

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION**

HUS HARI BULJIC, Individually and as Administrator of the Estate of Sedika Buljic, HONARIO GARCIA, Individually and as Administrator of the Estate of Reberiano Leno Garcia, and ARTURO DE JESUS HERNANDEZ and MIGUEL ANGEL HERNANDEZ as Co-Administrators of the Estate of Jose Luis Ayala, Jr.,

Plaintiffs,

vs.

TYSON FOODS, INC., TYSON FRESH MEATS, INC., JOHN H. TYSON, NOEL W. WHITE, DEAN BANKS, STEPHEN R. STOUFFER, TOM BROWER, TOM HART, CODY BRUSTKERN, BRET TAPKEN, JOHN CASEY, and JAMES HOOK,

Defendants.

No. 20-CV-2055-LRR

ORDER

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I. INTRODUCTION

The matter before the court is Plaintiffs Hus Hari Buljic’s, Honario Garcia’s, Arturo de Jesus Hernandez’s and Miguel Angel Hernandez’s (collectively, “Plaintiffs”) Motion to Remand (“Motion”) (docket no. 15).

II. BACKGROUND OF THE CASE

A. General Procedural History

On June 25, 2020, Plaintiffs filed a “Petition at Law and Demand for Jury Trial” (“Petition”) (docket no. 3) in the Iowa District Court for Black Hawk County. On July 27, 2020, Defendants Tyson Foods, Inc. and Tyson Fresh Meats, Inc. (collectively, “Tyson”) filed a Notice of Removal (docket no. 1), bringing the case before this court.¹

¹ It is “the settled rule that removal under 28 U.S.C. § 1442 can be effected by any defendant in an action, with or without the consent of co-defendants.” *Alsop v. 3-Day Blinds, Inc.*, 435 F.Supp.2d 838, 842 (S.D. Ill. 2006); *see also Akin v. Ashland Chemical Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998) (providing that 28 U.S.C. § 1442(a)(1) provides a statutory exception that “allows a federal officer [or any person acting under that officer] independently to remove a case to federal court even though that officer is only one of several named defendants”); *Ely Valley Mines, Inc. v. Hartford Acc. & Indem. Co.*, 644 F.2d 1310, 1315 (9th Cir. 1981) (finding that § 1442 “represents an exception to the general rule . . . that all defendants must join in the removal petition”);

On August 26, 2020, Plaintiffs filed the Motion. On September 9, 2020, Tyson filed a Resistance (docket nos. 16-17).² On September 16, 2020, Plaintiffs filed a Reply Brief (docket no. 18).

On November 6, 2020, Plaintiffs filed a notice of voluntary dismissal of Defendants Mary A. Oleksiuk, Elizabeth Croston, Hamdija Beganovic, James Cook, Ramiz Muheljic, Gustavo Cabarea, Pam Pisng, Alex Buff, Walter Cifuentes, Muwi Hlawnceu, Mark Smith and John/Jane Does 1-10. *See* docket no. 34. On November 18, 2020, Plaintiffs filed the First Amended Complaint (docket no. 40). Defendants John Casey and Bret Tapken were added in the First Amended Complaint. On December 9, 2020, Plaintiffs filed the Second Amended Complaint (docket no. 46). Defendant James Hook was added in the Second Amended Complaint.

B. Causes of Action Alleged in the Petition

Even though Plaintiffs have filed a Second Amended Complaint in this case, for purposes of the Motion, the court considers the complaint, or in this instance, the Petition that existed at the time that the Notice of Removal was filed. *See Scarlott v. Nissan North America, Inc.*, 771 F.3d 883, 888 n.2 (5th Cir. 2014) (citing *Boelens v. Redman Homes, Inc.*, 759 F.2d 504, 507 (5th Cir. 1985); *see also Harper v. AutoAlliance Intern., Inc.*, 392 F.3d 195, 210 (6th Cir. 2004) (“The existence of subject matter jurisdiction is determined by examining the complaint as it existed at the time of removal”); *United*

Citrano v. John Crane-Houdaille, Inc., 1 F.Supp.3d 459, 465 (D. Md. 2014) (“Unlike removal under § 1441, under § 1442(a) the other defendants need not join in or consent for removal to be proper.”). Here, Tyson is removing this case under 28 U.S.C. § 1442(a). *See* Notice of Removal at 1. Accordingly, this action may be removed without consent from the other Defendants.

² In its initial Resistance (docket no. 16), Tyson was unable to attach its Exhibits. On the same date that the Resistance was filed, Tyson filed a “Notice of Errata” (docket no. 17), which included the Resistance (docket no. 16) and all pertinent exhibits. *See* docket no. 17. For purposes of this Order, any reference to the Resistance will be to docket no. 16.

Farm Bureau Mut. Ins. Co., Inc. v. Metropolitan Human Relations Commission, 24 F.3d 1008, 1014 (7th Cir. 1994) (“It is a fundamental principle of law that whether subject matter jurisdiction exists is a question answered by looking to the complaint as it existed at the time the petition for removal was filed”) (quotation omitted); *Salton v. Polyock*, 764 F.Supp.2d 1033, 1035 (N.D. Iowa 2011) (“[A] fundamental principle of removal jurisdiction is that whether subject matter jurisdiction exists is a question answered by looking to the complaint as it existed at the time the petition for removal was filed”); *Virginia Gay Hospital, Inc. v. Amerigroup Iowa, Inc.*, No. C18-112-LTS, 2019 WL 5483827, at *2 (N.D. Iowa Feb. 15, 2019) (same).

In the first cause of action in the Petition Plaintiffs allege fraudulent misrepresentation and vicarious liability and seek punitive damages against Tyson. *See* Petition ¶¶ 99-113. In the second cause of action, Plaintiffs allege gross negligence and seek punitive damages against Defendants John H. Tyson, Noel W. White, Dean Banks, Stephen R. Stouffer and Tom Brower (collectively, “Executive Defendants”). *See id.* ¶¶ 114-129. In the third cause of action, Plaintiffs allege gross negligence and fraudulent misrepresentation and seek punitive damages against Defendants Tom Hart, James Hook, Bret Tapken, Cody Brustkern and John Casey (collectively, “Supervisory Defendants”).³ *Id.* ¶¶ 130-151.

Specifically, Plaintiffs allege that Tyson “made numerous false representations” to Plaintiffs’ decedents at the Waterloo facility and “falsely represented” that: (1) COVID-19 had not been detected at the facility; (2) COVID-19 was not spreading through the facility; (3) worker absenteeism was not related to COVID-19; (4) sick workers were not permitted to enter the facility; (5) workers from other Tyson facilities

³ The Defendants listed as Supervisory Defendants corresponds to the named Defendants in the Second Amended Complaint. Additionally, the fourth cause of action in the Petition is no longer viable as the claims are against Elizabeth Croston, whom Plaintiffs voluntarily dismissed from this action. *See* Petition ¶¶ 152-160; Notice of Dismissal (docket no. 34) at 1.

that were shut down due to COVID-19 outbreaks were not permitted to enter the Waterloo facility; (6) sick or symptomatic workers would be sent home immediately and would not be permitted to return until cleared by health officials; (7) workers would be notified if they had been in close contact with an infected co-worker; (8) the workers' health and safety was a top priority for Tyson; (9) safety measures implemented at the Waterloo facility would prevent or mitigate the spread of COVID-19 and protect workers from infection; (10) the Waterloo facility needed to stay open in order to avoid meat shortages in the United States; and (11) the Waterloo facility was a safe work environment. *Id.* ¶¶ 100-101(a)-(k). Plaintiffs allege that Tyson knew that such representations were false and material. *Id.* ¶¶ 102-103. Further, Plaintiffs allege that Tyson made the false representations to induce Plaintiffs' decedents to continue working despite the uncontrolled COVID-19 outbreak in the Waterloo facility. *Id.* ¶ 104. Plaintiffs allege that Plaintiffs' decedents "accepted and relied" on Tyson's representations and Plaintiffs' decedents were induced to continue working at the Waterloo facility. *Id.* ¶¶ 105-106. Plaintiffs also allege that Tyson is "vicariously liable for the culpable acts and omissions committed by all of its agents acting within the course and scope of their agency," including the Executive Defendants and Supervisory Defendants. *Id.* ¶ 108.

Plaintiffs allege that the Executive Defendants "had a duty to prevent injuries to [Plaintiffs' decedents]" and breached their duty and "were grossly negligent" by the following acts and omissions: (1) failing to develop or implement worksite assessments to identify COVID-19 risks and prevention strategies for the Waterloo facility; (2) failing to develop or implement testing and workplace contact tracing of COVID-19 positive workers at the Waterloo facility; (3) failing to develop and implement a comprehensive screening and monitoring strategy aimed at preventing the introduction of COVID-19 into the worksite, including: a program to effectively screen workers before entry into the workplace; return to work criteria for workers infected with or exposed to COVID-19 and criteria for exclusion of sick or symptomatic workers; (4) allowing or encouraging sick or symptomatic workers to enter or remain in the workplace; (5) failing to promptly

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