2d 177, 181 (S.D.N.Y. 2003). Therefore, the forum defendant rule, and specifically the "joined and served" addition to the statute, was made to prevent a plaintiff from joining but then never serving a forum defendant, with the sole purpose of defeating removal. The rule was not intended to allow a forum defendant who had not been served to remove an action.³ Such a result contravenes the clear and long-standing history behind the forum defendant rule and undercuts its rationale.

Moreover, the Tenth Amendment reserves to the states the power "to provide for the determination of controversies in their courts" and this right "may be restricted only by the action

³ In fact, prior to the days of electronic docketing, a defendant would likely be unaware of a lawsuit prior to process, and there would be no opportunity to "remove in order to circumvent the plaintiff's forum choice." *Stefan* at *3.

of Congress in conformity to the Judiciary Articles of the Constitution." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09, 61 S. Ct. 868, 85 L. Ed. 1214 (1941). It is for this reason that the removal statute is narrowly construed. *Brown v. Francis*, 75 F.3d 860, 33 V.I. 385 (3d Cir. 1996).

Adopting Defendants' interpretation of the forum defendant rule would require the Court to ignore sound principles of federalism and force cases that are properly the province of state courts into a federal tribunal. "Due regard for the rightful independence of state governments" therefore requires this Court, particularly in light of the extensive history above, to decline to adopt Defendants' interpretation and to observe the historic limits on the removal statute. *Shamrock*, 313 U.S. at 109 (quotation omitted). This action must be remanded.

IV. CONCLUSION

Both Bristol-Myers Squibb and Pfizer are forum defendants and are therefore precluded from seeking removal on the basis of federal diversity jurisdiction. Moreover, as Defendants failed to meet its "heavy burden" of proving that this Court has jurisdiction over the instant action. Plaintiff therefore requests that the Court grant this Motion to Remand and remand this action to the Superior Court.

Dated: June 1, 2017

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