UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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DANIEL WILLIAMS, *et al.,*

Plaintiffs, Case No.: 05-CV-836S(F)

v.

BEEMILLER, INC. d/b/a HI-POINT FIREARMS, *et al.,* ORAL ARGUMENT REQUESTED

Defendants.

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REMOVING DEFENDANTS' RULE 72(B) OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure ("Rule") and Rule 72.3(a)(3) of the Local Rules of Civil Procedure for the United States District Court for the Western District of New York ("Local Rule"), Beemiller, Inc. d/b/a Hi-Point Firearms ("Beemiller"); MKS Supply, Inc. ("MKS"); Charles Brown ("Brown"); and International Gun-A-Rama, Inc. ("Gun-A-Rama") (collectively, "Removing Defendants"), by and through counsel, respectfully submit the following objections to Magistrate Judge Foschio's October 31, 2008 Report and Recommendation ("Report") regarding Plaintiffs' Motion to Remand.

REPLY BRIEF REQUEST

Pursuant to Local Rule 7.1(c), Removing Defendants respectfully request an opportunity to file and serve reply papers with regard to these objections to the Magistrate Judge's Report, and, therefore, any opposing papers must be filed and served at least eight business days prior to the return date.

PROCEDURAL HISTORY

On July 28, 2005, Plaintiffs filed this action in the Supreme Court of the State of New York, Erie County bringing claims arising from the shooting of plaintiff Daniel Williams on August 16, 2003. (See Doc. No. 1-1, Plts.' Compl. 7/28/05.) The named defendants included the manufacturer of the pistol used in the shooting (Beemiller), the distributor (MKS), the retailer (Brown) and a gun show promoter that plaintiffs incorrectly allege operated the gun show at which the subject pistol was sold (Gun-A-Rama). In addition, the individuals responsible for illegally obtaining, transferring, and selling the incident pistol, Nigel Bostic ("Bostic") and Kimberly Upshaw ("Upshaw") and the individual who shot Plaintiff Daniel Williams with the pistol, Cornell Caldwell ("Caldwell"), were also named as defendants. (Id.)

Removal by Consenting Defendants

On October 17, 2005, without attempting to effect service of the original Complaint on any defendant, Plaintiffs filed an Amended Complaint. (See Doc. No. 1-2, Ex. 2, Plts.' 1st Am. Compl. 10/17/05.) Defendants Beemiller, MKS, Brown, and Gun-A-Rama were each served at the address listed on the summonses addressed to them. The summonses addressed to defendants Bostic and Upshaw, however, both contained invalid addresses. Plaintiffs then proceeded to serve the Amended Complaint on the named defendants and file the affidavits of service over a one (1) month period:[1]

[1] Please see Document No. 16-3, Exhibits C to Plts.' Motion to Remand, File-Stamped Affidavits of Service. Please note that Defendant Caldwell is not included in the chart reflecting date of service and the date the affidavit of service was filed. This is because, as will be shown (see Argument Section II., infra), Defendant Caldwell was fraudulently joined as a party to this litigation and, thus, the timing of service on Caldwell is irrelevant to the issues in this litigation. See, e.g., Whitaker v. Am. Telecasting Inc., 261 F.3d 196, 207 (2d Cir. 2001).

EVENT	DATE
Beemiller served with the Amended Complaint.	October 31, 2005
MKS served with the Amended Complaint.	November 2, 2005
Bostic served with the Complaint at USP Lewisburg, Pennsylvania instead of the address on the summons.	November 2, 2005
Brown served with the Amended Complaint.	November 15, 2005
Gun-A-Rama served with the Amended Complaint.	November 18, 2005
Beemiller and Brown execute the Notice of Removal and place it in the custody of Federal Express for overnight delivery and filing with the Clerk of the Court.	November 22, 2005, at 8:02 p.m.
Upshaw served with the Amended Complaint at 5640 Signet Drive, Huber Heights, OH 45424 instead of the address on the summons.	November 22, 2005, at 8:30 p.m.
Notice of Removal docketed with the Clerk of the Court.	November 23, 2005
MKS and Gun-A-Rama file written consents to removal.	November 23, 2005
Plaintiffs file affidavits of service on Beemiller, MKS and Brown in the state court after it had been Removed to this Court and do not serve them on counsel for removing defendants.	November 23, 2005
Plaintiffs improperly file affidavit of service on Upshaw in the state court after it had been removed to this Court and do not serve it on counsel for removing defendants.	November 25, 2005
Plaintiffs improperly file affidavits of service on Bostic and Gun-A-Rama in the state court after it had been removed to this Court and do not serve them on counsel for removing defendants.	November 30, 2005
Deadline to file consents to removal expires.	November 31, 2005

Beemiller was the first defendant to be served with the Amended Complaint and, as the manufacturer of the pistol at issue, was familiar with the distributor defendant, MKS, which was in turn familiar with the retailer defendant, Brown, who was familiar with Gun-A-Rama. (See Doc. No. 1-2, Ex. 2, Plts.' 1st Am. Compl. 10/17/05 at ¶ 5 (describing the chain of distribution of the incident pistol).) Due to the pre-existing relationships between these parties, they were able to communicate with each other and obtain actual knowledge that they had all been served. (Doc. No. 1, Notice of Removal at ¶ 4.) Removing defendants checked the Erie County Clerk's file and determined that plaintiffs had failed to file affidavits of service on Bostic or Upshaw, and, because removing defendants did not have ongoing relationships with them and they did not reside at the addresses listed for them on the summons, removing defendants were unable to contact them to determine whether they had been served or to obtain their consent to removal. Further, at the time the notice of removal was executed, Upshaw had not yet been served (compare Doc. No. 26, Allan Aff. at Ex. 3 (Upshaw served at 8:30 p.m. on 11/22/05) and Doc. No. 26, Ex. 5 (Notice of Removal placed in custody of Federal Express at 8:02 p.m. on 11/22/05)), and Bostic was in prison out of state.

On December 23, 2005, plaintiffs filed a motion to remand based on both procedural and substantive arguments. (Doc. No. 16, Plts.' Mot. to Remand.) Plaintiffs' procedural argument was that defendants did not comply with the "rule of unanimity" prior to removal and plaintiffs' substantive argument was that there was no subject matter jurisdiction due to a lack of diversity. (Doc. No. 17, Plts.' Memo. in Supp. of Mot. to Remand.) Subsequently, removing Defendants filed an Opposition to Plaintiff's Motion to Remand (Doc. No. 27), and plaintiffs filed a Reply in further support of their Motion to Remand (Doc. Nos. 29 & 30.)

On June 29, 2006 Magistrate Judge Foschio issued a Decision and Order granting plaintiffs' Motion to Remand on the grounds that the Removing Defendants failed to gain the consent of all defendants to the removal and granting costs to plaintiffs. (Doc. No. 31.) Notably, however, Magistrate Judge Foschio did not address the diversity or joinder issues raised by Removing Defendants. (Id.)

On July 14, 2006, Removing Defendants filed Rule 72(b) Objections to the Magistrate's Decision and Order. (Doc. No. 34.) One of the issues raised by Removing Defendants was that a motion to remand is a dispositive motion and, therefore, is subject to *de novo* review. (Id. at p. 2-6.) Plaintiffs filed a Response to the Objections (Doc. No. 39), and Removing Defendants filed a Reply in further support (Doc. No. 40). This Court, following prior decisions in this District using a clearly erroneous review standard, denied the Removing Defendants' Objections to Judge Foschio's Decision and Order on September 26, 2006. (Doc. No. 41.)

Appeal of Judge Skretny's Order

Removing Defendants appealed this ruling to the Second Circuit Court of Appeals on the basis that a motion to remand was a dispositive motion and subject to *de novo* review. (Doc. No. 44.) After the issues were fully briefed and oral argument was held, the Second Circuit Court of Appeals, on July 9, 2008, held that a motion to remand is a dispositive motion which cannot be ultimately decided by a Magistrate Judge. (Doc. No. 53.) Thus, the September 26, 2006 Order was vacated and the matter was remanded for further action in accord with the decision. (Id.)

On September 8, 2008, this Court referred plaintiffs' Motion to Remand to Magistrate Judge Foschio for a report and recommendation. (Doc. No. 54.) Then, on October 31, 2008, Magistrate Judge Foschio issued a Report and Recommendation ("Report") granting plaintiffs' Motion to Remand and awarding costs. (Id.) The Magistrate's Report was almost exactly the

same as the original Decision and Order (June 29, 2006), and identical case law was relied on in support. (Id.) Again, Magistrate Judge Foschio did not address the diversity or joinder issues raised by Removing Defendants. (Id.)

It should also be noted that, even though this case was commenced more than three (3) years ago, to date, none of the individual defendants (Bostic, Caldwell, and Upshaw) have answered or entered an appearance in this matter. Further, plaintiffs have failed to request the entry of default against any of these parties. Finally, at the time this matter was filed, defendants Bostic and Caldwell were in prison. Their current status is unknown.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Local Rule 72.3(a)(3) requires the objecting parties to "specifically identify the portions of the proposed findings and recommendations to which objection is made and basis for such objection and shall be supported by legal authority." Local R. Civ. P. 72.3(a)(3). The Magistrate Judge's October 31, 2008 Report recommends granting Plaintiffs' Motion to Remand solely on the basis that the Removing Defendants failed to "satisfy the threshold requirement" of obtaining consent of all defendants prior to removal. (See Doc No. 55 at p. 14.) Removing Defendants object to the following conclusions reached by Magistrate Judge Foschio in forming his ultimate opinion:

> I. In an action involving multiple defendants and sought to be removed upon diversity of citizenship, the relevant inquiry in determining whether removal was proper is not whether the defendants seeking to remove the action had actual or constructive notice of service of process on the other served defendants but, rather, whether the other defendants had in fact been served. Tate v. Mercedes-Benz USA, Inc., 151 F. Supp. 2d 222, 225 (N.D.N.Y. 2001). (Doc. No. 55 at p. 9.)
>
> II. Costs were awarded to plaintiffs because Removing Defendants' arguments for removal are "spurious" and contrary to overwhelming authority. Wallace v.

> Wiedenbeck, 985 F. Supp. 288, 291 (N.D.N.Y. 1998). (Doc. No. 55 at p. 14-16.)

Furthermore, Removing Defendants object to Judge Foschio's decision to not address the following issue:

> III. Whether Defendant Caldwell was fraudulently joined in this action in an attempt to defeat diversity jurisdiction and, if so, whether there is diversity jurisdiction.

The basis for such objections will be outlined in the Argument Section, infra, and will be supported by legal authority.

ARGUMENT

As a preliminary matter, even if plaintiffs' remand motion were to be granted, there is no basis for awarding costs and fees to plaintiffs in this scenario based on the standard espoused in the Supreme Court case Martin v. Franklin Capital Corp., 546 U.S. 132 (2005) and the case law cited by Removing Defendants in support of their position. All of the cases cited by Magistrate Judge Foschio in support of his award of costs pre-date this Supreme Court case, which significantly changed the standard for awarding costs pursuant to 28 U.S.C. § 1447(c). As such, Magistrate Judge Foschio used the wrong legal standard to determine if costs should be awarded back in 2006, and again in 2008.

Removing Defendants, in compliance with all procedural and substantive rules, have properly exercised their right to remove this action from state to federal court because (1) diversity jurisdiction exists as defendant Caldwell was fraudulently joined; (2) Removing Defendants did not violate the unanimous consent rule; and (3) the extraordinary circumstances of this matter permit the removal to federal court.

I. SINCE REMOVING DEFENDANTS HAD AN OBJECTIVELY REASONABLE BASIS FOR REMOVAL, COSTS AND FEES SHOULD NOT BE AWARDED EVEN IF THIS CASE IS ULTIMATELY REMANDED.

While Removing Defendants strongly contend that removal was proper and Plaintiffs' Motion to Remand should be denied, even if this Court ultimately decides that the case should be remanded to state court, there is no basis for an order directing Removing Defendants to pay plaintiffs' fees and costs arising out of the removal. Specifically, in his Report, Magistrate Judge Foschio fails to apply the objectively reasonable standard used to award attorneys' fees on remand that was outlined by the Supreme Court in Martin, 546 U.S. 132 (2005), and previously cited by Removing Defendants in this matter. (See Docs. Nos. 34 and 40, Defs.' R. 72(b) Objections 7/14/06 and Reply 8/16/06.) Applying this correct standard to the circumstances of this case demonstrates that, even if removal is granted, attorneys' fees are inappropriate.

A. A Court Must Use the Objectively Reasonable Standard Outlined in Martin When Awarding Attorneys' Fees Under § 1477(c).

Despite the fact that Martin was decided prior to Magistrate Judge Foschio's Report,[2] any mention of this case and the objectively reasonable standard outlined in Martin are conspicuously absent from the Magistrate's Report. Equally absent from the Magistrate's Report and Recommendation is any reference to the numerous cases cited by Removing Defendants in support of their position. In Martin, supra, the appropriate analysis for awarding attorneys' fees under § 1477(c) was outlined. Martin, 546 U.S. at 139. The Supreme Court explained that, **"[a]bsent unusual circumstances, attorney's fees should not be awarded under § 1477(c) when the removing party has an objectively reasonable basis for removal."** Id. (emphasis

[2] Please note that Martin was decided on December 7, 2005, which is more than six months before Magistrate Judge Foschio's initial Decision and Order on plaintiffs' Motion to Remand. (See Doc. No. 31.)

added). Part of the "objectively reasonable" assessment is to consider whether the removal was "sought for purpose[s] of prolonging litigation." Id. at 132. In laying out this standard, the Supreme Court expressly rejected arguments that § 1477(c) requires the court to grant attorneys' fees on "remand as a matter of course" and further cautioned that, since Congress created a right to removal, courts should not use sanctions awards to create a system where defendants can only exercise their right to remove in cases where the right to remove is completely obvious. Id. at 139 ("[T]here is no reason to suppose Congress meant to confer a right to remove, while at the same time discouraging exercise in all but obvious cases."). Thus, unless the removing party lacked an objectively reasonable basis for removal, attorneys' fees and costs should not be awarded. Id.

Courts in the Western District of New York have applied the standard espoused in Martin and, in doing so, have refused to award sanctions unless the basis for removal was *objectively unreasonable*. See Sinclair v. City of Rochester, No. 07-CV-6277, 2007 WL 3047096, *3-4 (W.D.N.Y. Oct. 18, 2007) (refusing to award attorneys' fees when "the Court cannot find that Defendants' removal was objectively unreasonable"); Cary v. TIAA-CREF, No. 06-CV-6421 CJS, 2006 WL 4070768, *4 (W.D.N.Y. Dec. 18, 2006) ("The Court finds that the question of whether ERISA preempted plaintiff's state common-law cause of action was not clearly decided by the prior case law; thus the Court cannot conclude that [defendant] lacked an objectively reasonable basis for removing the case."); Moose v. Stat Corp., No. 05-CV-0707E(Sc), 2006 WL 1007611, *3 n. 4 (W.D.N.Y. Apr. 13, 2006) (holding that, despite the fact that removing defendant "failed to show to a reasonable probability that the amount in controversy exceeds $75,000," the award of attorneys fees on remand was inappropriate).

In fact, an analysis of decisions from other courts within the Second Circuit demonstrates that, short of frivolous removal or removal for purposes of prolonging litigation, an award of attorneys' fees is inappropriate when granting a motion to remand.[3] See In re Fosamax, l:07-cv-2442 (JFK), 2008 WL 2940560, *9 (S.D.N.Y. Jul 29, 2008) (citing Martin and explaining that an award of costs and expenses is "not in order because defendants' fraudulent joinder arguments in support of removal were not frivolous"); see also Donald J. Rosenberg, N.Y. Practice Series: Com. Litig. In N.Y. State Courts, 2 N.Y. Prac. § 10:42 (2008) ("Recent opinions from district courts in the Second Circuit have applied the new test from Martin in determining the appropriateness of cost awards[, and a]pplications for attorneys fees under § 1447(c) appear to be denied more often than they are granted.").

Second Circuit courts, when remanding cases to state court and refusing to order attorneys' fees, have given numerous examples of what constitutes an objectively reasonable basis for removal: removal based on diversity jurisdiction due to fraudulent joinder of a defendant even though the court concluded that the argument was without merit (In re Fosamax, supra, 2008 WL 2940560, at *9); removal based on diversity jurisdiction even when the parties later agreed that the defendant and plaintiff were citizens of the same state (Good Energy, L.P. v. Kosachuk, No. 06 Civ. 1433 (LTS)(KNF), 2006 WL 1096900, *1 (S.D.N.Y. Apr. 25, 2006)); removal where the issues were "complex and the answer not obvious" (Contreras v. Host Am. Corp., 453 F. Supp. 2d 416, 421 (D. Conn. 2006)); removal based on counsel's "legal error" that there was "supplemental jurisdiction" (Tuccio v. Corleto, No. 3:06CV01934 AWT, 2007 WL

[3] Federal Courts throughout the country have applied Martin and refused to award attorneys' fees on removal without a showing that removal was an attempt to delay litigation or was frivolous. See, e.g., Kantha v. Pac. Life Ins. Co., No. 06-0905, *2 (WJM), 2006 WL 25863242 (D.N.J. Sept. 6, 2006) (holding that sanctions were inappropriate, even where the defendants had a "mistaken" belief in removability because the court did "not find that Defendants removed this case in an effort to delay litigation or that removal was frivolous in nature").

294129, *1 (D. Conn. Jan. 30, 2007)); removal where the case law was not determinative on the issue (Cary, supra, 2006 WL 4070768 at *4); removal based on diversity jurisdiction even though it was ultimately determined that the amount in controversy did not exceed $75,000 (Moose, supra, 2006 WL 1007611 at *3 n. 4); removal based on newly-decided case law (Groman v. Cola, No. 07 CV. 2635(RPP), 2007 WL 3340922, *7 (S.D.N.Y. Nov. 7, 2007)); and removal where there was a "limited number of decisions" on the issue presented (Ind. Elec. Workers Pension Trust Fund v. Millard, No. 07 Civ. 172 (JGK), 2007 WL 2141697, *8 (S.D.N.Y. Jul 25, 2007)).

The above-cited case law demonstrates that Magistrate Judge Foschio was required to apply the objectively reasonable standard when making a determination regarding costs on remand. Since this standard was not used, therefore, Removing Defendants have a proper basis for objecting to the awarding of costs and fees to plaintiffs in this matter.

B. Applying the Objectively Reasonable Standard Demonstrates That, Even if This Case is Ultimately Remanded, An Award of Fees and Costs is Inappropriate.

As discussed, the Magistrate Judge did not cite to Martin and did not use the proper "objectively reasonable" standard when deciding to award attorneys' fees to plaintiffs. When this scenario is assessed pursuant to the correct standard, it is clear that attorneys' fees are inappropriate because (1) there was no evidence, and no allegation, that this case was removed to purposely prolong litigation nor is there a showing that the removal was frivolous; (2) there are no "unusual circumstances" warranting attorneys' fees; (3) Removing Defendants' basis for removal is not "contrary to overwhelming authority" and not "spurious"; and (4) removal was objectively reasonable under the circumstances.

There is no allegation that this case was removed to purposely prolong litigation nor is there a showing that the removal was frivolous. Nowhere in plaintiffs' Motion to Remand do

they allege that removal was done to prolong this litigation. (See Doc. No. 16.) This is echoed by Magistrate Judge Foschio's Report, as there is no claim that the removal was frivolous or done to extend litigation. (See Doc. No. 55.) In fact, since the Report does not discuss Removing Defendants' arguments regarding fraudulent joinder, the only alleged fault is a procedural one. Likewise, the Report does not cite to any unusual circumstances in this case that would warrant the granting of attorneys' fees.

Furthermore, Magistrate Judge Foschio's claim that the basis for removal is "contrary to overwhelming authority" and "spurious" is misplaced. The fact is that the Second Circuit has never been presented with a situation that parallels the one at hand. While the specific case law will be more fully discussed in Section III of this brief, it is enough to point out that Removing Defendants relied on substantial legal authority from federal courts around the country as a basis for removal. (See Section III, infra.) In support of their position, Removing Defendants cited at least ten cases from federal courts throughout this country that stand for the proposition that removing defendants are only required to obtain the consent of other defendants who the removing defendants knew or should have known had been served at the time of removal. In determining that removal was procedurally improper, Magistrate Judge Foschio relied on **one** case from a sister District Court: Tate v. Mercedes-Benz U.S.A., Inc., 151 F. Supp. 2d 222 (N.D.N.Y. 2001). (Doc. No. 55 at p. 10-11.) As will be shown, the Tate case is factually dissimilar and not on point, and Removing Defendants' position does not contradict the holding from that case. Even if Tate was relevant to the issues at hand, however, this lone case cited by the Magistrate Judge cannot possibly constitute "overwhelming authority." Combining the fact that the Magistrate Judge relied on one dissimilar and non-controlling case with the fact that Removing Defendants have a reasonable legal basis for their position supported by numerous

authorities, it cannot be said that the basis for removal was objectively unreasonable. See Ind. Elec. Workers Pension Trust Fund, supra, 2007 WL 2141697 at *8 ("Given the closeness of the issue in the case and the limited number of decisions, and because the defendants raise 'objectively reasonable' legal arguments . . . the motion for an award of fees is denied.").

Comparing the facts and issues involved in this matter with the Second Circuit case law interpreting Martin clearly demonstrates that removal was not objectively unreasonable. Thus, even if this Court were to ultimately conclude that Removing Defendants were incorrect in removing this case, there was an objectively reasonable reason for doing so, and attorneys' fees are inappropriate as there is "no showing how the defendant[s'] error is distinguishable from conduct found to be objectively reasonable in other cases [in the Second Circuit]." See Tuccio, supra, 2007 WL 294129 at *1.

II. REMOVAL WAS SUBSTANTIVELY PROPER PURSUANT TO 28 U.S.C. § 1332(a) AS CALDWELL WAS FRAUDULENTLY JOINED TO DEFEAT DIVERSITY JURISDICTION.

Removing Defendants' second objection the Magistrate Judge Foschio's Report is the failure to address whether Defendant Caldwell was fraudulently joined as a defendant in this case. First, Magistrate Judge Foschio cannot include Caldwell in his procedural analysis without first addressing the fraudulent joinder issue. Consent to remove is not required from a fraudulently joined party. Had the fraudulent joinder issue been addressed by the Magistrate Judge, it is clear that Caldwell was fraudulently joined in this matter. Alternatively, the Magistrate Judge could have addressed the procedural consent issue without Caldwell in the analysis. The Magistrate Judge's Report and Recommendation requiring that the Removing defendant obtain the consent to remove from Caldwell was an error, both from a practical and legal perspective.

A. The Magistrate Judge was Wrong to Include Caldwell in the Analysis as to Whether Removal was Procedurally Proper.

Magistrate Judge Foschio's decision to include Caldwell in his procedural analysis was erroneous. Magistrate Judge Foschio should have either determined whether Caldwell was fraudulently joined prior to addressing whether removal was procedurally proper or he should have withheld reference to Caldwell from his analysis of the rule of unanimity.

In terms of common sense and efficiency, prior to addressing whether Removing Defendants complied with the so-called rule of unanimity, Magistrate Judge Foschio should have first determined whether or not Caldwell was fraudulently joined. Removing Defendants' sole basis for removal was that Caldwell's non-diverse citizenship must be disregarded for purposes of diversity jurisdiction. See Pampillonia v. RJR Nabisco, Inc., 138 F. 3d 459, 460-61 (2d Cir. 1998). Plaintiffs claim that Caldwell was correctly joined as a defendant, which, if true, defeats any claim of diversity jurisdiction. Thus, if the Magistrate Judge found that Caldwell was appropriately joined as a defendant, there can be no diversity jurisdiction and whether or not all necessary defendants joined in removal becomes a moot issue.

In substantive terms, the failure to determine whether Caldwell was fraudulently joined affected Magistrate Judge Foschio's analysis of the rule of unanimity. While the Magistrate Judge's decision to address the procedural issues first is not necessarily an error, the Magistrate Judge's inclusion of Caldwell in his procedural analysis was plainly an error. Case law demonstrates that while the consent of all defendants is required to effect removal, "the failure of an improperly joined party to participate in the petition will not defeat removal." In re Rezulin Prod. Liab. Litig., 133 F. Supp. 2d 272, 295 (S.D.N.Y. 2001). Despite this clear case law, Magistrate Judge Foschio included Caldwell in his procedural analysis. (See Doc. No. 55 at p. 6-14.) Since the Magistrate Judge decided to address the procedural issue first, Caldwell should

not have been included in the analysis because (1) if he was improperly joined, his participation in removal was not required, and (2) if he was properly joined, then diversity jurisdiction could not exist anyway and no procedural analysis would be required. Any way one chooses to look at it, Caldwell should not have been included in the procedural analysis.

Magistrate Judge Foschio should have either decided the issue as to whether or not Caldwell was fraudulently joined in this action prior to addressing procedural issues, or Magistrate Judge Foschio should have not included Caldwell in his analysis of the procedural issues. It was clearly an error for Caldwell to be included in the analysis of whether removal was procedurally proper.

B. Since Caldwell Was Fraudulently Joined, Diversity Jurisdiction Exists.

This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332(a)(1) because all proper parties are completely diverse and the amount in controversy exceeds $75,000. Although Caldwell is a citizen of New York, he is a fraudulently joined party whose non-diverse citizenship must be disregarded for purposes of diversity jurisdiction. This issue was fully briefed in Removing Defendants' Opposition to Removal (Doc. No. 27), Rule 72(b) Objections (Doc. No. 34), and Reply in Support of Rule 72(b) Objections (Doc. No. 40). The arguments and case law discussed therein are hereby incorporated by reference and, for the sake of efficiency, those arguments will not be recopied here. Removing Defendants, however, respectfully request that this Court review the arguments outlined in its past filings and issue a decision as to whether Caldwell was fraudulently joined prior to addressing the unanimity issue.

III. REMOVAL WAS PROCEDURALLY PROPER BECAUSE THE REMOVING DEFENDANTS COMPLIED WITH THE RULE OF UNANIMITY.

Removal was procedurally proper because the Removing Defendants complied with the so-called "rule of unanimity." Although not required by statute, most courts require

"unanimous" consent by defendants to remove a case. See, e.g., Piacente v. SUNY at Buffalo, 362 F. Supp. 2d 383, 383 n. 3 (W.D.N.Y. 2004). One of the exceptions to the rule of unanimity is that defendants who have not been served with process at the time of removal are not required to join the petition for removal. See Gribler v. Weisblat, No. 07 Civ. 11436(NRB), 2008 WL 563469, *1 n. 3 (S.D.N.Y. Feb. 25, 2008). At issue herein is Magistrate Judge Foschio's interpretation of this exception.

The Magistrate Judge, again only relying on one case, held that the Removing Defendants did not comply with the rule of unanimity because Bostic and Upshaw had been "served in fact prior" to removal and, therefore, remand was appropriate. As will be shown, however, this conclusion is incorrect because: (1) the Tate case upon which this ruling is based is not persuasive as it is factually different to the scenario presented in this case; (2) Bostic and Upshaw's consent were not required as there was no actual or constructive notice of service; and (3) Removing Defendants were diligent in attempting to determine whether Bostic and Upshaw had been served and plaintiffs' lack of diligence or intentional delay was the reason that Removing Defendants did not have actual or constructive notice that those two defendants had been served.

A. The Magistrate Judge's Reliance on Tate is Misplaced.

In reaching a conclusion about the necessity of consent to removal from the non-removing defendants, the Magistrate Judge relied upon Tate v. Mercedes-Benz USA, Inc., 151 F. Supp. 2d 222 (N.D.N.Y. 2001). Specifically, the Magistrate Judge interpreted Tate to stand for the proposition that "the relevant inquiry in determining whether removal was proper is not whether the defendants seeking to remove the action had actual or constructive notice of service of process on the other served defendants but, rather, whether the other defendants had in fact

been served." (Doc. No. 55 at p. 10.) Thus, the Magistrate Judge concluded that since the non-removing defendants had "in-fact" been served prior to removal, removal was procedurally improper. This reading of Tate is incorrect as that decision addressed entirely different facts and issues than the ones presented here. This interpretation of the rule is also practically onerous and provides an incentive to a party trying to avoid removal to withhold the filing of affidavits of service in an attempt to procedurally thwart removal.

The Second Circuit has never addressed whether removal is proper if removing parties do not have constructive or actual notice of service on the non-removing parties. The Tate case did not address this issue either because the issue in Tate was what rule will be used to determine the timeliness of a defendant's consent to a removal petition. Tate, 151 F. Supp. 2d at 224. In Tate, the Northern District examined the three rules various federal courts have fashioned in this regard: the first served rule; the last served ruled; and the McKinney rule. Id. After analyzing the three rules, the court concluded that the McKinney rule was the appropriate rule to apply, which holds that an individual defendant has thirty days from the time that it is served with process to join in an otherwise valid removal. Id. at 224-25.

Having decided on what standard to use, the Tate court then looked to the facts. In Tate, defendant Prestige Motors, Inc. ("Prestige") was served on September 19, 2000, and defendant Mercedes Benz ("Mercedes") was served on September 22, 2000. Id. at 223. On October 19, 2000, Mercedes filed a removal petition and did not obtain the consent of Prestige, the first-served defendant. Id. After removal by Mercedes, and more than thirty days after being served, defendant Prestige submitted an affidavit consenting to the removal. Id. Mercedes argued that since plaintiff failed to file proof of service upon Prestige until after the petition for removal was

filed, Mercedes had no ability to know that Prestige had been served and was actually a party to the litigation. Id. Applying the McKinney rule to these facts, the court explained:

> The proper inquiry under the McKinney rule is not whether the later served defendant had constructive or actual notice of service of process on the earlier served defendant. Rather, the inquiry is on the adequacy of service of process on Prestige, when objectively viewed, "gave fair notice" to it about the state court suit, **Mercedes' lack of "constructive knowledge" about service on Prestige becomes irrelevant as Prestige had a burden to either timely file its own removal petition or join Mercedes' petition.**

Id. at 225 (emphasis added). Thus, the holding in Tate is that since the thirty (30) day time period for the first-served defendant to remove the case had expired, a second-served defendant cannot remove the case. Id. The first-served defendant has the responsibility of timely petitioning for removal and failure to timely remove will not be excused because a later-served defendant lacked "constructive knowledge" that another defendant had been served first. Id.

Clearly, the Tate holding does not address the issue at hand: whether removal is proper when a first-served defendant timely removes and had no constructive or actual knowledge of service on non-moving, later-served defendants. The Tate decision, therefore, does not support the Magistrate Judge's conclusion.

B. Consent of a Defendant to Remand is Not Required Absent Actual or Constructive Notice of Service Upon that Defendant.

The federal cases that have addressed this issue have held that consent of a defendant is not required absent actual or constructive notice of service upon that defendant: "[J]oinder in or consent to the removal petition must be accomplished by only those defendants: (1) who have been served; and (2) whom the removing defendant(s) actually knew or should have known had been served." See Milstead Supply Co. v. Cas. Ins. Co., 797 F. Supp. 569, 573 (W.D. Tex. 1992). It has been held that, rather than Magistrate Judge Foschio's opinion that consent is

needed from all defendants who had "in fact been served," the better rule is to determine whether removing defendants had actual or constructive knowledge of service:

> [T]he better rule is that a defendant is required to obtain consent only from those codefendants who it knew or should have known, in the exercise of reasonable diligence, had been served.

See Laurie v. Nat'l Rd. Pass. Corp., No. Civ. A -01-6145, 2001 WL 34377958, *4 (E.D. Pa. Mar. 13, 2001).

Removing defendants are not required to obtain consent where, prior to removal, the removing defendants did not know or could not reasonably have known of service of process on the non-joining co-defendants. See, e.g., Waffer v. City of Garland, No. CIV.A. 3:01CV1355-G, 2001 WL 1148174, at *2 (N.D. Tex. Sept. 19, 2001) (denying motion to remand where state court record at time of removal did not disclose that non-joining defendant had been served); Parker v. State, No. C-98-4844 MHP, 1999 WL 111889, *5 (N.D. Cal. Feb. 26, 1999) (holding that only those defendants whom the removing defendants knew or should have known were served should be classified as served for purposes of consenting to removal); Eltman v. Pioneer Communications of Am. Inc., 151 F.R.D. 311, 314-15 (N.D. Ill. 1993) (applying exception where non-joining defendant was served on same day as removal petition was filed, even though service may have occurred first); Milstead, supra, 797 F. Supp. at 572-74 (denying motion to remand where return of service on non-joining defendant was filed only three hours before the removal petition); Driscoll v. Burlington-Bristol Bridge Co., 82 F. Supp. 975, 985 (D.N.J. 1949); cf. Barlett v. Hoseclaw, No. 95-CV-0388E(F), 1995 WL 591140, at *2 (W.D.N.Y. Sept. 7, 1995) (recognizing possibility of exception but refusing to apply it where proof of service was filed nine days before removal petition); Harlow Aircraft Mfg., Inc. v. Dayton Mach. Tool Co., No. 04-1377-JTM, 2005 WL 1153600, *3 (D. Kan. May 16, 2005) (acknowledging an exception to

the rule of unanimity when a party is "reasonably diligent" in attempting to determine if all defendants had been served); Pianovski v. Laurel Motors, Inc. 924 F. Supp. 86, 87 (N.D. Ill 1996) (recognizing an exception for "sufficient diligence," but that under the circumstances of that case, removing defendant was not reasonably diligent in attempting to determine if co-defendants had been served); Keys v. Konrath, No. 93 C 7302, 1994 WL 75037, *2 (N.D. Ill. March 10, 1994) (holding that the attorney for removing defendant was not reasonably diligent because he failed to ask one of the other defendants, who he also represented, whether he had been served).[4]

This constructive knowledge rule does not prejudice any non-joining defendants because "[s]uch defendants would still be able to move to remand the case if they so desired." Milstead, supra, 797 F. Supp. at 574. As the Milstead court explained:

> Indeed, if a removal petition is filed by a served defendant and another defendant is served after the case is thus removed, the latter defendant may still either accept the removal or exercise its right to choose the state forum by making a motion to remand [pursuant to 28 U.S.C. § 1448].

Id. at 572 (citing Getty Oil Corp. v. Ins. Co. of N. Amer., 841 F.2d 1254, 1263 (5th Cir. 1988)). As such, the rationale espoused by the above-cited cases make sense, and it is apparent that federal courts recognize that when removing defendants have neither constructive nor actual knowledge of service upon non-removing defendants prior to removal, the consent of the non-removing defendants is not required for removal.

[4] See also Getty Oil Corp. v. Ins. Co. of N. Am., 841 F.2d 1254, 1262 (5th Cir. 1988); Lewis v. Rego Co., 757 F.2d 66, 68 (3d Cir. 1985); Eltman v. Pioneer Comm. of Am., Inc., 151 F.R.D. 311, 314-315 (N.D. Ill. 1993); Thompson v. Louisville Ladder Corp., 835 F. Supp. 336, 338 (E.D. Tex. 1993); Brooks v. Rosiere, 585 F. Supp. 351, 353 (E.D. La. 1984).

C. Removing Defendants Were Reasonably Diligent in Attempting to Discover Whether Non-Removing Defendants Had Been Served.

Removing Defendants were reasonably diligent in attempting to determine whether the individual defendants had been served prior to removing this case. Courts require removing defendants, prior to petitioning for removal, to be reasonably diligent in attempting to discover whether non-removing defendants have been served. See, e.g., Laurie, supra, 2001 WL 34377958 at *4 (holding that removing defendant demonstrated reasonable diligence in trying to determine which defendants had been served). Case law demonstrates that continuously monitoring and checking the state court's docket to determine if an affidavit of service had been filed constitutes reasonable diligence. See, e.g., id. at *4; Parker, supra, 1999 WL 111889 at *5; Driscoll, 82 F. Supp. at 985 ("Since the petitioners had no information from the official record that other defendants had been served . . . they were justified in disregarding the other defendants in filing their petition for removal."). In fact, the Parker case specifically stated that removing defendants are only deemed to have constructive notice of service upon the non-removing defendants *at the date of the filing of an affidavit of service with the state court:*

> [T]he removing defendants are deemed to have constructive notice of service upon the nonjoined defendants as of the date of filing of a return of service in the state court. The constructive notice element should only be applied, however, to removing defendants who had reasonable time to become aware of this filing and to obtain the joinder of such other defendants.

Parker, 1999 WL 111889 at *5.

Applying the case law to this matter, it is undisputed that Removing Defendants did not have actual or constructive notice that any non-removing defendant had been served prior to removal. Preliminarily, Upshaw had not been served prior to execution of the notice of removal. (See Doc. No. 26, Allan Aff. at Ex. 3 (Upshaw Return of Service stating that she was served at

8:30 p.m. on 11/22/05) and Ex. 5 (Federal Express Receipt stating that Notice of Removal was picked up at 8:02 p.m. on 11/22/05).) Additionally, the affidavit of service as to Bostic was not filed with the Erie County Clerk of Court until November 30, 2005 -- seven days after removal (Doc. No. 26, Allan Aff., Ex. 1); and the affidavit of service as to Upshaw was not filed until November 25, 2005 -- two days after removal (id. at Ex. 3). Further, since the Notice of Removal had already been filed, plaintiffs should have filed the affidavits of service on Bostic and Upshaw in the Western District of New York and served them on Removing Defendants instead of filing them in state court. Finally, as previously discussed, since Caldwell was fraudulently joined as a defendant, the date of the filing of the affidavit of service on him is irrelevant to this analysis. See, e.g., Whitaker v. Am. Telecasting Inc., 261 F.3d 196, 207 (2d Cir. 2001). Removing defendants did not have constructive notice of service upon any non-removing defendant prior to petitioning for removal and, therefore, did not violate the rule of unanimity.

In his Report and Recommendation, the Magistrate does not contend that Removing Defendants had constructive knowledge of service on the non-removing defendants. Rather, Magistrate Judge Foschio attempts to create some kind of negative inference by stating that the Removing Defendants fail to explain how the Beemiller and Brown defendants had notice that the other removing defendants had been served given that MKS's and Gun-A-Rama's Returns of Service were filed on November 23, 2005 and on November 30, 2005, respectively. (Doc. No. 55 at p. 11-12.) Without citation, the Magistrate insinuates that because Removing Defendants Brown and Beemiller were able to obtain consent to removal from MKS and Gun-A-Rama that Removing Defendants should likewise have been able to contact the individual non-removing defendants prior to removal. This argument completely ignores the fact that Removing

Defendants Beemiller, MKS, and Charles Brown are in the chain of distribution of the pistol at issue in the litigation and all Removing Defendants have substantial pre-existing relationships with each other. Under federal law, each Federal Firearms Licensee is required to maintain the name and address, along with other information, about each entity from which it purchases and to whom it sells a firearm. Thus, it was unnecessary for removing defendants to await the filing of service affidavits to notify them how to locate each other. (See Doc. No. 1, Notice of Removal, Ex. 2 at ¶ 28.) Removing defendants were simply able to read the caption on the state court Complaint and contact the other entities in the commercial chain of distribution. On the other hand, the removing defendants have absolutely no relationship with the individual, non-removing defendants.[5] The fact that Beemiller and Brown were able to locate and obtain consent from other parties in the chain of distribution without the affidavits of service being filed in a timely fashion demonstrates that the Removing Defendants were, in fact, being diligent and trying to comply with the rule of unanimity as best they could. The failure of Removing Defendants to obtain the consent of two individuals involved in criminal acts according to the Complaint, therefore, does not support a conclusion that they knew or should have known that the individual, non-removing defendants had been served.

IV. EVEN IF REMOVAL WAS PROCEDURALLY DEFICIENT, THIS SCENARIO PRESENTS EXTRAORDINARY CIRCUMSTANCES PERMITTING THIS COURT TO RETAIN JURISDICTION.

Even if this Court were to determine that removal was procedurally deficient, the circumstances involved in this matter constitute extraordinary circumstances permitting this case to remain in federal court. Failure to join all defendants in a removal petition is not a

[5] In fact, both Bostic and Upshaw were served at different locations than the invalided addresses listed on the summonses addressed to them preventing defendants from contacting them to obtain consent. (Doc. No. 26, Allan Aff., Exs. 1-3.)

jurisdictional defect. See, e.g., Michaels v. State, 955 F. Supp. 315, 321 (D.N.J. 1996); Johnson v. Helmerich & Payne, Inc., 892 F.2d 422, 423 (5th Cir. 1990). While cognizant of the fact that removal statutes should normally be strictly construed, federal courts have nonetheless permitted removal, even if not procedurally correct, when extraordinary circumstances are present. Tedford v. Warner-Lambert Co., 327 F.3d 423, 426-27 (5th Cir. 2003); Brown v. Demco, Inc., 792 F.2d 478, 481 (5th Cir. 1986) ("In the absence of waiver of the time limit by the plaintiff, or some equitable reason why that limit should not be applied, however, a defendant who does not timely assert the right to removal loses that right."); White v. White, 32 F. Supp. 2d 890, 893-94 (W.D.La. 1998) (applying an equitable exception to the 30-day time limit on removal where the plaintiff engaged in forum manipulation); Staples v. Joseph Morton Co., 444 F. Supp. 1312, 1313 (E.D.N.Y. 1978) (holding that plaintiff could not file a motion to remand a case to federal court when he had convinced the defendant to not remove within the thirty-day time by promising to discontinue the case). Thus, in certain situations "exceptional circumstances" can exist to allow for removal even where removal was procedurally incorrect. See Getty Oil, supra, 841 F.2d at 1263, n. 12; see also Partners in Funding, Inc. v. Quest Capital Res., LLC, No. H-05-0729, 2007 WL 471128, *3 (S.D. Tex. Feb 8, 2007) (holding that "no exceptional circumstances exist in this case" to permit removal).

While these above-cited cases dealt with "exceptional circumstances" permitting a party to petition for removal beyond the statutory time limit, at least one case, White v. Bombardier Corp., 313 F. Supp. 2d 1295 (N.D. Fla. 2004), has addressed a scenario where non-joining defendants have failed to appear in the action. In White, a class of defendants (the "Bombardier defendants") failed to obtain consent of co-defendants (the "Destiny defendants") prior to filing the notice of removal. Id. at 1298. The Destiny defendants were served and the return of service

was filed with the Florida state court, and the Bombardier defendants removed the case after the return of service had been filed. Id. Because the affidavits of service had been filed prior to removal, the Northern District of Florida held that the Bombardier defendants were not excused from the rule of unanimity on the grounds of the non-service exception. Id. at 1301. The court, however, went on to explain that its own "research has revealed no reported federal appellate court decision where a removing defendant has been excused from obtaining the consent of a codefendant who has been personally served, but against whom a default has been entered for failure to appear and answer the complaint." Id. The court then created a new exception to the rule of unanimity in cases where default has been entered against a party who has entirely failed to appear in the action:

> **I conclude that, consistent with a strict interpretation of the removal statutes in favor of remand, it is possible under some circumstances for the unanimity requirement to be excused with respect to a defaulted defendant who has not appeared.**

Id. at 1303-04 (emphasis added) (footnotes omitted). Thus, at least one federal court has allowed removal where there were extraordinary circumstances based on the non-removing defendants failure to appear in a case. Id.; but see First Indep. Bank v. Trendventures, L.L.C., No. 07-CV-14462, 2008 WL 253045, *6 n. 11 (E.D. Mich. Jan. 30, 2008) (holding that "the Court declines to recognize the White court's 'non-appearing, defaulted defendant' exception to the unanimity rule").

In this case, extraordinary circumstances exist permitting this Court to retain jurisdiction over this matter as Removing Defendants had no practical ability to contact the non-removing individual defendants. As already discussed, the affidavits of service on Bostic and Upshaw reveal that they were not served at the addresses that were listed in the Summons and

Complaint.[6] Furthermore, Upshaw was served at 8:30 p.m. on November 22, 2005 (see Doc. No. 16 at p. 6, Affidavit of Service on Upshaw), which was after Removing Defendants had placed their Notice of Removal in the care and custody of Federal Express for overnight delivery (see Doc. No. 26, Ex. 5, Federal Express Receipt). This demonstrates that Upshaw's consent to removal was not even required as she was served after the Notice of Removal had been served. At the very least, this fact reveals that it was impossible for Removing Defendants to have known that Upshaw had been served prior to filing their Notice of Removal. Up until the Notice of Removal was filed, Removing Defendants continuously monitored the state court docket to determine if the individual defendants have been served. These facts, taken together, demonstrate that, despite their diligence, Removing Defendants had no feasible, or possible, way of knowing that Bostic or Upshaw had been served prior to removal.

Plaintiffs, on the other hand, were not diligent in filing the affidavits of service. Despite being served on November 2, 2005, the affidavit of service on Bostic was not filed until twenty-eight days later, on November 30, 2005. Additionally, the affidavits of service on Bostic and on Upshaw were both filed with the New York Supreme Court, Erie County. Having been served with the Notice of Removal on November 23, 2005, plaintiffs offer no explanation as to why the affidavits of service as to Bostic and Upshaw were filed in state court as opposed to in the Western District of New York as required.[7] If plaintiffs had filed the return of service on Bostic

[6] The Summons listed Bostic's address as 191 Orleans Street, Buffalo, New York, but the return of service indicates that he was served at USP Lewisburg, Robert Miller Drive, Lewisburg, Pennsylvania. (See Doc. No. 16 at p. 7, Aff. of Service on Bostic.) As to Upshaw, the summons indicated that she was to be served at 5513 Woodcreek Road, #D1, Dayton, Ohio, but the return of service indicates that she was served at 5640 Signet Drive, Huber Heights, Ohio. (See id. at p. 6, Aff. of Service on Upshaw.)

[7] See Fed. R. Civ. Pro. 81(c) ("These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal."); Fed. R. Civ. Pro. 4(l)

in a timely manner in the state court or if plaintiffs had filed the returns of service on Bostic and Upshaw with the Clerk of this Court and served copies on counsel for Removing Defendants, Removing Defendants could have been able to obtain the consent to removal from Upshaw and Bostic within the requisite time to do so. Instead, plaintiffs seek to use their failures to defeat removal.

Finally, it is also without dispute that, despite having been served three years ago, none of the individual defendants have ever answered or appeared in this matter. These individual defendants are in default and, whether it occurs at the federal or state level, default will assuredly be entered against these parties. The fact that these parties have failed to appear for more than three years demonstrates that there was nothing that Removing Defendants could have feasibly or realistically done to locate them, let alone obtain consent to removal. This situation presents "extraordinary circumstances" because the Removing Defendants are in an impossible situation: under Magistrate Judge Foschio's interpretation of the law they cannot remove the case because, despite their diligent efforts, two individual defendants have failed to appear in this case.[8]

In a situation where these individual defendants have failed to appear for three (3) years as well as the other above-described extraordinary circumstances, it is unreasonable and against the interests of justice to penalize Removing Defendants for failure to locate and obtain these individual defendants' consent to removal. It is respectfully requested, therefore, that this Court retain jurisdiction over this matter due to the circumstances presented.

("If service is not waived, the person effecting service shall make proof thereof to the court."); 28 U.S.C. § 1446(d) (noting that after removal "the State court shall proceed no further unless and until the case is remanded").

[8] It is also noteworthy that, despite the fact that Bostic and Upshaw (and Caldwell for that matter), have not appeared in this case in three years, plaintiffs have failed to take any action and have not sought to obtain a default judgment against any of the non-appearing individual defendants.

CONCLUSION

Removing Defendants properly exercised their right to remove this action from state to federal court. They obtained the consent of all necessary parties, and diversity jurisdiction exists because Caldwell's status as a New York resident is irrelevant due to his fraudulent joinder. The Magistrate's recommendations to the contrary should be rejected, and Plaintiffs' motion to remand should be denied. Finally, even if this case is ultimately remanded, the above-cited case law and facts demonstrate that Removing Defendants had an objectively reasonable basis for removal and, as such, costs and fees should not be awarded to plaintiffs.

Dated: White Plains, New York
November 17, 2008

Respectfully submitted,

/s/ Jeffrey M. Malsch
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CERTIFICATE OF SERVICE

Jeffrey M. Malsch, an attorney, certifies that on this 17th day of November 2008, he caused to be filed via the ECF system for the United States District Court for the Western District of New York the foregoing:

Removing Defendants' Rule 72(b) Objections to Magistrate Judge's Remand Recommendation

He further certifies that a copy of said filing is also being served on all counsel of record via the Court's electronic filing system.

/s/ Jeffrey M. Malsch
Jeffrey M. Malsch, Esq.