No. 23-677

In The

SUPREME COURT OF THE UNITED STATES

Royal Canin U.S.A., Inc., *et al.*,

Petitioners,

v.

Anastasia Wullschleger, *et al.*,

Respondents.

Amicus Brief in Support of Respondent
Affirmance Warranted

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Interests of Amicus Curiae, Thomas Fuller Ogden

I know neither party nor have any financial stake. I am a member of this Court's bar and, since 2014, recognized by the CA bar as one of less than 200 lawyers designated Certified Appellate Law Specialist. I have been involved in numerous federal appellate matters. For instance, I was appellate counsel before the 9th Cir. in *Lightfoot v. Cendant Mortgage Corp.*, 580 US 82 (2014), and preserved the points that unanimously prevailed before the Court regarding federal jurisdiction and removal.[1] I file this brief solely on my own behalf to assist the Court.

Summary of Argument

A faulty assumption permeates that respondents' amended complaint was a voluntary act simply because FRCP 15(a)(1)'s "matter of course" amendment provision was used. R.15(a)(1) nowhere says amending is tantamount to a voluntary act. Respondents obviously amended in a coercive litigation environment thereby making the amendment involuntary. As amendment was involuntary, it was error not to consider the original complaint for purposes of assessing jurisdiction. [2]

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from Thomas Fuller Ogden, made any monetary contribution intended to fund the preparation or submission of this brief.

[2] In full disclosure, I initially filed this brief on 8/12/24, in support of neither party and concluded reversal warranted. Respondent's counsel correctly noted the brief as untimely if in support of neither party. Therefore, I have amended to support Respondent's position as a strong argument exists that

Argument.

A largely ignored threshold question exists regarding whether respondent's amended complaint was voluntarily filed. The questions presented cannot be answered until this question is first addressed.

The 8th Cir. and parties agree the original complaint is alive if an amended complaint was filed due to involuntariness. The assumption, to date, seemingly is respondents' amended complaint was voluntarily filed as amending a pleading, via FRCP 15(a)(1), is tantamount to a voluntary act. Accordingly, the conclusion so far is the original complaint cannot be assessed for purposes of federal question jurisdiction because respondents' amended complaint supersedes it given the voluntary nature of the amendment.[3] What is puzzling is the plain text of

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Petitioner waived issues addressed here that the amended complaint was involuntarily filed. In order to comply with the amicus filing rules, and allow a timely filed brief in support of respondent, my conclusion would be that reversal is not warranted as petitioner conceded the amended complaint was voluntarily filed. However, by determining waiver, the Court would still be effectuating the observation that FRCP 15(a)'s matter of course amendment provision is not conclusive that amendments were voluntary. The important point in this matter is that R.15(a)(1) amendments, to defeat removal, should be presumed involuntarily filed unless rebutted by plaintiff. The undersigned flip-flops, from supporting neither party to respondent, as the point of law is more important to the undersigned to get before the Court than which party should prevail. By pointing out waiver potentially occurred by petitioners, this amicus' conclusions clearly are technically now swayed to supporting Respondent thereby allowing filing.

[3] As an aside, respondents claim the amended complaint now relates back under FRCP 15(c) is misplaced. The 1966

R.15(a)(1) nowhere says the act of amending as a matter of course is equivalent to a voluntary act.

The 8th Cir., at app'x p.7a fn1, refers in passing to *In re Atlas Van Lines, Inc.,* 209 F.3d 1064 (8th Cir. 2000):

> There is an exception. We would have looked at the original complaint if the "district court [had] order[ed] [Wullschleger] to amend [her] complaint or [if] the **decision to amend [was] otherwise involuntary.**" *Atlas Van Lines*, 209 F.3d at 1067... Neither, however, occurred here. [my emphasis]

The 8th Cir. used four words to analyze respondents' decision process regarding amending. In a colloquial sense, trial court practitioners – the undersigned included— loosely refer to amending as a matter of course as a voluntary amendment. The nuanced and correct approach, however, is to not simply conclude that just because R.15(a)(1) was used that an amendment was voluntary. It seems colloquialism permeates and clouds analysis here.

Atlas indicates inquiry into a party's decision to amend is necessary to assess whether it was voluntarily made. *Atlas* says amending a pleading to avoid a coercive predicament (*e.g.*, potential dismissal) indicates amendment was involuntary. *Id.* at 1067. The 8th Cir. nowhere states any findings, beyond the perfunctory fact R.15(a) was used to amend, concerning respondents' decision to amend.

Advisory Committee Notes on Rule 15(c) confirms the relation-back effect of R.15(c) regards statute of limitation concerns and not jurisdictional ones as respondents believe.

The 8th Cir., instead, appears to incorrectly equate the unilateral action allowed by amending under R.15(a) as voluntary action. As unilateral action and voluntary action usually appear objectively similar, it is easy to see how analyzing respondents' subjective decision-making was glossed over. The reality is respondents' unilateral amending act is not necessarily voluntary.

No reasoned explanation exists why the amended complaint was the product of voluntary action when everything indicates respondents amended to thwart the coercive predicament of a likely federal court dismissal that did occur. Respondents' brief argues the forum-shopping policy considerations raised by petitioners should be irrelevant when addressing jurisdiction questions. Yet, those forum-shopping considerations are indeed materially relevant when assessing respondents' decision to amend. With a meritorious case it should make no difference what forum a matter is to be heard in as any competent court should be able to remedy a wrong. The fact respondents zealously did everything in their power to get out of federal court only bolsters a factual conclusion respondents perceived a coercive predicament of the type alluded to in *Atlas*. The fact respondents were later dismissed further confirms respondents amended while feeling coerced and compelled towards efforts to hopefully keep the matter alive. *Atlas* indicates respondents' amendment in such environment was involuntary.

Conclusion

The amended complaint was involuntarily filed given the coercive predicaments respondents believed they faced in federal court. The amended complaint was dismissed with proper jurisdiction as the original complaint, and its federal nature, still governed when the district court ruled on petitioners' R.12(b)(6) motion.

Nonetheless, reversal is not warranted here as petitioners nowhere preserved objection to the 8th Cir. characterization the amended complaint was voluntarily filed. The Court should focus discussion in the opinion to point out that FRCP 15(a)(1) does not presume a voluntary act, and that defeating removal by simply amending as of right should be presumed involuntary, warranting review of the original complaint for purposes of assessing jurisdiction.

At the same time, as this is a jurisdictional issue, the undersigned needs to point out that the Court probably can still ignore the waiver.

Respectfully Submitted,

Thomas Ogden

Thomas Ogden, Esq.