

FILED
US DISTRICT COURT
WESTERN DISTRICT
OF ARKANSAS
Dec 6, 2017
OFFICE OF THE CLERK

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION**

**SAM JEFFUS, AS POWER OF ATTORNEY FOR WINNIE FAYE JEFFUS;
TRACIE CALDWELL, AS SPECIAL ADMINISTRATRIX
OF THE ESTATE OF MARY ANN PORTER;
TONI GREENLEE, AS SPECIAL ADMINISTRATRIX
OF THE ESTATE OF MARGIE TUFT BRYANT; and
MARY FRAZIER, AS SPECIAL ADMINISTRATRIX
OF THE ESTATE OF SYLVESTER DRIVER**

PLAINTIFFS

VS. NO. 17-1072

**OVATION HEALTH SYSTEMS, INC.; RELIANCE HEALTH CARE, INC.;
RHC OPERATIONS, INC.; EAGLE HEALTH SYSTEMS, INC.;
AFNC, INC. d/b/a EAGLECREST NURSING AND REHAB;
GNNC, INC. d/b/a GOSNELL THERAPY AND LIVING;
LAKESIDE NURSING AND REHABILITATION CENTER, INC.
d/b/a LAKESIDE NURSING CENTER;
RTNC, INC. d/b/a RECTOR NURSING AND REHAB;
OCNC, INC. d/b/a SILVER OAKS HEALTH AND REHABILITATION;
SLNC, INC. d/b/a SOUTHFORK RIVER THERAPY AND LIVING;
WESTWOOD HEALTH AND REHAB, INC.;
WINDCREST HEALTH AND REHAB, INC.;
BRYAN M. ADAMS; ANTHONY BRANDON ADAMS; GENA TURNER;
AMY ROLLINS; APRIL SPURLOCK; ANDREA NEIL;
REBECCA LEAVITT; KATHY SPEAKS; KATHY LANGLEY; BRENT TYSON;
JACQUELYN MADDOX; JOHN R. McPHERSON;
and JOHN DOE DEFENDANTS 1 THROUGH 5**

DEFENDANTS

NOTICE OF REMOVAL

Defendants Ovation Health Systems, Inc.; Reliance Health Care, Inc.; RHC Operations, Inc.; Eagle Health Systems, Inc.; AFNC, Inc. d/b/a Eaglecrest Nursing and Rehab; GNNC, Inc. d/b/a Gosnell Therapy and Living; Lakeside Nursing and Rehabilitation Center, Inc. d/b/a Lakeside Nursing Center; RTNC, Inc. d/b/a Rector Nursing and Rehab; OCNC, Inc. d/b/a Silver Oaks Health and Rehabilitation;

SLNC, Inc. d/b/a Southfork River Therapy and Living; Westwood Health and Rehab, Inc.; Windcrest Health and Rehab, Inc.; Bryan M. Adams; Anthony Brandon Adams; Gena Turner; Amy Rollins; April Spurlock; Andrea Neil; Rebecca Leavitt; Kathy Speaks; Kathy Langley; Brent Tyson; Jacquelyn Maddox; and John R. McPherson (collectively “defendants”) appear and pursuant to 28 U.S.C. §§ 1331, 1332, 1367, 1441, and 1446, hereby give their notice of the removal of this action from the Circuit Court of Ouachita County, Arkansas, to the United States District Court for the Western District of Arkansas, El Dorado Division. As grounds for this removal, defendants state as follows:

1. On July 31, 2017, the plaintiffs in this action filed a class action complaint in the Circuit Court of Ouachita County, Arkansas, Case No. 52CV-17-170 (the “State Court Case”).
2. On November 3, 2017, the plaintiffs filed a first amended class action complaint against the defendants in the State Court Case.
3. The State Court Case is a civil action within the meaning of the Acts of Congress relating to the removal of actions to federal court.
4. Some or all of the defendants were served with summonses and copies of the first amended complaint on various dates, with the earliest served defendant receiving a summons and copy of the first amended complaint on November 6, 2017. Therefore, the filing of this notice of removal is timely.
5. The State Court Case involves a controversy arising under the laws of the United States, making removal proper under 28 U.S.C. § 1331.

6. The State Court Case is also a putative class action that involves parties of minimal diversity, a class that has at least 100 members, and an amount in controversy in excess of \$5,000,000.00, exclusive of interest and costs, making removal proper under the Class Action Fairness Act (“CAFA”), 28 U.S.C. § 1332(c).

Jurisdiction under 28 U.S.C. § 1331

7. This action is properly removable under 28 U.S.C. § 1441(a) because the United States District Court has original jurisdiction under 28 U.S.C. § 1331, which provides, “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”

8. While Arkansas law is the nominal basis for all of the plaintiffs’ claims, a federal question nevertheless appears on the face of the first amended complaint filed by the plaintiffs.

9. “Federal jurisdiction may be found from a complaint if adjudication of a state claim would turn on a federal constitutional or other important federal question, even where only state law issues have been pled.” *Pet Quarters, Inc. v. Depository Trust & Clearing Corp.*, 559 F.3d 772, 779 (8th Cir. 2009). To that end, the United States Supreme Court has identified four factors that must be examined to determine whether a cause of action created by state law may nevertheless fall within federal-question jurisdiction:

- a. The complaint must necessarily raise an issue of federal law;
- b. That issue must be actually disputed;
- c. The disputed issue must be “substantial”; and

- d. The federal court must be able to entertain that issue “without disturbing any congressionally approved balance of federal and state judicial responsibilities.”

See Grable & Sons Metal Prods. v. Darue Eng’g & Mfg., 545 U.S. 308, 314 (2005).

Grable recognizes that there is a category of cases that can be removed under federal-question jurisdiction even though the claims asserted arise under state law.

Empire Healthchoice Assur., Inc. v. McVeigh, 547 U.S. 677, 700 (2006).

10. The first *Grable* element asks whether federal law provides an essential element of the plaintiff’s claims. *See Becnel v. KPMG, LLP*, 387 F. Supp. 2d 984, 986 (W.D. Ark. 2005). In other words, the construction of federal law must be dispositive in the case. *Longie v. Spirit Lake Tribe*, 400 F.3d 586, 589-90 (8th Cir. 2005). *Grable* jurisdiction is, therefore, met when a “suit raising a state-law claim rises or falls on the plaintiff’s ability to prove the violation of a federal duty.” *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1569 (2016).

11. Second, an actual dispute under the applicable federal law is required. *See Grable*, 545 U.S. at 314.

12. Whether a federal issue is “substantial” depends on the importance of the question to the federal system as a whole, as is the case when the question is primarily an issue of law that will establish precedent going forward. *See Gunn v. Minton*, 568 U.S. 251, 261 (2013); *Empire Healthchoice Assur.*, 547 U.S. at 700.

13. Finally, the fourth element examines the interest of the federal government in the case, the importance of providing a federal forum, and whether allowing federal-question jurisdiction will flood the federal courts with similar claims. *Grable*, 545 U.S. at 318-19. As to the importance of providing a federal forum, a court must examine whether the claims “turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues.” *Id.* at 312.

14. Here, the plaintiffs’ first amended complaint expressly alleges that the defendants’ alleged chronic understaffing of certain facilities violates “Ark. Code Ann. § 20-10-1402(a); 42 U.S.C. 1396r § 1819(4)(c) and § 1919(4)(c); and 42 C.F.R. § 483.30.” (Ex. 1, First. Am. Compl. ¶ 49.) The cited federal statutes and regulations are necessarily implicated by the plaintiffs’ claims. Any claim that the defendants were impermissibly understaffed, notwithstanding their meeting the state’s minimum staffing ratios, can be premised only on federal law.

15. The plaintiffs’ claims turn on the interpretation of the cited federal statutes and regulations, including but not limited to the issues of whether these statutes and regulations impose a standard of conduct that may be the basis for tort and/or contractual liability and if so, precisely what standards these statutes and regulations impose. For example, federal courts have split on whether 42 U.S.C. § 1396r can be the basis of liability in a private suit, either under 42 U.S.C. § 1983 or embedded within a state-law cause of action. *See Liptak v. Ramsey Cty.*, No. CV 16-225 ADM/JSM, 2016 WL 5349429, at *5 (D. Minn. Sept. 23, 2016) (noting

disagreement on this issue and holding that statute did not create a private right of action); *Massey v. Fair Acres Geriatric Ctr.*, 881 F. Supp. 2d 663, 670 (E.D. Pa. 2012) (holding that alleged violations of 42 U.S.C. § 1396r could not be the basis for a claim under Pennsylvania’s wrongful-death statute). These disputed issues of law have not been resolved by the United States Supreme Court or the United States Court of Appeals for the Eighth Circuit.

16. These issues of law are actually disputed, satisfying the second prong. For example, the defendants will argue that this Court should join the “majority” recognized in *Liptak* and hold that 42 U.S.C. § 1396r does not create a private right of action. The defendants will further argue that to the extent 42 U.S.C. § 1396r may be the basis for a private cause of action, the defendants did not violate any rights conferred on the plaintiffs or the class by that statute. Defendants anticipate that the plaintiffs will adopt the contrary position on both of these issues.

17. These issues of law are “substantial,” in that the precedent established in this case will establish or eliminate a basis of liability under federal law, and, if a cause of action exists based on these federal statutes and regulations, this case will set the requirements of that cause of action.

18. This Court may hear this case without disturbing any congressionally approved balance of federal and state judicial responsibilities.

19. For the foregoing reasons, these claims arise under the laws of the United States, and this Court has original jurisdiction over them. *See* 28 U.S.C. § 1331; *Grable*, 545 U.S. at 314.

20. Plaintiffs' first amended complaint also asserts claims arising under state law. Given that the pendent state claims in plaintiffs' complaint are sufficiently related to the federal claims and form part of the same case or controversy, this Court may exercise supplemental jurisdiction over the state-law claims. *See* 28 U.S.C. § 1367; *Lindsey v. Dillard's, Inc.*, 306 F.3d 596, 598 (8th Cir. 2002).

21. Because plaintiffs' claims arise under the laws of the United States, removal of this entire action is appropriate under 28 U.S.C. § 1441(a)-(c).

Jurisdiction under 28 U.S.C. § 1332(d)

22. As an alternative basis for removal, this Court has original diversity jurisdiction over this action under CAFA, 28 U.S.C. § 1332(d).

23. CAFA applies to civil class actions commenced on or after February 18, 2005. *See* Pub. L. No. 109-2 § 9, 119 Stat. 4, 14 (2005). CAFA confers federal jurisdiction over class actions where “1) there is minimal diversity; 2) the proposed class contains at least 100 members; and 3) the amount in controversy is at least \$5 million in the aggregate.” *Plubell v. Merck & Co.*, 434 F.3d 1070, 1071 (8th Cir. 2006) (citing 28 U.S.C. § 1332(d)).

24. “Minimal diversity” exists if the citizenship of “any member of a class of plaintiffs is a citizen of a State different from any defendant.” *See* U.S.C. § 1332(d)(2)(A) (emphasis added). Here, even though defendants are citizens of the State of Arkansas, minimal diversity exists because at least one member of the putative class is a citizen of a state other than Arkansas.

25. The plaintiffs' first amended complaint defines the putative class as "all residents and estates of all residents" of the stated facilities for the specified period. (First Am. Compl. ¶ 5.) Based on this class definition, one or more members of the described class are not citizens of the State of Arkansas.

26. The plaintiffs' first amended complaint expressly alleges that "[f]rom April 1, 2014 to July 31, 2017, the Defendants provided custodial care to more than 500 Residents at the Facilities." (First. Am. Compl. ¶ 61.) The class size therefore contains more than 100 members.

27. CAFA does not require a defendant to admit or prove that class-wide damages "are greater" than \$5 million, only that "a fact finder might legally conclude that they are." *Raskas v. Johnson & Johnson*, 719 F.3d 884, 887 (8th Cir. 2013). Once the removing defendant "has explained plausibly how the stakes exceed \$5 million, . . . the case belongs in federal court unless it is legally impossible for the plaintiff to recover that much." *Id.* at 888.

28. The amount in controversy for the putative 500+ member class in the aggregate exceeds \$5,000,000.00 because plaintiffs seek substantial compensatory damages, attorneys' fees, and punitive damages, all of which are included as part of the amount in controversy.

29. Accordingly, this Court has original jurisdiction over the plaintiffs' first amended complaint pursuant to 28 U.S.C. § 1332(d), and this action is removable pursuant to 28 U.S.C. § 1441(a).

Compliance with Procedural Requirements

30. This notice of removal is timely pursuant to 28 U.S.C. § 1446(b) because this notice of removal has been filed within thirty (30) days of November 6, 2017, which is the earliest service date .

31. Attached as Exhibit 1 is a copy of all documents filed in the State Court Case, which includes all process, pleadings, and orders served upon defendants in the State Court Case in compliance with 28 U.S.C. § 1446(a).

32. Defendants are also filing contemporaneously with this Notice a civil cover sheet and a separately signed certificate of interested persons and corporate disclosure statements that comply with the local Federal Rule of Civil Procedure 7.1.

33. The United States District Court for the Western District of Arkansas, El Dorado Division, is the proper venue for this action under 28 U.S.C. § 1441(a) because it is the federal district court that embraces Ouachita County, Arkansas, which is the place where the original action was filed and remains pending at the time of removal.

34. This notice of removal is signed pursuant to Rule 11 of the Federal Rules of Civil Procedure, as required by 28 U.S.C. § 1446(a).

35. Undersigned counsel have been retained to represent all of the defendants in this matter and are authorized to state that all properly joined and served defendants join in or consent to the removal of this action to federal court as required by 28 U.S.C. § 1446(b)(2).

36. The defendants named only under the fictitious names “John Doe Defendants 1 through 5” need not be considered for purposes of determining this Court’s diversity jurisdiction, nor is it necessary for those defendants to consent to removal. See 28 U.S.C. §§ 1441(b)(1), 1446(b)(2)(A).

37. A filed-marked copy of this notice will be filed with the Clerk of the Circuit Court of Ouachita County, Arkansas, in accordance with 28 U.S.C. § 1446. Defendants are also giving prompt written notice to the plaintiffs of the filing of this Notice of Removal.

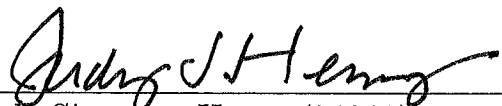
38. Nothing in this Notice of Removal shall be interpreted as a waiver or relinquishment of defendants’ rights to assert any defense or affirmative matter, whether pursuant to Fed. R. Civ. Proc. 8(c), Fed. R. Civ. Proc. 12(b), or otherwise.

39. Defendants reserve the right to amend or supplement this Notice of Removal.

WHEREFORE, defendants Ovation Health Systems, Inc.; Reliance Health Care, Inc.; RHC Operations, Inc.; Eagle Health Systems, Inc.; AFNC, Inc. d/b/a Eaglecrest Nursing and Rehab; GNNC, Inc. d/b/a Gosnell Therapy and Living; Lakeside Nursing and Rehabilitation Center, Inc. d/b/a Lakeside Nursing Center; RTNC, Inc. d/b/a Rector Nursing and Rehab; OCNC, Inc. d/b/a Silver Oaks Health and Rehabilitation; SLNC, Inc. d/b/a Southfork River Therapy and Living; Westwood Health and Rehab, Inc.; Windcrest Health and Rehab, Inc.; Bryan M. Adams; Anthony Brandon Adams; Gena Turner; Amy Rollins; April Spurlock; Andrea Neil; Rebecca Leavitt; Kathy Speaks; Kathy Langley; Brent Tyson;

Jacquelyn Maddox; and John R. McPherson hereby remove this action from the Circuit Court of Ouachita County, Arkansas, to this Court and respectfully request that this Court take jurisdiction of this action and seek resolution by this Court of all issues raised in this action.

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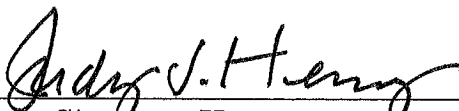
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Attorneys for Defendants

CERTIFICATE OF SERVICE

On December 6, 2017, a copy of the foregoing was served by first class U.S. mail, postage prepaid on the following:

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Attorneys for Plaintiffs



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