

## Western District Case Notes



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### Removal and Derivative Claims

In *Jones v. Koch*, No. 20-cv-1730-JLS (Dec. 9, 2020), the Court ordered the parties to address whether it had subject matter jurisdiction after defendant

removed the lawsuit citing diversity jurisdiction. Plaintiff and defendant were sole members of an operating company, and plaintiff alleged that defendant breached the operating agreement to the detriment of the operating and underlying companies, making her claims derivative in nature. The Court concluded that it lacked subject matter jurisdiction because the operating company was an indispensable party to plaintiff's derivative claims and the Court was required to account for the operating company's citizenship when determining whether diversity jurisdiction existed. In such a case, an operating company takes the citizenship of all of its members. Because both such members were parties to the lawsuit, complete diversity necessarily could not exist, regardless of whether the operating company were considered to be a plaintiff or a defendant. As a result, the Court ordered that the lawsuit be remanded back to state court.

### Removal and Forum Selection Clauses

In *Valvetech, Inc. v. OHB System AG*, No. 19-cv-06829-CJS-MJP (Dec. 17, 2020) — a breach of contract action originally commenced in state court — defendant removed the action on the basis of diversity jurisdiction and plaintiff moved to remand, arguing that it elected to file suit in state court in accordance with the forum selection clause in the parties' agreement. Defendant opposed, arguing that the agreement between the parties provided for jurisdiction of the New York State Supreme Court, Monroe County, or the United States District Court for the Western District of New York. According to defendant, it therefore had the right to select which



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of the two listed forums it would litigate in. In deciding the motion, the Court first observed that forum selection clauses are interpreted according to standard principles of contract law, and will be enforced in the absence of fraud or overreaching. Nonetheless, the Court noted that a waiver of a party's statutory right to remove a case to federal court must be clear and unequivocal.

Thus, an agreement conferring jurisdiction in one forum will not be interpreted as excluding jurisdiction elsewhere unless it contains specific language of exclusion, or it leaves the choice in the control of one party to dictate the appropriate forum. Ultimately, the Court concluded that, while the forum selection clause at issue contained specific language of exclusion (in that it narrowed the parties' choice of forum to New York State Supreme Court or the United States District Court for the Western District of New York), the clause did not vest plaintiff with the exclusive right to choose a particular court. Therefore, because 28 U.S.C. § 1441(a) afforded defendant a qualified right of removal, and because the forum selection clause did not give plaintiff the exclusive right to dictate the forum, plaintiff's motion to remand was denied.

### Removal and Severance

In *LG 37 Doe v. Nail, et al.*, No. 20-cv-217-FPG (Jan. 19, 2021), Plaintiff sued an individual defendant, a national organization, and its regional affiliate under the Child Victim's Act, alleging that the individual defendant had sexually assaulted and battered him while serving in a representative capacity with the regional affiliate of the national organization. The lawsuit was brought in state court and removed to this Court by the national organization after it filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, thus staying plaintiff's claims against it. Plaintiff filed a motion to sever the claims against the national organization from his claims against the regional organization and the individual defendant, and then to remand

the severed claims back to state court. Following the filing of that motion, the national and regional organizations filed a notice with the Court of a Consent Order entered in the Bankruptcy Court staying the prosecution of claims against certain "Related Parties," which included the regional organization. The Court proceeded to order that the claims against the individual defendant could be severed under Rule 21, finding that plaintiff could obtain complete relief for his claims against the individual defendant without the other two defendants present in the litigation, making severance of the claims warranted. The Court then exercised its "wide discretion" to remand the severed claims against the individual defendant back to state court on equitable grounds, noting that the claims arose exclusively under state law, and principles of comity and the local significance of the litigation weighed substantially in favor of returning the matter to the state court. The Court thus granted the motion to remand as to the individual defendant only.

### Mandatory v. Prohibitory Preliminary Injunctions

In *Vollmer v. Xerox Corp.*, No. 20-cv-06979-CJS-MWP (Jan. 6, 2021), plaintiffs brought a putative class action alleging that defendant violated the terms of its employee benefit plan and breached fiduciary and statutory duties by: (i) requiring participants to begin paying 50% of the premiums for their medical and dental insurance; and (ii) prohibiting participants from re-enrolling in the plan if they discontinued participation as a result of the change. Eight days later, plaintiffs moved for a preliminary injunction, asking the Court to enjoin defendants from requiring participants to contribute to the cost of the plan's premiums, and ordering defendant to allow former plan participants to re-enroll in the plan. Noting first that a preliminary injunction "is an extraordinary and drastic remedy" that should not be granted unless the movant carries the burden of persuasion by a clear showing, the Court then observed that, as a threshold matter, it was required to determine whether the requested injunction was mandatory or prohibitory in order to apply the appropriate standard. Next, the Court determined that the requested relief was prohibitory in nature because it sought to maintain the status quo pending

resolution of the case, while mandatory injunctions seek to alter the status quo. Citing Second Circuit precedent, the Court explained that the status quo to be preserved by a prohibitory preliminary injunction is the status the parties enjoyed at the “last actual, peaceable uncontested status which preceded the pending controversy.” The Court then determined that, in this case, the appropriate point in time was marked by the positions the parties occupied before defendant implemented the requirement that participants contribute to the partial payment of premiums. Finally, the Court found that plaintiffs failed to carry their burden on the motion because there was no evidence submitted to suggest they would face an involuntary termination of coverage, or that the harm they potentially faced could not be remedied by an award of monetary damages. Plaintiffs, therefore, failed to demonstrate they were likely to suffer irreparable harm in the absence of an injunction, and their motion was denied.

#### **Defamation**

In *Wellsville Manor, LLC v. Campbell*, No. 20-cv-621 (CRR) (Dec. 4, 2020), plaintiff alleged claims of injurious falsehood and defamation per se arising out of statements defendant made to the New York State Division of Human Rights (“DHR”) and the Equal Employment Opportunity Commission (“EEOC”) after plaintiff terminated defendant’s employment. Following removal, defendant filed a motion to dismiss. First, the Court concluded plaintiff failed to plausibly state a claim for defamation because her statements related to plaintiff’s conduct as an employer, not as a skilled nursing facility, the statements signaled to readers or listeners that what was being read or heard was likely to be opinion and not fact, and the statements were privileged because they were made during, or in preparation for, proceedings before the DHR and the EEOC. In addition,

plaintiff’s contention it suffered financial harm in the form of legal fees or damage to its reputation, without more, failed to plausibly allege special damages. Plaintiff’s claim for injurious falsehood also failed, both because plaintiff failed to plausibly plead special damages and because the statements on which it relied for its claim were privileged. After granting the motion to dismiss, the Court determined that it could not conclude at this stage in the proceeding that either claim, no matter how framed, would be futile, and therefore granted plaintiff leave to amend its complaint.

#### **Motion for Interlocutory Appeal and Stay of Proceedings**

In *Fairbank Reconstruction Corp. v. Greater Omaha Packing Co., Inc.*, 13-cv-00907-WMS-JJM (Dec. 18, 2020), plaintiff — a processor of ground beef that is later sold to supermarkets — sought contractual indemnification and breach of contract damages for losses it suffered as a result of the presence of E.coli in certain beef that defendant supplied to it. Summary judgment was entered in favor of plaintiff based, in part, on a concession by defendant that a contract between the parties governed their relationship. Two-and-a-half years later, defendant claimed it had uncovered new evidence that plaintiff was not in contractual privity with defendant and sought leave to amend its answer, as well as reconsideration of the prior grant of summary judgment. The Magistrate Judge recommended denying both motions, finding that defendant failed to exercise reasonable diligence, and the District Judge adopted that recommendation. Defendant then sought certification for an interlocutory appeal, and a stay of proceedings, contending the Court erroneously applied an “inquiry notice” standard in denying its motions. Noting first that an interlocutory appeal is considered “an extraordinary remedy that lies within a

district court’s unfettered discretion,” the Court then observed that it may certify an order for interlocutory appeal where the order (i) involves a controlling question of law as to which (ii) there is substantial ground for difference of opinion and (iii) that an immediate appeal from the order may materially advance the ultimate termination of the litigation. Applying this standard, the Court determined that defendant failed to meet its burden in connection with either of its motions. Specifically, regarding the motion for leave to amend, the Court found a lack of diligence on the part of defendant because it had sufficient notice of plaintiff’s ownership structure as early as 2011, and no later than 2013 when plaintiff filed its Fed. R. Civ. P. 7.1 corporate disclosure statement. Thus, defendant had the information well before its deadline to amend passed, and well before it conceded that the parties’ relationship was governed by a contract. Similarly, regarding the motion for reconsideration, defendant failed to show that the allegedly “new” evidence was unavailable to it upon the exercise of reasonable diligence. Finally, the Court found that an immediate appeal would not materially advance the ultimate termination of the case but, instead, would prolong the already drawn-out litigation, noting that defendant retained the ordinary remedy of appeal after the case is resolved on the merits.

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