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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE: ROUNDUP PRODUCTS
LIABILITY LITIGATION

MDL No. 2741

THIS DOCUMENT RELATES TO:

Roybal v. Monsanto Co., et al.,
Case No. 3:20-cv-06235

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION TO REMAND ACTION
TO STATE COURT; MEMORANDUM
OF POINTS AND AUTHORITIES**

Hon. Vince Chhabria
Date: November 5, 2020
Time: 10:00 a.m.
Courtroom: 4

NOTICE OF MOTION

PLEASE TAKE NOTICE that on November 5, 2020, at 10:00 AM, or as soon thereafter as counsel may be heard by the above-entitled Court, located at San Francisco Courthouse, Courtroom 4 – 17th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102, in the courtroom of Judge Vince Chhabria, plaintiff will and hereby does move the Court for an Order remanding this action to the Superior Court of the State of California, County of San Francisco.

This motion is brought on the following grounds: (1) that Defendants cannot meet their burden of demonstrating that diversity of citizenship exists under 28 U.S.C. § 1332, and (2) Defendants Wilbur-Ellis Co., LLC and Wilbur-Ellis Nutrition, LLC (formerly Wilbur-Ellis Feed, LLC) were not fraudulently joined so 28 U.S.C. 1441(b) prevents removal of this case. This motion is based on the attached Memorandum of Points and Authorities, the papers and pleadings on file herein, and upon such further evidence, oral or documentary, as may be presented at the hearing of this motion.

Dated: October 1, 2020

GIBBS LAW GROUP LLP

By: /s/ Karen Barth Menzies

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Monsanto’s notice of removal is substantively improper, and this action must be remanded
4 to state court. The case at bar involves a suit brought in California state court against Monsanto,
5 Wilbur-Ellis Company, Wilbur-Ellis Feed, and DOES defendants for injuries sustained as a result
6 of Plaintiff’s use and exposure to Monsanto’s Roundup products.

7 Plaintiff, Shirley Roybal, is and has been a California resident for all applicable times
8 relevant to this action. Both Wilbur-Ellis Company and Wilbur-Ellis Feed have their principal
9 place of business in California, as Monsanto admits. As such, complete diversity is lacking, and
10 federal jurisdiction is lacking in this case as a result.

11 While admitting that complete diversity does not exist, Monsanto attempts to remove this
12 case on the bases of fraudulent joinder. For the reasons stated herein, this argument is untenable
13 and should be rejected in favor of immediate remand.

14 **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

15 Shirley Roybal (“Plaintiff”) was exposed to Roundup from 1978 until 2004 when she
16 applied the product to her half acre California residence. On or about March 2, 2019, Plaintiff was
17 diagnosed with non-Hodgkin lymphoma, proximately caused by her Roundup use and exposure.
18 Suit was filed on Plaintiff’s behalf on July 31, 2020. Monsanto then filed a notice of removal on
19 September 3, 2020.

20 **ARGUMENT**

21 **I. SUBSTANTIVE REQUIREMENTS FOR REMOVAL ARE NOT SATISFIED.**

22 Monsanto agrees that complete diversity is lacking on the face of the complaint, clearly
23 lending to Plaintiff’s argument that this case should be remanded.

24 A federal court can exercise removal jurisdiction over a case only if it would have had
25 jurisdiction over the case as originally brought by the plaintiff. *Snow v. Ford Motor Co.*, 561 F.2d
26 787, 789 (9th Cir.1977); *see also* 28 U.S.C. § 1441. Removal based on diversity jurisdiction
27 pursuant to 28 U.S.C. § 1332 requires complete diversity of citizenship (i.e., all plaintiffs must be
28

1 of different citizenship than all defendants). *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067
2 (9th Cir.2001); *see also* 28 U.S.C. § 1332. Removal is not permitted where one of the defendants
3 “is a citizen of the State in which such action is brought.” 28 U.S.C. § 1441(b).

4 Further, the Ninth Circuit has long held that it is the burden of the party seeking removal to
5 establish federal jurisdiction, *Holcomb v. Bingham Toyota*, 871 F.2d 109, 110 (9th Cir.1989), and
6 there is a “strong presumption against removal jurisdiction.” *Abrego Abrego v. Dow Chem.*
7 *Co.*, 443 F.3d 676, 685 (9th Cir.2006). In fact, removal jurisdiction should be strictly construed in
8 favor of remand, *Harris v. Bankers Life and Cas. Co.*, 425 F.3d 689, 698 (9th Cir. 2005) (citing
9 *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–09 (1941)), and the law is clear that there
10 must be *no doubt* that jurisdiction exists. If doubt exists, remand is required. *Gaus v. Miles, Inc.*,
11 980 F.2d 564, 566 (9th Cir. 1992) (“Federal jurisdiction must be rejected if there is *any doubt* as to
12 the right of removal.”) (emphasis added). “Doubts as to removability must be resolved in favor of
13 remanding the case to state court.” *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089,
14 1090 (9th Cir. 2003).

15 Regarding the case at bar, Monsanto agrees that the Wilbur-Ellis entities are citizens of the
16 State of California. Monsanto Company’s Notice of Removal, ¶ 16. Plaintiff, also, is and has been
17 a citizen of the State of California for all times applicable to this action. As such, on the face of the
18 complaint, diversity jurisdiction is lacking, and Plaintiff’s case must be remanded to state court.

19 **II. THE WILBUR-ELLIS ENTITIES ARE NOT FRADULENTLY JOINED.**

20 Faced with an obvious lack of diversity in this case, Monsanto seeks to employ the doctrine of
21 fraudulent joinder to remove this case to federal court. This argument must fail.

22 Fraudulent joinder constitutes an exception to the requirement of complete diversity. This
23 doctrine holds that, where a non-diverse defendant has been “fraudulently joined,” the court
24 disregards that defendant and recognizes complete diversity. *Morris v. Princess Cruises, Inc.*, 236
25 F.3d 1061, 1067 (9th Cir. 2000). However, fraudulent joinder only exists “[i]f the plaintiff fails to
26 state a cause of action against a resident defendant, and the failure is obvious according to the
27 settled rules of the state.” *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987).
28

1 Further, a defendant must show that the joinder was fraudulent by “clear and convincing
2 evidence,” *Hamilton Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007). In
3 determining whether a defendant was joined fraudulently, a court must resolve “all disputed
4 questions of fact and all ambiguities in the controlling state law in favor of the non-removing
5 party.” *Plute v. Roadway Package Sys., Inc.*, 141 F. Supp. 2d 1005, 1008 (N.D. Cal. 2001)
6 (quoting *Dodson v. Spiliada*, 951 F.2d 40, 42-43 (5th Cir. 1992)).

7 Indeed, the district court must remand if there is a “non-fanciful possibility” that the plaintiff
8 can state a claim against the non-diverse defendant. See *Vu v. Ortho–McNeill Pharm., Inc.*, 602
9 F.Supp.2d 1151, 1154 (N.D. Cal. 2009) (citation omitted). The relevant inquiry is whether the
10 plaintiff could state a claim against the non-diverse defendant on any legal theory. See *Grancare,*
11 *LLC v. Thrower by and through Mills*, 889 F.3d 543, 548 (9th Cir. 2018).

12 When determining if a non-diverse defendant has been fraudulently joined, the court may look
13 beyond the pleadings and consider summary judgment-type evidence such as deposition testimony
14 and affidavits. See *Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 265 (5th Cir. 1995)
15 (“[F]raudulent joinder claims can be resolved by ‘piercing the pleadings’ and considering
16 summary judgment-type evidence such as affidavits and deposition testimony.”). Thus, the
17 defendant seeking removal is free to present as many facts as he wishes in order to show
18 fraudulent joinder. *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998).

19 Regarding the case at bar, Monsanto avers that “Wilbur-Ellis Company is (and has been) in
20 the business of, among other things, distributing and selling certain pesticides and herbicides,
21 including certain glyphosate-based herbicide products.” Hushbeck Declaration, ¶ 6.
22 However, Monsanto also alleges that Wilbur-Ellis is involved in a limited market only, not
23 distributing to outlets that sell to the general public. As such, the claim is that Wilbur-Ellis was not
24 involved in the distribution chain that distributed Roundup to Plaintiff or to which Plaintiff was
25 exposed and cannot be liable under a product liability theory as a result. As shown below,
26 Monsanto’s argument is simply untenable. Wilbur-Ellis is a massive company with a massive
27 reach, constantly touting itself as a leader in distribution, marketing itself as a solution for
28 *everyone*, and engaging in Pac-Mac like consumption of other entities to make itself grow. Given

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