

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

JERRY GARGIULO,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
JOHN P. DESSAUER, et al.,	:	
Defendants.	:	No. 04-1206

MEMORANDUM AND ORDER

Schiller, J.

May 5, 2004

On March 19, 2004, Defendants John P. Dessauer, John Dessauer’s Investor’s World and Phillips Investment Resources, LLC (“PIR”) removed this action to this Court from the Court of Common Pleas of Philadelphia County. Presently before the Court is Plaintiff’s timely Petition to Remand under 28 U.S.C. § 1447(c). For the reasons stated below, I deny Plaintiff’s Petition to Remand.

I. BACKGROUND

Plaintiff brought suit in the Court of Common Pleas of Philadelphia County against Defendants for breach of contract, negligent misrepresentation, negligence, and violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (“UTPCPL”). In his complaint, Plaintiff alleges that he purchased a subscription to “John Dessauer’s Investor’s World,” in which Defendant Dessauer pledged to “bring unique benefits each month . . . [through] confidence that comes from firsthand research [by] travel[ing] the globe, grill[ing] the CEOs and run[n]g the numbers [him]self for all the companies [he] recommend[s].” (Compl. ¶ 13.) Plaintiff also alleges that in subsequent written representations, Defendant Dessauer reiterated the pledge to do firsthand

research on the companies that he recommended. From January to November 2001, Plaintiff allegedly relied on this promise when he purchased shares of Global Crossings Ltd. (“Global Crossing”) stock pursuant to Defendants’ recommendations.

In the March 2002 issue of John Dessauer’s *Investor’s World*, Defendant Dessauer allegedly admitted a mistake in recommending Global Crossing stock to subscribers, stating that: (1) “I let my guard down”; (2) “In light of the collapse of Global Crossing, I will redouble my effort toward getting to know the top management of our companies”; (3) “My mistake was relying on other people’s judgment of top management, rather than making my own evaluation”; and (4) “The bankruptcy proposal by management says that I was 100% wrong about their character Management should be fired and replaced by people with some sense of equity and ethics.” (Compl. ¶ 21, Ex. B.) Plaintiff asserts that as a direct result of this breach of Defendants’ promise to conduct firsthand research, Plaintiff suffered losses in excess of \$50,000.00.

On March 19, 2004, Defendants removed this action to this Court from the Court of Common Pleas. In their Notice of Removal, Defendants alleged complete diversity of citizenship as the basis for removal under 28 U.S.C. § 1332, stating that “plaintiff, Jerry Gargiulo is alleged to be a resident of Philadelphia, Pennsylvania, while defendant Dessauer is a resident and defendant PIR is a limited liability company organized under the laws of the State of Maryland and with a principal place of business in Potomac, Maryland.” (Notice of Removal ¶ 1 (*citing* Compl. ¶¶ 2, 3, 5).) Plaintiff moved this Court for remand to the Court of Common Pleas, asserting that removal was defective as Defendants failed to sufficiently allege diversity of citizenship. Specifically, Plaintiff argues that: (1) there is no allegation of “citizenship” as Defendants have only alleged “residency;” (2) Defendants failed to properly allege citizenship of PIR in that “a” principal place of business was

alleged instead of “its” principal place of business; and (3) Defendants have failed to allege the existence of diversity of citizenship both at the commencement of the action in state court and at the time of removal. (Pet. to Remand ¶ 6.)

Defendants thereafter filed an amended Notice of Removal, which specifically stated that at the time the complaint was removed to the time the amended notice was filed, Plaintiff was a citizen of Pennsylvania, Defendant Dessauer was a citizen of Florida, and Defendant PIR was a citizen of Maryland with its principal place of business in Potomac, Maryland. (Am. Notice of Removal ¶¶ 1-4.) Plaintiff supplemented his petition for remand by reiterating his previous arguments and asserting that Defendants’ amendment was untimely.

II. DISCUSSION

Under 28 U.S.C. §§ 1441 and 1446, a state court action may be removed by the defendant to the district court having original jurisdiction and embracing the place where such action is pending within thirty days after the service of summons upon the defendant. 28 U.S.C. §§ 1441(a), 1446(c)(1) (2004). Defendants allege that this Court has original jurisdiction over this case pursuant to 28 U.S.C. §1332. 28 U.S.C. §1332 (2004). Under § 1332, a district court has jurisdiction over a civil action if the parties are citizens of different states and the amount in controversy exceeds \$75,000.00.¹ 28 U.S.C. § 1332(a). In order to remove a case where jurisdiction is predicated upon 28 U.S.C. § 1332, diversity jurisdiction must be alleged at the time the complaint was filed and at

¹ In their Notice of Removal, Defendants assert that while Plaintiff only pled a loss of \$50,000.00 in his complaint, Plaintiff’s counsel advised Defendants’ counsel that he was seeking approximately \$400,000.00 in compensatory damages, treble damages, attorneys fees, costs, and interest. (Notice of Removal ¶ 2; Am. Notice of Removal ¶ 5.)

the time of removal. *Ellerbee v. Union Zinc, Inc.*, 881 F. Supp. 162, 164 (E.D. Pa. 1995). Where a corporation is one of the parties to the action, it is deemed to be “a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.” 28 U.S.C. § 1332(c)(1).

A notice of removal that alleges that a corporate defendant has “a” principal place instead of “its” principal place of business fails to properly plead diversity jurisdiction. *Hunt v. Acromed Corp.*, 961 F.2d 1079, 1080, 1082 n.7 (3d Cir. 1992); *Meltzer v. Continental Ins. Co.*, 163 F. Supp. 2d 523, 526 (E.D. Pa. 2001) (holding that “the replacement of ‘its’ with ‘a’ renders the notice of removal ‘technically defective.’” (quoting *Hunt*, 961 F.2d at 1080, 1082)). Under 28 U.S.C. § 1653, however, a court may permit a defendant to amend a notice of removal to correct defects in allegations of jurisdiction. 28 U.S.C. § 1653; *J & R Ice Cream Corp. v. Ca. Smoothie Licensing Corp.*, 31 F.3d 1259, 1265 n.3 (3d Cir. 1994); *Ellerbee*, 881 F. Supp. at 164-65 (allowing amendment to cure technical pleading deficiencies). An imperfect or defective allegation can be amended outside the thirty-day period for removal provided for under 28 U.S.C. § 1446, but a missing or completely new jurisdictional allegation may not be added by amendment after the thirty-day period has expired. 28 U.S.C. § 1446(b); *Miller v. Principal Life Ins. Co.*, 189 F. Supp. 2d 254, 258 (E.D. Pa. 2002) (holding that amended notice of removal is permitted where amendment simply corrects technical omission); *Ellerbee*, 881 F. Supp. at 164-65; 14C CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE. § 3733 (3d ed. 1998) (stating that in amending defective notice of removal, “completely new grounds for removal jurisdiction may not be added and missing allegations may not be furnished”).

In this case, it is clear that diversity of citizenship has been sufficiently alleged by

Defendants. Although Defendants' original notice of removal contained a defective allegation that diversity of citizenship existed, Defendants' amended notice of removal successfully cured the technical defect by replacing "a" with "its" and replacing "resident" with "citizen". In doing so, Defendants did not add a new jurisdictional allegation. Notably, Plaintiff does not contest that diversity exists, rather he argues that it was merely pled improperly. Accordingly, I find that the defects with Defendants' allegation were technical in nature and thus were cured by amendment. *Hunt*, 961 F.2d at 1080, 1082; *J & R Ice Cream Corp.*, 31 F.3d at 1265 n.3; *Ellerbee*, 881 F. Supp at 165; *Stellwagen v. ChemLawn Servs. Corp.*, Civ. A. No. 92-6437, 1993 U.S. Dist. LEXIS 210, at *4-5, 1993 WL 9025, at *1-2 (E.D. Pa. Jan. 11, 1993) (permitting amendment to cure jurisdictional allegation in notice of removal where plaintiff did not deny that diversity existed); *Camacho v. Cove Trader, Inc.*, 612 F. Supp. 1190, 1192-93 (E.D. Pa. 1985) (permitting amendment where residency alleged instead of citizenship and diversity of citizenship was not contested); *Moser v. Bostitch Div. of Textron, Inc.*, 609 F. Supp. 917, 919 (W.D. Pa. 1985) (permitting amendment where notice of removal averred defendant had "a" principal place of business in Ohio and that plaintiff was resident, not citizen, of Pennsylvania). Thus, diversity of citizenship has been sufficiently alleged, and Plaintiff's Petition to Remand is denied.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Petition to Remand is denied. An appropriate Order follows.

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Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
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JOHN P. DESSAUER, et al.,	:	No. 04-1206
Defendants.	:	

ORDER

AND NOW, this 5th day of **May, 2004**, upon consideration of Plaintiff's Petition to Remand, his Supplemental Petition to Remand, and Defendants' response thereto, it is hereby **ORDERED** that:

Plaintiff's Petition to Remand (Document No. 15) is **DENIED**.

BY THE COURT:

Berle M. Schiller, J.