

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

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CLEAR CHANNEL COMMUNICATIONS,	:	
INC.; and CC MEDIA HOLDINGS, INC.,	:	
	:	
Plaintiffs,	:	
	:	
- against -	:	
	:	
CITIGROUP GLOBAL MARKETS, INC.;	:	
CITICORP USA, INC.; CITICORP NORTH	:	Civil Action No. SA-08-CA-
AMERICA, INC.; MORGAN STANLEY	:	0251-OG
SENIOR FUNDING, INC.; CREDIT SUISSE	:	
SECURITIES USA, LLC; RBS SECURITIES	:	
CORPORATION; WACHOVIA	:	
INVESTMENT HOLDINGS, LLC;	:	
WACHOVIA CAPITAL MARKETS, LLC;	:	
and DEUTSCHE BANK SECURITIES INC.,	:	
	:	
Defendants.	:	
	:	
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**DEFENDANTS’ SUR-REPLY IN OPPOSITION TO PLAINTIFFS’
EMERGENCY MOTION FOR REMAND AND REQUEST FOR
EXPEDITED RULING**

In their reply brief, Plaintiffs do not dispute most of the key points in Defendants’ opposition papers: as Plaintiffs are compelled to recognize, the fraudulent joinder doctrine *does* apply to joinder of Plaintiffs; CC Media Holdings, Inc. is a shell corporation wholly owned and controlled by the Buyers/Sponsors who signed the loan commitment containing an exclusive New York forum selection clause; and the individual who signed that commitment letter and agreed that CC Media would be bound was the President of CC Media and therefore had authority to bind CC Media. These undisputed facts conclusively establish that CC Media is barred from suing in Texas state or federal court.

The only argument Plaintiffs now advance in their reply brief is that it does not matter whether CC Media can file its claim in Texas because the fraudulent joinder doctrine looks only at whether a plaintiff has a claim, not where that claim can be filed. That argument is wrong, however, and in advancing it Plaintiffs ignore contrary caselaw cited in Defendants' opposition brief, not to mention the basic principles of fraudulent joinder, and misstate the holding in the one case on which they rely, Dripping Wet Water, Inc. v. Halox Technologies, Civ. No. SA-03-CA-1048-OG, 2004 U.S. Dist. LEXIS 18532 (W.D. Tex. Mar. 22, 2004).

As Defendants set forth in their opposition brief, under the doctrine of improper joinder, when "there is no reasonable basis for the district court to predict that the plaintiff might be able to recover" in the previously filed state court action, that plaintiff's claim cannot be a basis for thwarting the federal court's diversity jurisdiction. See Def. Opp. Br. at 6-7. Accordingly, *regardless* of whether the plaintiff might be able to bring the same claim in some other state, if the state court action that is the subject of removal cannot stand, then that claim cannot defeat federal jurisdiction. For this purpose, there is no principled distinction – Plaintiffs offer none and the case law recognizes none – between a case that is defective on its underlying merits and a case that is defective because the plaintiff is barred as a matter of law from bringing it in the underlying state court action that is the subject of the remand motion. In either case, the action is defective on its face, and therefore cannot be used to try to frustrate federal jurisdiction. Thus, for example, if personal jurisdiction is lacking over a defendant in a particular state, the defective claim must be disregarded for purposes of the improper joinder analysis, *regardless* of whether personal jurisdiction for the same claim could be obtained in some other state. See, e.g., Thomas v. Mitsubishi Motor North America, 436 F.Supp.2d 1250, 1252-56 (M.D. Ala. 2006) (denying motion to remand because state court lacked personal jurisdiction over the non-diverse

defendant) (cited at p. 11 of Def's Op. Brief). The same is true if the state claim that is the subject of the remand motion is time-barred, or barred for any legal reason, without regard to whether the claim would be similarly barred if brought in some other state. See Def. Op. Brief at 10-11 (citing In re Briscoe, 448 F.3d 201, 219 (3d Cir. 2006); O'Neil Productions, Inc. v. ABC Sports, Inc., No. 06-10804 Section C, 2007 U.S. Dist. LEXIS 28932 (E.D. La. Apr. 19, 2007)).

This same principle applies when the underlying state law claim is contractually barred, whether as a result of a forum selection clause requiring suit to be brought elsewhere, or some other contractual bar. See Def. Op. Brief at 14-15 (citing Guillot v. Credit Suisse First Boston, L.L.C., 03-0797, 2005 WL 2037372, at *4-5 (E.D. La. July 21, 2005); Hoosier Energy Rural Elec. Coop., Inc. v. Amoco Tax Leasing IV Corp., 34 F.3d 1310 (7th Cir. 1994); Ideal Brands Ltd. P'ship v. Spencer-Smith, 05-CV 131, 2005 U.S. Dist. LEXIS 20197 (S.D. Ohio Sept. 15, 2005)).

Plaintiffs are unable to provide any case law or any principled basis for contending that the same logic that governs those cases does not also govern here. Quite simply, if the plaintiffs' action is contractually barred from proceeding in the jurisdiction where plaintiff has attempted to bring it, then without any need to examine the underlying merits of the claim, "there is no reasonable basis for the district court to predict that the plaintiff might be able to recover" in the underlying state court action, Smallwood v. Ill. Cent. R.R. Co., 385 F.3d 568, 573 (5th Cir. 2004), and the barred state court action cannot strip the federal court of jurisdiction.

Plaintiffs' reliance on Dripping Wet Water is completely misplaced. Dripping Wet Water does not stand for the proposition that fraudulent misjoinder is limited to a consideration of whether a claim has merit and not where it was filed. The court in Dripping Wet Water never considered that issue because the only basis for removal advanced in that case was that there was

no merit to the substantive claim that had been made against one of the defendants. The court considered that issue, even allowing limited discovery and factual submissions, and upheld removal to federal court because the improperly joined defendant had no involvement in the underlying tort. The defendants also advanced other motions, including lack of venue and personal jurisdiction, but those were not the basis for the removal petition and the improper joinder argument. The court simply noted that these other motions would be considered after the removal petition and remand motion were decided. (Having found improper joinder because the relevant defendant was not involved in the underlying events, the Court then granted the separate motion to transfer the case to the federal district court in Connecticut, while denying without prejudice a motion to dismiss for lack of personal jurisdiction.) Quite simply, Dripping Wet Water does *not* stand for the proposition that even if a plaintiff is barred from bringing its action in the state court in which it has chosen to bring, it, the suit may nonetheless be a basis for thwarting diversity jurisdiction.

The 5th and 11th Circuits have expressly held that the misjoinder of a party who may have a meritorious claim, but whose claims are not closely related to others in the case, is grounds for removal under 28 USC § 1441. See In re Benjamin Moore & Co., 318 F.3d 626 (5th Cir. 2002) (also cited at p. 13 of our opposition brief); Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1359-60 (11th Cir. 1996); see also Crockett v. R.J. Reynolds, 436 F.3d 529, 533(5th Cir 2006) (applying the Tapscott doctrine); Accardo v. Lafayette Ins. Co., No. 06-8568 Section "R" (3), 2007 U.S. Dist. LEXIS 6859, at *9-16 (same). This doctrine, sometimes referred to as procedural fraudulent joinder, squarely applies in this case. In cases such as Tapscott and Benjamin Moore removal to federal court is allowed, not because the plaintiff's claims lack substantive merit, but because the procedural joinder rules do not permit those claims to be heard

in the same case as the other pending claims. That is precisely the situation here: CC Media is barred from joining this case because the forum selection clause it is bound to does not permit it to join its claim in this suit. If anything, the case for fraudulent joinder is even stronger here than in Tapscott and Benjamin Moore: In those cases the misjoinder violated a general procedural rule, but was not otherwise unlawful or deceptive. Here, the filing by CC Media is itself an unlawful abrogation of a binding contractual commitment in the same loan agreement that Plaintiffs are seeking to enforce. It is also noteworthy, that in the Tapscott line of cases the federal inquiry required is much more complicated and involved than in this case because the courts there are required first to decide whether to apply state or federal joinder rules and then must engage in an analysis to determine if there is enough overlap among the different claims to warrant joining them together in one action. Here the analysis is much simpler because it is clear that the joinder by CC Media violates the forum selection clause in the loan commitment.

Finally, the argument by CC Media that the fact that it is barred from proceeding in Texas is not relevant to this Court's removal jurisdiction is completely inconsistent with the fundamental principles of that jurisdiction. The only reason for permitting a plaintiff to seek removal to a state court is when the plaintiff has a right to pursue a claim in that state court. That rationale has no application whatsoever in a case such as this in which it is clear that the plaintiff, CC Media, has no right to proceed with its claim in any court in Texas.

In sum, Dripping Wet Water does *not* support the proposition that a plaintiff can defeat diversity jurisdiction by bringing a state action that is barred from being brought in the relevant jurisdiction. The law is clear that where such a claim is barred – whether because of lack of personal jurisdiction, statute of limitation or other statutory bar, procedural misjoinder, or a contractual bar including an applicable forum selection clause – it cannot be used to defeat

federal jurisdiction. Here, because CC Media is plainly bound by a forum selection clause requiring it to bring suit in New York, its effort to bring suit in Texas cannot destroy diversity and thereby deprive this Court of jurisdiction.

Dated: San Antonio, Texas
April 1, 2008

HAYNES & BOONE

By: /s/ Lamont A. Jefferson

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed electronically with the Clerk of the Court for the Western District of Texas, San Antonio Division, using the CM/ECF system with notice of case activity to be generated and sent electronically by the Clerk of the Court and by facsimile to all other parties.

On this 1st day of April, 2008.

 /s/ Lamont A. Jefferson
Lamont A. Jefferson