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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED
May 28, 2024
Lyle W. Cayce
Clerk

No. 23-40197

SARAH PALMQUIST, *Individually and as Next Friend of* E.P., *a minor*; GRANT PALMQUIST,

Plaintiffs—Appellants,

versus

THE HAIN CELESTIAL GROUP, INCORPORATED; WHOLE FOODS MARKET, INCORPORATED, *also known as* WHOLE FOODS MARKET ROCKY MOUNTAIN/SOUTHWEST, L.P.,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 3:21-CV-90

Before STEWART, CLEMENT, and HO, *Circuit Judges*.

CARL E. STEWART, *Circuit Judge*:

In 2021, Grant and Sarah Palmquist, individually and on behalf of their minor son ("Palmquists"), sued baby-food manufacturer, Hain Celestial Group, Inc. ("Hain"), and grocery retailer, Whole Foods Market, Inc. ("Whole Foods"), in Texas state court, seeking damages for their son [E.P.]'s physical and mental decline that began when he was about thirty months old. Following removal, the district court dismissed Whole Foods as improperly joined and granted judgment as a matter of law in favor of Hain during trial. The Palmquists appeal the district court's (1) dismissal of Whole Foods on improper joinder grounds, (2) denial of the Palmquists' motion to remand, and (3) grant of Hain's motion for judgment as a matter of law. For the reasons that follow, we hold that the Palmquists were entitled to a remand to state court because the allegations in their state-court complaint stated plausible claims against Whole Foods. Thus, we REVERSE the district court's judgment denying the Palmquists' motion to remand, VACATE the final judgment of the district court, and REMAND with instructions for the district court to remand the case to the state court.

I. Factual and Procedural History

A. Factual Background

Sarah Palmquist gave birth to [E.P.] in September 2014 after a healthy and uneventful pregnancy. During the first two years of his life, [E.P.] met or exceeded developmental milestones. The Palmquists allege that during this time, [E.P.] almost exclusively

consumed Hain's Earth's Best Organic Products, which the Palmquists purchased from Whole Foods.

When he was about thirty months old, [E.P.]'s "social, language, and behavior[al]" skills rapidly regressed. [E.P.]'s parents, Grant and Sarah, visited numerous physicians and specialists for a diagnosis and appropriate treatment. They aver that those medical tests revealed that [E.P.] suffered from several physical and mental disorders. [E.P.]'s physical ailments include seizure disorder, chronic diarrhea, epileptiform disorder (excessive and abnormal brain activity), hypotonia (abnormally decreased muscle tone), and mitochondrial dysfunction. [E.P.]'s mental diagnoses range from intellectual disability to anxiety and aggression. Some physicians attributed most, if not all, of [E.P.]'s symptoms to autism spectrum disorder or major neurocognitive disorder. Some physicians also diagnosed [E.P.] with heavy-metal poisoning. While the Palmquists assert that heavy metal toxicity caused [E.P.]'s symptoms, Hain attributes the entirety of [E.P.]'s disabilities to autism.

In 2021—several years after [E.P.]'s heavy metal toxicity diagnosis—the House Oversight and Reform Committee released a report ("Committee Report") demonstrating that certain baby foods, including Hain's, contained elevated levels of toxic heavy metals, including arsenic, lead, cadmium, and mercury. The Committee Report also revealed that: (1) Hain's Earth's Best Organic Products contained up to 129 parts per billion ("ppb") inorganic arsenic; (2)

some of Hain's ingredients contained as much as 352 ppb lead; and (3) Hain did not test for mercury.[1]

From 2014 to 2019, Hain only tested some ingredients in its baby foods for toxic metals but did not test the finished products. In 2019, in an effort to reduce the heavy-metal concentration in its products, Hain stopped using a vitamin pre-mixed ingredient, switched to a lower-arsenic-content rice for its infant cereal, and started final-product testing.

B. Procedural History

Attributing the high levels of toxic metals appearing in [E.P.]'s blood tests to his consumption of Earth's Best Organic Products, the Palmquists sued both Hain and Whole Foods in Texas state court in 2021, alleging strict-products-liability and negligence claims against Hain and breach-of-warranties and negligence claims against Whole Foods.[2] The Palmquists sought to show that heavy-metal exposure causes heavy-metal poisoning and that [E.P.]'s consumption of heavy metals in Hain's products caused his heavy-metal poisoning and resultant cognitive decline. Hain removed the case to federal court, contending that Whole Foods, a multinational supermarket chain headquartered in Austin, Texas, was improperly joined to defeat diversity jurisdiction.[3]

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[1] In 2016, the Food and Drug Administration ("FDA") published draft guidance recommending that infant-rice-cereal producers limit end-product inorganic-arsenic levels to 100 ppb.

[2] Hain is a Delaware corporation with its principal place of business in New York and therefore is a citizen of Delaware and New York. Whole Foods is a citizen of Texas.

[3] The Palmquists amended their state-court petition once in state court before the case was removed.

After removal, the Palmquists filed an amended complaint (the "second amended complaint") that purportedly "clarified their allegations against Whole Foods under the federal pleading standard." In their second amended complaint, the Palmquists sought to clarify that their breach-of-warranties cause of action included claims that Whole Foods expressly represented to the public and to the Palmquists that Hain's baby food was safe. The Palmquists also added a negligent-undertaking claim against Whole Foods.

After amending their complaint, the Palmquists moved to remand the suit, countering that they had viable claims against Whole Foods under the Texas Products Liability Act[4] and the Deceptive Trade Practices Act ("DTPA"). The Palmquists based their remand motion on the details in their second amended complaint.

The district court determined that any new claims could not be considered because jurisdiction "is resolved by looking at the complaint at the time [the] petition for removal [was] filed." Specifically, the district court concluded that the Palmquists added a new breach of express warranty claim in the second amended complaint, in addition to their new negligent-undertaking claim. Nonetheless, even considering the purportedly new express breach-of-warranty claim the district court concluded that, under the Texas Civil Practice & Remedies Code §

[4] Chapter 82 of the Texas Civil Practice & Remedies Code outlines the duties of manufacturers and nonmanufacturing sellers in a products liability action. Section 82.003(a) provides that a nonmanufacturing seller's protection from liability under Chapter 82 can be pierced if one of seven exceptions is established. TEX. CIV. PRAC. & REM. CODE ANN. § 82.003(a).

82.003(a), "[g]enerally, retail sellers such as Whole Foods are not liable for the harm caused by the products they sell." The district court subsequently determined that the Palmquists had improperly joined Whole Foods and dismissed their claims against it.

The Palmquists' claims against Hain proceeded in federal court. Prior to trial, Hain moved for summary judgment. The Palmquists' marketing-defect claim, manufacturing-defect claim, and negligent-testing claim all survived summary judgment. On February 6, 2023, a jury trial on the merits commenced. On February 15, 2023, Hain filed a written motion under Rule 50(a) of the Federal Rules of Civil Procedure, requesting that the court enter judgment as a matter of law because the Palmquists (1) failed to either prove specific causation or offer expert testimony to support general causation and (2) lacked sufficient evidence to establish that [E.P.] had heavy-metal toxicity. On February 17, 2023—after the Palmquists had rested—the court heard, considered, and orally granted in its entirety Hain's motion for judgment as a matter of law under Rule 50(a) finding that the Palmquists had presented "no evidence of general causation." The court explained that the jury "heard no testimony from a qualified expert that the ingestion of heavy metals can cause the array of symptoms that [E.P.] suffers from, much less any evidence of at what level those metals would have to be ingested to bring about those symptoms." The court ultimately concluded that "the law is clear that such testimony is necessary to show general causation." The Palmquists filed this appeal.

II. STANDARD OF REVIEW

Denial of a remand motion and the determination that a party is improperly joined are reviewed de novo. *Int'l Energy Ventures Mgmt., L.L.C., v. United Energy Grp. Ltd.*, 818 F.3d 193, 199 (5th Cir. 2016) (denying a remand motion); *Kling Realty Co., Inc. v. Chevron USA, Inc.*, 575 F.3d 510, 513 (5th Cir. 2009) (analyzing improper joinder). "[W]e have recognized two ways to establish improper joinder: (1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court." *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004) (en banc) (internal quotation marks and citations omitted). However, this court reviews a district court's procedure for determining improper joinder only for abuse of discretion. *Kling Realty Co.*, 575 F.3d at 513; *Guillory v. PPG Indus., Inc.*, 434 F.3d 303, 309–10 (5th Cir. 2005).

III. DISCUSSION

The Palmquists contend that the district court erred in its improper joinder analysis and erroneously denied their remand motion. The Palmquists challenge the court's conclusion that they are unable to recover against Whole Foods based on the claims alleged in either their state-court pleading or their second amended complaint. They argue that their second amended complaint detailed viable claims—already alleged in their original state-court petition—against Whole Foods, thus defeating diversity jurisdiction. Specifically, the Palmquists maintain that their state-court petition alleged a breach-of-warranties claim against Whole Foods before the case was removed to federal court and their amended

federal court complaint merely contained new *allegations* clarifying how those claims satisfied the newly applicable federal pleading standard. Thus, the Palmquists argue they have stated a claim against Whole Foods, which defeats diversity jurisdiction.

While the Palmquists concede that circuit precedent recognizes that plaintiffs cannot defeat removal by changing the substance of their pleadings, they nevertheless emphasize that removed plaintiffs are allowed to "clarify a petition that previously left the jurisdictional question ambiguous." *Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 264–65 (5th Cir. 1995) (holding that jurisdiction is judged "on the basis of claims in the state court complaint as it exists at the time of removal"). They contend that longstanding Fifth Circuit precedent holds that plaintiffs may "clarify" and "amplify" their jurisdictional allegations after removal for purposes of improper joinder analysis. *See Griggs v. State Farm Lloyds*, 181 F.3d 694, 699–700 (5th Cir. 1999).

A. "Breach of Warranties" Cause of Action

As an initial matter, the parties dispute whether the Palmquists' breach-of-warranties claim pleaded in state court was broad enough to encompass a claim for breach of express and implied warranties. We determine whether removal was proper by examining the Palmquists' pleading at the time of the petition for removal. *See Cavallini*, 44 F.3d at 264. "As the effect of removal is to deprive the state court of an action properly before it, removal raises significant federalism concerns. The removal statute is therefore to be strictly construed, and any doubt about the propriety of removal must be resolved in favor of remand." *Gasch v. Hartford Acc. & Indem. Co.*, 491

F.3d 278, 281–82 (5th Cir. 2007) (internal quotation marks and citations omitted). We conduct our improper joinder analysis "on the basis of claims in the state court complaint as it exists at the time of removal." *Cavallini*, 44 F.3d at 264. Thus, while we will not entertain new theories not raised in state court, we will examine the Palmquists' state-court pleadings and the viability of those claims alleged against Whole Foods, deferring to resolve any doubt or ambiguities in favor of remand. *Griggs*, 181 F.3d at 699.

Under the paragraph entitled "Breach of Warranties," the Palmquists' as-removed complaint alleged that:

> Whole Foods . . . sold Hain's Earth's Best Organic baby food products and in doing so impliedly warranted to the public generally and specifically that the products were safe for consumption by infants and young children . . . Whole Foods' implied warranty was incorrect given the high levels of heavy toxic metal Hain's baby food products contained . . . [The Palmquists'] injuries were sustained because of Whole Foods' implied warranties.

The "Breach of Warranties" paragraph of the as-removed complaint also stated that:

> [The Palmquists] relied on Whole Foods' representations that Hain's Earth's Best Organic baby food products were safe and of the highest quality . . . If Hain's products were as advertised, [the

> Palmquists] would not have been injured by the product. Hain and Whole Foods markets the Earth's Best Organic baby food products as safe, natural, and organically produced.

The language in the as-removed complaint was broad enough to encompass both breach of express and implied warranties' claims. The paragraph was entitled "Breach of Warranties," which could include both express and implied claims. *See Breach of Warranty*, Black's Law Dictionary (11th ed. 2019) ("[a] breach of an express or implied warranty relating to the title, quality, content, or condition of goods sold."); Tex. Bus. & Com. Code Ann. § 17.50(a)(2) (Texas's Deceptive Trade Practices Act empowers "[a] consumer [to] maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish: . . . breach of an express or implied warranty."). Although the language in the as-removed complaint generally discussed Whole Foods' implied warranties, it also discussed Whole Foods' express representations regarding Hain's products. We therefore hold that the district court erred in concluding that the Palmquists added a new breach of express warranty claim in their second amended complaint.

B. Improper Joinder Analysis

For purposes of our inquiry, circuit precedent directs us to conduct a Rule 12(b)(6)-type analysis, looking initially at the allegations in the complaint to determine whether it states a claim under state law against the in-state defendant. *Smallwood*, 385 F.3d at 573. Circuit precedent makes clear that removed state-court petitions are evaluated under the federal

pleading standard. *Int'l Energy Ventures Mgmt.*, 818 F.3d at 204 ("The *Smallwood* opinion instructs us to apply the Rule 12(b)(6)-type analysis, which must mean the entirety of that analysis. Because that analysis is inseparable from the federal pleading standard, this is an instruction to apply the federal pleading standard."); *see also Smallwood*, 385 F.3d at 573.

Before we conduct our improper joinder analysis, we must consider whether the Palmquists were permitted to amend their pleadings to conform to the federal pleading standard. In other words, we must assess whether we may consider the "express factual" language that the Palmquists added in their second amended complaint to describe representations Whole Foods made about its baby products. We will not consider the negligent-undertaking claim, a theory not raised in state court, in our analysis of whether Whole Foods was improperly joined. *Griggs*, 181 F.3d at 700.

In *Peña v. City of Rio Grande City*, this court held that where defendants challenge the pleadings on the merits after a case has been removed to federal court, plaintiffs should be permitted leave to amend their complaint in order to conform to the federal pleading standard. 879 F.3d 613, 617 (5th Cir. 2018). Although *Peña* concerned a motion for judgment on the pleadings rather than improper joinder, *id.* at 616, the same standard—the one provided by Federal Rule of Civil Procedure 12(b)(6) used to assess failure to state a claim—applied. *Id.* at 618 ("The city's motion for judgment on the pleadings is subject to this same standard [to which motions to dismiss are subject]."); *Mageev. Reed*, 912 F.3d 820, 822 (5th Cir. 2019)

("[T]he standard for dismissal under Rule 12(c) is the same as under Rule 12(b)(6).").[5]

Even if *Peña* is not binding on this panel, its logic makes good sense: a plaintiff should not be penalized for adhering to the pleading standards of the jurisdiction in which the case was originally brought. Otherwise, where there are potentially diverse parties, plaintiffs would essentially have to plead the federal pleading standard in state court for fear of having their claims against non-diverse parties thrown out upon reaching federal courts for failing to comply with the demands of Rule 12(b)(6). *Peña*, 879 F.3d at 617 ("Removal from a notice-pleading jurisdiction is a natural time at which justice would call for the court to permit such an amendment.") (citing *Faulkner v. ADTSec. Servs., Inc.*, 706F.3d 1017, 1021 (9th Cir.2013)).

Hain next contends that *Cavallini*, *Griggs*, and *ANPAC* foreclose the district court's examination of the post-removal second amended complaint. *See Griggs*, 181 F.3d at 694; *Cavallini*, 44 F.3d at 256; *Asociacion Nacional de Pescadores a Pequena Escala O Artesanales de Colombia (ANPAC) v. Dow Quimica de Colombia S.A.*, 988 F.2d 559 (5th Cir. 1993). On this issue, we disagree. Although post-removal filings

[5] Although *Peña* concerned a district court's denial of leave to amend a complaint under Federal Rule of Civil Procedure 15(a)(1)–(2), by declining to consider the facts alleged in the second amended complaint and instead assessing the as-removed complaint, the district court effectively denied the Palmquists the ability to amend their complaint. To be sure, plaintiffs cannot add new causes of action after a case is removed from state to federal court, but that is not the proposition that *Peña* stands for.

may not be considered "to the extent that they present new causes of action or theories not raised in the controlling petition filed in state court," they can be considered to the extent they "clarify or amplify the claims actually alleged" in the removed pleading. *Griggs*, 181 F.3d at 700 (citing *Cavallini*, 44 F.3d at 263).

Hain maintains that the district court's decision correctly followed *Cavallini*. It argues that this court similarly rejected the plaintiffs' attempt in *Cavallini* to amplify their allegations consistent with similar facts as the instant case. *See* 44 F.3d at 264 (holding that *ANPAC* "offers no support" for the plaintiffs' assertion that "their amended complaint would have clarified any jurisdictional ambiguity in their state court complaint"). But recall that the *Cavallini* panel pinpointed that, at the time the case was removed, the state-court petition "simply [did] not allege any facts against [the non-diverse defendant]. Other than listing his name and address for purposes of service, the petition [did] not specifically mention [the non-diverse defendant] at all." *Cavallini*, 44 F.3d at 260 n.8. While the petition alleged various causes of action, it did not delineate under which theories the non-diverse defendant could be liable to the plaintiffs. *Id*. It was under these circumstances that the panel determined that "[t]he Cavallinis' proposed amended complaint [did] not clarify the jurisdictional facts at the time of removal; it attempt[ed] instead to amend away the basis for federal jurisdiction." *Cavallini*, 44 F.3d at 265.

Although the Palmquists added an additional negligent-undertaking claim against Whole Foods, they too clarified their existing breach-of-warranties

claim with supporting jurisdictional facts. As is the case here, adding new causes of actions and clarifying already alleged causes of actions are not mutually exclusive. We have already determined that the Palmquists may not expand the substance of their pleadings, for jurisdictional purposes, with the negligent-undertaking allegations. We, too, follow circuit precedent by permitting them to "clarify" their already averred jurisdictional allegations after removal for purposes of an improper joinder analysis. *See Griggs*, 181 F.3d at 700 (acknowledging that post-removal evidence may be considered when determining whether removal was proper "only to the extent that the factual allegations in [petitioner's] affidavit clarify or amplify the claims actually alleged in the amended petition that was controlling when the suit was dismissed"); *Cavallini*, 44 F.3d at 265 (differentiating a case that allows for "clarification of a state court complaint" after removal from a case where "there is no need for clarification of [the] complaint [because] it does not contain allegations against [a non-diverse defendant] that state a claim for relief under [the] legal theories pleaded"); *ANPAC*, 988 F.2d at 565 (holding that "the court is considering information submitted after removal" because it "clarif[ies] a petition that previously left the jurisdictional question ambiguous").

Turning now to the substance of our improper joinder analysis, when conducting a Rule 12(b)(6)-type analysis, we must accept all well-pleaded facts as true and view them in the light most favorable to the non-moving party. *In re S. Scrap Material Co.*, 541 F.3d 584, 587 (5th Cir. 2008). A plaintiff must state a claim for relief that is facially plausible by pleading "factual

content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Anderson v. Valdez*, 845 F.3d 580, 589 (5th Cir. 2016) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Yet, the plausibility standard "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of the necessary claims or elements." *In re S. Scrap Material Co.*, 541 F.3d at 587 (quoting *Twombly*, 550 U.S. at 556) (internal quotation marks omitted).

When considering whether a plaintiff has stated a claim against a non-diverse party in state court,[6] the test "is whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant." *Id.* "This means that there must be a reasonable possibility of recovery, not merely a theoretical one." *Campbell v. Stone Ins., Inc.*, 509 F.3d 665, 669 (5th Cir. 2007) (quoting *Ross v. Citifinancial, Inc.*, 344 F.3d 458, 462 (5th Cir. 2003)). The burden of persuasion on a party claiming improper joinder is a "heavy one." *Id.* "[A]ny contested issues of facts and any ambiguities of state law must be resolved" in favor of remand. *Cuevas v. BAC Home Loans Servicing, LP*, 648 F.3d 242, 249 (5th Cir. 2011) (quoting *Travis v. Irby*, 326 F.3d 644, 649 (5th Cir. 2003)).

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[6] Whole Foods does not argue that the Palmquists have committed actual fraud in the pleading of jurisdictional facts.

C. Nonmanufacturing Seller Liability

The parties agree that Section 82.003(a)(5) of the Texas Products Liability Act governs whether Whole Foods is potentially liable in this action. Although Section 82.003 appears to *limit* rather than *establish* liability, our court has required plaintiffs to address Section 82.003 to state a claim against nonmanufacturing sellers, *George v. SI Grp., Inc.*, 36 F.4th 611, 620, n.5 (5thCir. 2022), so we do the same here.[7]

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[7] We note, however, that we were unable to locate any caselaw from Texas state courts indicating that Section 82.003 can be used to establish liability in the first instance. *Cf.*, *Amazon.com, Inc. v. McMillan*,625 S.W.3d 101, 109 (Tex. 2021) ("Chapter 82 is a liability-restricting statute."); *Transcon. Ins. Co. v. Briggs Equip. Tr.*, 321S.W.3d 685,701(Tex.App.—Houston [14th Dist.] 2010, no pet.) (assuming that the defendant had met its burden to show that it was a "seller" entitled to the application of Section 82.003 when assessing whether the Section 82.003 exceptions applied); *but cf. McMillian*, 625 S.W. at 109 (describing Section 82.003 as "imposing liability" on nonmanufacturing sellers in certain instances). Rather, Section 82.003establishes an exception to the common law's imposition of strict liability for sellers of defective products. *McMillan*, 625 S.W.3d at 109 ("Chapter 82 does not expand the pool of potentially liable non-manufacturing sellers beyond those recognized at common law; it reduces that pool."). Thus, the exceptions listed in Section 82.003 appear to be exceptions to that exception. *See Sidwell v. Zuo Mod. Contemp., Inc.*, No. 05-20-00127-CV, 2022 WL 3040634, at *3 (Tex. App.—Dallas Aug. 2, 2022, no pet.) (Chapter82 "limits the circumstances under which a nonmanufacturing seller may be liable to a claimant.. . unless one of the enumerated exceptions" in Section 82.003 applies) (internal quotation marks and citation omitted). So, it would seem that to recover against a nonmanufacturing seller, a plaintiff would need to prove both a products liability cause of action, *see* TEX. CIV. PRAC. & REM. CODE § 82.001(2) *and* that one of the Section 82.003 exceptions applied. No party has argued

The Palmquists argue that they have pleaded sufficient facts to establish that the exception under Section 82.003(a)(5) applies. Section 82.003(a)(5) provides that a nonmanufacturing reseller may not be held liable unless:

> (A) The seller made an express factual representation about an aspect of the product;
>
> (B) The representation was incorrect;
>
> (C) The claimant relied on the representation in obtaining or using the product; and
>
> (D) If the aspect of the product had been as represented, the claimant would not have been harmed by the product or would not have suffered the same degree of harm[.]

TEX. CIV. PRAC. & REM. CODE ANN. § 82.003(a)(5).

The Palmquists argue they can meet each element of this exception. First, they contend that "Whole Foods markets [Hain's] Earth's Best Organic baby food products as safe, natural, and organically

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that the Palmquists have not otherwise stated a claim sufficient to establish liability in the first instance, so we need not address it. *See Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021) ("A party forfeits an argument . . . by failing to adequately brief the argument on appeal."). We also note that the caselaw requiring plaintiffs to plead facts sufficient to overcome Section 82.003 immunity to state a claim appears to originate from federal, rather than Texas courts. *See, e.g.*, *Alonso ex rel. Est. of Cagle v. Maytag Corp.*, 356 F. Supp. 2d 757, 761 (S.D. Tex. 2005).

produced." Specifically, they state in their second amended complaint that:

As a seller of "natural and organic foods," Whole Foods specifically represents to its customers that it only sells products that are of the "*highest quality*." Whole Foods further represents to the public that it "*carefully vet[s] our products to make sure they meet our high standards by researching ingredients, reading labels and auditing sourcing practices*." And it promises its customers that "if it doesn't meet our standards, we don't sell it." In short, "Whole Foods" claims to "take pride in what we do sell and even more in what we don't" by *refusing to sell products with harmful ingredients*. Whole [F]oods made these express factual representations about Hain's Earth's Best Baby Food.

The Palmquists further contend that Whole Foods' representations were incorrect given the high levels of heavy toxic metals that Hain's baby food contained, that they relied on Whole Foods' representations that Hain's baby food was safe and high quality, and that had Whole Foods' claims been true, [E.P.] would not have been injured.

Hain, for its part, contends that the Palmquists cannot satisfy the first element of Section 82.003(a)(5) because the only allegations set forth in the operative complaint are generalized, positive statements, which it asserts are not actionable under Texas law. Per Hain, the statements must be about its baby food products specifically. Whole Foods makes similar arguments, asserting that generalized, positive statements are not actionable under Section 82.003(a)(5). The district court adopted such reasoning in denying the Palmquists' motion to

remand. *See Howard v. Lowe's Home Ctrs., LLC*, 306 F. Supp. 3d 951, 958 (W.D. Tex. 2018), *aff'd*, 765 F. App'x 76 (5th Cir. 2019); *Gill v. Michelin N. Am., Inc.*, 3 F. Supp. 3d 579, 585 (W.D. Tex. 2013).

As to Hain's argument that the statements must be about Hain's products specifically, the Palmquists' operative complaint directly links the allegations to Hain's products. And, when conducting a Rule 12(b)(6)-type analysis, we must accept all well-pleaded facts as true. *In re S. Scrap Material Co.*, 541 F.3d at 587.

Hain, Whole Foods, and the district court all relied on decisions from federal courts for the proposition that alleged misrepresentations may be too general to be actionable. This is a problem, however, because "federal courts sitting in diversity apply state substantive law." *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 437 (2010) (citation omitted). Federal courts look to the decisions of the Texas Supreme Court (and lacking any authoritative decision, decisions from the intermediate appellate courts) to determine matters of Texas law. *Primrose Oper. Co. v. Nat'l Am. Ins. Co.*, 382 F.3d 546, 564-65 (5th Cir. 2004). And "any ambiguities of state law must be resolved in favor of remand." *African Methodist Episcopal Church v. Lucien*, 756 F.3d 788, 793 (5th Cir. 2014). Neither Hain nor Whole Foods have pointed to any Texas cases to support its argument that Whole Foods' representations about the quality of its food are too generalized.

Although there are few Texas cases interpreting Section 82.003(a)(5), the few that the Palmquists point to have found fairly generalized statements adequate enough to support a claim against a

nonmanufacturing seller. *See Transcon. Ins. Co. v. Briggs Equip. Tr.*, 321 S.W.3d 685, 702 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (holding that the plaintiff had asserted a viable claim against a seller who assembled a hydraulic lift and "told [the purchaser's] employees that it was 'okay' not to use the outriggers."); *JSC Nizhnedneprovsky Tube Rolling Plant v. United Res., LP*, 2016 WL 8921926, at *9 (Tex. App.—Corpus Christi–Edinburg [13th Dist.] Dec. 21, 2016, no pet.) (holding that the evidence supported a jury finding of liability where a seller incorrectly represented that a pipe was of a certain grade (*i.e.*, quality)). Moreover, other Texas express representation cases outside of those interpreting Section 82.003(a)(5) likewise support the Palmquists' argument that fairly generalized statements may sometimes be actionable. *See Pennington v. Singleton*, 606 S.W.2d 682, 687 (Tex. 1980) (determining that statements expressing that products were in "excellent condition," "perfect condition," and "just like new" were actionable under Texas's DTPA). This is especially so, under Texas law, where a seller purports to have specialized knowledge. *See Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 338 (Tex. 2011).

The Palmquists alleged that Whole Foods represents that it "carefully vet[s] [its] products to make sure they meet [] high standards by researching ingredients, reading labels and auditing sourcing practices." Accepting these facts as true, and interpreting ambiguities of state law in favor of the Palmquists, we hold that the district court erred in determining that there was no possibility of recovery under Section 82.003(a)(5). In particular, we note that

Whole Foods purports to have special knowledge about the ingredients in Hain's baby food that is not available to customers. As the Palmquists argue, the Whole Foods business model depends on this reputation and customers' willingness to a pay a premium for products that Whole Foods advertises as healthy and high quality. Therefore, the district court erred in concluding that Whole Foods was improperly joined and in denying the Palmquists' motion to remand.[8]

D. The Caterpillar *Exception to Remand*

Lastly, at issue is whether the district court's refusal to remand the case to state court requires us to vacate the take-nothing judgment. Hain and Whole Foods rely on *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), to argue against remand. Hain argues that vacatur of the final judgment is not the correct remedy, under *Caterpillar* and *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989), because there was complete diversity jurisdiction at the time judgment was entered. It urges this court—in the interests of judicial efficiency and finality—to preserve the judgment below even if we determine remand should have been granted at the beginning of the case. However, the Palmquists argue that, unlike *Caterpillar*, the jurisdictional defect here was not cured prior to judgment. We agree with the

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[8] Hain further contends that the Palmquists' claim constitutes a claim for fraud that must satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). But Hain failed to make this argument before the district court, thus it is forfeited. *Rollins*, 8 F.4th at 397.

Palmquists. Remand is proper in the instant case because the jurisdictional defect was never cured.

The case involving state law claims in *Caterpillar* was removed on the basis of diversity jurisdiction. 519 U.S. at 64. Correspondingly, the district court denied the plaintiff's motion to remand the case to state court. *Id*. Prior to final judgment, however, the sole non-diverse defendant in *Caterpillar* was dismissed after that defendant and the plaintiff voluntarily settled. Thus, the settlement reached between the non-diverse party and the plaintiff created the diversity of citizenship between parties necessary to give rise to federal subject matter jurisdiction. *Id.* The Supreme Court said as much by holding that the removal defect was cured when the non-diverse party was dismissed after removal but before trial commenced. *Id.* at 73–75 (holding that the "jurisdictional defect was cured, *i.e.*, complete diversity was established before the trial commenced"). Consequently, the Court declined to remand the case for a new trial in state court. *Id.* The Court affirmed that "[d]espite a federal trial court's threshold denial of a motion to remand, if, at the end of the day and case, a jurisdictional defect remains uncured, the judgment must be vacated." *Id*. at 76–77.

This case is not controlled by *Caterpillar*. The improper removal affected the subject-matter jurisdiction in this case. Unlike *Caterpillar*, complete diversity did not exist at the time judgment was entered because the Palmquists alleged non-fraudulent claims against a non-diverse defendant, Whole Foods. Where a jurisdictional defect lingers (*i.e.*, lack of subject matter jurisdiction) through judgment in the district court, the case must be

remanded because the federal court lacked jurisdiction. *McKee v. Kansas City S. Ry. Co.*, 358 F.3d 329, 336 n.4 (5th Cir. 2004). The district court should have remanded the case because “federal courts are courts of limited jurisdiction and because without complete diversity the federal courts do not have subject matter jurisdiction over a case that does not concern a federal question.” *See id.* at 336–37.

IV. CONCLUSION

For the foregoing reasons, we REVERSE the district court’s judgment denying the Palmquists’ motion to remand, VACATE the final judgment of the district court, and REMAND with instructions for the district court to remand the case to the state court from which it was removed. Because we have determined that the district court erred in denying the Palmquists’ motion to remand the case to the state court, we do not address whether the district court erred in granting judgment as a matter of law in favor of Hain.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ENTERED
June 15, 2021
Nathan Ochsner, Clerk

CIVIL ACTION NO. 3:21-CV-90

SARAH PALMQUIST, *ET AL.*,

Plaintiffs,

VS.

THE HAIN CELESTIAL GROUP, INC., *ET AL.*,

Defendants.

ORDER

Defendant Hain Celestial Group, Inc. removed this products-liability dispute to this court, contending that Whole Foods Market, Inc., a multinational supermarket chain headquartered in Austin, was improperly joined to defeat diversity jurisdiction. Plaintiffs Grant and Sarah Palmquist, individually and on behalf of their minor son, then moved to remand, countering that they have viable claims

against Whole Foods under the Texas Products Liability Act.

Seeking to feed their son high-quality food during his developmental years, the Palmquists purchased Hain's "Earth's Best Organic" baby food, from the time of his birth until he was about three years old. *See* Dkt. 1-1 at 10–11. In 2019, an FDA-testing investigation revealed that Hain's products were tainted with high levels of toxic metals, including arsenic, lead, cadmium, and mercury. *Id*. at 5. Among other effects, these toxic metals can lead to cognitive impairment, severe illness, and—in high doses—death. *See id*. at 7-8. Attributing the high levels of toxic metals found in their son to his consumption of Earth's Best Organic Products, the Palmquists sued both Hain and Whole Foods in state court to recover damages for his permanent neurological impairment. *See id*. at 11-12, 22. After Hain removed the case, the Palmquists moved to remand, insisting that Whole Foods is a properly joined in-state defendant.

As an initial matter, the Palmquists base their remand motion on the allegations in their second amended complaint, which includes new claims such as breach of express warranty and negligent undertaking. *See* Dkt. 6 at 23-26; Dkt. 8 at 14-19. But because jurisdiction "is resolved by looking at the complaint at the time petition for removal [was] filed," *Brown v. Sw. Bell Tel. Co.*, 901 F.2d 1250, 1254 (5th Cir. 1990) (citing *Pullman Co. v. Jenkins*, 305 U.S. 534, 537-38 (1939)), the new claims cannot be considered.

But even if the court were to rely on the Palmquists' second amended complaint, there is still no reasonable basis to predict that they could recover

from Whole Foods. Generally, retail sellers such as Whole Foods are not liable for the harm caused by the products they sell. *See* TEX. CIV. PRAC. & REM. CODE § 82.003(a). The Texas Products Liability Act lists just seven exceptions that may render a non-manufacturing seller liable in a products-liability suit. *See id*. §§ 82.003(a)(1)-(7). The Palmquists rely on three of those exceptions, arguing that Whole Foods (1) participated in the product design, (2) made express factual representations about the product, which were inaccurate and on which they detrimentally relied, and (3) had actual knowledge of the defect that caused their son's injury. *See* Dkt. 8 at 11-19.

First, the Palmquists assert that both Hain and Whole Foods negligently "designed, produced, marketed, and distributed baby food products." Dkt. 6 at 17. Yet the Palmquists do not provide any facts to show that Whole Foods engaged in any of the design or manufacturing of Hain products. Mere conclusory statements to that effect do not suffice. *See Ashcroft v. Iqbal*, 556 U.S. 662, 129 (2009); *Smallwood v. Ill. Cent. R. R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004).

Second, to demonstrate that Whole Foods made inaccurate representations about Hain's products, the Palmquists allege that "Hain and Whole Foods market the Earth's Best Organic baby food products as safe, natural, and organically produced." Dkt. 6 at 25. In support of this claim, the Palmquists point to representations made in Whole Foods' Mission Statement and website, such as:

- "Whole Foods' stated purpose is 'to nourish people and the planet.'" Dkt. 6 at 24.

- Whole Foods sells only the "highest quality" products that are vetted by "researching ingredients, reading labels, and auditing source practices." *Id.*
- "[I]f it doesn't meet our standards, we don't sell it." *Id.*

Courts have consistently held that generalized positive statements about a product and general representations about its safety are insufficient under § 82.003(a)(5). *See, e.g., Howard v. Lowe's Home Centers*, *LLC*, 306 F. Supp. 3d 951, 958 (W.D. Tex. 2018), *aff'd*, 765 F. App'x 76 (5th Cir. 2019); *Gill v. Michelin N. Am.*, *Inc.*, 3 F. Supp. 3d 579, 585 (W.D. Tex. 2013). The Palmquists fail to show how any of the above statements amount to anything more than generalized positive statements and general representations about safety. Indeed, the statements are neither specific to Hain as a company nor specific about any particular aspect of Hain's product. The Palmquists' allegation thus fails to trigger the § 82.003(a)(5) exception.

Third, and finally, the Palmquists argue that because Whole Foods allegedly made these representations, it "knew or had reason to know that consumers like [p]laintiffs would purchase the Hain products . . . ." Dkt. 6 at 24. Texas law, however, requires *actual* knowledge of the condition that renders the product defective. *See Garcia v. Nissan Motor Co.*, No. M-05-59, 2006 U.S. Dist. WL 86994, at *3 (S.D. Tex. Mar. 30, 2006); *Williams v. Avon Prods.*, No. 4:19-CV-02337, 2019 U.S. Dist. WL 6040073, at *3-5 (S.D. Tex. Oct. 24, 2019) (finding that the plaintiff's assertion that the defendants "knew or should have known" of the product defect failed to

state a claim under § 82.003(a)(6)). The Palmquists likewise fail to provide any facts showing that Whole Foods had actual knowledge of the defects in Hain's baby food, so the § 82.003(a)(6) exception does not apply either.

* * *

In sum, the court finds that Whole Foods was improperly joined, as the Palmquists failed to state any plausible claims against Whole Foods under the Texas Products Liability Act. Accordingly, the Palmquists' motion to remand (Dkt. 8) is denied, their claims against Whole Foods are dismissed with prejudice, and Whole Foods' motion dismiss [*sic*] (Dkt. 10) is denied as moot.

Signed on Galveston Island on the 15th day of June, 2021.

/s/
Jeffrey Vincent Brown
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION NO. 3:21-CV-90

8:48am

SARAH PALMQUIST, *ET AL.*,

Plaintiffs,

VS.

THE HAIN CELESTIAL GROUP, INC., *ET AL.*,

Defendants.

JURY TRIAL
BEFORE THE HONORABLE
JEFFREY VINCENT BROWN
UNITED STATES DISTRICT JUDGE
FEBRUARY 17, 2023
DAY 8

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* * *

THE COURT: All right. Thank you. All right. Any last words?

Okay. The jury -- I asked the jury to be here at 10:00. They may be early, and if they are, we'll deal with that.

Let me -- let's take a break. I -- and I'll make a determination as to whether I'm going to make a ruling now or continue to hold on to it, and we'll let y'all know, okay?

(Recess taken from 9:45 a.m. to 10:25 a.m.)

THE COURT: Thank you. Y'all can take your seats.

Let me lead with this: If Dr. Rao's testimony is anything, it's evidence of specific causation. That still leaves us with no evidence of general causation. We heard no testimony from a qualified expert that the ingestion of heavy metals can cause the array of symptoms that [E.P.] suffers from, much less any evidence of at what level those metals would have to be ingested to bring about those symptoms. The law is clear that such testimony is necessary to show general causation.

I do not believe the failure to present any expert evidence on general causation was a failure of lawyering, rather, such general causation is simply not supported by the science. [E.P.]'s lawyers have made a valiant effort to persuade the Court otherwise, but the scientific facts are simply not there.

I'm convinced that there is no legally sufficient basis on which a reasonable jury could find for the plaintiffs. A failure to offer evidence of general causation is fatal to all of the plaintiffs' claims. Further, I'm so convinced of the merits of the Rule 50(a) motion in general that, if this case were to go to jury, and they were to return a verdict for the plaintiffs, that I would have to grant a renewed motion for judgment as a matter of law.

So I believe that in the interest of justice and judicial efficiency, the prudent course is to grant the motion now. It is granted, and I will be entering judgment in favor of the defendant.

It was certainly not an easy decision for me to come to.

I will go and tell the jury about it in the jury room and thank them for their service and explain to them, as best I can, what has happened and assure them that they were very necessary to the process. I will also encourage them to speak with y'all, with the attorneys in the case. I will tell them that they don't have to, but that they may.

I mean, they haven't even talked to each other yet about this, if they followed my instructions, which I'm sure they have.

I think the best place to see them would be on the -- in the first floor lobby as they leave, once I have finished visiting with them.

Is there anything else we need to do right now other than...

MS. JONES: I mean, Your Honor, nothing from our perspective. We, obviously, want to thank the

Court and the Court's staff for the courtesies that you've extended to both the parties.

THE COURT: Okay. It was a very well-tried case. It's been -- both sides have been eminently professional all the way through, and both -- both sets of clients were very well represented. And I wish the best to the Palmquists, and my heart goes out to them, but I believe this was the right decision under the law.

All right. We stand adjourned.

(Proceedings concluded at 10:28 a.m.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above matter.

Date: February 17, 2023

/s/ Heather Alcaraz
Signature of Court Reporter

APPENDIX D

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS GALVESTON DIVISION

ENTERED
March 03, 2023
Nathan Ochsner, Clerk

NO. 3:21-CV-90

SARAH PALMQUIST, *et al.,*

Plaintiffs,

VS.

THE HAIN CELESTIAL GROUP, INC.,

Defendants.

FINAL JUDGMENT

On February 6, 2023, the court seated a jury in this case and commenced trial on the merits. On February 17—after the plaintiffs had rested—the court heard, considered, and orally granted in its entirety the defendant's motion for judgment as a matter of law under Fed. R. Civ. P. 50(a). Accordingly, the court renders judgment in the defendant's favor, ruling that the plaintiffs take nothing by way of their claims. The court likewise assesses all taxable court

costs in the defendant's favor and against the plaintiffs. All relief not expressly granted herein is denied.

Signed on Galveston Island this 3rd day of March, 2023.

/s/
JEFFREY VINCENT BROWN
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED
September 9, 2024
Lyle W. Cayce
Clerk

No. 23-40197

SARAH PALMQUIST, *Individually and as Next Friend of* E.P., *a minor*; GRANT PALMQUIST,

Plaintiffs—Appellants,

versus

THE HAIN CELESTIAL GROUP, INCORPORATED; WHOLE FOODS MARKET, INCORPORATED, *also known as* WHOLE FOODS MARKET ROCKY MOUNTAIN/SOUTHWEST, L.P.,

Defendants—Appellees.

Appeal from the United States District Court for the Southern District of Texas
USDC No. 3:21-CV-90

ON PETITIONS FOR REHEARING EN BANC

Before STEWART, CLEMENT, and HO, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc filed by Appellee Whole Foods Market, Incorporated as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

Treating the petition for rehearing en banc filed by Appellee Hain Celestial Group, Incorporated as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.