

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN ROTHGEB and GLEN MEYERS,

Plaintiffs,

vs.

AXIS GROUP HOLDINGS, LLC; AXIS CON-
SULTANTS HOLDINGS, LLC d/b/a AXIS
CONSULTANT SERVICES, LLC; AKASAS, LLC;
LQM VENTURES, LLC; WILLIAM DOLLARD;
PAUL TANTILLO; JORDAN GITTERMAN;
STEVEN FRIEDMAN; UNKNOWN ENTITIES 1-
10; DOES 1-10; and ABR KEOKUK, LLC,

Defendants.

No. 3:12-cv-00138 – JEG

ORDER

Before the Court are both a Motion to Remand and a Motion to Strike brought by Plaintiffs John Rothgeb and Glen Meyers (collectively, Plaintiffs). Defendants Axis Group Holdings, LLC, Axis Consultant Holdings, LLC d/b/a Axis Consultant Services, LLC, Akasas, LLC, LQM Ventures, LLC (LQM Ventures), William Dollard, Paul Tantillo, Jordan Gitterman, Steven Friedman (Friedman), Unknown Entities 1-10, Does 1-10, and ABR Keokuk, LLC (ABR Keokuk) (collectively, Defendants) resist. The Court finds no hearing is necessary in the resolution of this motion, which is fully submitted and ready for disposition.

I. BACKGROUND

It is undisputed by the parties that Plaintiffs initially formed and wholly owned ABR Keokuk in 2010. After its formation, Plaintiffs allege that “[t]hrough a series of subsequent actions and transactions that were purposefully crafted to hide [Defendants’] purpose and not disclosed, discussed, voted upon, or otherwise approved pursuant to Iowa law, [Plaintiffs’] ownership of ABR Keokuk was diluted by [the other Defendants].” Compl. ¶ 25, ECF No. 1-2. Plaintiffs further aver they have twice demanded information from the LLC defendants to

explain the events that occurred in relation to ABR Keokuk, a request with which no defendant has complied.

On October 10, 2012, Plaintiffs filed their Complaint in the Iowa District Court for Lee County against Defendants alleging breach of fiduciary duties, fraud, oppression of minority shareholders, breach of contract, unjust enrichment and/or quantum meruit, conversion, civil conspiracy, and seeking judicial dissolution and a complete accounting of ABR Keokuk. LQM Ventures and Friedman (the Removing Defendants) removed the action to this Court on November 30, 2012, asserting that this Court had diversity jurisdiction over the matter.¹ The Removing Defendants contend that complete diversity exists despite ABR Keokuk's status as a citizen of Iowa as ABR Keokuk is properly a plaintiff and has been fraudulently added to the action to defeat diversity. Specifically, the Removing Defendants aver that ABR Keokuk was formed and owned by the Plaintiffs, that the Plaintiffs have levied no specific allegations against ABR Keokuk, and the Plaintiffs have not sought to recover from ABR Keokuk, thus ABR Keokuk should be realigned as a plaintiff or disregarded as fraudulently joined to the action.

On December 20, 2012, Plaintiffs filed their Motion to Remand arguing the Court lacks jurisdiction for two reasons: (1) complete diversity does not exist as ABR Keokuk is properly joined, and (2) the Removing Defendants have not properly alleged the citizenship of the LLC defendants thereby failing to establish diversity. On February 12, 2013, having resisted Plaintiffs' Motion to Remand, the Removing Defendants filed an Amended Notice of Removal. On February 18, 2013, Plaintiffs filed a Motion to Strike the Amended Notice of Removal as untimely.

¹ The remaining defendants, save Unknown Entities 1-10, Does 1-10, and ABR Keokuk, have filed their Consents to Removal. See Defs.' Ex. A-Ex. F, ECF Nos. 1-4 - 1-5. No other defendant, however, apart from the Removing Defendants, has entered an appearance by counsel.

II. DISCUSSION

A. Standard for Motion to Remand

“[D]efendant[s]’ removal of a case to federal court is appropriate ‘only if the action originally could have been filed there.’” Junk v. Terminix Int’l Co., 628 F.3d 439, 444 (8th Cir. 2010) (quoting In re Prempro Prods. Liab. Litig., 591 F.3d 613, 619 (8th Cir. 2010)), cert. denied, 132 S. Ct. 94 (2011). Diversity jurisdiction requires an amount in controversy that exceeds \$75,000, see 28 U.S.C. § 1332, and “complete diversity, that is where no defendant holds citizenship in the same state where any plaintiff holds citizenship.” Cascades Dev. of Minn., LLC v. Nat’l Specialty Ins., 675 F.3d 1095, 1098 (8th Cir. 2012) (internal quotation marks omitted) (quoting Junk, 628 F.3d at 445). After removal, plaintiffs “may move to remand the case,” which the Court must do if it “concludes that it does not have subject matter jurisdiction.” Junk, 628 F.3d at 444. “The removing defendant[s] bear[] the burden of establishing federal jurisdiction by a preponderance of the evidence” Skoda v. Lilly USA LLC, 488 F. App’x 161, 162 (8th Cir. 2012) (per curiam) (citing In re Prempro, 591 F.3d at 620). “All doubts about federal jurisdiction should be resolved in favor of remand to state court.” Block v. Toyota Motor Corp., 665 F.3d 944, 948 (8th Cir. 2011) (quoting In re Prempro, 591 F.3d at 620).

B. Joinder of ABR Keokuk

1. Standard

Fraudulent joinder is a well-settled exception to the complete diversity rule. See In re Prempro Prods., 591 F.3d at 620 (citing 14B Charles Alan Wright, Arthur R. Miller & Edward H. Copper, Federal Practice and Procedure § 3723, at 788-89 (4th ed. 2009)). “Joinder is fraudulent and removal is proper when there exists no reasonable basis in fact and law supporting a claim against the resident defendant[.]” Karnatcheva v. JPMorgan Chase Bank, N.A., 704 F.3d 545, 546 (8th Cir. 2013) (quoting Wiles v. Capitol Indem. Corp., 280 F.3d 868, 871 (8th Cir. 2002)).

[T]here is a common thread in the legal fabric guiding fraudulent-joinder review. It is reason. Thus, a proper review should give paramount consideration to the reasonableness of the basis underlying the state claim. Where applicable state precedent precludes the existence of a cause of action against a defendant, joinder is fraudulent.

Filla v. Norfolk S. Ry. Co., 336 F.3d 806, 810 (8th Cir. 2003).

Moreover, this Court “is not bound by the designations assigned to the parties,” Andersen v. Khanna, 827 F. Supp. 2d 970, 976 (S.D. Iowa 2011), but must “look beyond the pleadings, and arrange the parties according to their sides in the dispute,” Dryden v. Dryden, 265 F.2d 870, 873 (8th Cir. 1959) (quoting City of Indianapolis v. Chase Nat’l Bank, 314 U.S. 63, 69 (1941)); see also Polanco v. H.B. Fuller Co., 941 F. Supp. 1512, 1523 (D. Minn. 1996). The parties must be properly aligned both at the time the case is filed in state court and at the time of removal. Ryan ex rel. Ryan v. Schneider Nat’l Carriers, Inc., 263 F.3d 816, 819 (8th Cir. 2001) (per curiam). A court determines the proper alignment of a party not by mechanical rules but by ascertaining “the principal purpose of the suit, and the primary and controlling matter in dispute.” Andersen, 827 F. Supp. 2d at 976 (emphasis omitted) (quoting Dryden, 265 F.2d at 873); see also Fin. Guar. Ins. Co. v. City of Fayetteville, Ark., 749 F. Supp. 934, 942 (W.D. Ark. 1990) (quoting City of Indianapolis, 314 U.S. at 69), aff’d, 943 F.2d 925 (8th Cir. 1991).

2. Analysis

Plaintiffs assert that ABR Keokuk has not been fraudulently joined as there remains a reasonable basis in fact and law for the claims brought against ABR Keokuk. This Court must agree. There is no indication in the record that ABR Keokuk was joined to escape complete diversity. See Filla, 336 F.3d at 809 (defining fraudulent joinder as “the filing of a frivolous or otherwise illegitimate claim against a non-diverse defendant solely to prevent removal”). Nor are Plaintiffs’ claims deficient in a manner generally identified by other courts to support a finding of fraudulent joinder. See, e.g., Block, 665 F.3d at 950 (finding plaintiff failed to offer a factual basis establishing the non-diverse party had the requisite knowledge to subject it to the

claim); Menz v. New Holland N. Am., Inc., 440 F.3d 1002, 1005 (8th Cir. 2006) (finding fraudulent joinder when there was no law supporting the imposition of the duty upon which plaintiffs' claim relied); Gurley v. FedEx Ground Package Sys., Inc., 874 F. Supp. 2d 803, 805 (S.D. Iowa 2012) (finding fraudulent joinder when plaintiff failed to timely assert the claims against the defendants that defeated diversity); Dunbar v. Wells Fargo Bank, N.A., 853 F. Supp. 2d 839, 844 (D. Minn. 2012) (finding fraudulent joinder where non-diverse parties were immune from liability). While Plaintiffs have not alleged an act or omission on the part of ABR Keokuk, they seek both an accounting and its dissolution, which directly affect ABR Keokuk, thus its joinder is not only colorable, it is intuitive.

As argued by Plaintiffs, Iowa case law appears consistent with this result. In Bottoms v. Stapleton, 706 N.W.2d 411, 413 (Iowa 2005), a minority shareholder brought suit against a limited liability company and its majority shareholder alleging breach of fiduciary duty and conversion while seeking judicial dissolution, an accounting, and the appointment of a receiver. The basis of the claim was that the individual defendant "converted certain assets of [the LLC] to his own use, made certain distributions to himself at the expense of Plaintiff and [the LLC], and has refused to fulfill his contractual and fiduciary duties." Id. At issue before the Iowa Supreme Court was the defendants' interlocutory appeal of the district court's holding that the potential for a conflict of interest between the two defendants precluded them from maintaining common counsel. Id. While the court determined "the equitable claims asserted by [the plaintiff] against [the LLC] are merely ancillary to his damage claims against [the individual defendant]," the court did not question the plaintiff's ability to bring suit against the limited liability company. Id. at 417. Ultimately, the court determined that the parties could be jointly represented, although conceding that a conflict could arise, thus the plaintiff could raise his concern again at a later date. Notably, in Bottoms, there was no indication that the defendants were objecting to the LLC's inclusion as a defendant. However, the review of the plaintiff's claim in that case is

certainly indicative that plaintiff's claim is "colorable," as the court found the LLC "a true defendant." Id. at 418.

The burden remains upon Defendants to demonstrate that removal is proper, Knudson v. Systems Painters, Inc., 634 F.3d 968, 980 (8th Cir. 2011) (requiring "a defendant seeking removal to prove that the plaintiff's claim against the diversity-destroying defendant has no reasonable basis in fact and law" (internal quotation marks and citation omitted)); Arens v. O'Reilly Auto., Inc., 874 F. Supp. 2d 805, 808 (D. Minn. 2012) ("It is a defendant's burden to establish fraudulent joinder, and that burden is a heavy one."), and "where the sufficiency of the complaint against the non-diverse defendant is questionable, 'the better practice is for the federal court not to decide the doubtful question in connection with a motion to remand but simply to remand the case and leave the question for the state courts to decide,'" Fillia, 336 F.3d at 811 (quoting Iowa Pub. Servs. Co. v. Med. Bow Coal Co., 556 F.2d 400, 406 (8th Cir. 1977)); see also Junk, 628 F.3d at 446 ("All doubts about federal jurisdiction should be resolved in favor of remand to state court." (quoting In re Prempro, 591 F.3d at 620)). Based on the above standard, the Court finds the joinder of a limited liability company that Plaintiffs seek to have dissolved is supported by, and thus colorable under, Iowa statutes and case law. See Baur v. Baur Farms, Inc., 780 N.W.2d 249, 2010 WL 447063, at *2, 11 (Iowa Ct. App. Feb. 10, 2010) (table decision) (reversing the entry of summary judgment by the district court based on statute of limitation concerns where shareholder brought suit against a corporation and its majority shareholder alleging violation of fiduciary duties by the individual defendant and seeking dissolution of the corporate defendant); see also id. at *5 ("[A] corporation may be judicially dissolved in a proceeding brought by a shareholder if it is established that '[t]he directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent.'" (second alteration in original) (quoting Iowa Code § 490.1430(2)(b))); Threlkeld v. Smith, No. 01-1899, 2002 WL 31883004, at *2-3 (Iowa Ct. App. Dec. 30, 2002) (affirming the trial

court's findings where plaintiff sought and received a declaratory judgment determining the respective ownership shares that the plaintiff and individual defendant had in the defendant corporation and further sought dissolution of the defendant corporation).² Based on wrongful actions allegedly taken by the Defendants, Plaintiffs seek a remedy that directly affects ABR Keokuk's legal rights and existence; the Court cannot find joinder in such circumstances is without a colorable basis. See Wilkinson v. Shackelford, 478 F.3d 957, 964 (8th Cir. 2007) ("The relevant inquiry in analyzing fraudulent joinder, however, focuses only on whether a plaintiff 'might' have a 'colorable' claim under state law against a fellow resident, Menz, 440 F.3d at 1005, not on the artfulness of the pleadings.").

Further, the Removing Defendants have failed to specifically allege how ABR Keokuk's interests are truly aligned with Plaintiffs. Were ABR Keokuk wholly owned by Plaintiffs, such a claim could lie, but the ownership and control of ABR Keokuk is at issue, as Plaintiffs contend theirs has been diluted, a claim the Removing Defendants do not directly dispute. As entitled under Iowa law, Plaintiffs have brought a direct suit against ABR Keokuk in their capacity as members of the LLC. See Iowa Code § 489.901(1) ("[A] member may maintain a direct action against another member, a manager, or the limited liability company to enforce the member's rights and otherwise protect the member's interests . . ."). However, Iowa law also establishes that "[a] limited liability company is an entity distinct from its members." Iowa Code § 489.104(1). Thus, this Court cannot find ABR Keokuk, a legally separate entity, is better aligned as a plaintiff in a case that seeks its dissolution.

Finally, the Removing Defendants request that the Court permit limited discovery on the issues they have raised. When considering allegations of fraudulent joinder, some courts have

² Though the courts in these cases addressed claims seeking the dissolution of corporations, they remain instructive as a limited liability company similarly maintains a distinct legal status.

looked beyond the complaint to determine if any factual support for the claims raised against the non-diverse party exists. See Block, 665 F.3d at 948. However, the Eighth Circuit Court of Appeals has yet to opine on the propriety of looking beyond the complaint or granting limited jurisdictional discovery when ruling on a motion to remand. See Mattress Warehousing, Inc. v. Power Mktg. Direct, Inc., No. 08-CV-141-LRR, 2009 WL 395162, at *5 (N.D. Iowa Feb. 17, 2009); see also Wells' Dairy, Inc. v. Am. Indus. Refrigeration, Inc., 157 F. Supp. 2d 1018, 1031 n.3 (N.D. Iowa 2001) (noting that even were a defendant “entitled to *present* such facts,” that right alone “does not necessarily translate into a requirement that the defendant be permitted to seek such facts in limited discovery once the action is removed on the basis of fraudulent joinder and a motion to remand is filed asserting joinder was not fraudulent.”).³ The Removing Defendants cite a number of out of circuit cases that they entreat this Court to follow; however, the consideration is academic in light of the Removing Defendants’ failure to indicate why they are entitled to such a measure. The Removing Defendants elucidate no evidence they might unearth that would demonstrate Plaintiffs’ joinder of the LLC they seek to dissolve is fraudulent, and, in light of Iowa case law, this Court can conceive of none. Accordingly, this Court must find that, as complete diversity does not exist, subject matter jurisdiction is lacking, and the case must be remanded to state court.

³ In Wells' Dairy, Inc. v. American Industrial Refrigeration, Inc., 157 F. Supp. 2d 1018, 1040 (N.D. Iowa 2001), the district court concluded the grant of jurisdictional discovery is proper only when said discovery pertains to jurisdictional facts rather than to the merits of the claim. Thus, the court espoused that challenges regarding the sufficiency of the alleged facts would not require jurisdictional discovery, as the determination could be made by the pleadings alone, but concluded that when the challenges pertain to the status of a party with regard to whether that defendant may be liable to the plaintiff, limited discovery may be appropriate to resolve the dispute. Id. at 1040-41. In the present case, while the challenge arguably revolves around the “status” of ABR Keokuk as a party properly subject to suit, Iowa law indicates that ABR Keokuk can be joined to a suit in which its own dissolution is at issue, making further discovery unnecessary. Thus, even assuming the Court has the discretion to allow discovery at this preliminary stage, the Court concludes it is not warranted.

C. Deficiencies in Removal Notice & Motion to Strike

As complete diversity does not exist, this Court need not consider Defendants' initial failure to disclose the citizenship of the LLC members nor Plaintiffs' objection to Defendants' filing of the Amended Notice of Removal. Also, given the lack of jurisdiction, the pending Motion to Dismiss is moot.

III. CONCLUSION

For the reasons stated, the Court finds removal was improper, and therefore Plaintiffs' Motion to Remand (ECF No. 4) must be **granted**. Plaintiffs' Motion to Strike (ECF No. 19) and Defendants' Motion to Dismiss (ECF No. 5) are **denied as moot**.

IT IS SO ORDERED.

Dated this 25th day of February, 2013.



JAMES E. GRITZNER, Chief Judge
U.S. DISTRICT COURT