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Western District Case Notes

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REMOVAL ("OTHER PAPER")

In Essenmacher v. Keene Carriers, Inc., 23-cv-574-EAW (Nov. 20, 2023), one defendant removed the case, based on diversity jurisdiction and with the consent of the second defendant. Although the Notice of Removal was filed more than 3 months after the complaint had been served, the removing defendant argued in opposition to a motion for remand that the removal was timely because it was filed within 30 days of having received plaintiff's demand for damages that established, for the first time, that the amount in controversy exceeded the minimal jurisdictional amount of $75,000.00 for actions based on diversity of citizenship. The Court denied the remand motion, holding that defendants were not required to investigate or speculate in order to ascertain whether the amount in controversy exceeded the minimal jurisdiction amount for diversity jurisdiction. For instance, discovery responses served in a separate but related proceeding involving different defendant-parties did not constitute an "other paper" under 28 U.S.C. §1446 (c)(3)(A). Instead, only when the removing defendant in this lawsuit received plaintiff's demand for $1 million in compensatory damages was it able to reasonably ascertain that the lawsuit met the jurisdiction requirements for removal to Federal Court.


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REMOVAL (LLC DIVERSITY)

In *Spartan Business Solutions, LLC v. Marquis Cattle Co. Inc.*, 23-cv-6258-FPG (Nov. 6, 2023), plaintiff moved to remand the lawsuit back to state court on the basis that diversity jurisdiction had not properly been alleged in the notice of removal by defendants, who were two limited liability companies ("LLCs"), two corporations, and an individual. In their notice of removal, defendants alleged that they all were citizens of the state of Montana, but failed to alleged which state the members of the LLC defendants hailed from. If any member of the LLC defendants was a citizen of New York or New Jersey, complete diversity of citizenship would not exist, and the court would lack subject matter jurisdiction. The court denied the remand motion, noting that, when diversity is not absent but may have been defectively alleged in a notice of removal, courts typically will permit the removing party to amend its notice. Accordingly, although the Notice of Removal did not establish the required diversity of citizenship with respect to all parties, including the members of the LLC defendants, the court permitted defendants to amend their Notice of Removal to specify the citizenship of the LLC members in order to cure the pleading deficiency.

REMOVAL (CONSENT)

In *Joan Z. Doyle Family Trust, et al v. Town of Hanover*, 23-cv-970-LJV (Nov. 20, 2023), seven of the eight defendants removed the action and attached to their notice of removal a copy of an email from the eighth defendant's attorney expressing his consent to the removal. 28 U.S.C. § 1441(a) permits a defendant to remove a case so long as, among other requirements, all defendants who have been properly joined and served join in or consent to the removal of the action within that 30-day removal period. At least in this Circuit, all defendants who consent to rather than join in the removal must do so by communicating their consent directly to the court within the 30-day removal period. Here, the email from the eighth defendant's attorney was not an independent communica-

tion from the party to the Court expressing his consent to the removal. Moreover, this failure to consent in a written communication to the Court within the 30-day removal period constituted a fatal procedural defect in the removal procedure that could not be cured after the fact and warranted remand back to state court.

PROTECTIVE ORDERS AND CONFIDENTIAL BUSINESS RECORDS

In *Nanjing CIC Int'l Co., Ltd. v. Schwartz*, 20-cv-07031-EAW-MWP (Oct. 20, 2023), plaintiff—a distributor of component parts to manufacturers—sued its former U.S. sales agent and its Chief Executive Officer for breach of fiduciary duty and unjust enrichment, claiming they colluded with plaintiff's former employee to steal plaintiff's U.S. customer base. During document discovery, a dispute arose concerning whether plaintiff could use documents produced in this litigation in support of its claims against its former employee, which was pending in China. The parties eventually agreed on a protective order that permitted a party to designate discovery material as "Confidential" or even for "Attorneys' Eyes Only" in certain circumstances. Shortly after it was entered by the Court, defendants produced a sales report and designated the entire document "Attorneys' Eyes Only." Plaintiff challenged the designation and contended it should be permitted to use the sales report in the Chinese litigation. Defendants opposed, arguing that the sales report contains "confidential, proprietary, and trade secret information." The Court first observed that Fed. R. Civ. P. 26(c)(1)(G) confers broad discretion on the Court to decide when a protective order is appropriate and what degree of protection is required, and that the designating party bears the burden of establishing "good cause" for the protection afforded by the designation. Here, although defendants maintain that disclosure of the information in the sales report would provide a competitive advantage to their competitors, the Court found that their assertions "are non-specific and conclusory, and unaccompanied by any explanation as to how competitors could actually use the information to defendants' disadvantage." Accordingly, an "Attorneys' Eyes Only" designation was not justified under the terms of the protective order, but whether that information could be designated "Confidential" was a "closer question" based on defendants' contention that the information was "commercially sensitive." Ultimately, the Court found that, while defendants failed to establish good cause for designating information pre-dating 2018 as "Confidential," defendants proffered sufficient information to support their contention that more recent (i.e. 2018 to present) sales information is commercially and competitively sensitive, thereby establishing good cause to designate that information "Confidential." As a result, the Court directed defendants to produce a de-designated and redacted version of the sales report containing the information predating 2018, and limiting the use of the information to this litigation and/or in support of its damages claims in the Chinese litigation.

NON-PARTY SUBPOENAS

In *California Attorney Lending, LLC v. Legal Recovery Associates, LLC*, 23-mc-20-LJV-MJR (Oct. 25, 2023), plaintiffs sought to quash non-party subpoenas served by defendant in connection with a second lawsuit pending in another court. Rule 45(d)(3)(A)(iii-iv) provides that a court must modify or quash a subpoena that "requires disclosure of privileged or other protected matter, if no exception or waiver applies" or "subjects a person to an undue burden." Here, the Court denied the motion to quash the non-party subpoenas, finding, first, that the subpoenas issued to plaintiffs were relevant to the claims and counter-claims asserted in the companion lawsuit; next, that compliance with the subpoenas would not result in the disclosure of confidential and proprietary information that would damage plaintiffs' competitive position in the marketplace or otherwise cause them to suffer irreparable harm; third, that plaintiffs had not made a sufficient showing as to the nature and extent of the actual burden they would face in responding to the subpoenas; and, finally, that defendant was not using the subpoenas as an end run around party discovery in the other litigation, in part because not all of the documents and information requested in the subpoenas were necessarily available from the defendants in that other litigation.

RULE 26(a) DISCLOSURES

In *Loria, et al v. PJS Hyundai West, et al*, 21-cv-6687-CJS-MJP (Oct. 24, 2023), after the Court amended the scheduling order, it determined during a subsequent conference that both parties had ignored the deadline for mandatory disclosures under Rule 26(a). The amended scheduling order had included a provision that stated, "Requests to extend the above cut-off dates may be granted upon written application, made prior to the cut-off date, and showing

good cause for the extension." Having determined that both parties had ignored the deadline for mandatory Rule 26(a) disclosures, the Court provide both parties with an opportunity to be heard on the question of whether sanctions should be imposed for their willful neglect, and neither party accepted the Court's invitation. Noting that scheduling orders are not "frivolous pieces of paper," and attorneys and parties who "flout scheduling orders [do so] at their own peril," the Court found that neither party's attorney had any excuse nor made any attempt to communicate to each other or to the Court their failure to serve the Rule 26(a) disclosures, and accordingly ordered that sanctions of the attorneys (and not their clients) were appropriate under Rule 16(f)(2).

MOTION TO STRIKE EXPERT REPORT

In *Lutz v. Kaleida Health*, 18-cv-01112-EAW-JJM (Oct. 11, 2023)—a putative class action alleging violations of ERISA—plaintiff appealed the Magistrate Judge's Order granting defendants' motion to strike the reports of plaintiffs' expert witness. Noting first that motions regarding the admissibility of expert testimony are non-dispositive, and that the District Court must review objections to a Magistrate Judge's determination under the "highly deferential," clearly erroneous standard, the District Court rejected plaintiffs' suggestion that the Magistrate Judge was required to "expressly parse through the reports to determine whether the unreliable and reliable portions were intertwined." The Court found that the Magistrate Judge applied the appropriate standard when concluding that the errors in the expert's analysis were so significant that they rendered the entirety of his reports unreliable and inadmissible based on "numerous demonstrable and acknowledged errors," which called into question the level of intellectual rigor applied by the expert in reaching his conclusion. Moreover, the "quantity and magnitude" of the expert's errors "cast such a pall on his overall reliability" that it was not appropriate to attempt to parse out any unproblematic aspects of the expert's opinions. Finally, because "it is critical that an expert's analysis be reliable at every step," the Court found that the Magistrate Judge's conclusion was not clearly erroneous, and denied plaintiffs' appeal of the Order striking the expert's reports.

TIMELINESS OF APPEAL FROM BANKRUPTCY COURT

In *Pynn v. Rupp Pfalzgraf LLC*, 23-cv-00835-LJV (Nov. 1, 2023), after filing for bankruptcy, appellant hired appellee to represent her in a matrimonial and child custody proceeding. Thereafter, the parties' relationship soured and appellee sued appellant in New York State Supreme Court for unpaid legal fees. That court entered a judgment in favor of appellee, which appellant moved to vacate. The motion was denied and, in the meantime, appellant sued appellee in the Western District of New York, arguing that appellee violated the automatic stay attendant to her bankruptcy filing. In light of the pending bankruptcy proceeding, the District Court referred the matter to the Judge presiding over the bankruptcy case, who ultimately issued an Order finding that appellee's state court lawsuit did not violate the automatic stay. Two months later, appellant asked the Bankruptcy Court to extend her time to appeal that Order and the request was denied. One week later, appellant filed an amended motion in the Bankruptcy Court seeking again to extend her time to file an appeal but, before that motion was ruled on, appellant went ahead and filed a notice of appeal with the District Court. Three days later, the Bankruptcy Court issued an Order denying the amended motion for an extension of time. Noting first that the procedural history "is a knotty one," the District Court observed that the only issue before it was whether the Court had jurisdiction over appellant's appeal of the Bankruptcy Court's Order, which, in turn, depended on whether appellant's appeal was timely. The Court then answered the question in the negative—a notice of appeal must be filed with the bankruptcy clerk within 14 days after entry of the judgment, order or decree being appealed, and appellant did not do so until 48 days after her time to appeal had expired. Thus, the District Court lacked jurisdiction over the purported appeal. Finally, the Court remarked that even if it did not lack jurisdiction over the appeal, it would have affirmed the Bankruptcy Court's determination for the reasons stated in the Bankruptcy Court's Order.

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