

did not sign the notice of removal; however, Armstrong averred in its notice that Brooks had agreed to the removal of this case to federal court. Armstrong also attached to its notice a letter it had previously sent to Brooks which stated: “Please be advised that per our conversation, you had no objection to Armstrong Blum filing a Notice of Removal on behalf of Brooks Machine, Inc.” (Armstrong’s Resp., Ex. A.)

On January 11, 2001, more than thirty days after the service of the complaint to both defendants, Armstrong and Brooks jointly filed an amended notice of removal with this Court. Plaintiffs argue that the original notice of removal is procedurally defective because both defendants did not consent to removal and that the amended notice of removal should be stricken because it is time barred. Accordingly, plaintiffs request that this case be remanded to the Court of Common Pleas of Philadelphia County.

II. Analysis

A defendant may remove any civil action from a state court to a federal court. See 28 U.S.C. § 1441. A defendant’s right of removal is a statutory one, and the procedures to effect removal must be followed. See Lewis v. Rego, 757 F.2d 66, 68 (3d Cir. 1985). Removal statutes are to be strictly construed, and all doubts are resolved in favor of remand. See Landman v. Borough of Bristol, 896 F. Supp. 406, 408 (E.D. Pa. 1995) (citing Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990), cert. denied, 498 U.S. 1085, 111 S. Ct. 959, 112 L. Ed. 2d 1046 (1991)). Under 28 U.S.C. § 1446, a defendant must remove within thirty days of service of the complaint. The Court of Appeals for the Third Circuit has construed section 1446 to

require that *all* defendants must join in the removal petition.¹ See Lewis, 757 F.2d at 68 (citing Northern Illinois Gas Co. v. Airco Indus. Gases, 676 F.2d 270, 272 (7th Cir. 1982)); Davidson v. National R.R. Passenger Corp., Civ. A. No. 00-1226, 2000 U.S. Dist. LEXIS 8707, at *4 (E.D. Pa. June 9, 2000); Landman v. Borough of Bristol, 896 F. Supp. 406, 408 (E.D. Pa. 1995); Ogletree v. Barnes, 851 F. Supp. 184, 186 (E.D. Pa. 1994); Prowell v. West Chem. Prod., Inc., 678 F. Supp. 553, 554 (E.D. Pa. 1988). The so-called rule of unanimity provides that “all defendants must join in the notice of removal or *otherwise consent* to the removal.” Ogletree, 851 F. Supp. at 186 (emphasis added). “A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446 (a).” 28 U.S.C. § 1441.

The parties do not dispute that the rule of unanimity is applicable to this case. Rather, the issues in dispute are (1) whether Brooks properly consented to join in the notice of removal filed by Armstrong when it did not personally sign the notice or otherwise express its consent to this

¹ Specifically, section 1446 provides in relevant part:

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action. (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

Court within thirty days of service of the complaint; and (2) whether the jointly filed amended notice of appeal is time barred.

It appears that the majority of courts both within and outside this circuit have held that consent to join in a notice of removal must be express, official and unambiguous.² See Getty Oil, Div. of Texaco, Inc. v. Ins. Co. of North Am., 841 F.2d 1254, 1262 (5th Cir. 1998); Parker v. Johnny Tart Enterprises, 104 F. Supp. 2d 581, 584 (M.D.N.C. 1999); Codapro Corp. v. Wilson, 997 F. Supp. 322, 325 (E.D.N.Y. 1998); Patel v. Moore, 968 F. Supp. 587, 590 (D.C. Kan. 1997); Ogletree, 851 F. Supp. at 188; Production Stamping Corp. v. Maryland Casualty Co., 829 F. Supp. 1074, 1076 (E.D. Wisc. 1993); Knickerbocker v. Chrysler Corp., 728 F. Supp. 460, 461-62 (E.D. Mich. 1990); but see Jasper v. Wal-Mart Stores, Inc., 732 F. Supp. 104, 105 (M.D. Fla. 1990) (court determined that “the petition must be signed by all defendants or the signer must allege consent of all defendants”).

Armstrong argues that Brooks’ method of joinder in the notice of removal is valid for four reasons. First, Armstrong contends that, relying on Ogletree, “under federal law, it is not necessary that all defendants sign the Petition for Removal.” (Armstrong’s Resp. to Pls’ Mot. to Rem., ¶ 5). Armstrong failed, however, to fully articulate the holding of Ogletree. The Court determined that while all defendants do not have to sign the notice of removal, absent the signature of all defendants, ““some timely filed written document from each served defendant or its official representative, indicating that it has consented [to remove]”” is necessary to properly effectuate removal to a federal court. Ogletree, 851 F. Supp. at 188 (quoting Thompson v.

² There are few circuit court cases addressing this matter because 28 U.S.C. § 1447 (d) provides, with limited exceptions, that “an order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise.”

Louisville Ladder Corp., 835 F. Supp. 336, 337 n.3 (E.D. Tex. 1993)); see also Southwick v. Yale Materials Handling Corp., No. Civ.A. 97-383, 1997 WL 381771, at *1 (E.D. Pa. June 27, 1993).

Armstrong next argues that its own proclamation that Brooks had consented to the removal suffices to show the requisite intent. However, one defendant may not speak for the other when filing a notice of removal. See Landman, 896 F. Supp. at 408-09 (determining that one defendant's assertion of consent on behalf of a co-defendant is insufficient to establish the requisite intent). All defendants must instead, expressly, officially and unambiguously consent to the notice of removal. See Ogletree, 851 F. Supp. at 186 (quoting Getty Oil, Div. of Texaco, Inc. v. Ins. Co. of North Am., 841 F.2d 1254, 1262 (5th Cir. 1988)) (without such direct consent, "there would be nothing on the record to 'bind' the allegedly consenting defendant"). Armstrong's statement in its notice of removal regarding Brooks' consent is therefore insufficient to establish that both defendants consented to join in the removal within the requisite thirty day period.

Armstrong also argues that this Court should find that Brooks consented because it filed an entry of appearance with this Court. However, filing an entry of appearance fails to constitute consent. See Southwick, 1997 WL 381771, at *2; See also Landman, (determining that answering a complaint does not qualify as consent). Filing an entry of appearance merely demonstrates that the defendant knew the case had been removed. See Southwick, 1997 WL 381771, at *2. Accordingly, I conclude that the entry of an appearance fails to establish the consent necessary to establish joinder in the notice of removal within the requisite period.

Finally, Armstrong would like this Court to accept an amended notice of removal filed

after the thirty day statutory period has expired. It is well-settled in this district that “the thirty-day limitation is mandatory and the court is without authority to expand it.” Ogletree, supra, 851 F. Supp. at 190 (quoting Collins v. American Red Cross, 724 F. Supp. 353, 359 (E.D. Pa. 1989)); See also McManus v. Glassman’s Wynnefield, Inc., 710 F. Supp. 1043, 1045 (E.D. Pa. 1989); Balestrieri v. Bell Asbestos Mines, Ltd., 544 F. Supp. 528, 529 (E.D. Pa. 1982).³

Armstrong asserts that courts have allowed defendants to file an amended notice of removal outside the thirty day removal period to cure technical defects. However, the cases cited by Armstrong do not support its argument.

Armstrong argues that the holding of Lewis v. Rego, 757 F. 2d at 68, where the court allowed co-defendants to file an amended notice of removal after the expiration of the thirty day period, should control here. Armstrong, however, misstates the holding of this case. Lewis involved what is known as the non-service exception to the unanimity rule. The defendants there were allowed to file an amended notice of removal solely because they had yet to be served with the complaint when the original notice of removal was filed. See Id. at 68. That exception is inapplicable where both defendants involved here were served with the complaint before Armstrong filed the original notice of removal.

Armstrong also mistakenly relies upon Miniet v. Automated Packaging Systems Inc., Civ. A. No. 96-1970, 1996 U.S. Dist. Lexis 21805, at *12-13 (D. N.J. June 3, 1996), where the court

³ But cf., Notte v. Sears, Roebuck & Company, et al., No. 9106069, 1991 U.S. Dist. LEXIS 18706, at *3 (E.D. Pa. December 20, 1991) (allowing defendants to amend notice of removal in order to clarify the unanimity of all defendants). Notte appears to be an aberration from the view of the majority of the courts inside and outside of this district. This Court is unpersuaded by the decision in Notte. It is conclusory in nature and unclear whether the thirty day period was even at issue in that case.

determined that technical defects may be cured after the expiration of the thirty day period. However, the court further provided that “where the defect is fundamental, ... the notice of removal may not be untimely amended ... [T]he thirty day requirement imposed by 28 U.S.C. § 1446 is fundamental.” Miniet, 1996 U.S. Dist. Lexis 21805, at *12-13. The requirement that all defendants unequivocally express their consent to join in the notice of removal is also a fundamental aspect of 28 U.S.C. § 1446. Lewis v. Rego, 757 F. 2d at 68. Defendant Brooks’ failure to properly join in the notice of removal is a fundamental defect that may not be cured after the expiration of the thirty day period.⁴

III. CONCLUSION

All defendants to an action must expressly, officially and unambiguously consent to join in a notice of removal to federal court. I find that Defendant Brooks failed to take such action in a timely fashion. Therefore, I conclude that this case must be remanded to the Court of Common Pleas of Philadelphia County.

An appropriate Order follows.

⁴ Armstrong also argues that it is being deprived of its fifth amendment right to due process because Congress provides a federal forum for diversity cases. Armstrong’s constitutional argument is without merit. The courts of this circuit, and the majority of courts nationwide, have interpreted section 1446 to require that all defendants must expressly join in a notice of removal. Lewis v. Rego, 757 F. 2d at 68.

Armstrong has the right to be heard in federal court only to the extent that it follows the procedures to properly effectuate such removal. If Armstrong and Brooks both expressly consented to the notice of removal, then this case would have been heard in federal court. Their failure to follow clear procedure bars their right to be heard in federal court. Their defenses will be adjudicated in the state court where their due process rights will be observed.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DANIEL MORGANTI and	:	CIVIL ACTION
DONNA MORGANTI, h/w	:	
	:	
Plaintiffs,	:	
v.	:	NO. 00-6343
	:	
ARMSTRONG BLUM MANUFACTURING	:	
COMPANY and MARVEL INTERNATIONAL	:	
INC. and BROOKS MACHINE, INC.	:	
	:	
Defendants.	:	

ORDER

AND NOW on this 19th day of March, 2001, upon consideration of the motion of plaintiffs to remand (Document No. 5) pursuant to 28 U.S.C. §1447 (c), the motion of plaintiffs to strike the amended notice of removal of defendants (Document 13), the responses, replies, the pleadings and affidavits submitted therewith, and having concluded, for the reasons set forth in the foregoing memorandum, that Armstrong and Brooks failed to join in the original notice of removal and that the amended notice of removal was not timely filed, it is hereby **ORDERED** that the motions of plaintiffs are **GRANTED** and the amended notice of removal is stricken.

It is further **ORDERED** that this action is hereby **REMANDED** to the Court of Common Pleas in Philadelphia County, Pennsylvania at Civil Action No. 2111, November Term, 2000, and that the Clerk of this Court shall forthwith cause the file and record to be delivered to the Prothonotary of the Court of Common Pleas of Philadelphia County.

LOWELL A. REED, JR., S.J.

