

No. 05-55490

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MEERA SAMANTA,
Individually and as Successor in Interest to
the Estate of Parineeta Samanta,

Plaintiff & Appellant,

versus

OLINA HARWER, M.D.,

Defendant,

and

BARR LABORATORIES, INC.,

Defendant & Appellee.

On Appeal From an Order of the
United States District Court for the Central District of California

BRIEF OF APPELLANT

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INTRODUCTION

The issue in this appeal is whether a case was properly removed to federal court. The underlying lawsuit arose out of the tragic and sudden death of a young woman. The death occurred after the woman, a California resident, traveled to India on a long-haul flight after being prescribed a certain oral contraceptive. Plaintiff and appellant – the mother of the deceased – contends that the drug caused blood clotting that led to the death.

The mother filed a lawsuit in California state court against the New York-based pharmaceutical company that produced the drug and the California-resident doctor who prescribed it. The pharmaceutical company removed the action to federal court, claiming that the doctor was “fraudulently joined” to prevent diversity jurisdiction. The District Court agreed to accept jurisdiction, but only after forming the mistaken belief that a state court summons had never been issued against the doctor.

There is nothing in the record to support a finding of fraudulent joinder if one applies the test that the Ninth Circuit has established but that the District Court appeared to overlook. The party removing the case had urged the District Court to accept jurisdiction on a theory that strays outside the boundaries of the fraudulent-joinder doctrine. This case provides this Court with an opportunity to underscore what those boundaries really are.

JURISDICTIONAL STATEMENT

(a) The Basis For The District Court's Jurisdiction

If the District Court had jurisdiction, it was pursuant to 28 U.S.C. § 1332(a) on the theory that this was a diversity action, which was removed from the Superior Court of the State of California pursuant to 28 U.S.C. § 1441(a).

That, however, raises the issue now on appeal, which is whether the removal from California state court was proper. Appellant contends that it was improper and that there is no federal jurisdiction over this lawsuit.

(b) The Basis For Claiming That The Order & Judgment Is Appealable

The District Court granted a motion for summary judgment, thereby disposing of all the claims of all parties appearing in the proceeding before it. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 (“[t]he courts of appeals... shall have jurisdiction of appeals from all final decisions of the district courts of the United States”).

(c) The Dates Of Judgment And Of The Filing Of The Appeal

Judgment in the case was entered on March 22, 2005. Appellant filed a Notice of Appeal with the District Court on March 28, 2005. The appeal is thus timely. 28 U.S.C. § 2107(a); FRAP 4(a)(1)(A).

STATEMENT OF ISSUES

1. Did the District Court make a clearly erroneous finding of fact when, in ruling on whether defendant Olina Harwer, M.D. (“Dr. Harwer”) was fraudulently joined in the California state court action, it found that no state court summons had been issued against her?
2. Does the record indicate that the District Court applied the correct tests in determining whether Dr. Harwer was fraudulently joined in the state court action?
3. Applying the correct standards for fraudulent joinder, was Dr. Harwer fraudulently joined in the state court action?
4. Did the District Court err in finding appellant’s objection to the removal to have been untimely?
5. If the joinder of defendant Dr. Harwer was not fraudulent, and if she has never been dismissed from the case, must the judgment of the District Court be vacated?

STATEMENT OF THE CASE

On November 13, 2003, plaintiff and appellant Meera Samanta (“Samanta”) filed an action in the Superior Court for the State of California for the County of Orange against defendant and appellee Barr Laboratories, Inc. (“Barr”), a New York resident, and defendant Dr. Olina Harwer, M.D.

(“Dr. Harwer”), a California resident. The complaint asserted causes of action for product liability and negligence solely under California law. A summons was issued against both defendants.

On March 4, 2004, Barr filed a Notice of Removal on diversity grounds with the United States District Court for the Central District of California, Southern Division (the “District Court”).

On March 18, 2004, the District Court issued an order to Barr to show cause re removal, questioning whether it had jurisdiction. On April 23, 2004, the District Court vacated that order, finding that Dr. Harwer had been fraudulently joined. The matter then proceeded in federal court. Dr. Harwer was never dismissed from the action in either state or federal court.

On March 10, 2005, the District Court granted Barr’s motion for summary judgment in its entirety. At the same time, it denied Samanta’s request for a remand.

STATEMENT OF FACTS

1. The Death Of Parineeta Samanta

This lawsuit arose out of the death of Parineeta Samanta. Parineeta was known to her family, and is referred to herein, as “Pinky.” (Appellant’s Excerpts of Record (hereinafter “E.R.”) 64.) She was the daughter of

plaintiff and appellant Meera Samanta (“Samanta”). (E.R. 16.) Samanta is a California resident. (E.R. 2.)

Pinky died suddenly in Mumbai, India, on November 14, 2002, while visiting that city. (E.R. 15, 66.) She was 34 years old. (E.R. 16.)

Pinky suffered from cerebral palsy, and was heavily overweight. (E.R. 16, 77.) She had the mental capacity of a seven-year-old child. (E.R. 16.) She was cared for by her mother. (E.R. 77.)

2. Pinky’s Use Of The Drug Known As “Kariva”

At the time of her death, Pinky was taking an oral contraceptive known as “Kariva.” (E.R. 18.) Pinky was not, and had never been, sexually active. (E.R. 65.) The reason the contraceptive was prescribed concerned gynecological issues related to irregular menstruation. (E.R. 64.) It was only after Pinky’s death that Samanta learned that Kariva was a contraceptive. (*Id.*)

Kariva is manufactured by defendant and appellee Barr Laboratories, Inc. (“Barr”). (E.R. 18.) It was prescribed to Pinky by her doctor, defendant Olina Harwer, M.D. (“Dr. Harwer”). (E.R. 23.)

Barr’s principal place of business is in New York. (E.R. 3.) Dr. Harwer is a California resident. (*Id.*)

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3. The Start Of The Lawsuit In State Court

Samanta filed the complaint that began this litigation in the Superior Court of the State of California for the County of Orange (the “Superior Court”). (E.R. 15-28.) The complaint was filed on November 13, 2003. (E.R. 15.) Samanta filed in pro per, although with the informal assistance of a lawyer. (E.R. 15, 82.)

4. What The Complaint Alleged

The complaint alleged that Pinky’s sudden death was caused by a blood clot resulting in pulmonary embolism that occurred as a result of her having taken Kariva. (E.R. 16.) The complaint asserted causes of action against Barr under theories of negligence and strict product liability. (E.R. 17, 19-20.) It also asserted causes of action against Dr. Harwer for medical negligence and lack of informed consent. (E.R. 22, 24.)

In the District Court proceedings, Barr acknowledged that Kariva does carry a risk of thromboembolic disorders and other vascular problems, especially when taken by women who are overweight. (E.R. 79.) Furthermore, Dr. Harwer testified at a deposition that she knew of the risk that this drug carried concerning deep vein thrombosis and pulmonary embolism. (E.R. 78.)

Samanta alleged that Pinky's circumstances and condition, especially combined with the fact of long-haul air travel, created a heightened risk of clotting from Kariva, about which Barr failed to warn and of which Dr. Harwer failed to take account. (E.R. 19, 23, 62, 65-66.)

5. A Summons Was Issued Against Both Defendants, But No Proof Of Service For Dr. Harwer Was Filed With The Superior Court

The Superior Court issued a summons against both Barr and Dr. Harwer. (E.R. 11.) It is undisputed that Barr was properly served on January 12, 2004. (E.R. 2.) Samanta believes that Dr. Harwer was also served. (E.R. 82.) However, Samanta concedes that a proof of service for Dr. Harwer never found its way into the Superior Court's files and, most likely, was never filed. (E.R. 42.)

6. Dr. Harwer's Participation In The Litigation

Despite the absence of a proof of service, the record below does show that Dr. Harwer took part in discovery relating to Samanta's claims. (E.R. 89-98.) Discovery demands propounded by Dr. Harwer indicate that the doctor wished to arbitrate the dispute, but they also tend to suggest that the doctor knew that Samanta wanted to litigate it in Superior Court. (*Id.*)

This is evidenced by the caption on two of Dr. Harwer's discovery demands, which refers to "In the Matter of Arbitration Between..." but then

adds (in capitalized, underlined, and bold text): “The propounding of this discovery is in no way intended to act as a waiver of this defendant’s intent to pursue enforcement of the binding arbitration agreement between the parties.” (E.R. 89, 93.)

This language appeared on a set of special interrogatories and a demand for the production of documents. (*Id.*) All of these were propounded about one month after the filing of Samanta’s Superior Court complaint, and cited to appropriate sections of the California Code of Civil Procedure. (*Id.*)

The Superior Court docket indicates that Dr. Harwer never filed a Petition to Compel Arbitration. (E.R. 42.) And the caption on these discovery requests does not reference any specific arbitration forum or proceeding. (E.R. 89, 93.)

An attorney was working with Samanta in her dispute with Dr. Harwer at this time, but he never substituted in as an attorney of record in Superior Court. (E.R. 42, 99.) The reason, apparently, was that this attorney felt out of his league doing battle with Barr on a product liability case. (E.R. 82.) A letter from this attorney does mention an “arbitration matter.” (E.R. 99.) The Court’s attention is drawn to the Request for Judicial Notice, filed concurrently, in which Samanta asks for judicial notice to be taken of

proceedings in the Superior Court that tend to show Dr. Harwer to be involved in the underlying Superior Court action¹.

7. The Superior Court Never Dismissed The Action Against Dr. Harwer

Although a proof of service for Dr. Harwer was never filed, the Superior Court docket indicates that the state court action against her was never dismissed. (E.R. 42.) Nor was there ever an order to show cause as to why it should not be dismissed. (*Id.*) At the time that the case was removed to federal court, no Case Management Conference had yet taken place in Superior Court. (*Id.*)

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¹ In the Request for Judicial Notice, the Court is asked to take judicial notice of proceedings in the Superior Court that show the following: (1) That since removal, the case has been on the Superior Court’s “Omnibus Calendar,” in a state of suspension pending the final outcome of proceedings in federal court. (Exhibit A to Request for Judicial Notice, minute order by Judge Derek G. Johnson.) (2) That a “review hearing” in the case took place in Department C64 of the Superior Court on July 13, 2005, for the purpose of updating the Superior Court on where the case stood. (Exhibit B to Request for Judicial Notice, minute order by Superior Court Judge Di Cesare; Exhibit C to Request for Judicial Notice, certified transcript of the review hearing.) (3) That counsel for Dr. Harwer made an appearance at that review hearing, as well as counsel for Barr and Samanta. (*Id.*) See *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803, fn. 2 (9th Cir. 2002) (“we may take notice of proceedings of other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue”).

8. Barr's Removal Of The Lawsuit To Federal Court

Barr filed an answer in Superior Court on February 10, 2004. (*Id.*) However, on March 4, 2004, about three weeks later, it filed a Notice of Removal with the United States District Court for the Central District of California, Southern Division (the "District Court"). (E.R. 1.)

In this notice, Barr argued that because Dr. Harwer had not been served, and the proper time for service laid out under the California Rules of Court had passed, it could be concluded that Samanta did not intend to proceed against her. (E.R. 3-5.) Barr contended that Dr. Harwer had been named as a defendant "for the fraudulent purpose of defeating Barr's right to have this case heard in federal court." (E.R. 5.)

Barr also noted that the complaint alleged that Samanta had provided Dr. Harwer with the "intent-to-sue-a-doctor warning" required by California Code of Civil Procedure § 364 on or about October 25, 2001. (*Id.*) Barr appeared to argue that the fact that this date was two years earlier – *even before Pinky's death* – was probative of Samanta's alleged lack of intent to proceed against the doctor. (*Id.*)

A typographical error might have been a more plausible explanation for the fact that the complaint appeared to allege that Samanta had advised Dr. Harwer of an intent to sue on account of Pinky's sudden death long

before that death actually occurred. However, Barr did not, apparently, countenance such an obvious explanation. It preferred, instead, the one that seemed consistent with its “fraudulent joinder” theory.

9. The District Court’s Order To Show Cause Why The Matter Should Not Be Remanded Back To State Court

On March 18, 2004, the District Court issued to Barr an order to show cause (“OSC”) as to why the matter should not be remanded. (E.R. 29-30.) The OSC noted that Barr was not a California resident, but that Dr. Harwer was. (E.R. 30.) It further noted that Dr. Harwer had not been “properly served.” (*Id.*)

However, the District Court then cited authority to the effect that nonservice of a defendant who was joined in good faith was irrelevant and that diversity arises from the citizenship of the parties named and not from the fact of service. (*Id.*) The OSC concluded: “Although Defendant Dr. Harwer has not been served or responded to the complaint, [s]he remains a named defendant. Removal does not appear appropriate.” (E.R. 30.)

10. Barr’s Response To The OSC Re Removal

On April 16, 2004, Barr filed papers responsive to the OSC. (E.R. 31-47.) In these papers, while conceding that the mere fact that Dr. Harwer had not been served did not create fraudulent joinder, Barr argued that Samanta

“clearly has no intention of prosecuting an action against Dr. Harwer....”

(E.R. 5-6.)

However, Barr did not make any specific allegations in support of this conclusion beyond the fact of nonservice. (E.R. 31-40.) Nor did Barr address the question of whether Samanta’s complaint pled a cause of action under California law upon which relief could be granted. (*Id.*)

11. The District Court’s Decision To Retain Jurisdiction, Citing To The Supposed Nonissuance Of A Summons Against Dr. Harwer

On April 23, 2004, after reviewing these papers, the District Court vacated the OSC. (E.R. 48.) In its minute order, the District Court wrote: “On April 16, 2004, Defendant Barr Laboratories filed a response, indicating Plaintiff has never served Defendant Dr. Harwer nor requested a summons for service from the state court or this court. At this stage, it appears Defendant Dr. Harwer is joined fraudulently and removal is appropriate.” (*Id.*)

12. The District Court’s Factual Errors Concerning The Issuance Of A Summons Against Dr. Harwer

The District Court was factually wrong in the above statement in two regards – *first*, as to the issuance of a summons by the Superior Court and, *second*, as to the nature of what Barr had represented on that subject. The

District Court's own files *did* show that a Superior Court summons *had* been issued against Dr. Harwer. (E.R. 11.) And Barr's response – to which the District Court cited – confirmed this. (E.R. 36.)

Rather, Barr had written that the *District* Court had not issued a summons against Dr. Harwer. (*Id.*) And Barr had stated that a Superior Court summons *had* been issued. (*Id.*) In fact, the papers filed by Barr – to which the District Court referred – themselves *included* a further copy of that summons. (E.R. 44.)

The record indicates nothing to suggest that Barr tried to correct the District Court's misunderstanding. (E.R. 110-118.) Rather, the litigation proceeded in District Court. Samanta remained unrepresented by counsel throughout all of the District Court proceedings up to the point at which the Notice of Appeal was filed. (*Id.*)

13. The Dismissal Of “Does,” But Not Of Dr. Harwer

On May, 17, 2005, the District Court dismissed “any unserved does.” (E.R. 55.) However, there was no dismissal of Dr. Harwer.

14. Samanta's Request For Reconsideration Of The Jurisdiction Issue

Subsequently, Samanta filed a document captioned “Ex Parte Application For A Review Of Barr Laboratories, Inc. Removal Of Lawsuit To Federal Court.” This request came some time later, but before judgment

was entered. It was filed on March 8, 2005. (E.R. 81.) It can only be construed as an objection to the removal and, therefore, as the functional equivalent of a motion to remand.

Here, Samanta stated her belief that the doctor had been served. (E.R. 82.) In addition, through exhibits, she offered a further copy of the Superior Court summons as well as the above-mentioned discovery demands that had been propounded by the doctor. (E.R. 83, 89-98.)

15. The District Court's Response To Samanta's Objections To Its Jurisdiction

The District Court took this request as a motion for reconsideration and described it as being "not timely." (E.R. 102-103.) The request was denied. (*Id.*)

The decision – contained within the order granting summary judgment that brought the trial court proceedings to a close – stated that there were "no changed facts or new evidence." (*Id.*) The District Court continued: "The fact that Doctor Harwer may have been involved in an arbitration proceeding with Plaintiff does not mean she is a party to this case." (*Id.*)

16. The Outcome Of The Case In District Court

Once in federal court, Samanta did not succeed in keeping up with the rigorous schedule that was applied. Barr itself considered the case so

complex that it recommended a discovery timetable lasting until December 2005 with a planned motion for summary judgment in January 2006 and a trial date in April 2006. (E.R. 51-53.)

However, the District Court imposed a much tighter schedule, requiring discovery to be complete by October 8, 2004, leaving only about five months. (E.R. 55.) Samanta fell behind in the ensuing months, and never caught up. This was, in part, caused by the fact that she was suffering from severe depression that, in the opinion of several doctors, prevented her from participating meaningfully in litigation during that time. (E.R. 68-74.)

Although the District Court found in September 2004 that there was no basis to dismiss the case for lack of prosecution (E.R. 59), and although it granted one discovery extension after requesting and receiving specifics about the purpose (E.R. 60, 61-66, 67), it refused to grant another to enable Samanta to deal with Barr's motion for summary judgment. (E.R. 68, 75.)

The motion for summary judgment was filed on February 18, 2005 and was granted on March 21, 2005 on the grounds that Samanta had not presented a triable issue of fact as to causation. (E.R. 76, 101-103.)

Recognizing the deferential standard of review that would apply, Samanta is not appealing the District Court's refusal to grant the second extension to conduct discovery, notwithstanding her reservation of her right

to do so when filing the Notice of Appeal². Her case on appeal is that the matter should not have been removed to federal court.

STANDARDS OF REVIEW

This Court reviews a district court's denial of a plaintiff's request for a remand to state court de novo. *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1315 (9th Cir. 1998). The factual findings underlying a district court's decision are reviewed for clear error. *Kruso v. Int'l Tel. & Tel.*, 872 F.2d 1416, 1421 (9th Cir. 1989).

SUMMARY OF THE ARGUMENT

Diversity jurisdiction requires that no defendant be a resident of the same state as the plaintiff. Here, the plaintiff, Samanta, and one defendant, Dr. Harwer, were both residents of California.

Faced with this alignment of parties, Barr – the New York defendant seeking removal – relied on a “fraudulent joinder” theory, in which it pointed out that Dr. Harwer had not been served. The District Court responded that the fact of nonservice of a resident defendant does not create diversity.

² On February 24, 2005, Samanta filed a document that requested a “review” of the ruling denying the requested extension. The District Court construed this as a notice of appeal. That set in motion an interlocutory appeal that was subsequently dismissed on jurisdictional grounds as premature (Ninth Circuit docket number: 05-55343). By the time that appeal was dismissed, Samanta, by then represented by counsel, had started the present appeal.

However, the District Court later went on to find that a state court summons had never been issued against Dr. Harwer. On this basis, it concluded that Samanta did not intend to proceed against Dr. Harwer and that the doctor had been fraudulently joined.

The District Court's factual finding was clearly erroneous. The state court summons was in its own files. The question then becomes whether there was any other basis on which to find fraudulent joinder.

Fraudulent joinder is a "term of art." It does not mean that a plaintiff was, literally, trying to perpetrate a fraud. Rather, it refers to a situation in which no cause of action has been asserted against a resident defendant and the failure is obvious according to the settled rules of the state.

Here, Samanta's complaint did plead a cause of action against Dr. Harwer for medical negligence that met all of the elements required under California law. As such, the test for fraudulent joinder was not met. (Not that there is any indication that it was even *applied* in the proceedings below.)

However, Barr urged – and the District Court may have adopted – a test that focuses the fraudulent-joinder inquiry on the *intent* of a plaintiff to proceed (as opposed to whether a proper cause of action had been stated). The legal authority for such an approach is thin. However, to the extent that there is any authority, it requires an *express* statement by a plaintiff

indicating a lack of intent. That is entirely missing from the record in the present case.

Rather, Barr, and, perhaps, the District Court, merely *inferred* a lack of intent to proceed from the fact of nonservice. (It is actually unclear whether the District Court *did* accept Barr's theory of fraudulent joinder, or whether it agreed to removal based solely on its mistaken understanding about no summons having been issued.)

The inference urged by Barr is inconsistent with the rule that the fact of nonservice does not create diversity. In addition, an inquiry into what the plaintiff did, or did not do, *after* the time of the filing of the action is inconsistent with the hornbook rule that diversity is tested *at* the time of filing.

If Barr was concerned that Dr. Harwer was not really part of the lawsuit and would never be served, it should have waited for the state court to dismiss her. At that point, the case could properly have been removed. The state court handling the case was much better placed to determine whether or not there was good cause to allow more time for service. The District Courts are not the overseers of their state counterparts in such matters. (The record indicates, incidentally, that Samanta believed – rightly or wrongly – that Dr. Harwer had *already* been served.)

Removal is an invasive procedure. It raises significant federalism issues. This is why the Supreme Court has called for the removal statute to be strictly construed. The basis on which Barr sought removal, and on which the District Court appeared to grant it, strayed outside the established boundaries and was, thus, improper.

That, however, was not the full extent of the District Court's error. When Samanta objected to the removal, the District Court brushed off the objection as untimely. This was also an error. An objection to the District Court's jurisdiction and a request for a remand could be made at any time.

The record shows that Dr. Harwer was participating in the dispute before the case was removed. It indicates that she wished to arbitrate it and that she propounded discovery after the filing of the state court action stating that this was without waiving her right to arbitration.

The record does not show that Samanta had agreed to arbitration – in fact, the filing of the state court action suggests the opposite. No Petition to Compel Arbitration was ever filed in the state court proceeding. And there is nothing in the record from which the District Court could have concluded that there was an enforceable right for Dr. Harwer to have arbitrated the dispute.

Samanta was entitled to the benefit of any doubts in the fraudulent-joinder analysis. The District Court was required to resolve all contested issues of fact in Samanta's favor.

In addition, this Court has been asked to take judicial notice of the fact that Dr. Harwer appeared through counsel at a state court status conference on this case held during the pendency of the appeal, at which no mention was made of an arbitration.

The record shows that Dr. Harwer was never dismissed from the case, either in state or in federal court. (This would not have occurred automatically upon removal.) If, at the end of the day and case, a jurisdictional defect relating to diversity remains uncured, the judgment *must* be vacated.

Thus, if this Court finds the removal to have been improper, the judgment in favor of Barr cannot be allowed to stand. Jurisdictional defects are not subject to harmless-error analysis. However, even if such an inquiry were made, prejudice can be shown on account of the additional hurdles that federal jurisdiction presented to someone in Samanta's position, including the far shorter period allowed to respond to a motion for summary judgment.

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ARGUMENT

A. DIVERSITY JURISDICTION APPLIES ONLY TO CASES IN WHICH THE CITIZENSHIP OF EACH PLAINTIFF IS DIVERSE FROM THE CITIZENSHIP OF EACH DEFENDANT

The Constitution of the United States provides, in Article III, § 2, that “[t]he judicial Power [of the United States] shall extend... to Controversies... between Citizens of different States.” Accordingly, beginning with the Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78, Congress has consistently authorized the federal courts to exercise jurisdiction based on the diverse citizenship of parties.

In *Strawbridge v. Curtiss*, 7 U.S. 267 (1806), the Supreme Court construed the original Judiciary Act’s diversity provision to require *complete* diversity of citizenship. *Id.*, at 267. It has adhered to that statutory interpretation ever since. *Carden v. Arkoma Associates*, 494 U.S. 185, 187 (1990).

Thus, the current general-diversity statute, permitting federal district court jurisdiction over suits for more than \$75,000 “between... citizens of different States,” 28 U.S.C. § 1332(a), applies only to cases in which the citizenship of each plaintiff is diverse from the citizenship of *each* defendant. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996).

B. THE EXISTENCE OF DIVERSITY IS DETERMINED FROM THE CITIZENSHIP OF CODEFENDANTS JOINED IN GOOD FAITH IN A NONSEPARABLE ACTION, AND NOT FROM THE FACT OF SERVICE

(i) Citizenship, Not Service, Is Relevant To A Diversity Inquiry

A nonresident defendant cannot remove a “nonseparable” action if the citizenship of any codefendant, joined by the plaintiff in good faith, destroys complete diversity, regardless of service or nonservice upon the codefendant. *Clarence E. Morris, Inc. v. Vitek*, 412 F.2d 1174, 1176 (9th Cir. 1969). Whenever federal jurisdiction in a removal case depends upon complete diversity, the existence of diversity is determined from the fact of citizenship of the parties named and *not* from the fact of service. *Id.*

(ii) Samanta’s California State Court Action Was Brought Against One Resident And One Nonresident Defendant

Here, it was undisputed in the proceedings below that while Barr was a New York resident, Samanta and Dr. Harwer were both California residents. (E.R. 2-3.) Therefore, if Dr. Harwer was joined in good faith, and if the claims were not separable, there was no diversity jurisdiction.

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(iii) Samanta's Claims Against The Two Defendants Were Not Separable

Claims are not separate and independent of each other for the purpose of diversity jurisdiction if they grow out of a single actionable wrong for which a single recovery could be obtained no matter how many defendants shared liability. *Clarence E. Morris, Inc. v. Vitek*, 412 F.2d at 1176. A single wrong cannot be parlayed into separate and independent claims on account of multiple legal theories upon which relief is sought or multiple defendants against whom a remedy is sought for the same injury. *Id.*

Here, the actionable wrong was the prescribing by Dr. Harwer of a drug manufactured by Barr that allegedly caused Pinky's death. The claims against Barr for strict liability and negligence, and those against the doctor for negligence, are intertwined. There is a single injury arising out of the alleged actions, for which liability, if proven, would be shared by the two defendants.

Barr never contended in the proceedings below that the claims asserted against it and Dr. Harwer were separable. Nor did the District Court indicate that it considered them to be separable. In this brief, therefore Samanta will not dwell in more detail on that issue.

On the face of the case, therefore, there appears to be no basis for diversity jurisdiction. One of the defendants is a resident of the same state as the plaintiff, and both defendants are part of a nonseparable action. The inquiry thus turns to the basis upon which the District Court found that the requirements for removal were, in its mind, nonetheless met.

C. THE DISTRICT COURT WAS CLEARLY IN ERROR WHEN IT FOUND THAT A STATE COURT SUMMONS HAD NEVER BEEN ISSUED AGAINST DR. HARWER

(i) The District Court Appeared To Base Its Decision On Removal Upon Its Understanding That No State Court Summons Had Been Issued Against Dr. Harwer

In its order to show cause (“OSC”) dated March 18, 2004, the District Court noted that even though Dr. Harwer had not been “properly served,” removal did not “appear appropriate.” (E.R. 30.) It cited correctly to the rule that citizenship, not the fact of service, determines whether or not diversity jurisdiction exists. (*Id.*)

When the District Court vacated its OSC approximately one month later, it identified one factor – and one factor alone – that changed its initial assessment. Specifically, it wrote:

Plaintiff had never served Defendant Dr. Harwer nor requested a summons for service from the state court or this court. At this

stage it appears Defendant Dr. Harwer is joined fraudulently and removal is appropriate. (E.R. 48.)

In other words, the *only* factor upon which the District Court appeared to base its change of mind, between the issuance of the OSC and the subsequent vacating of that order, was its new understanding that a state court summons had not been issued against the doctor. While the District Court reasoned that failure to *serve* the doctor did not create diversity, it concluded that a failure to obtain a *summons* did mean that the doctor was not a part of the lawsuit.

(ii) The District Court's Own Files Showed That A State Court Summons Against Dr Harwer *Had* Been Issued

The District Court's legal reasoning would have been correct if those were, indeed, the facts. Samanta agrees, as a general principle, that if a plaintiff does not get as far as obtaining a summons against a particular person, that person cannot be factored into the diversity equation. However, the record shows that the *factual basis* upon which the District Court reasoned was clearly erroneous.

A summons *had* been issued by the Superior Court against the doctor. What is more, it was in the District Court's own files all along. In fact, Barr itself had attached a further copy in its papers responsive to the OSC. Indeed, it is hard to fathom how Dr. Harwer's name could even have got

onto the caption of the case – which, all along, has been *Samanta v. Harwer et al* – absent the issuance of that summons.

D. THE CORRECT TEST FOR FRAUDULENT JOINDER IS WHETHER THE PLAINTIFF OBVIOUSLY FAILS TO STATE A CAUSE OF ACTION AGAINST A RESIDENT DEFENDANT

(i) The Record Does Not Indicate That The District Court Looked Further Into The Fraudulent-Joinder Issue, Beyond Concluding That No Summons Had Been Issued

The alleged nonissuance of a summons was the only stated basis upon which the District Court decided that removal was proper. There is no indication in the record that the District Court felt the need to inquire any further. If it were correct in its factual assumption, there would, of course, have been no need to have done so.

Since the District Court was plainly not correct in its factual assumption, the inquiry thus turns to whether, had it inquired further, the record would have provided some other basis for a finding that Dr. Harwer had been fraudulently joined.

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(ii) “Fraudulent Joinder” Describes A Situation In Which The Plaintiff Fails To State A Cause Of Action Against A Resident Defendant

Fraudulent joinder is a “term of art.” *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1139 (9th Cir. 1987). It does not mean that the party was actually trying to perpetrate a fraud on the court or reflect on the integrity of plaintiff or counsel. *AIDS Counseling & Testing Ctrs. v. Group W Television, Inc.* 903 F.2d 1000, 1003 (4th Cir. 1990). Rather, it describes a situation where the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state. *McCabe v. General Foods Corp.*, 811 F.2d at 1139. This is a judicially created doctrine that provides an exception to the requirement of complete diversity. *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287 (11th Cir. 1998).

Stated differently, the test is whether there is any possibility that the plaintiff could establish any cause of action against non-diverse defendants. 32A Am. Jur. 2d Federal Courts § 1630. Thus, joinder is not fraudulent if it is possible that the plaintiff would be able to establish a cause of action against the nondiverse defendant in state court. *Id.*

In a similar vein, the Ninth Circuit has applied a test that joinder is not fraudulent if a case can withstand a motion under Federal Rule of Civil Procedure 12(b)(6) – and, impliedly, a demurrer in state court – directed to sufficiency of the cause of action. *Sessions v. Chrysler Corp.*, 517 F.2d 759, 760-761 (9th Cir. 1975).

Some authority qualifies this by allowing the pleadings to be pierced to make factual determinations. *Ross v. Citifinancial, Inc.*, 344 F.3d 458, 462 (5th Cir. 2003). However, this is only with a view to evaluating the *possibility* of a claim succeeding. “We do not decide whether the plaintiff will actually or even probably prevail on the merits, but look only for a possibility that he may do so.” *Dodson v. Spiliada Maritime Corp.*, 951 F2d 40, 42-43 (5th Cir. 1992).

(iii) It Is Irrelevant Whether Or Not Samanta Hoped To Defeat Diversity Jurisdiction Through Bringing A Properly Stated Cause Of Action Against Dr. Harwer

In its papers responding to the District Court’s OSC, Barr argued that Samanta “named [Dr. Harwer] as a defendant for the fraudulent purpose of defeating Barr’s right to have this case heard in federal court.” (E.R. 36.) Samanta disputes that conclusion, which cannot be reached from facts in the record.

However, as a matter of law, Samanta's motive was *irrelevant*. It is immaterial that a plaintiff's motive is to destroy diversity jurisdiction, provided there is in good faith a cause of action against those joined. 32A Am. Jur. 2d Federal Courts § 1630. See also *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183, 189 (1931).

Having laid out the correct test for fraudulent joinder, the next step is to examine whether Samanta had stated a cause of action against Dr. Harwer, the resident defendant.

E. SAMANTA'S COMPLAINT STATED A CAUSE OF ACTION AGAINST DR. HARWER MAKING ALLEGATIONS THAT, IF PROVEN, WOULD HAVE ENTITLED HER TO RELIEF UNDER CALIFORNIA LAW

(i) Samanta's Complaint Included A Cause Of Action Against Dr. Harwer For Medical Negligence

The fourth cause of action in Samanta's complaint was for "medical negligence." This cause of action was against Dr. Harwer only. (E.R. 22.)

(ii) The Elements Of A Cause Of Action Under California Law For Medical Negligence

To establish a medical negligence cause of action under California law, a plaintiff must establish the following basic elements: (1) The duty of

the professional to use such skill, prudence, and diligence as other members of this profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence. *Galvez v. Frields*, 88 Cal.App.4th 1410, 1420 (2001).

**(iii) Samanta's Cause Of Action For Medical Negligence Made
The Allegations Necessary Under California Law**

Here, paragraph 42 of Samanta's complaint did plead the existence of a duty on the part of Dr. Harwer "to comport with the standard of care applicable to healthcare providers under similar circumstances within the medical community." (E.R. 22.) Paragraph 44 of the complaint alleged specific acts that Dr. Harwer undertook as Pinky's physician pursuant to that duty. (E.R. 23.)

Paragraphs 43, 45, and 46 alleged that these acts failed to meet the appropriate standard of care and, hence, constituted a breach. (*Id.*) And paragraphs 48, 49, 50, and 51 alleged that these breaches of duty "were a substantial and legal cause" of Pinky's death and of other related losses. (E.R. 23-24.) Hence, the requirements for a cause of action for medical negligence under California law were properly pled.

(iv) Samanta’s Complaint Also Included A Properly Pled Cause Of Action Against Dr Harwer For “Lack Of Informed Consent”

Additionally, the fifth cause of action was also directed against Dr. Harwer. (E.R. 24-25.) Although not explicitly labeled as such, its substance leaves no doubt that this was the intent. This cause of action was labeled “Lack Of Informed Consent – Wrongful Death.” It was based on Dr. Harwer’s alleged failure to have informed Pinky – through Samanta, her mother and legal guardian – of either the fact that she was prescribing an oral contraceptive or of the attendant risks.

Establishing a prima facie case against a physician for failure to obtain informed consent requires proof that: 1. the physician had a duty to disclose sufficient information about a proposed treatment to obtain the patient's informed consent; 2. the physician breached that duty; 3. the physician's failure to disclose adequate information was approximate cause of the patient's decision to consent to a treatment to which the patient would have withheld consent if he or she had been adequately informed; and 4. a potential adverse consequence of the treatment materialized, resulting in a detriment to the patient. 5 Causes of Action 1 (2004) (West) (*Cause of Action Against Physician for Failure to Obtain Patient's Informed Consent*).

An examination of the fifth cause of action in Samanta's complaint shows that all of these elements were pled in paragraphs 53-59. (E.R. 24-25.)

(v) Since Samanta Had Not Failed To State A Cause Of Action Against Dr. Harwer, There Was No Fraudulent Joinder Of That Defendant

There can be little doubt that Samanta's complaint pled a cause of action against Dr. Harwer upon which relief could have been granted under California law and in California state court. Certainly, Barr did not appear to raise such an objection in the proceeding below.

The nearest Barr came to so doing was pointing out that paragraph 11 of Samanta's complaint alleged that the "intent-to-sue-a-doctor" letter relating to Pinky's death that was required by California Code of Civil Procedure section 364 appeared to have been sent long before Pinky's sudden death and even before Dr. Harwer prescribed the drug that was alleged to have caused that death. (E.R. 5, 17.)

The most reasonable inference is that this was a mere typographical error. Even if this were a sufficient basis on which to sustain a demurrer, it would most surely have led to leave by the Superior Court to file an amended complaint. *Angie M. v. Superior Court*, 37 Cal.App.4th 1217, 1227

(1995) (“[l]iberality in permitting amendment is the rule [in California Superior Court], if a fair opportunity to correct any defect has not been given”).

To vindicate the District Court’s decision regarding removal, the record would need to support a conclusion that no cause of action was stated against Dr. Harwer from the outset. However, there is *nothing* in the record that supports such a conclusion.

F. RATHER THAN EXAMINING WHETHER THERE WAS A PROPERLY STATED CAUSE OF ACTION AGAINST DR. HARWER, THE DISTRICT COURT APPEARED TO MAKE AN IMPROPER INQUIRY INTO SAMANTA’S “INTENT”

(i) The Record Does Not Indicate That The District Court Applied The Correct Test For Fraudulent Joinder

The record contains no indication that the District Court applied the correct test with regard to fraudulent joinder. Certainly, the District Court received no help in making a correct determination from Barr, whose papers on the issue consistently failed to state the correct meaning of the term as defined by this Court in *McCabe* (and as defined by many other courts in similar terms). (E.R. 1-9, 31-40.) It was as though Barr was talking about an

entirely different rule of law from that which the rest of the legal world understands from the term “fraudulent joinder.”

What Barr *needed* to do was to avail itself of “the opportunity to show that the individual... joined in the action cannot be liable on any theory.” *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998). This it failed to do. Moreover, Barr had the *burden* of proving that the joinder of Dr. Harwer was fraudulent. 32A Am. Jur. 2d Federal Courts § 1630. That proof had to be *clear and convincing*, consisting of facts rightly leading to that conclusion, apart from its own deductions. *Id.* See also *Bertrand v. Aventis Pasteur Laboratories, Inc.*, 226 F.Supp.2d 1206, 1212 (D.Ariz. 2002), citing to *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 550 (5th Cir. 1981).

(ii) The Authority Cited By The District Court About “Intent To Serve” Was Inapposite

Barr failed in meeting its burden. Nonetheless, it appears that the District Court allowed itself to be guided by Barr. Rather than making the type of inquiry required by *McCabe*, the District Court appeared to rely on a 50-year-old district court case – to which it cited in its order vacating its OSC (and that had been cited by Barr) – that found fraudulent joinder where a plaintiff had “no intention of serving the resident defendant.” (E.R. 48,

citing to *Herzig v. Twentieth Century-Fox Film Corp.*, 129 F.Supp. 845 (C.D. Cal. 1955).) In other words, the District Court seemed to draw a distinction between the fact of nonservice and whether there was an intent to serve.

Herzig – even if good law – provides little support to the District Court’s decision, since it dealt with facts that are not comparable. In *Herzig*, plaintiff’s counsel had made a written representation to the court that no more defendants – including those needed to defeat diversity – would be served. *Id.* at 847.

Furthermore, the district court in *Herzig* noted that plaintiff had stated that he wished to dismiss the action against all the defendants except for the nonresident one, such “that the only real controversy at the time of the filing of the petition for removal, and presently existing, is between the plaintiff, a resident of California, and the defendant, Twentieth Century-Fox Film Corporation, nonresident.” *Id.* at 848.

In the present matter, the record reveals *no* facts comparable to those in *Herzig*. The record contains *no* indication that Samanta made any representation to the Superior Court, the District Court, or to anyone else, that she wished to dismiss the action against Dr. Harwer. The reason why

she did not take further steps to serve Dr. Harwer is that she believed the doctor had *already* been served. (E.R. 82.)

The record contains not a single piece of direct evidence that Dr. Harwer did not intend to proceed. The District Court can only have made an inference, which, as shown below, makes no legal sense.

(iii) Lack Of Intent To Proceed Cannot Be Inferred From The Fact Of Nonservice

The District Court's citation to *Herzig*, supra, suggests that it was basing its fraudulent-joinder conclusion on its determination that there was a lack of intent to proceed. As shown above, facts comparable to those in *Herzig* on which to base such a conclusion are entirely absent from the record. The question, then, is whether the District Court could properly *infer* such a lack of intent on the part of Samanta from the mere fact of nonservice of Dr. Harwer. The answer is that such inference must be improper.

Given that it is settled that the fact of nonservice of a resident defendant is *not* sufficient to create diversity jurisdiction, *Clarence E. Morris, Inc. v. Vitek*, 412 F.2d at 1176, it would be illogical to allow an inference of "lack of intent to proceed" from the fact of nonservice. If lack of intent to proceed were, indeed, a basis for a finding of fraudulent joinder, and if such a lack of intent could be inferred from the mere fact of

nonservice, then there would be nothing left of the well-established rule that diversity jurisdiction *cannot* arise from the fact of nonservice. In other words, a defendant cannot circumnavigate the law simply by re-labeling “nonservice” as “lack of intent to proceed.”

(iv) To The Extent That “Lack Of Intent” Is Even A Proper Inquiry, It Cannot Involve An Examination Of The Course Of Conduct After Filing

There remains the larger question as to whether “lack of intent to proceed” is even a proper line of inquiry in a fraudulent-joinder evaluation, especially to the extent that it involves looking beyond whether a proper cause of action is asserted against the resident defendant. Certainly, it is not part of the standard analysis in prominent Ninth Circuit cases on point, such as *McCabe*.

The problem with making “lack of intent” a factor, and with then allowing the course of conduct in the litigation to be probative of the required intent, is that it runs contrary to one of the most fundamental tenets of jurisdictional jurisprudence, which is that diversity is tested by reference to *the time of the filing of the action*. The foundational nature of this rule was recently described by the Supreme Court in the following terms:

It has long been the case that the jurisdiction of the Court depends upon the state of things at the time of the action

brought. This time-of-filing rule is hornbook law (quite literally) taught to first-year law students in any basic course on federal civil procedure. It measures all challenges to subject-matter jurisdiction premised upon diversity of citizenship against the state of facts that existed *at the time of filing*. *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570-571 (2004) (internal citation and quotation omitted, emphasis added).

Logically, if a district court evaluates whether a plaintiff is actually taking sufficient steps against the resident defendant to prosecute a state court action, it goes beyond an examination of “the state of things” at the time of filing. By definition, the pace of prosecution involves focusing on the “state of things” *after* the bringing of the action. That is why such an inquiry is improper.

To be fair, it is not clear that the District Court actually *was* examining what Samanta had done – or not done – with respect to Dr. Harwer *after* filing the action (even though such an inquiry was urged upon it by Barr). On one reading of its order vacating the OSC, it was basing its decision *solely* on its mistaken belief about the nonissuance of a summons and looking no further. Unfortunately, the District Court’s very brief reasoning in its order vacating the OSC re remand raises more questions than it answers.

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G. THE PROPER WAY OF DEALING WITH UNSERVED DEFENDANTS AGAINST WHOM CAUSES OF ACTION HAVE BEEN STATED IS TO WAIT FOR THE STATE COURT TO DISMISS THEM, AND THEN TO REMOVE THE CASE

(i) Dr. Harwer Was Never Dismissed By The State Court

The Superior Court docket does not indicate that the action against Dr. Harwer was ever dismissed. (E.R. 42.) Instead of waiting patiently to see whether the Superior Court was going to dismiss Dr. Harwer, Barr jumped the gun and rushed into federal court.

(ii) The Issue Of Whether To Dismiss Dr. Harwer As An Unserved Defendant Would Have Come Before The Superior Court At A Case Management Conference

In a situation where a nonresident defendant does have concerns about whether a plaintiff who has pled a proper cause of action against a resident defendant actually intends to proceed against that defendant, there is *no need* to turn to a district court. Sooner or later, the *state* court will dismiss the unserved defendant.

In California, at least, dismissal does not happen automatically through the passage of time, even if service does not take place by some prescribed limit. Rather, it requires an order by the Superior Court, one that

was never made with respect to Dr. Harwer. The time at which such an order would generally be made is at a Case Management Conference. California Rule of Court 212(i)(8) provides for the Case Management Conference Order to include “the dismissal or severance of unserved or not-appearing defendants from the action.” However, in this case, Barr swooped and removed the case *before* a Case Management Conference had occurred³. (E.R. 42.)

(iii) A State Court Is Much Better Placed Than The District Court To Determine The Intent Of A Plaintiff Before It

The removal scheme allows a defendant to remove a case merely by filing a notice of removal. 28 U.S.C. § 1446. No motion or hearing is necessary in either the state court from which the case is removed or the federal court to which it is removed. *Id.*

The removal is effective as soon as the defendant files a proper notice of removal that meets the requirements of the statute. *Id.*, § 1446(d). After a

³ Even had there been a CMC, the dismissal of Dr. Harwer would not have been mandatory. Under California law, the decision as to when to dismiss an unserved defendant is in the trial court’s discretion. *Terzian v. County of Ventura*, 24 Cal.App.4th 78, 83 (1994). Thus, if the Superior Court had found that Samanta had been mistaken as to the fact of service, more time could have been allowed for her to do that which she had understood had already been done.

case is removed, the state court may no longer rule on any matter in the case. *Mitchum v. Foster*, 407 U.S. 225, 234 n.12 (1972).

All of this is a very invasive procedure. *U.S. ex. rel. Walker v. Gunn*, 511 F.2d 1024, 1027 (9th Cir. 1975) (removal is done in “derogation of state sovereignty”). Nonetheless, the traditional fraudulent-joinder rule, which involves determining whether there is a properly stated cause of action against the resident defendant, is one that a district court judge can handle in an objective manner.

However, when it comes to deciding whether a plaintiff has a bona fide intention to proceed against a resident defendant, against whom a cause of action has been pled, there may be a myriad of issues – known to and understood by – the state court, but not the district court.

There may be perfectly acceptable grounds for the fact that a defendant has not been served. The trial judge who has been handling that matter in state court is far better placed to make that call.

**(iv) Once The Unserved Resident Defendant Has Been
Dismissed By The State Court, Diversity Jurisdiction
Would At That Point Arise**

If the dismissal of an unserved defendant means that the only defendant(s) is or are nonresident, then diversity jurisdiction will, *at that*

point, be invoked. *Caterpillar Inc. v. Lewis*, 519 U.S. at 69-69. This is because an exception to the rule of testing removal by reference to the “state of things” at the outset is that diversity may be established through the dismissal of a resident defendant at any time prior to judgment. *Id.*

What this means is that a nonresident defendant who is skeptical about whether a properly pled action against a resident defendant is actually going to proceed should – absent, perhaps, some *Herzig*-style express statement by the plaintiff proving a lack of intent – take his or her concerns to the state court in the first instance. If the state court dismisses the action against the unserved defendants, the nonresident defendant can then obtain the desired federal jurisdiction.

H. THE FEDERALISM CONCERNS THAT ARISE FROM THE REMOVAL PROCESS CALL FOR STRICT CONSTRUCTION OF THE REMOVAL STATUTE

(i) The Invasiveness Of Removal Requires That Stringent Care Be Taken To Confine Its Use Within Precise Limits

Due to the invasiveness of the removal process, federal courts have long recognized that the process raises significant federalism questions. See, e.g., *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941) (recognizing federalism concerns inherent in the removal process).

These concerns have, in turn, led to a strict construal of removal statutes, lest, through judicial laxity, the proper powers of the states might be invaded. The Supreme Court has held:

The policy of the [diversity jurisdiction] statute calls for its strict construction. The power reserved to the states, under the Constitution (Amendment 10), to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution (Article 3). Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they *scrupulously confine their own jurisdiction to the precise limits which the statute has defined*. *Healy v. Ratta*, 292 U.S. 263, 270 (1934) (emphasis added, internal citation omitted).

In *Healy*, the Supreme Court was discussing diversity jurisdiction in general. The Court has made a similar pronouncement with respect to removal jurisdiction, in particular. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. at 108-09. And this Court has made clear that it “strictly construes the removal statute against removal jurisdiction.” *Boggs v. Lewis*, 863 F.2d 662, 663 (9th Cir. 1988).

(ii) A Finding That Removal Was Proper In This Case Would Violate Established Principles Of Federalism

If what took place in this case were found to be a proper method of establishing diversity jurisdiction based on removal, a rule of law would be created that any nonresident defendant, unhappy at the pace of proceedings

in state court against a resident defendant, could file a notice of removal and, in essence, ask the district court to second-guess whether the state court had acted sufficiently quickly to dismiss unserved defendants.

Such a rule would not only impose a burden on overworked district courts, in making them the overseers of their state court counterparts, but it would also intrude on the rights of state courts to manage their own affairs. It would stretch the removal statute and thus contravene the Supreme Court's mandate that this be strictly construed.

**I. THE DISTRICT COURT ERRED IN FINDING SAMANTA'S
OBJECTION TO ITS DIVERSITY JURISDICTION TO BE
"NOT TIMELY"**

**(i) Samanta Objected To The District Court's Jurisdiction
Before Judgment Was Entered**

On March 8, 2005, Samanta filed with the District Court a document captioned "Ex Parte Application For A Review Of Barr Laboratories, Inc. Removal Of Lawsuit To Federal Court." (E.R. 81.) The District Court ruled on this in its order granting summary judgment. (E.R. 102-103.) There, the District Court indicated that it viewed what had been filed as a motion for reconsideration of the April 2004 minute order vacating the OSC re

dismissal. (E.R. 103.) On this basis, the District Court stated that Samanta’s request was “not timely.” (*Id.*)

This was the *first* objection that Samanta filed with the District Court. Rather than being viewed as a motion for reconsideration, it should have been construed as a motion for remand. Remand, *plainly*, was what Samanta was asking for.

(ii) The District Court Was Obligated To Remand The Case If, At Any Time Before Final Judgment, It Appeared That It Lacked Subject Matter Jurisdiction

Samanta was entitled to make such a request, and to have it properly considered, when she made it. Congress, in 28 U.S.C. § 1447(c), has provided that “if *at any time before final judgment* it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.” (Emphasis added.)

(iii) Not Only Was There No Cut-Off Prior To Judgment For Remand, There Also Was No Cut-Off To Samanta Making A Request For Remand

This “any-time-before-judgment” provision covers objections based on there not being complete diversity. 28 U.S.C.A. § 1447, *Commentary On 1988 Revision Of Section 1447* (“If the defect is not one of mere procedure,

but goes to subject matter jurisdiction, as where a case was removed on the basis of diversity of citizenship and it turns out that complete diversity is lacking, there is no time limit on the motion to remand. It may be made at any time.”). The 30-day limit provided elsewhere in section 1447 applies only “if the basis for the remand motion is a mere defect in the procedure used in the removal process.”⁴ *Id.*

In fact, even if Samanta had raised the issue for the first time *after* a trial, she would have been within her rights. Subject to the rule that diversity will always be tested as of the time of the filing of the action, the challenge may “be brought shortly after filing, after the trial, or even for the first time on appeal.” *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. at 571.

It makes no difference even if the timing of the objection “means a complete waste of the court’s time as well as the parties’ costs and efforts” in having taken the case through federal court up to the point at which the

⁴ Such a “mere defect in the procedure” would include a late filing of a Notice of Removal. *Id.* Samanta may, therefore, have been late if she had been challenging the fact that the Notice of Removal was about a month outside of the period permitted under 28 U.S.C. § 1446(b). In fact, she never raised that specific objection in the proceedings below. However, the District Court should, *sua sponte*, have raised this in its OSC re removal. *Knutson v. Allis-Chalmers Corp.*, 358 F.Supp.2d 983 (D.Nev. 2005) (“If there exists a jurisdictional defect in the removal, *sua sponte* remand is not only permissible, but the district court “must remand if it lacks jurisdiction...” (internal citation omitted)).

challenge is brought. Schwarzer et al, *Cal. Prac. Guide Fed. Civ. Pro. Before Trial* (Rutter Group) § 2:371.5.

J. THE RECORD INDICATES THAT DR. HARWER WANTED TO ARBITRATE THE DISPUTE, BUT IT PROVIDES NO PROOF THAT THIS IS WHAT SAMANTA WANTED OR HAD AGREED TO

(i) The Record Contains Evidence That Dr. Harwer Wanted To Arbitrate The Dispute

As shown in the Statement of Facts, Dr. Harwer was actively participating in the litigation before the case was removed to federal court. However, it appears that she wanted to arbitrate the dispute, which is why her discovery demands were expressly made without waiving her right to do so. (E.R. 89, 93.) The record also indicates that an attorney who was then counseling Samanta sent a letter to his client in which he referenced an “arbitration matter” involving Dr. Harwer. (E.R. 99.)

The only meaning that can be lent to Dr. Harwer’s statements in propounding discovery about not wanting to “waive” her right to arbitrate is that she was concerned that, by propounding the discovery, she would somehow be appearing in the Superior Court action. This tends to suggest an awareness of that action and a belief that Samanta was actively pursuing it.

(ii) The Record Contains No Proof That Samanta Wanted To Arbitrate The Dispute

The record does not provide any proof that Samanta had consented to, or was in any sense committed to, an arbitration. The very filing of her lawsuit in Superior Court indicates precisely the opposite. And there is nothing in the record from which the District Court could have concluded that there was an enforceable right for Dr. Harwer to have arbitrated the dispute.

In deciding whether fraudulent joinder is appropriate, any ambiguities or contested issues of fact must be resolved in plaintiff's favor. *Travis v. Irby*, 326 F.3d 644, 649 (5th Cir. 2003). Therefore, even if the arbitration issue did raise a question in the District Court's mind, Samanta was entitled to the benefit of any doubt.

(iii) The Proper Way Of Settling Whether The Samanta-Harwer Dispute Should Be Arbitrated Would Have Been By Means Of A Petition In Superior Court To Compel Arbitration

The Ninth Circuit has previously indicated that a defendant is not fraudulently joined if there is either a factual or legal uncertainty concerning his or her relationship with the plaintiff. *Smith v. Southern Pacific Co.*, 187 F.2d 397, 402 (9th Cir. 1951) (“The necessity of establishing... the

relationship of the defendants... is at best a doubtful question of state law which should be tried in the state court and not determined in removal proceedings.”).

Thus, if there were a dispute as to whether Samanta and Harwer were in some type of a relationship that required their dispute to be resolved through arbitration, the proper method of dealing with that would have been through a Petition to Compel Arbitration in Superior Court pursuant to California Code of Civil Procedure section 1281.2 (or, perhaps, a Petition to Stay Pending Litigation pursuant to California Code of Civil Procedure section 1281.4).

(iv) No Petition To Compel Arbitration Was Filed

The Superior Court’s docket shows that no such Petition to Compel Arbitration (or anything similar) was ever filed. (E.R. 42.) The issue of arbitrability was, therefore, left unresolved.

(v) The Issue Of Whether There Was, Or Should Be, An Arbitration Did Not Factor In The District Court’s Decision In April 2004 In Favor Of Removal

It is worth adding that the arbitration issue never featured in the District Court’s decision to vacate the OSC re remand. Barr did not bring it up. There was nothing in the District Court’s files about it at that time. And

the District Court did not mention it in its order. The issue only came up, some months later, because Samanta, herself, in her subsequent request for review of the jurisdiction issue, provided the papers that mentioned it.

(vi) This Court Has Been Asked To Take Judicial Notice Of The Fact That Dr. Harwer Has Appeared In Superior Court In This Matter During The Pendency Of This Appeal

To the extent that the arbitration issue may create any doubt as to whether Dr. Harwer was a bona fide defendant in the Superior Court action, this Court has been asked to take judicial notice of the fact that the doctor has appeared, through counsel, in the underlying Superior Court action – which is in a suspended state – at a status conference during the pendency of this appeal. That, surely, assuages any doubt as to whether she is involved in this litigation in Superior Court.

In addition, if the Court were to take judicial notice of the transcript of the status conference in Superior Court in July 2005 (Exhibit C to the Request for Judicial Notice filed concurrently), it would note that there was no mention of an arbitration proceeding during that, admittedly brief, hearing.

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K. IF THIS COURT FINDS THAT THE REMOVAL WAS IMPROPER, THE JUDGMENT MUST BE VACATED

(i) The Jurisdictional Defect Was Never Cured, Since Dr. Harwer Was Never Dismissed After Removal

After removal under the doctrine of “fraudulent joinder,” the purportedly “sham” parties are *not* automatically eliminated from the suit. Schwarzer et al, *Cal. Prac. Guide Fed. Civ. Pro. Before Trial* (Rutter Group) § 2:687.1. They remain part of the action until or unless dismissed by the district court. (*Id.*)

The removing defendant should, therefore, move for an order in District Court under Rule 12(b)(6) dismissing the action as to the “sham” party. *Id.*, citing to *Farias v. Bexar County Bd. of Trustees*, 925 F.2d 866, 872 (5th Cir. 1991). This Barr never did. (Nor would it most likely have succeeded, since the fact is that Samanta *had* stated a cause of action against Dr. Harwer upon which relief could be granted.) Nor does the docket show that Dr. Harwer was ever dismissed on the District Court’s own motion. (E.R. 110-118.) Therefore, the jurisdictional defect that occurred upon the act of removal was never cured.

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(ii) Because Dr. Harwer Was Never Dismissed And The Jurisdictional Defect Was Never Cured, The Judgment Cannot Stand

If, at the end of the day and case, a jurisdictional defect relating to diversity remains uncured, the judgment *must* be vacated. *Caterpillar Inc. v. Lewis*, 519 U.S. at 76-77. Here, it has been shown Dr. Harwer was never dismissed. Thus, if this Court finds the removal to have been improper, the judgment in favor of Barr cannot be allowed to stand.

(iii) Harmless Error Is Not Generally A Factor Curing Jurisdictional Defects

Because jurisdiction goes to the power of the court to act, jurisdictional defects cannot be waived, see, e.g., *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951) (superseded by statute on other grounds), and, for the same reason, are not generally subject to harmless-error analysis. *Gomez v. United States*, 490 U.S. 858, 876; see also *Farley Transp. Co., Inc. v. Santa Fe Trail Transportation Co.*, 778 F.2d 1365, 1368 (9th Cir.1985) (failure to properly appeal is jurisdictional and not subject to harmless-error analysis).

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**(iv) Even If A Harmless-Error Standard Were Applied,
Samanta Did Suffer Prejudice**

Samanta urges the Court not to apply a harmless-error standard, but nonetheless offers the following brief argument on that subject lest the Court should consider it relevant. Samanta, it should be recalled, lost to Barr on summary judgment after the District Court denied her request for further time to conduct discovery in order to deal with that motion. (E.R. 75, 76, 101-103.) In federal court, *far less* notice has to be given of a motion for summary judgment than in California state court.

The California Central District requires a notice of a motion for summary judgment to be served at least 21 days before the hearing if served personally, or 24 days before if served by mail. Central District, CA Rule 6-1. In California state court, by contrast, the notice period is 75 days, or 80 days if the service is by mail. California Code of Civil Procedure § 437(c)a. The difference is approximately eight weeks. That can be outcome-dispositive in a situation in which a defendant is scrambling to obtain the evidence necessary to deal with the motion.

There are many other differences between state and federal court in procedure and in actual practice. Many consider federal court to be

procedurally a more rigorous and less forgiving environment. As one treatise points out:

[Compared with California state court] [district] court hearings are scheduled regularly, requiring counsel to report on the status of the case. Dismissal for lack of prosecution is a real threat in federal court. A signed order is required even for routine matters (e.g., extensions of time to plead or answer discovery) and despite the fact that all parties have so stipulated. Continuances may be hard to obtain; declarations showing good cause are required. And, federal judges do not hesitate to impose sanctions against counsel who abuse federal procedures.”). Schwarzer et al, *Cal. Prac. Guide Fed. Civ. Pro. Before Trial* (Rutter Group) § 1:379.

Presumably, indeed, Barr considered there were advantages to being in District Court. Otherwise, it would not have gone to the trouble of removing the case on such shaky grounds.

In noting these differences, Samanta’s point is not that what happened in federal court was fundamentally unfair or that it constituted reversible error under federal law. But the fact remains that the federal and state courts and legislatures have made any number of different choices about the way in which judicial proceedings ought to be conducted, each of which is, on its own merits, entirely fair and reasonable.

And the persons who select (or, in California, elect) the judges who exercise substantial discretion in the conduct of trials may have very different priorities regarding the characteristics that they seek out in

prospective judges. Again, each set of choices may be entirely just and reasonable, but they may produce very different results in the litigation and trial of cases.

Having said all of that, it is Samanta's position that she is not required to show prejudice in order to have the judgment vacated. Therefore, this portion of her argument need not even be reached. If the removal was improper, and given that Dr. Harwer was never dismissed, the judgment should be vacated with no further inquiry.

CONCLUSION

For the reasons stated above, this Court is respectfully urged to reverse and to instruct that the case of *Samanta v. Harwer et al* be remanded to the Superior Court.

July 28, 2005

Respectfully submitted,

THE LAW OFFICE OF
JOHN DERRICK

By _____
John Derrick
Attorney for
Appellant Meera Samanta

CERTIFICATE OF COMPLIANCE

**Certificate of Compliance Pursuant to
Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1
for Case Number 05-55490**

I certify that pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 11,631 words (including footnotes).

Dated: July 28, 2005

Respectfully submitted,

The Law Office of John Derrick

by _____
John Derrick
Attorney for Appellant

STATEMENT OF RELATED CASES

Certificate of Related Cases Ninth Circuit Rule 28-2.6 for Case Number 05-55490

Pursuant to Ninth Circuit Rule 28-2.7, appellant Meera Samanta states that she is not aware of any related cases pending in this Court.

An earlier interlocutory appeal arising out of the same district court proceedings, but concerning a different issue, was dismissed for lack of jurisdiction. (Ninth Circuit docket number: 05-55343. See also footnote 2 on page 16 of appellant's brief.)

DECLARATION OF SERVICE BY MAIL

Case name: Samanta v. Harwer et al

Case no.: 05-55490

I am a citizen of the United States, over the age of 18 years, and not a party to the within action. My place of employment and business address is The Law Office of John Derrick, 1216 State Street, Suite 609, Santa Barbara, CA 93101. On July 28, 2005, I served the documents entitled

BRIEF OF APPELLANT and

APPELLANT'S EXCERPTS OF RECORD

by placing one true copy of each in an envelope addressed to each of the persons named on the service list attached and at the addresses shown, and by sealing and causing said envelopes to be deposited in the United States Mail at Santa Barbara, California, with postage thereon fully prepaid.

I declare that the foregoing is true and correct. Executed this 28th day of July, 2005, at Santa Barbara, California.

John Derrick

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