No.

IN THE
Supreme Court of the United States

BETTY R. SHIPLEY,

Petitioner,

v.

HELPING HANDS THERAPY and SARAH BEAUGEZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals has jurisdiction to review an order remanding a case to state court based on a procedural defect, when the plaintiff files a motion to remand within 30 days of the notice of removal but articulates the procedural defect in a reply more than 30 days after the notice of removal.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

Shipley v. Helping Hands Therapy, et. al., No. 19-13812 (11th Cir.) (opinion issued on May 6, 2021 finding appellate jurisdiction and vacating remand order. Mandate issued June 4, 2021).

Shipley v. Helping Hands Therapy, et. al., No. 2:18-cv-00437-CG-B (S.D. Ala.) (report and recommendation by Magistrate Judge Bivins denying remand issued June 19, 2019. District court order remanding to state court issued August 26, 2019).

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a) is reported at 996 F.3d 1157. The decision of the district court (Pet. App. 10a) is unreported but available at 2019 WL 4014764. The magistrate judge's report and recommendation (Pet. App. 34a) is unreported and is available at 2019 WL 5068691.

JURISDICTION

The decision of the court of appeals was entered on May 6, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1447 of Title 28 of the United States Code states, in relevant part:

> (c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

> (d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

INTRODUCTION

This case squarely presents an important issue of statutory interpretation that, as the decision below emphasized, has sharply divided the courts of appeals: whether a court of appeals has jurisdiction under 28 U.S.C. § 1447(d) to review an order remanding a case based on a procedural defect when the plaintiff properly files a motion to remand within 30 days of the notice of removal but identifies a procedural defect in a later-filed reply. *See* Pet. App. 2a.

Two courts of appeals, including the Eleventh Circuit in the decision below, have concluded that a district court exceeds its authority under 28 U.S.C. § 1447(c) by remanding under these circumstances and that the court of appeals may thus review the remand order. The decision below reasoned that because Petitioner "did not file a motion to remand based on a procedural defect within the 30-day time limit required by [Section 1447(c)]," she "forfeited any procedural objection to removal." Pet. App. 7a. The Ninth Circuit adopted the same approach under the same circumstances. *Northern California Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co.*, 69 F.3d 1034, 1038 (9th Cir. 1995) ("§ 1447(c) prohibits a defect in removal procedure from being raised later than 30 days after the filing of the notice

of removal, regardless of whether a timely remand motion has been filed").

By contrast, the Fifth Circuit has reached the opposite conclusion under the same circumstances. It "reject[ed] any suggestion that the timing of the presentation of a removal defect—rather than the submission of the remand motion—is what matters for a timeliness analysis under Section 1447(c)." *BEPCO, L.P. v. Santa Fe Minerals, Inc.*, 675 F.3d 466, 471 (5th Cir. 2012). That court concluded that the district court did not exceed its authority to remand and therefore dismissed the plaintiff's appeal for lack of jurisdiction.

This conflict is current and unlikely to resolve on its own: four courts of appeals have acknowledged the confusion among the courts of appeals on this question. *See* Pet. App. 4a–5a ("Our sister circuits have split on this issue."); *BEPCO, L.P.*, 675 F.3d at 470 n.4 ("We are unpersuaded by *Pittsburg-Des Moines*'s Section 1447(c) analysis, and thus refuse to follow it."); *Pierpoint v. Barnes*, 94 F.3d 813, 820 (2d Cir. 1996); *Arnold Crossroads, LLC v. Garnder Mountain Co.*, 751 F.3d 935, 941 (8th Cir. 2014) ("We therefore need not address the sometimes vexing question of whether an appellate court has jurisdiction over a remand based on a procedural flaw not timely raised.").[1] The three courts to have decided the issue are unlikely to reconsider their positions

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[1] Though Second and Eight Circuits have acknowledged that the question of appellate jurisdiction has given rise to confusion among the circuits, neither has squarely decided the question presented. *See Pierpoint v. Barnes*, 94 F.3d 813, 820 (2d Cir. 1996); *Arnold Crossroads, LLC v. Garnder Mountain Co.*, 94 F.3d 813, 941 (8th Cir. 2014).

because each applied its interpretation of the plain text of the statute.

This Court should grant certiorari to resolve this split of authority, which results in different removal requirements under Section 1447 in New Orleans and Atlanta. The uniform interpretation and application of the removal statute is essential to the statute's effectiveness. This Court should ensure that the same rules govern removal in every federal court.

This case is an ideal vehicle to resolve the split. There is no threshold issue that would preclude this Court from reaching the question presented. The issue here is dispositive: the district court held that Respondents' notice of removal was untimely and remanded the case to state court. Pet. App. 32a ("[T]he time for removal commenced on August 31, 2018, and closed on September 30, 2018. As such, Defendants' removal on October 11, 2018 was untimely."). The Eleventh Circuit vacated, and there is no question that the Fifth Circuit would have reached the opposite result. This Court's resolution of the question presented will therefore determine whether this case proceeds in Alabama state court, where it belongs, or in the Southern District of Alabama.

Certiorari is warranted.

STATEMENT

1. Plaintiffs are the "masters of their complaints" and may control the scope of litigation by deciding in which forum their claims will be litigated. *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 595 (2013); *see also The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("[T]he party who

brings a suit is master to decide what law he will rely upon."). Courts historically defer to a plaintiff's choice of forum, including the choice between state and federal courts, "unless the balance is strongly in favor of the defendant." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (superseded on other grounds by statute); *see also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255–56 (1981) (same). Federal courts have also recognized a general preference, under our system of federalism, for cases that present questions only of state law to be heard in state court. *Cf. United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) ("Needless decisions of state law should be avoided."); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning*, 136 S. Ct. 1562, 1576 (2016) (Thomas, J., concurring) ("[A] suit belongs in state court when the complaint asserts purely state-law causes of action that do not require binding legal determinations of rights and liabilities under [federal law]." (internal quotations and citations omitted)); *Acri v. Varian Associates, Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997) (en banc) (O'Scannlain, J., dissenting) ("[A]bsent a strong justification, state law claims belong in state court.").

Removal provides a narrow exception to these principles, and statutes authorizing removal are thus construed narrowly. *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100, 108–09 (1941) ("Due regard for the rightful independence of state governments . . . requires that [the federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined.") (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)). A defendant may override a plaintiff's choice of forum only in certain limited circumstances. The 1789 Judiciary Act authorized re-

moval in cases "against an alien, or by a citizen of a state in which the suit is brought against a citizen of another state," provided the amount in controversy exceeded $500. 1789 Judiciary Act, First Cong. Sess. I, Ch. 20, § 12. Soon after, federal courts began exercising their inherent authority to remand to state court cases that were improperly removed. *See generally, e.g.*, *Beardsley v. Torrey*, 2 F. Cas. 1188 (D. Penn. 1822); *New Jersey v. Babcock*, 18 F. Cas. 82 (D.N.J. 1823).

Around the time of the Civil War, Congress expanded removal authority. In 1815, Congress made removal available for suits related to actions taken by customs officers or in connection with the Revenue Act without consideration of diversity of parties or amount in controversy. William M. Weicek, *The Reconstruction of Federal Judicial Power, 1863–1875*, 13 Am. J. Legal Hist. 333, 337 (1969). In 1833, Congress allowed for removal of any action involving rights under any federal revenue statute, and in 1863, Congress again further expanded removal authority to encompass cases involving federal officers. *Id.* at 337–38. In 1866, an amendment voided proceedings in state court after removal to ensure that the parties involved were not subject to parallel litigation in the state and federal courts. *Id.* at 338. And, in the 1875 Judiciary Act, Congress gave "plenary removal jurisdiction to the federal courts" by expanding removal jurisdiction to include all cases presenting a federal question, regardless of the citizenship of the parties. *Id.* at 340.

The 1875 Judiciary Act also altered historical practice by "expressly authoriz[ing] the review of an order of remand by appeal or writ of error in any suit removed from a state court." *United States v. Rice*,

327 U.S. 742, 748 (1946). Historically, "an order of remand was deemed to be not reviewable by appeal or writ of error because the order was not final." *Id.* (citing *Chicago & A.R. Railroad Co. v. Wiswall*, 90 U.S. (23 Wall.) 507 (1874)); *but see Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 714–15 (1996) (disavowing the principle that an order remanding a removed action is not a final judgment and therefore reviewable only by a writ of mandamus).

The 1887 Judiciary Act repealed this section of the 1875 Act and returned to the historical rule. To "make doubly certain" of the prohibition on appeals of remand orders, the 1887 Judiciary Act "specifically prohibited appeals, with the added direction that the order of remand should be immediately carried into execution." *Rice*, 327 U.S. at 748. This provision was later incorporated into the 1911 Judicial Code. *See Thermtron Prod., Inc. v. Hermansdorfer*, 423 U.S. 336, 347–48 (1976) (citing the 1911 Judicial Code, §§ 26, 37, 36 Stat. 1094 (1911)), *abrogated on other grounds by Quackenbush*, 517 U.S. at 714–15.

Congress has since amended the removal statute, but the general prohibition on appellate review of removal orders has persisted. *Id.* In 1949, Congress passed what is now Section 1447(d) to make clear that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."[2] Amendment of Title 18 and Title

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[2] This amendment was intended to "remove any doubt" about "the finality of an order to remand to a State court." Amendment of Title 18 and Title 28, United States Code, House Report from the Committee on the Judiciary, H.R. Rep. No. 352 at 15 (1949). An earlier version of the statute, passed the year prior,

28, United States Code, Pub. L. No. 81-72 § 84, 68 Stat. 89, 101 (1949).

"There is no doubt that in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues, . . . Congress immunized from all forms of appellate review any remand order issued on the grounds specified in section 1447(c), whether or not that order might be deemed erroneous by an appellate court." *Thermtron*, 423 U.S. at 351. In enacting Section 1447(d), Congress clarified that it intended to continue "the same rule of finality previously in effect"—that "remanding a cause to the state court is final and conclusive," and not subject to further review in the federal courts. *Id*. at 360 (Rehnquist, J., dissenting) (quoting *In re Pennsylvania Co.*, 137 U.S. 451, 454 (1890)). This rule reflects Congress' judgment that permitting appeals from remand orders "works a significant interference in the conduct of litigation commenced in state court" and allows the federal removal order to "become a device affording litigants a means of substantially delaying justice." *Id*. at 354–55 (Rehnquist, J., dissenting); *see also Rice*, 327 U.S. at 751 ("Congress . . . established a policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed."); *cf.* Judicial Improvements and Access to Justice Act, H.R. Rep. No. 100-889 at 6032–33 (1988) (restricting the timing of removal toe prevent against "substan-

had mistakenly omitted the language barring appellate review of remand orders. *Id*.

tial delay and disruption" of proceedings "after substantial progress has been made in state court.").

Congress has since twice amended Section 1447(d) to provide limited and concrete exceptions to the general bar on appellate review of remand orders. The first amendment was part of the 1964 Civil Rights Act, and allowed for appellate review of remand orders in cases alleging equal protection or civil rights violations. 1964 Civil Rights Act, Pub. L. No. 88-352 § 62, 63 Stat. 102 (1964); *see also id.* at § 902, 62 Stat. 938. Congress intended to provide appellate review of remand orders only in a specific, narrow set of cases; the exception was meant to ensure that cases in which the laws of a state were used to deny individuals their civil rights could be effectively removed to federal court. 110 Cong. Rec. 6955–56 (1964) (April 6, 1964) (Statement by Representative Albert); *see also* 1964 Civil Rights Act, H.R. Rep. No. 88-914, pt. 2 at 32 (1963) (noting that "this inability to appeal remand orders has effectively barred citizens from obtaining a redress to their denial of civil rights.").

The second amendment was passed as a standalone provision in 2011 and allowed appellate review of remand orders of claims against federal officers. 2011 Removal Clarification Act, Pub. L. No. 112-51, 125 Stat. 545 (2011). The amendment was a direct response to a decision from the Fifth Circuit denying review of a remand order in such a case. By extending appellate review over these remand orders, Congress ensured that, where appropriate, cases against federal officers were heard in federal, rather than state court. *See generally*, 2011 Removal Clarification Act, H.R. Rep. No. 112-17(I) (2011).

2. This Court's decisions interpreting Section 1447(d) have made clear that "a case removed under [section 1446] may be remanded only in accordance with § 1447 which governs procedure." *Thermtron,* 423 U.S. at 342. Section 1447(d)'s general prohibition on appellate review does not apply to a remand order "issued on grounds not authorized by § 1447(c)." *Id*. at 343.

In *Thermtron Products, Inc. v. Hermansdorfer*, this Court held that the Sixth Circuit had authority to review an order remanding an action to state court based solely upon the district court's assessment that its crowded docket and many other cases would severely impair the plaintiffs' "right of redress," which "would not be the case if the case had not been removed from the state courts." 423 U.S. at 340–41. Writing for the Court, Justice White observed that "the right to remove has *never* been dependent on the state of the federal court's docket," *id.* at 344 (emphasis added), and concluded that the district court far exceeded its authority by remanding the case "on grounds not permitted by the controlling statute" and indeed, on grounds that had no basis in law, *id*. at 345. Justice Rehnquist, joined by Chief Justice Burger and Justice Stewart, dissented, reasoning that "the limitation found in § 1447(d) has remained substantially unchanged since its enactment in 1887, and [that] this Court has consistently ruled that the provision prohibits any form of review of remand orders." *Thermtron*, 423 U.S. at 354 (Rehnquist, J., dissenting). Justice Rehnquist criticized the majority for "avoid[ing] the plain language of § 1447(d)," "ignor[ing] the undoubted purpose behind the congressional prohibition," and "effectively under-

min[ing] the accepted rule established by Congress and adhered to for almost 90 years." *Id.* at 355–56.

In *Quackenbush v. Allstate Insurance Co.*, this Court held that the Ninth Circuit had authority to review an order remanding an action based on *Burford* abstention. 517 U.S. at 713. This Court concluded that such orders are final decisions that "surrender jurisdiction of a federal suit to a state court," *id.* (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 11 n.11 (1983)), and that they do "not fall into either category of remand order described in § 1447(c)" because they are "not based on lack of subject matter jurisdiction or defects in removal procedure," *id.* at 712.

And in *Carlsbad Technologies, Inc. v. HIF Bio, Inc.*, this Court held that the Federal Circuit had authority to review a removal order that was based on the district court's decision not to exercise supplemental jurisdiction over state-law claims after the federal claims had been dismissed. 556 U.S. 635, 639 (2009). Such an order, Justice Thomas explained, is not based on the district court's "lack of subject matter jurisdiction"; rather, "[a] district court's decision whether to exercise [supplemental] jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary." *Id.* Nor is such an order based on any defect, timely raised or otherwise, in the notice of removal. Justices Stevens, Scalia, and Breyer (joined by Justice Souter) each wrote separately to reject the Court's willingness in prior cases to "replace [Section 1447(d)'s] clear bar on appellate review with a hodgepodge of jurisdictional rules that have no evident basis even in common sense." *Carlsbad Tech.*, 556 U.S. at 643 (Scalia, J., concurring); *see also id.* at

642 (Stevens, J., concurring) ("If we were writing on a clean slate, I would adhere to the statute's text."); *id*. at 645 (Breyer, J., concurring) (suggesting that "experts in this area reexamine the matter" in light of the confusion caused by the Court's jurisprudence regarding § 1447(d)'s appellate review bar). Justice Scalia explained that the Court's willingness to "depart[] from the literal text" created a "mess—entirely of our own making," and urged this Court to "return to the court's focus on congressionally enacted text" and deny appellate review of remand orders that do not fall within one of the two specifically enumerated exceptions. *Id*. at 643 (Scalia, J., concurring). "[I]t would not be unreasonable to believe that 28 U.S.C. § 1447(d) means what it says . . . and what it says is no appellate review of remand orders." *Id*. (cleaned up); *see also id*. at 641–42 (Stevens, J., concurring) (citing *Thermtron*, 423 U.S. at 354, 360 (Rehnquist, J., dissenting)).

3. On October 12, 2017, Petitioner filed a negligence action in the Circuit Court of Hale County, Alabama, alleging that Sarah Beaugez, a physical therapist with Helping Hands Therapy, caused an injury to her knee during a physical therapy session. Petitioner brought claims under the Alabama Medical Liability Act, seeking compensatory and punitive damages.

On October 11, 2018, Respondents filed a notice of removal. On November 8, 2018, 28 days after the notice of removal was filed, Petitioner moved to remand, arguing that the federal court lacked subject matter jurisdiction because the parties were not completely diverse. On November 26 and 27, Respondents Beaugez and Helping Hands Therapy filed their responses. On December 4, 2018, 54 days after

the notice of removal was filed, Petitioner filed her reply, arguing for the first time that Respondents' notice of removal was untimely.

The magistrate judge held a hearing on Petitioner's motion to remand and entered a Report and Recommendation that the motion to remand be denied. First, the magistrate judge concluded that the parties were completely diverse. Second, the magistrate judge acknowledged that "[c]ourts are split over the issue of whether the timely filing of a motion to remand alleging a procedural defect, such as lack of unanimity, is sufficient to preserve a timeliness or other procedural objection under 1447(c)," *see* Pet. App. 51a, but concluded that timeliness is a procedural defect that "must be raised within thirty days of the Notice of Removal," *see* Pet. App. 54a.

Petitioner filed objections to the Report and Recommendation, and the district court rejected the magistrate judge's conclusion that Petitioner waived her timeliness objection to Respondents' motion to remand. The district court relied on Eleventh Circuit precedent holding that a district court may remand *sua sponte* on grounds that were not raised in a plaintiff's motion to remand, concluding that it could consider the procedural defect Petitioner identified on reply. Pet. App. 22a–23a. The district court concluded the Respondents' motion to remand was untimely and remanded the case to state court. Pet. App. 32a. ("Defendants' removal on October 11, 2018 was untimely.").

The Eleventh Circuit vacated. It concluded that it had jurisdiction to hear the appeal under 28 U.S.C. § 1447(d). Pet. App. 6a (quoting *In re Bethesda Mem'l Hosp., Inc.*, 123 F.3d 1407, 1409 (11th Cir. 1997)). Though Petitioner timely filed the motion to

remand, the court reasoned, she identified the procedural defect only in her reply, which was filed 54 days after the notice of removal. Pet. App. 6a. The Eleventh Circuit thus concluded that the district court's remand order was based on neither a "(1) lack of subject matter jurisdiction, nor (2) a motion to remand based on a procedural defect made within 30 days after the notice of removal." Pet. App. 7a. (citing *In re Bethesda Mem'l Hosp. Inc.*, 123 F.3d at 1409). On that basis, the court concluded that the remand order fell outside the scope of the bar on appellate review codified in 28 U.S.C. § 1447(d). For the same reason, the court vacated the remand order, holding that "the district court had no authority to remand the case" on the basis of a procedural defect in removal that was not timely raised. Pet. App. 8a–9a.

REASONS FOR GRANTING THE WRIT

This case meets all of the Court's criteria for granting certiorari.

First, the question presented concerns an intractable, acknowledged split on a recurring question that only this Court can resolve.

Second, the question presented is important. It concerns whether a plaintiff who articulates a procedural defect in a defendant's notice of removal in a reply filed outside the 30-day limit set forth in Section 1447(c) must proceed in state or federal court. The circuit split on this question means that Section 1447(c) operates differently in different jurisdictions, and that some cases removed to a district court within the Ninth and Eleventh Circuits will proceed in federal court while identical cases removed to a

district court within the Fifth Circuit will be remanded to state court.

Third, the decision below is incorrect. The Eleventh Circuit's decision contradicts the plain text of the statute, Congress's intent, and this Court's precedent.

Fourth, this case is an ideal vehicle to resolve the question.

Certiorari is warranted.

A. The Question Presented Implicates an Intractable, Acknowledged Circuit Split That Only This Court Can Resolve.

Three courts of appeals have considered whether a plaintiff who articulates a procedural defect in a defendant's notice of removal in a reply filed outside the 30-day limit set forth in Section 1447(c) must proceed in state or federal court. Those decisions have produced an active 2-1 split.

1. Two Courts of Appeals Have Held That a District Court Exceeds its Statutory Authority by Remanding Based on a Procedural Defect Identified in a Reply in Support of Remand.

Two courts of appeals have held that a district court exceeds its statutory authority under 28 U.S.C. § 1447(c) by remanding a case based on a procedural defect when the plaintiff files a motion to remand within 30 days of the notice of removal but raises a procedural defect in a reply filed outside the 30-day limit and therefore, that the court of appeals has ju-

risdiction to review such orders under 28 U.S.C. § 1447(d).

In *Northern California District Counsel of Laborers v. Pittsburg-Des Moines Steel Co.*, the plaintiffs filed a motion to remand within 30 days of removal "based solely on the argument that the forum selection clause required remand." 69 F.3d at 1037. Plaintiffs' reply in support of remand, which was filed more than 30 days after removal, identified for the first time "a defect in removal procedure." *Id.* The district court entered a remand order, and the Ninth Circuit vacated. The Ninth Circuit held "that 1447(c) prohibits a defect in removal procedure from being raised more than 30 days after the filing of the notice of removal, regardless of whether a timely remand motion has been filed." *Id.* at 1038. The court reasoned that the plain text of Section 1447(c) "requires that a defect in removal procedure be raised in the district court within 30 days after the filing of the notice of removal." *Id.* at 1037. The court further explained that the "purpose of the 30-day time limit is to resolve the choice of forum at the early stages of litigation, and to prevent the shuffling of cases between state and federal courts after the first thirty days." *Id.* at 1038. This purpose, the court reasoned, "would be defeated if a party were free to raise such a procedural defect more than 30 days after the filing of the notice of removal." *Id.* And, because the district court lacked power to issue the remand order, the Ninth Circuit concluded, it had jurisdiction to review the merits of the order. *Id.*

In the decision below, the Eleventh Circuit aligned itself with the Ninth Circuit. The court relied on its view of the plain text of Section 1447(c), concluding that "because Shipley did not file a mo-

tion to remand based on a procedural defect within the 30-day time limit required by the statute[, she] forfeited any procedural objection to removal." Pet. App. 7a. Consequently, the Eleventh Circuit held, it has "jurisdiction to review and to vacate the remand order." Pet. App. 6a. In so holding, the Eleventh Circuit acknowledged that the "circuits have split on this issue," Pet. App. 4a, and distinguished its earlier decision in *Velchez v. Carnival Corp.*, which "held that when a plaintiff files a timely motion to remand based on a procedural defect, the court can order remand based on a different procedural defect that the plaintiff never raised," Pet. App. 8a (citing *Velchez v. Carnival Corp.*, 331 F.3d 1207, 1210 (11th Cir. 2003) (holding that a remand order based on a procedural defect that is different from one raised in a timely motion to remand is nonetheless insulated from appellate review under Section 1447(d))).

2. The Fifth Circuit Has Held a District Court Does Not Exceed its Statutory Authority by Remanding Based on a Procedural Defect Identified in a Reply in Support of Remand.

The Fifth Circuit reached the opposite conclusion in circumstances indistinguishable from those presented here. In *BEPCO, LP v. Santa Fe Minerals, Inc.*, the plaintiff filed a motion to remand within 30 days after removal based on a provision in the parties' contract and on a defendants' improper joinder. 675 F.3d 466. Plaintiff's reply in support of remand, which was filed more than 30 days after removal, also identified a procedural defect—that removal was untimely. The district court entered a remand order,

and the Fifth Circuit affirmed. The Fifth Circuit held that whether "a removal defect is not raised by a plaintiff in the motion to remand, or is raised more than 30 days after removal, does not matter." *Id.* at 471. Where a plaintiff files a "timely motion to remand," and the district court relies "on a permissible Section 1447(c) ground," "the district court's remand order [is] unreviewable on appeal." *Id.* The court relied on "the unambiguous statutory language" to conclude that it is the timing of a remand motion, rather than the timing of the presentation of a removal defect, that "matters for a timeliness analysis under Section 1447(c)" and for purposes of determining appellate jurisdiction to review the order. *Id.*[3]

B. The Issue Is Important and Will Not Be Resolved Without a Decision from This Court.

This split among the courts of appeals is entrenched and unlikely to resolve without action by

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[3] Other courts of appeals have also struggled to interpret and apply Section 1447(d)'s appellate review bar. The Tenth Circuit, for example, has interpreted Section 1447(d) to find that "'any defect' applies *solely* to failures to comply with the statutory requirements for removal," and that a remand order based on common law principles of "waiver by participation" fell outside the scope of Section 1447(d). *City of Albuquerque v. Soto Enters.*, 864 F.3d 1089, 1096, 1098 (10th Cir. 2017). The Second Circuit, by contrast, has reached the opposite conclusion, holding that, because "Congress intended the phrase 'defect in removal procedure' to be interpreted broadly," it did not have jurisdiction to review a remand order based on common law principles that were later codified into statute. *Pierpoint*, 94 F.3d at 817–19.

this Court. Four circuits have acknowledged the split of authority on the question presented, and there is no realistic prospect that the conflict will disappear on its own. This issue need not percolate further; three circuits have squarely decided the question presented, and the arguments on both sides of the split have been fully aired.

Not only is the split clear and established, but it is also important and recurring. "The removal statute . . . was intended to be uniform in its application, unaffected by local law definition or characterization." *Shamrock Oil & Gas Co.*, 313 U.S. at 104; *see also Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 705 (1972) ("[T]he removal statutes and decision of this Court are intended to have uniform nationwide application."); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 134 (1995) (Stevens, J., concurring) (noting the importance of the "uniform treatment of all remands, regardless of the party initiating the removal or the court from which the case is removed"). The split acknowledged by the Eleventh Circuit in the decision below undermines these vital interests. It allows parties in some jurisdictions, but not others, to seek appellate review of remand orders and, by doing so, to "interrupt[] . . . litigation of the merits of a removed case by prolonged litigation of questions of jurisdiction" in the federal courts. *Powerex Corp. v. Reliant Energy Serv., Inc.*, 551 U.S. 224, 238 (2007) (quoting *Rice*, 327 U.S. at 751).

The varying approaches taken by the courts of appeals not only create unnecessary confusion with respect to the proper allocation of cases between the state and federal courts but also can encourage forum-shopping. *Cf. Carlsbad Tech. Inc.*, 556 U.S. at

643 (Scalia, J., concurring) (noting that exceptions to section 1447(d)'s appellate review bar have created confusion among the lower courts). "Appellate courts must take [section 1447(d)'s] jurisdictional prescription seriously, however pressing the merits of the appeal might seem" and however incorrect the district court's decision may appear. *Powerex Corp.*, 551 U.S. at 238–39. Allowing this split to persist creates intolerable geographic disparities and threatens to introduce another element of gamesmanship into the removal process.

C. The Decision Below is Incorrect.

The decision below conflicts with the plain text of Section 1447, Congress's clear intent, and this Court's decisions.

1. Section 1447(c) provides that "[a] motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a)." The decision below misreads this provision by imposing a requirement found nowhere in the text: that all removal defects must also be identified within 30 days after the filing of a notice of removal.

"On its face, Section 1447(c)'s 30-day requirement governs the timeliness of the filing of a motion to remand, not the time limit for raising removal defects." *BEPCO, L.P.*, 675 F.3d at 471. A motion to remand "establishes that the moving party does not want to acquiesce in the federal forum despite any procedural defects." *Velchez*, 331 F.3d at 1210. Therefore, "[b]y its own terms, § 1447(c) is limited to *motions*,

not *issues*." *Schexnayder v. Entergy Louisiana, Inc.*, 394 F.3d 280, 284 (5th Cir. 2004).

Indeed, when a party is required to identify a particular issue, as opposed to simply file a particular motion, within a set period of time, the text says so explicitly. *Compare* 28 U.S.C. § 1447(c), *with* Fed. R. Civ. P. 60 (enumerating the bases for a motion for relief from judgment and setting a one-year time limit for motions based on specified grounds for relief); *see also* Fed. R. Civ. P. 12(h) (specifying that certain bases for dismissal are waived if not raised in the initial motion to dismiss or raised within a specified period of time). Congress has not done so here. Unlike various other federal rules, Section 1447(c) does not differentiate between the various procedural bases on which remand may be granted or apply the 30-day time limit to individual issues.

Rather, Section 1447(c) describes the vehicle a plaintiff must use to seek remand—"a motion"—and defines the timing requirement for such a motion—"30 days after the filing of the notice of removal," unless the motion is based on a lack of subject matter jurisdiction. Under the plain text of the statute, then, "what does matter is the timing of the remand motion," not the timing of the presentation of a removal defect. *BEPCO, L.P.*, 675 F.3d at 471–72. Because the remand motion here was timely, the decision below that the district court lacked the power to remand is incorrect.

2. The decision below also frustrates Congress's clear intent. Section 1447(c)'s 30-day time limit was meant to ensure that neither the court nor the parties were subject to the burden of "prolonged litigation of questions of jurisdiction" before the case could be resolved on the merits. *Rice*, 327 U.S. at 752; *see*

also Judicial Improvements and Access to Justice Act, H.R. Rep. No. 100-889 at 6032–33 (1988). And Section 1447(d)'s broad prohibition on appellate review was similarly designed to prevent additional delay or interference with the orderly resolution of the case. *Thermtron*, 423 U.S. at 351 (citing *Rice*, 327 U.S. at 751); *see also id.* at 355 (Rehnquist, J., dissenting) ("It is clear that the ability to invoke appellate review . . . provides a significant opportunity for additional delay.").

Indeed, Congress has consistently and expressly prohibited appeals from orders remanding a case to state court since 1887 in order to ensure the swift and efficient resolution of cases on their merits in the appropriate court. *Rice*, 327 U.S. at 748–49. The Eleventh Circuit's decision does not serve Congress's goal of ensuring that motions to remand are decided promptly: Petitioner's motion to remand was timely filed and promptly informed the district court that she did not consent to litigation in federal court, and allowing her to raise an issue in reply is consistent with ensuring that remand is resolved expeditiously. The Eleventh Circuit's decision to exercise jurisdiction over the appeal further frustrates this purpose by delaying the resolution of the remand motion.

3. Finally, the decision below runs contrary to this Court's precedent. This Court has consistently permitted appellate review of a remand order only when that order was not based on either the court's lack of subject matter jurisdiction or any procedural defect inherent in the notice of removal. *See, e.g.*, *Thermtron Prod., Inc.*, 423 U.S. at 344–45; *Quackenbush*, 517 U.S. at 713; *Carlsbad Tech. Inc.*, 556 U.S. at 639. In other words, this Court has prohibited appellate review unless the underlying re-

mand order was based on grounds that were entirely unrelated to the timing or sufficiency of the removal notice or to the district court's power to hear the underlying case. This Court has never expressly allowed, or even suggested, that appellate review is appropriate in cases like this, where a remand order was based on a procedural defect that was raised and litigated in the district court in connection with a timely motion to remand. *Cf. Carlsbad Tech. Inc.*, 556 U.S. at 643 (Scalia, J., concurring) (noting that Section 1447(d) establishes a "clear bar on appellate review" in all circumstances other than civil rights and federal officer removal). The decision below stretches this Court's interpretation of Section 1447(d) far beyond recognition by asserting appellate jurisdiction in such circumstance.

The decision below is also contrary to the rule that "removal statutes should be construed narrowly with doubts resolved against removal." *Allen v. Christenberry*, 327 F.3d 1290, 1293 (11th Cir. 2003); *see also Shamrock Oil & Gas Corp.*, 313 U.S. at 108 ("[T]he policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for strict construction of [removal statutes]."). Rather, the decision below does exactly the opposite, and improperly reads Section 1447(d) to expand appellate jurisdiction far beyond both the statute's plain text and this Court's precedent in the area.

The decision below also departs from precedent barring appellate review when a district court grants a party's motion to remand, but relies on a procedural defect not asserted by the moving party. *See Velchez*, 331 F.3d at 1210; *Schexnayder*, 394 F.3d at 285. In such circumstances, at least two courts of appeals have expressly held that Section 1447(d)

prohibits appellate review because the district court's decision to remand is based "on a timely § 1447(c) motion" and predicated on a procedural defect in removal. *Velchez*, 331 F.3d at 1209. Moreover, because the moving party has made clear that they "want[] to go back to state court," the remand order was not issued *sua sponte* and is therefore not reviewable.[4] *Id*. at 1210. The court below attempted to distinguish the present case by noting that the motion here was initially based on a lack of subject matter jurisdiction, but did not explain why that fact alone was sufficient to override the plain text of Section 1447(d) and Congress's clearly-stated intent to preclude appellate review of remand orders. Pet. App. 6a.

Nor did the court below explain why appellate review should be precluded where the district court raises a basis for removal *sua sponte* without giving the parties an opportunity to respond, *see Velchez*, 331 F.3d at 1210, but not in this case, where the defendants had full opportunity to address, both orally and in writing, the arguments related to the timeliness of removal. That the parties here repeatedly addressed in the district court the timeliness issue

[4] The courts of appeals agree that a district court's decision returning a case to state court in the absence of a motion to remand is reviewable because of the concern that such remand "might deprive *both* sides of their preferred forum" and of a meaningful opportunity to be heard. *Velchez v. Carnival Corp.*, 331 F.3d 1207, 1210 (11th Cir. 2003). *See also Academy of Country Music v. Continental Casualty Co.*, 991 F.3d 1059, 1067–68 (9th Cir. 2021); *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 197 (4th Cir. 2008); *Page v. City of Southfield*, 45 F.3d 128, 133 (6th Cir. 1995); *In re Continental Casualty Co.*, 29 F.3d 292, 294–95 (7th Cir. 1994).

articulated in Petitioner's reply demonstrates that appellate review of this issue is not justified here. *See in re Continental Casualty Co.*, 29 F.3d 292, 294–95 (7th Cir. 1994).

Moreover, under ordinary waiver rules, the district court had discretion to consider Shipley's arguments with respect to the procedural defects in removal. *See, e.g.*, *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1164 (10th Cir. 1998) (holding that the district court has discretion to consider an argument raised for the first time on reply after giving the other side a chance to respond). Nothing in either the text of the statute or in this Court's precedent suggests that, when the district court exercises this discretion, the remand order that follows somehow becomes reviewable on appeal.

D. This Case Is an Ideal Vehicle.

This case is an ideal vehicle for resolving the question presented.

The question was briefed and decided below, and is dispositive here. This Court's interpretation of Section 1447(d) will determine whether the merits of Petitioner's case are heard in state or federal court. The district court expressly held that the procedural defect articulated in Petitioner's reply in support of her motion to remand—that Respondents' notice of removal was untimely—was meritorious. Pet. App. 32a ("[T]he time for removal commenced on August 31, 2018, and closed on September 30, 2018. As such, Defendants' removal on October 11, 2018 was untimely."). The Eleventh Circuit acknowledged a split of authority on the question presented, squarely decided it, and declined to follow the Fifth Circuit.

Pet. App. 4a–5a. This case cleanly presents the question, unobstructed by any threshold issues, and this petition seeks review of a published, precedential opinion.

Further, Petitioner's preference to litigate in state court is well-founded. Not only is state court her chosen forum, but also it is the traditional forum for resolution of these kinds of private disputes and is the final authority on questions of state law, on which the merits of this case turn. *See West v. American Tel. & Tel. Co.*, 311 U.S. 223, 236–37 (1940) (state courts have final say over questions of state law).

This case provides the Court with the opportunity to clarify that Section 1447(d) bars appellate review in cases like this, where there is a timely motion to remand, and to ensure that these cases, which are properly decided by the state courts, are able to proceed expeditiously without unnecessary delays before the federal courts of appeals.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 28, 2021

APPENDIX

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 19-13812
D.C. Docket No. 2:18-cv-00437-CG-B

BETTY R. SHIPLEY,
Plaintiff - Appellee,

versus

HELPING HANDS THERAPY,
Greensboro Out-Patient Clinic,
a.k.a. New Hope, LLC
d.b.a. Helping Hands Therapy,
PT SARAH BEAUGEZ,

Defendants - Appellants.

Appeal from the United States District Court
for the Southern District of Alabama

(May 6, 2021)

Before WILSON, GRANT, and TJOFLAT, Circuit Judges.

WILSON, Circuit Judge:

This appeal presents an issue of first impression in our circuit: whether a district court has authority to remand a case based on a procedural defect in removal when (1) a motion to remand for lack of subject matter jurisdiction is filed within 30 days of the notice of removal, but (2) a procedural defect is not raised until after the 30-day statutory time limit. Although a remand order based on a procedural defect in removal generally is unreviewable, we have jurisdiction to review such an order when a district court exceeds its statutory authority. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711–12 (1996). Because we conclude that a district court exceeds its authority by remanding in this circumstance, we have jurisdiction to review the remand order. And for the same reason, we vacate the order remanding the case to state court.

I.

On October 12, 2017, Plaintiff Betty Shipley filed this negligence action in Alabama state court, alleging that Sarah Beaugez, a physical therapist with Helping Hands Therapy, caused an injury to Shipley's knee during a physical therapy session. Shipley brought claims against Beaugez and Helping Hands Therapy (Defendants) under the Alabama Medical Liability Act, seeking compensatory and punitive damages.

On October 11, 2018, Defendants filed a notice of removal. Shipley filed a timely motion to remand—within 30 days after removal—on November 8, 2018, arguing that there was no subject matter jurisdiction in federal court because the parties lacked complete

diversity.[1] She did not raise any procedural defects with removal in that motion. After Defendants responded to her motion, Shipley filed a reply on December 4, 2018—54 days after the notice of removal. In her reply, she raised a procedural defect with removal for the first time, arguing that Defendants failed to remove the case within the statutory timeframe.

The magistrate judge entered a Report and Recommendation that the motion to remand be denied because Shipley's objection to the timeliness of removal was itself untimely. But the district court disagreed. It found, first, that Shipley had not waived her objection to the removal process. Second, it found that Defendants did not file the notice of removal within 30 days after they became aware that the case was removable. Accordingly, the district court determined that removal was defective and remanded the case to Alabama state court. This appeal followed.

II.

We review questions of statutory interpretation de novo. *Truesdell v. Thomas*, 889 F.3d 719, 723 (11th Cir. 2018).

III.

On appeal, Defendants argue that we should vacate the district court's remand order. They argue that, although remand orders generally are

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[1] It is now clearly established that the district court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332.

unreviewable, we have jurisdiction to review this order because it was not prompted by a timely motion to remand based on a procedural defect. Entwined with this jurisdictional issue is Defendants' contention that Shipley waived any argument that there was a procedural defect in removal by failing to timely raise it. Shipley responds that she did not waive her objection to the timeliness of removal and that, as a threshold matter, the district court's remand order is unreviewable.

We begin with the threshold jurisdictional question of whether the district court's remand order is reviewable. Section 1447(d) provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). But there are exceptions to this general prohibition on appellate review. The Supreme Court has explained that § 1447(d) applies "only [to] remands based on grounds specified in § 1447(c)." *Quackenbush*, 517 U.S. at 711–12 (1996) (quotation omitted). We have jurisdiction to review whether the district court remanded a case by exceeding its statutory authority under § 1447(c). *See Corp. Mgmt. Advisors, Inc. v. Artjen Complexus, Inc.*, 561 F.3d 1294, 1296 (11th Cir. 2009).

We have not yet addressed whether a district court exceeds its statutory authority by remanding a case based on a procedural removal defect when the plaintiff files a motion to remand within 30 days of the notice of removal, but raises a procedural defect only outside the 30-day time limit. Our sister circuits have split on this issue. *Compare BEPCO,*

L.P. v. Santa Fe Minerals, Inc., 675 F.3d 466, 471 (5th Cir. 2012) (holding that the district court was within its statutory authority to remand in this circumstance), *with N. Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co.*, 69 F.3d 1034, 1038 (9th Cir. 1995) (holding that the district court exceeded its statutory authority to remand in this circumstance).

Because this is a question of statutory interpretation, our analysis starts with § 1447(c)'s plain text. *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1199 (11th Cir. 2007).

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

28 U.S.C. § 1447(c). We have interpreted this language to mean that a remand order pursuant to § 1447(c) must be "openly based" on (1) lack of subject matter jurisdiction, or (2) "a motion to remand the case filed within 30 days of the notice of removal which is based upon a defect in the removal procedure."[2] *In re Bethesda Mem'l Hosp., Inc.*, 123 F.3d 1407, 1409 (11th Cir. 1997).

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[2] Our precedent shows that § 1447(c) governs only remands for lack of subject matter jurisdiction or defects in removal procedure and does not preclude remand on grounds other than these, such as contractual forum-selection clauses. *Snapper,*

Here, remand was for a defect in the removal procedure, rather than for lack of subject matter jurisdiction. *See Moore v. N. Am. Sports, Inc.*, 623 F.3d 1325, 1329 (11th Cir. 2010) (per curiam) (holding that "timeliness of removal is a procedural defect—not a jurisdictional one"). Therefore, our task is to determine whether the remand order is based on "a motion to remand the case filed within 30 days of the notice of removal which is based upon a defect in the removal procedure." *In re Bethesda Mem'l Hosp., Inc.*, 123 F.3d at 1409. If so, the remand order is "immune from review under § 1447(d)." *Quackenbush*, 517 U.S. at 712. If not, the district court exceeded its authority under § 1447(c), meaning we have jurisdiction to review and to vacate the remand order.

We conclude that the remand order is not based on such a motion. Shipley filed a motion that was timely, but it was based on lack of subject matter jurisdiction—not a procedural defect. Her reply was based on a procedural defect—timeliness of removal. But it was filed 54 days after the notice of removal, well outside the 30-day timeframe set forth by the statute. *See* 28 U.S.C. § 1447(c). Neither Shipley's motion nor her reply brief was "[a] motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction . . . made within 30 days after the filing of the notice of removal." *Id.* Therefore, when the district court remanded because of a procedural defect, it did not base its order "on grounds specified in § 1447(c)." *Quackenbush*, 517

Inc. v. Redan, 171 F.3d 1249 (11th Cir. 1999) (reaching the merits and affirming remand based on forum-selection clause).

U.S. at 712. And as a result, the remand order is not "immune from review under § 1447(d)." *Id.*

Seeking to reconcile her position with the plain language of the statute, Shipley argues that her reply, in which she first raised a procedural defect, was effectively an amendment to her earlier timely motion for remand. But there is simply nothing in the district court's remand order to suggest that the court construed Shipley's later motion as an amendment to her earlier motion. Instead, the district court's reasoning was that it could remand when a plaintiff timely filed a motion to remand, even if the motion did not raise a procedural defect. So, as we have explained, the district court's order is "openly based" on a ground that is neither (1) lack of subject matter jurisdiction, nor (2) a motion to remand based on a procedural defect made within 30 days after the notice of removal. *See In re Bethesda Mem'l Hosp. Inc.*, 123 F.3d at 1409.

For the same reason—because Shipley did not file a motion to remand based on a procedural defect within the 30-day time limit required by the statute— Shipley forfeited any procedural objection to removal.[3] In finding that Shipley's procedural

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[3] While the district court and the parties refer to "waiver," this is really an issue of "forfeiture." Waiver refers to the "intentional relinquishment or abandonment of a known right" whereas forfeiture refers to the "failure to make the timely assertion of a right." *United States v. Olano*, 507 U.S. 725, 733 (1993). Because the question here is whether Shipley timely asserted her right to object to a defect in the removal process, we use the term forfeiture.

objection was preserved, the district court found persuasive our decision in *Velchez v. Carnival Corp.*, 331 F.3d 1207 (11th Cir. 2003), although the court recognized that the case was not directly on point. In *Velchez*, we held that when a plaintiff files a timely motion to remand based on a procedural defect, the court can order remand based on a different procedural defect that the plaintiff never raised. *Id.* at 1210. That holding does not conflict with our decision today. The plaintiff in *Velchez* filed a motion making a procedural objection to removal within 30 days of the notice of removal as required by the statute, whereas Shipley did not. Finding that our holding is not inconsistent with our decision in *Velchez*, we rely on the plain statutory language in concluding that Shipley forfeited any procedural objections by failing to raise them within the timeframe required by the statute.

IV.

In conclusion, § 1447(c) allows a district court to remand based on lack of subject matter jurisdiction or upon a timely motion to remand on the basis of a procedural defect. The district court's remand order is based on neither of those grounds. Shipley *untimely* raised a procedural defect in removal, thus forfeiting that objection. As a result, the district court had no authority to remand the case on that

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The parties' briefing also focuses on whether removal was timely. Because Shipley waived her objection to the defect in removal, we need not reach that question.

basis. Therefore, we vacate the order remanding the case to state court. **VACATED**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

BETTY R. SHIPLEY,)
)
Plaintiff,)
)
vs.) **CIVIL ACTION NO.**
)**18-0437-CG-B**
)
HELPING HANDS)
THERAPY)
et. al.,)
)
Defendants.)

ORDER

This matter is before the Court on Plaintiff's Motion to Remand. The Magistrate Judge has entered a Report and Recommendation recommending that Plaintiff's motion be denied, to which Plaintiff has filed an Objection. (Doc. 42). After review of the relevant pleadings, the undersigned finds Plaintiff's objection compelling, in part. As such, for the reasons set forth herein below, Plaintiff's Motion to Remand is GRANTED.

BACKGROUND[1]

Plaintiff, Bettye R. Shipley ("Shipley" or "Plaintiff"), commenced this action on October 12, 2017, in the Circuit Court of Hale County, Alabama. (Doc. 1-1at 3). In her complaint, Shipley names as Defendants Helping Hands Therapy/Greensboro Out-Patient Clinic and Sarah Beaugez, PT. (*Id.*). Shipley asserts that she had a left knee replacement and underwent prescribed physical therapy with Helping Hands Therapy, located in Greensboro, Alabama, to regain strength and range of motion in her left knee. Shipley contends that, on September 8, 2016, Defendant Sarah Beaugez, a physical therapist with Helping Hands Therapy, forced her leg to bend to fourteen degrees beyond her tolerance, and in so doing, caused her left knee replacement to fail. (*Id.* at 3-4). Shipley contends that she was unable to walk or do anything for two weeks, that she is unable to walk properly and needs another surgery, that she is in constant pain and requires daily pain medication, and that she must use a wheel chair and a riding buggy in order to get around places such as the grocery store. (*Id.*). Shipley asserts that Beaugez acted negligently and with wantonness, and seeks compensatory and punitive damages. (*Id.*)

On October 11, 2018, New Hope LLC d/b/a Helping Hands Therapy/Greensboro Out-patient

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[1] For the sake of judicial economy, the information provided in the Background and Standard of Review is repeated from Magistrate Judge Bivins' Report and Recommendation and is only updated to include Plaintiff's objection (Doc. 42) and the undersigned's analysis of the same.

Clinic filed a Notice of Removal. (Doc. 1). On the same date, Defendant Beaugez filed a notice of consent and joinder in the removal. (Doc. 3). Defendants assert the existence of complete diversity because Shipley is a resident of Alabama; New Hope LLC is a Mississippi corporation, with its principal place of business in Meridian, Mississippi, and its three members are Jia Liu, Roshanda Lankford, and Bailing Wang, residents of Georgia, Mississippi, and Georgia respectively.[2] (Doc. 1-2). Defendants further contend that Defendant Beaugez was a resident of Mississippi at the time the lawsuit was filed in October 2017 and that she had an intent to remain there at that time. (Doc. 1 at 3).

With respect to the amount in controversy, Defendants contend that on May 24, 2018, in response to Helping Hands' interrogatories, Shipley claimed to be housebound for most of the time since her injury on September 8, 2016, and that she now requires the use of a cane and has slept in a recliner for over two to three years. She also indicated that she had to have another surgery in January 2018 and that she had filed a claim for disability due to the injuries she sustained as a result of Beaugez's actions. (Doc. 1-1 at 151, Plaintiff's Interrogatory Responses, Nos. 10, 11, and 14).

Defendants assert that subsequent thereto, Helping Hands issued Requests for Admissions to Shipley requesting that she admit or deny that that her damages exceed $75,000 and that she would

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[2] Defendants later clarified that Liu, Lankford, and Wang are citizens of Georgia, Mississippi, and Georgia respectively. (Doc. 18-1 at 3)

accept more than $75,000.(Doc. 1, Doc. 1-1 at 161-62). Shipley responded that she was unable to admit or deny the admission requests, and in response thereto, Defendants requested that she amend her discovery responses. (*Id.*). When Shipley refused to do so, Helping Hands filed a motion to compel in state court and requested an order directing Shipley to supplement her responses by October 1, 2018. (*Id.* at 6). The state court scheduled the matter for a hearing on November 5, 2018, which was more than one year after Shipley had filed her complaint in state court. Defendants requested that the hearing date be moved up, but Shipley refused. (*Id.* at 10).

Defendants contend that this case became removable on October 1, 2018, when Shipley refused to respond to Defendants' requests regarding damages with full knowledge that the one-year limitation for removal was approaching. (Doc. 1-1 at 10). Defendants further assert that Plaintiff's refusal to limit her damages and refusal to agree to moving up the hearing date for the summary judgment motion shows an intent to dodge jurisdictional inquiries in an effort to defeat removal jurisdiction. (*Id.*). According to Defendants, those refusals, coupled with the injuries claimed and damages sought in Shipley's complaint and interrogatory responses provided Defendants with the evidence necessary to ascertain that Plaintiff was seeking more than $75,000 and unambiguously establishes that the amount in controversy exceeds $75,000. Defendants thus argue that the case was timely removed. (*Id.*)

Shipley filed her motion to remand on November 8, 2018. (Doc. 10). In her motion to remand, Shipley

argues that a record from the Alabama Secretary of State clearly shows that Helping Hands Therapy is an Alabama limited liability company incorporated in Alabama; thus, there is no diversity jurisdiction. (Doc. 10at 4). Shipley further asserts that even if Helping Hands Therapy is a trade name for a Mississippi business, at the time the lawsuit was filed, its principal place of business was Alabama under the "nerve center test" given that all three of its clinics are located in Alabama. (*Id*. at 5). Shipley contends that Meridian, Mississippi cannot possibly be Helping Hands' "nerve center" because there is no corporate activity occurring there, as all of its clinics are located in Alabama. (*Id*.)

With respect to the amount in controversy, Shipley asserts that she "does not intend to waive an argument that the amount in controversy is less than $75,000" and "that the issue is moot without complete diversity." (*Id*. at 7). Plaintiff also contends that contrary to Defendants' assertion, she refused to move up the hearing date in state court because the motion to compel was "obviously frivolous," and Defendants' only goal was to try to establish diversity jurisdiction. (*Id*. at 8).

In Defendant Beaugez's response in opposition to Shipley's motion to remand (Doc. 16), Beaugez asserts that the sole basis for Shipley's motion is her contention that Helping Hands is a citizen of Alabama. Beaugez notes that Shipley made no argument contesting the amount in controversy and offered no evidence to rebut Helping Hands' showing that the amount in controversy is satisfied. (*Id*.).

Defendant Helping Hands also filed a response in opposition to Shipley's motion. (Doc. 14). Helping

Hands argues that Shipley's motion actually bolsters Defendants' contention that the amount in controversy exceeds $75,000. (Doc. 18). According to Helping Hands, Shipley has indicated that she is seeking compensatory and punitive damages for significant physical harm, increased medical costs, pain, suffering and other damages, that she cannot walk properly and is in constant pain and that she takes pain medication daily and uses a wheelchair and riding buggy at places such as the grocery store. Helping Hands asserts that such evidence is sufficient to establish that the amount in controversy exceeds $75,000. (*Id*. at 7).

With respect to diversity, Helping Hands contends that contrary to Shipley's assertions, for diversity purposes, a limited liability company, unlike a corporation, is a citizen of any state of which a member of the company is a citizen, and it matters not where the company was formed or has its principal place of business. (*Id*. at 6). Helping Hands further contends that the uncontroverted evidence establishes that Helping Hands Therapy, LLC was not formed until March 2018 and that the allegations in Plaintiff's complaint relate to services provided at a clinic operated by New Hope, LLC, which was doing business under the trade name Helping Hands Therapy. (*Id*. at 5). Additionally, Defendant asserts that at the time this lawsuit was filed, and at the time of removal, New Hope, LLC d/b/a Helping Hands Therapy, had three members, namely Jia Liu, Roshanda Lankford, and Bailey Wang, who were citizens of Georgia, Mississippi, and Georgia respectively. (*Id*. at 6). Helping Hands also asserts that it has demonstrated, and Shipley has

not contested, that she is a citizen of Alabama, and Sarah Beaugez is a citizen of Mississippi. Thus, diversity of citizenship has been established. (*Id.*).

On December 4, 2018, Shipley filed her reply to Defendants' response in opposition to her motion to remand. (Doc. 21). In her reply, Shipley argues that the removal was untimely. (*Id.* at 1). According to Shipley, while Defendants contend that they did not know that the amount in controversy exceeded $75,000 until October 1, 2008, her factual allegations did not change between the filing of her complaint on October 11, 2017, and October 1, 2018, the date Defendants contend they were on notice that the amount in controversy exceeds $75,000. (*Id.* at 2). Shipley also asserts that assuming that Helping Hands is a citizen of Mississippi and Georgia, diversity jurisdiction is still lacking because Defendant Beaugez is a citizen of Alabama notwithstanding her representations to the Court. Shipley avers that Beaugez has an Alabama driver's license, appears to own a car with a current Alabama registration, is registered to vote and has voted in Alabama, and in July 2017 and July 2018, she received two traffic tickets in Alabama, and both tickets reflect an Alabama home address. (*Id.* at 3-4).

Defendant Beaugez filed a response in opposition to Plaintiff's response. (Doc. 31). In her response, Beaugez argues that the removal was timely and that at the time the lawsuit was filed in October 2017, she physically resided in Mississippi and had the intent to remain there. (*Id.*) Helping Hands also filed a response to Shipley's reply (Doc. 30). Helping Hands argues that the removal was timely and that

Beaugez was a citizen of Mississippi at the time the Complaint was filed. (Doc. 30). Following the evidentiary hearing on March 6, 2019, the parties filed supplemental briefs, at the Court's directive, on the issue of whether the removal was timely filed. (Docs. 37, 38). Shipley asserts that Defendants' removal was untimely, while Defendants allege that the removal was timely filed and that Shipley waived the timeliness issue by not raising it in her motion to remand. On June 19, 2019, the Magistrate Judge issued a Report and Recommendation recommending that Plaintiff's motion be denied. (Doc. 41). Plaintiff filed the instant objection on July 2, 2019. (Doc. 42).

STANDARD OF REVIEW

A removing defendant has the burden of proving proper federal jurisdiction. *See Adventure Outdoors, Inc. v. Bloomberg*, 552 F.3d 1290, 1294 (11th Cir. 2008);

Friedman v. New York Life Ins. Co., 410 F.3d 1350, 1353 (11th Cir. 2005) ("In removal cases, the burden is on the party who sought removal to demonstrate that federal jurisdiction exists.") (citation and internal brackets omitted); *McCormick v. Aderholt*, 293 F.3d 1254, 1257 (11th Cir. 2002) (noting that "the party invoking the court's jurisdiction bears the burden of proving, by a preponderance of the evidence, facts supporting the existence of federal jurisdiction."); *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1373 (11th Cir. 1998) ("In a motion to remand, the removing party bears the burden of showing the existence of federal jurisdiction."). Because removal infringes upon state sovereignty and implicates central concepts of

federalism, removal statutes must be construed narrowly, with all doubts resolved in favor of remand. *See University of S. Ala. v. American Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999); *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994). Furthermore, "once a federal court determines that it is without subject matter jurisdiction, the court is powerless to continue." *Underwriters at Lloyd's, London v. Osting-Schwinn*, 613 F.3d 1079, 1092 (11th Cir. 2010) (citation and internal brackets omitted).

"Eleventh Circuit precedent permits district courts to make reasonable deductions, reasonable inferences, or other reasonable extrapolations from the pleadings to determine whether it is facially apparent that a case is removable." *SUA Ins. Co. v. Classic Home Builders, LLC*, 751 F. Supp. 2d 1245, 1252 (S.D. Ala. 2010) (quoting *Roe v. Michelin North America, Inc.*, 613 F.3d 1058, 1061-62 (11th Cir. 2010)). Courts may use judicial experience and common sense to determine whether the case stated in the complaint meets the requirements for federal jurisdiction. *Id.* Reliance on "speculation" is "impermissible." *Id.* (citing *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 771 (11th Cir. 2010)).

DISCUSSION

Plaintiff objects to the Report and Recommendation ("R&R") of the Magistrate Judge on multiple grounds. The undersigned has reviewed each of those grounds and finds them to be unconvincing, save for one: the issue of whether Plaintiff timely raised the untimeliness of

Defendants'[3] Notice of Removal.[4] On that issue, the Magistrate Judge found that Plaintiff had waived her argument that Defendants' removal was untimely because she failed to raise the same in her initial motion to remand, and instead, only raised the issue in her reply to Defendants' opposition to her motion to remand.[5] In so finding, the Magistrate Judge discussed that courts are split over the issue of whether the timely filing of a motion to remand alleging a procedural defect is sufficient to preserve another procedural objection under §1447(c). (Doc. 41 at 19). After considering the relevant decisions on the issue from the Ninth and Fifth Circuits, the Magistrate Judge found the reasoning of the Ninth Circuit to be applicable. Specifically, the decision of the Ninth Circuit in *Northern California Dist. Council of Laborers v. Pittsburgh-Des Moines Steel Co.*, 69 F.3d 1034 (9th Cir. 1995), wherein the court

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[3] The Notice of Removal was filed by Helping Hands with Defendant Beaugez filing a Notice of Joinder the same day. (Docs. 1 and 3). However, because both Defendants oppose the motion to remand and have presented overlapping positions as to the same, the undersigned will simply refer to them collectively as "Defendants".

[4] Of note, Plaintiff's Objection correctly states that the citizenship of Beaugez should have been analyzed based on the date of removal, not based on the date of the filing of the Complaint. (Doc. 42 at 13-15). Nevertheless, the undersigns finds that the result would be the same if Beaugez's citizenship were determined based on the date of the removal. As such, no further discussion of Beaugez's citizenship is warranted.

[5] There is no dispute that Plaintiff did not raise timeliness until December 4, 2018, more than thirty days after Defendants filed a notice of removal.

held that where the plaintiff's remand motion was filed within thirty days, but no defect in the removal procedure was ever raised until a reply brief filed more the thirty days after the removal petition, the plaintiff had waived any procedural objections. (Doc. 41 at 19-20). The R&R also recognized that several courts within this circuit have followed the reasoning of the Ninth Circuit. (*See* Doc. 41 at 22) (citing *Clark v. USAA Cas. Ins. Co.*, 2015 WL 7272305, *2 (M.D. Fla. Nov. 18, 2015); *Robinson v. Affirmative Ins. Holdings, Inc.*, 2013 WL 838285, *2 (N.D. Ala. March 1, 2013); *accord Harris v. JLG Indus.*, 2016 WL 325132, (S.D. Ala. Jan. 27, 2016)[6].

A. WAIVER

In her Objection, Plaintiff urges this Court not to follow the Ninth Circuit's decision in *Pittsburgh-Des Moines Steel*, relied on by the Magistrate Judge and instead, to adopt the reasoning of the Fifth Circuit in *BEPCO, L.P. v. Santa Fe Minerlas, Inc.*, 675 F.3d 466 (5th Cir 2012). In support of her position, Plaintiff points to dicta from a not-on-point Eleventh Circuit decision in *Velchez v. Carnival Corp.*, 331 F.3d 1207, (11th Cir. 2003), which she asserts parallels the Fifth Circuit's reasoning in

[6] The undersigned recognizes that the R&R in *Harris*, which was adopted by this Court, contained an analysis as to waiver that is almost identical to the analysis in the R&R in this action. However, in that action, as in this one, before the filing of Plaintiff's objection, the Court was not presented with the argument Plaintiff has now presented based on *Velchez*, which the undersigned finds compelling.

Schexnayder v. Entergy Louisiana, Inc., 394 F.3d 280 (5th Cir. 2004), and led to *BEPCO*. (Doc. 42 at 2-9)

In *Velchez*, a plaintiff sought remand of his action against Carnival Cruise Line for failure of Carnival to attach a copy of all process, pleadings, and orders served, to the removal as required by § 1446(a). *Velchez*, 331 F.3d at 1208-09. The case was remanded, not for failure to attach the requisite documents, but for untimeliness. *Id*. Carnival sought to appeal the remand order despite the fact that a remand order is unreviewable by claiming that the district court went outside of its authority because it granted remand on a procedural defect not raised by Plaintiff, i.e. timeliness. *Id*. at 1209-10. Thus, Carnival urged that the remand was ordered *sua sponte* and should be reviewable because it was improper. *Id*. The Eleventh Circuit denied the appeal after determining that the remand order was not *sua sponte* because the Plaintiff had timely filed a motion to remand which made known the plaintiff's lack of desire to acquiesce to federal forum. *Id*.

Similar to the Eleventh Circuit's conclusion in *Velchez*, in *Schexnayder*, the Fifth Circuit held that a Court could remand an action based on a procedural defect not raised by a Plaintiff in a timely motion to remand. Later, in *BEPCO*, the Fifth Circuit rejected "any suggestion that the timing of the presentation of a removal defect -- rather than the submission of the remand motion -- is what matters for a timeliness analysis under § 1447(c)." *Id*. at 471. As such, in *BEPCO*, the court found that a motion to remand could be granted based on a procedural defect that was raised by a plaintiff, even if that

defect was not raised in the initial timely motion to remand. *Id.* As a result, Plaintiff contends that the Eleventh Circuit's decision in *Velchez* supports the ultimate conclusion reached by the Fifth Circuit in *BEPCO*, i.e. that a plaintiff does not waive a procedural defect by failing to raise that issue in her initial timely motion to remand.

Plaintiff additionally argues that following the Ninth Circuit's position on waiver, i.e. that a procedural defect not raised in an otherwise timely motion to remand is waived, while simultaneously following the rationale of the Eleventh Circuit in *Velchez* would create a rule "stating that a timeliness argument is waived if first asserted more than thirty (30) days after removal but is not waived if never asserted." (Doc. 42 at 4). Plaintiff goes on to cite other decisions within this circuit that have granted remand based on a procedural defect that was not raised by a plaintiff in her initial motion to remand. *See LaTasha Card v. Safeco Ins. Co. of Illinois*, 2016 WL 9114002, *1 (N.D. Fla. Feb. 1, 2016); *Deweese v. Doran*, 2015 WL 5772156. At *1 (M.D. Fla. September 30, 2015); *Axis Underwriters, Inc. v. Arch Specialty Ins. Co.*, *Axis Underwriters, Inc. v. Arch Specialty Ins. Co.*, 2008 WL 11406185 (S.D. Fla. Feb. 28, 2008) (S.D. Fla. Feb. 28, 2008).

This Court finds Plaintiff's arguments compelling and agrees that the rationale behind *Velchez* can logically be read to support the position that a Plaintiff does not waive a procedural defect by failing to raise that issue in an otherwise timely motion to remand. Certainly, if the Eleventh Circuit found the district court in *Velchez* to be within the confines of its statutory power when it remanded an action on

grounds that were not raised by Plaintiff at all because such a remand was not *sua sponte*, then the same rationale would support that a case could be remanded when a Plaintiff timely filed a motion to remand, even if the motion did not raise the issue on which a plaintiff later argues remand is warranted. Accordingly, the undersigned finds that the rationale of *Velchez* and the reasoning of the Fifth Circuit and the courts within this circuit that have followed *Velchez* and *BEPCO*, to be persuasive. Such a conclusion, however, only incites the question of whether or not Defendants timely removed this action, an issue not addressed by the Report and Recommendation.

B. TIMELINESS

Plaintiff is adamant that Defendants removal was untimely because absolutely nothing changed between the date on which Plaintiff filed her Complaint, and October 1, 2018, the date on which Defendants contend this case became removeable by "other paper" pursuant to 1446(b). (Doc. 21 at 2; Doc. 37 and 42, generally). Plaintiff alternatively argues that even if the amount in controversy was not facially apparent from the Complaint, the case became removable on May 24, 2018, the date on which Plaintiff responded to Defendant's Interrogatories and Request for Production, or, at the very latest, on August 31, 2018, when Plaintiff responded to Defendants' Requests for Admissions. (Doc. 42).

28 U.S.C. § 1446(b) makes removal proper in two instances. In the first instance, which is delineated in section 1446(b)(1) (formerly referred to as "first

paragraph removal"), the notice of removal must be filed "within 30 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." *Robinson*, at *2. In the second instance, a case may be removed under section 1446(b)(3) (formerly referred to as "second paragraph removal") if the defendant receives "a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." *Id.*

28 U.S.C. § 1446(b)(3) imposes the following thirty-day limitation on the removal of diversity cases:

> (3) [...] [I]f the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable....

28 U.S.C. § 1446(b)(3). Pursuant to § 1446(b)(3), the renewed removal window opens, but only for thirty days, when the defendant receives a document "from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b) (second paragraph). The Fifth Circuit has explained that "[a]scertain" means "to make certain, exact, or precise" or "to find out or learn with certainty." *Bosky v. Kroger Tex., LP*, 288 F.3d 208, 211 (5th Cir. 2002) (footnotes omitted). The "receipt from the plaintiff" rule in the second paragraph of

§ 1446(b), applies if "the case stated by the initial pleading is not removable" but the case "has become removable" due to changed circumstances. *See* 28 U.S.C. § 1446(b) (second paragraph). The traditional rule is that only a voluntary act by the plaintiff may convert a non-removable case into a removable one. *See Insinga v. LaBella*, 845 F.2d 249, 252 (11th Cir. 1988) (explaining the judicially created "voluntary-involuntary" rule that applies in diversity cases); *see also Weems v. Louis Dreyfus Corp.*, 380 F.2d 545, 547 (5th Cir. 1967). As such, removal under § 1446(b) requires three elements, "there must be (1) 'an amended pleading, motion, order or other paper,' which (2) the defendant must have received from the plaintiff (or from the court, if the document is an order) and from which (3) the defendant can 'first ascertain' that federal jurisdiction exists." *Lowery v. Alabama Power Company*, 483 F.3d at 1213 n.63 (11th Cir. 2007). "Thus, a defendant cannot show that a previously non-removable case 'has become removable' as a result of a document created by the defendant." *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 761 (11th Cir. 2010).

1. The Complaint

Plaintiff first asserts that Defendants' removal is untimely pursuant to §1446(b)(1) because it was filed more than thirty days after the service of the initial Complaint. This Court finds Plaintiff's assertion to be disingenuous. As repeatedly pointed out by Defendants, Plaintiff's Complaint made no mention of the amount of claimed damages that Plaintiff sought and only broadly described Plaintiff's injuries and damages, which may or may not have stated a

viable claim for punitive damages. (Doc. 1-1 at 3-5). Specifically, Plaintiff alleged only that she had a previous knee surgery that was allegedly ruined which caused her to be unable to walk for two weeks, caused daily pain for which she took medications, and required her to use a wheel chair or electronic cart when shopping. *Id.* It is further undisputed that at the time the Complaint was filed, Defendants were unaware of any actual damages incurred by Plaintiff. As a result, at the time of the filing of the Complaint, it was not facially apparent that the jurisdictional requirement for removal was satisfied. Furthermore, notwithstanding the lack of information available to Defendants as of the time of the filing of the Complaint, this Court also now has the benefit of hindsight. The fact that Plaintiff – after filing her Complaint which she now contends was facially obvious as to the amount in controversy – still failed to provide information as to her actual and potential damages to Defendants in response to discovery and has now argued on multiple occasions that she was unable to clearly determine the value of her case in August 2018, is telling. Plaintiff cannot have it both ways. Either Plaintiff provided Defendants with the information from which they could ascertain the amount of damages in the Complaint or at the time of filing the Complaint, and for months thereafter, Plaintiff herself could not determine such information. To find otherwise is not reasonable. In fact, this double-edged position is additionally highlighted by Plaintiff's continued insistence, even in her objection to the Report and Recommendation, that the amount in controversy has not been established. (*See* Doc. 42 at 13)

("Despite the Magistrate Court's finding that Ms. Shipley's claims meet the $75,000 threshold by a preponderance of the evidence [citation omitted], Ms. Shipley has never asserted an amount in controversy in any of her pleadings, responses to interrogatories, or answers to requests for admission [...as] more discovery is needed to give an unequivocal response to the question of amount in controversy.") Plaintiff would have this Court find that Defendants acted untimely in removing this case based on the Compliant, while at the same time allowing Plaintiff to dodge the amount in controversy question to serve as a basis of her remand. This Court is not inclined to oblige.

2. Plaintiff's Written Discovery Responses

Plaintiff next argues that the amount in controversy became ascertainable pursuant to §1446(b)(3) on May 24, 2018, the date on which she responded to Defendants' Interrogatories and Request for Production. (Doc. 42 at 10). However, Plaintiff offers nothing to suggest that she provided Defendants with information or documentation on that date by which her damages could be ascertained. Rather, Plaintiff's discovery responses only echoed the allegations of her Complaint but for the update that she had undergone a second surgery (the first attributed to this action). Moreover, Defendants have pointed out that according to Plaintiff's discovery responses, she had total medical bills of $373.30. (Doc. 38 at 1). Even considering the general allegations relating to damages asserted by Plaintiff at that time, there lacked clear and

convincing evidence that the monetary requirement for removal had been met. Accordingly, this Court is not satisfied that Defendants' time to remove this action began to run when Plaintiff responded to written discovery on May 24, 2018.

3. Plaintiff's Responses to Requests for Admission

Finally, Plaintiff asserts "even if this Court agrees that the case was not removable until Plaintiff responded to Helping Hands' Request for Admissions on August 31, 2018, stating that she was unable to admit or deny that the amount in controversy exceeded $75,000, Helping Hands still waited 42 days to remove. (Doc. 42 at 10).[7] In

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[7] Plaintiff simultaneously argues that this Court should not allow her responses to the RFA to essentially result in an admission of the requests, thereby satisfying the jurisdictional requirement. However, this Court does not find that Plaintiff's responses to the RFA *independently* established the amount in controversy. *See Jackson v. Litton Loan Servicing, LP, 2010* WL 3168117, *5 (M.D. Ala. August 10, 2010) "([A] refusal to stipulate to an amount in controversy in response to an interrogatory does not result in an admission regarding the amount in controversy.*") citing to Harmon v. Wal–Mart Stores, Inc.*, 2009 WL 707403 at *4 (M.D. Ala. 2009) ("Defendant cannot create an end-run around the jurisdictional requirements by forcing a denial of a negative and then claim the positive is admitted and conclusively determined."). Rather, this Court finds that that Plaintiff's refusal to limit her damages in response to the RFA was "other paper" which triggered the time to remove and that her refusal coupled with the other factors discussed herein above in her notice of removal satisfied the jurisdictional requirement by clear and convincing evidence.

response to Defendants' Requests for Admissions, Plaintiff provided the following answers to Defendants:

> RFA No. 1: Admit or deny that you will never seek to recover more than $75,000.00, exclusive of interest and costs.
>
> RESPONSE: The Plaintiff is unable to admit or deny this request at this time.
>
> RFA No. 2: Admit or deny that you will never accept any award greater than $75,000.00, exclusive of interest and costs.
>
> RESPONSE: The Plaintiff is unable to admit or deny this request at this time.
>
> RFA No. 3: Admit or deny that the total damages in this case do not exceed $75,000.00, exclusive of interest and costs.
>
> RESPONSE: The Plaintiff is unable to admit or deny this request at this time.

(Doc. 1-1 at 162; Doc. 30 at 7-8). It is undisputed that upon receipt of the above responses, Plaintiff was promptly asked by Defendants to supplement the same within seven days or on or before September 11, 2018. (Doc. 38 at 2). Plaintiff failed to do so. As a result, Defendants filed a motion to compel. (*Id.*). The state court set the motion for a hearing on November 5, 2018, a date beyond the one-year time limit to remove this civil action pursuant

to 28 U.S.C §1446(c)(1)[8] Defendants then sought Plaintiff's approval to move the hearing to a date prior to the expiration of the one-year removal deadline and Plaintiff refused. Accordingly, Defendants argue that Plaintiff's refusal on October 1, 2018, to supplement her responses to Defendants RFA, was the event that triggered the thirty-day removal timeline. (Doc. 1 at 7; Doc. 38). As a result, they argue their removal on October 11, 2018, was timely.

For the reasons set forth in the Magistrate Judge's R&R, this Court finds that Defendants' notice of removal satisfied the amount in controversy requirement based on Plaintiff's Complaint, her responses to Defendants' written discovery and her responses to the RFA. The pertinent question, then, is on what date did the relevant facts become ascertainable to Defendants by means of "other paper" pursuant to § 1446(b). In *Lowery*, the Eleventh Circuit listed "numerous types of documents [that] have been held to qualify. They include: responses to requests for admissions, settlement offers, interrogatory responses, deposition testimony, demand letters, and email estimating damages. *Lowry*, F.3d at 1212 n. 62. (internal citations omitted).

According to Defendants, the "other paper" provision of §1446(b) is satisfied by the state court's

[8] "A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action." 28 U.S.C §1446(c)(1)

order of September 18, 2018, setting the motion to compel for a hearing. (Doc. 38 at FN 2). However, the order of the state court setting the motion to compel, does nothing in the way of allowing Defendants to ascertain Plaintiff's damages. In fact, Defendants' action in removing when they did (prior to supplementation, a hearing, or an Order on the motion to compel), suggests that it was the answers to the RFA which actually prompted support for the removal, not the order setting the motion to compel for a hearing. In this action, the record does not contain any paper document created by Plaintiff and provided to Defendants on October 1, 2018 which would trigger the thirty-day time to remove this action. Specifically, Plaintiff's refusal to supplement her answers to the RFA on October 1, 2018, is not "other paper" and did not provide Defendants with any additional information than they had on August 31, 2018, when Plaintiff answered the RFA stating she was without sufficient information so as to answer. The motion to compel, created by Defendants, likewise, cannot constitute "other paper". Finally, Plaintiff's refusal to consent to rescheduling the hearing on the motion to compel does not qualify as "other paper". As a result, this Court is left with a situation in which Plaintiff has been less than forthcoming about her damages pre-removal, while arguing post-removal that the damages threshold had clearly been met since the Complaint was filed. Reason suggests that to remand this action would be unfair.[9] However,

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[9] This Court appreciates Defendants' argument that Plaintiff's conduct warrants a denial of her motion to remand. (Doc. 38 at 6-8). However, those cases cited by Defendant in which remand

timeliness under § 1446(b) hinges on the date in which defendant received "other paper" from which it could ascertain the case had become removable. *See* § 1446(b). Considering the totality of circumstances, as set forth in the notice of removal, this action became removable on August 31, 2018. On that date, Defendants were aware of Plaintiff's assertions in her Complaint, coupled with her discovery responses, including her assertion that she underwent a second surgery, and finally, (and importantly), her responses to the RFA, in which she refused to limit her damages. These are the same set of facts on which the Magistrate Judge concluded the jurisdictional monetary requirement was apparent.[10] As a result, despite this Court condemning Plaintiff's actions, the time for removal commenced on August 31, 2018, and closed on September 30, 2018. As such, Defendants' removal on October 11, 2018 was untimely.

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was denied, do not establish that the *conduct* warranted remand, rather than whether the underlying jurisdictional requirements were met despite a plaintiff's conduct. *See Logsdon v. Duron, Inc.*, 2005 WL 1163095, (M.D. Fla. May 17, 2005); *see also Nowlin v. National Linen Svcs.*, 1997 WL 715035 (N.D. Fla. Oct. 7, 1997). Similarly, this Court does not find that Plaintiff's conduct warrants a denial of Plaintiff's Motion to Remand.

[10] This Court is not of the opinion that any one of these events, when considered separately, would have been sufficient evidence to support removal. Rather, removal was ascertainable only when these events were considered together, which became possible on the date of the latest action by Plaintiff, August 31, 2018.

CONCLUSION

For the reasons stated hereon above, Plaintiff's Motion to Remand is **GRANTED** and this action is **REMANDED** to the Circuit Court of Hale County, Alabama.

DONE and **ORDERED** this 26th day of August, 2019.

/s/ Callie V. S. Granade
SENIOR UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA NORTHERN DIVISION

BETTY R. SHIPLEY,	*	
	*	
Plaintiff,	*	
vs.	*	
	*	CIVIL ACTION NO. 18-437-CG-B
HELPING HANDS THERAPY,	*	
et al.,	*	
	*	
Defendants.	*	

REPORT AND RECOMMENDATION

This matter is before the Court on Plaintiff Bettye R. Shipley's Motion to Remand (Doc. 10). The motion, which has been fully briefed, has been referred to the undersigned Magistrate Judge for entry of a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and S.D. Ala. CivLR 72(a)(2)(S). The Court conducted an evidentiary hearing on March 6, 2019. (Doc. 35). Upon consideration of the parties' briefs and the testimony and materials submitted at the evidentiary hearing, the undersigned **RECOMMENDS** that Plaintiff's Motion to Remand be **DENIED**.

I. Factual and Procedural Posture.

Plaintiff, Bettye R. Shipley ("Shipley" or "Plaintiff"), commenced this action on October 12,

2017, in the Circuit Court of Hale County, Alabama. (Doc. 1-1 at 3). In her complaint, Shipley names as Defendants Helping Hands Therapy/Greensboro Out-Patient Clinic and Sarah Beaugez, PT. (*Id.*). Shipley asserts that she had a left knee replacement and underwent prescribed physical therapy with Helping Hands Therapy, located in Greensboro, Alabama, to regain strength and range of motion in her left knee. Shipley contends that, on September 8, 2016, Defendant Sarah Beaugez, a physical therapist with Helping Hands Therapy, forced her leg to bend to fourteen degrees beyond her tolerance, and in so doing, caused her left knee replacement to fail. (*Id.* at 3-4). Shipley contends that she was unable to walk or do anything for two weeks, that she is unable to walk properly and needs another surgery, that she is in constant pain and requires daily pain medication, and that she must use a wheel chair and a riding buggy in order to get around places such as the grocery store. (*Id.*). Shipley asserts that Beaugez acted negligently and with wantonness, and seeks compensatory and punitive damages. (*Id.*)

On October 11, 2018, New Hope LLC d/b/a Helping Hands Therapy/Greensboro Out-patient Clinic filed a Notice of Removal. (Doc. 1). On the same date, Defendant Beaugez filed a notice of consent and joinder in the removal. (Doc. 3). Defendants assert the existence of complete diversity because Shipley is a resident of Alabama; New Hope LLC is a Mississippi corporation, with its principal place of business in Meridian, Mississippi, and its three members are Jia Liu, Roshanda Lankford, and Bailing Wang, residents of Georgia, Mississippi, and

Georgia respectively.[1] (Doc. 1-2). Defendants further contend that Defendant Beaugez was a resident of Mississippi at the time the lawsuit was filed in October 2017 and that she had an intent to remain there at that time. (Doc. 1 at 3).

With respect to the amount in controversy, Defendants contend that on May 24, 2018, in response to Helping Hands' interrogatories, Shipley claimed to be housebound for most of the time since her injury on September 8, 2016, and that she now requires the use of a cane and has slept in a recliner for over two to three years. She also indicated that she had to have another surgery in January 2018 and that she had filed a claim for disability due to the injuries she sustained as a result of Beaugez's actions. (Doc. 1-1 at 151, Plaintiff's Interrogatory Responses, Nos. 10, 11, and 14).

Defendants assert that subsequent thereto, Helping Hands issued Requests for Admissions to Shipley requesting that she admit or deny that that her damages exceed $75,000 and that she would accept more than $75,000. (Doc. 1, Doc. 1-1 at 161-62). Shipley responded that she was unable to admit or deny the admission requests, and in response thereto, Defendants requested that she amend her discovery responses. (*Id.*). When Shipley refused to do so, Helping Hands filed a motion to compel in state court and requested an order directing Shipley to supplement her responses by October 1, 2018. (*Id.* at 6). The state court scheduled the matter for a

[1] Defendants later clarified that Liu, Lankford, and Wang are citizens of Georgia, Mississippi, and Georgia respectively. (Doc. 18-1 at 3).

hearing on November 5, 2018, which was more than one year after Shipley had filed her complaint in state court. Defendants requested that the hearing date be moved up, but Shipley refused. (*Id.* at 10).

Defendants contend that this case became removable on October 1, 2018, when Shipley refused to respond to Defendants' requests regarding damages with full knowledge that the one-year limitation for removal was approaching. (Doc. 1-1 at 10). Defendants further assert that Plaintiff's refusal to limit her damages and refusal to agree to moving up the hearing date for the summary judgment motion shows an intent to dodge jurisdictional inquiries in an effort to defeat removal jurisdiction. (*Id.*). According to Defendants, those refusals, coupled with the injuries claimed and damages sought in Shipley's complaint and interrogatory responses provided Defendants with the evidence necessary to ascertain that Plaintiff was seeking more than $75,000 and unambiguously establishes that the amount in controversy exceeds $75,000. Defendants thus argue that the case was timely removed. (*Id.*)

Shipley filed her motion to remand on November 8, 2018. (Doc. 10). In her motion to remand, Shipley argues that a record from the Alabama Secretary of State clearly shows that Helping Hands Therapy is an Alabama limited liability company incorporated in Alabama; thus, there is no diversity jurisdiction. (Doc. 10 at 4). Shipley further asserts that even if Helping Hands Therapy is a trade name for a Mississippi business, at the time the lawsuit was filed, its principal place of business was Alabama under the "nerve center test" given that all three of

its clinics are located in Alabama. (*Id.* at 5). Shipley contends that Meridian, Mississippi cannot possibly be Helping Hands' "nerve center" because there is no corporate activity occurring there, as all of its clinics are located in Alabama. (*Id.*)

With respect to the amount in controversy, Shipley asserts that she "does not intend to waive an argument that the amount in controversy is less than $75,000" and "that the issue is moot without complete diversity." (*Id.* at 7). Plaintiff also contends that contrary to Defendants' assertion, she refused to move up the hearing date in state court because the motion to compel was "obviously frivolous," and Defendants' only goal was to try to establish diversity jurisdiction. (*Id.* at 8).

In Defendant Beaugez's response in opposition to Shipley's motion to remand (Doc. 16), Beaugez asserts that the sole basis for Shipley's motion is her contention that Helping Hands is a citizen of Alabama. Beaugez notes that Shipley made no argument contesting the amount in controversy and offered no evidence to rebut Helping Hands' showing that the amount in controversy is satisfied. (*Id.*).

Defendant Helping Hands also filed a response in opposition to Shipley's motion. (Doc. 14). Helping Hands argues that Shipley's motion actually bolsters Defendants' contention that the amount in controversy exceeds $75,000. (Doc. 18). According to Helping Hands, Shipley has indicated that she is seeking compensatory and punitive damages for significant physical harm, increased medical costs, pain, suffering and other damages, that she cannot walk properly and is in constant pain and that she takes pain medication daily and uses a wheelchair

and riding buggy at places such as the grocery store. Helping Hands asserts that such evidence is sufficient to establish that the amount in controversy exceeds $75,000. (*Id.* at 7).

With respect to diversity, Helping Hands contends that contrary to Shipley's assertions, for diversity purposes, a limited liability company, unlike a corporation, is a citizen of any state of which a member of the company is a citizen, and it matters not where the company was formed or has its principal place of business. (*Id.* at 6). Helping Hands further contends that the uncontroverted evidence establishes that Helping Hands Therapy, LLC was not formed until March 2018 and that the allegations in Plaintiff's complaint relate to services provided at a clinic operated by New Hope, LLC, which was doing business under the trade name Helping Hands Therapy. (*Id.* at 5). Additionally, Defendant asserts that at the time this lawsuit was filed, and at the time of removal, New Hope, LLC d/b/a Helping Hands Therapy, had three members, namely Jia Liu, Roshonda Lankford, and Bailey Wang, who were *citizens* of Georgia, Mississippi, and Georgia respectively. (*Id.* at 6). Helping Hands also asserts that it has demonstrated, and Shipley has not contested, that she is a citizen of Alabama, and Sarah Beaugez is a citizen of Mississippi. Thus, diversity of citizenship has been established. (*Id.*).

On December 4, 2018, Shipley filed her reply to Defendants' response in opposition to her motion to remand (Doc. 21). In her reply, Shipley argues that the removal was untimely. (*Id.* at 1). According to Shipley, while Defendants contend that they did not know that the amount in controversy exceeded

$75,000 until October 1, 2008, her factual allegations did not change between the filing of her complaint on October 11, 2017, and October 1, 2018, the date Defendants contend they were on notice that the amount in controversy exceeds $75,000. (*Id.* at 2). Shipley also asserts that assuming that Helping Hands is a citizen of Mississippi and Georgia, diversity jurisdiction is still lacking because Defendant Beaugez is a citizen of Alabama notwithstanding her representations to the Court. Shipley avers that Beaugez has an Alabama driver's license, appears to own a car with a current Alabama registration, is registered to vote and has voted in Alabama, and in July 2017 and July 2018, she received two traffic tickets in Alabama, and both tickets reflect an Alabama home address. (*Id.* at 3-4).

Defendant Beaugez filed a response in opposition to Plaintiff's response. (Doc. 31). In her response, Beaugez argues that the removal was timely and that at the time the lawsuit was filed in October 2017, she physically resided in Mississippi and had the intent to remain there. (*Id.*) Helping Hands also filed a response to Shipley's reply (Doc. 30). Helping Hands argues that the removal was timely and that Beaugez was a citizen of Mississippi at the time the Complaint was filed. (Doc. 30). Following the evidentiary hearing on March 6, 2019, the parties filed supplemental briefs, at the Court's directive, on the issue of whether the removal was timely filed. (Docs. 37, 38). Shipley asserts that Defendants' removal was untimely, while Defendants allege that the removal was timely filed and that Shipley waived

the timeliness issue by not raising it in her motion to remand.

II. DISCUSSION.

A. Standard of Review

A removing defendant has the burden of proving proper federal jurisdiction. *See Adventure Outdoors, Inc. v. Bloomberg*, 552 F.3d 1290, 1294 (11th Cir. 2008); *Friedman v. New York Life Ins. Co.*, 410 F.3d 1350, 1353 (11th Cir. 2005) ("In removal cases, the burden is on the party who sought removal to demonstrate that federal jurisdiction exists.") (citation and internal brackets omitted); *McCormick v. Aderholt*, 293 F.3d 1254, 1257 (11th Cir. 2002) (noting that "the party invoking the court's jurisdiction bears the burden of proving, by a preponderance of the evidence, facts supporting the existence of federal jurisdiction."); *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1373 (11th Cir. 1998) ("In a motion to remand, the removing party bears the burden of showing the existence of federal jurisdiction."). Because removal infringes upon state sovereignty and implicates central concepts of federalism, removal statutes must be construed narrowly, with all doubts resolved in favor of remand. *See University of S. Ala. v. American Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999); *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994). Furthermore, "once a federal court determines that it is without subject matter jurisdiction, the court is powerless to continue." *Underwriters at Lloyd's, London v. Osting-Schwinn*,

613 F.3d 1079, 1092 (11th Cir. 2010) (citation and internal brackets omitted).

"Eleventh Circuit precedent permits district courts to make reasonable deductions, reasonable inferences, or other reasonable extrapolations from the pleadings to determine whether it is facially apparent that a case is removable." *SUA Ins. Co. v. Classic Home Builders, LLC*, 751 F. Supp. 2d 1245, 1252 (S.D. Ala. 2010) (quoting *Roe v. Michelin North America, Inc.*, 613 F.3d 1058, 1061-62 (11th Cir. 2010)). Courts may use judicial experience and common sense to determine whether the case stated in the complaint meets the requirements for federal jurisdiction. *Id.* Reliance on "speculation" is "impermissible." *Id.* (citing *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 771 (11th Cir. 2010)).

B. Amount In Controversy

As a preliminary matter, the undersigned observes that while Shipley has contested the existence of complete diversity of citizenship, she has not argued or sought to dispute Defendants' showing that the amount in controversy exceeds $75,000. In her complaint, Shipley asserts a medical malpractice claim against Defendants based on physical therapy services that Defendant Beaugez provided Shipley following a left knee replacement. As noted, *supra*, Shipley contends that her knee replacement was ruined, that she was unable to walk for two weeks, that she is in constant, excruciating pain which requires daily pain medication, that she is unable to walk properly, and that she requires a wheelchair and a riding buggy when she is out. Shipley further

alleges that Beaugez acted negligently and wantonly, and she seeks punitive and compensatory damages.

Additionally, in her discovery responses, Shipley alleges that she had to have another knee surgery in January 2018 due to Beaugez's actions, that she has been homebound most of the time, and that she has to use a cane and sleep in a recliner. (Doc. 1-1 at 151). The undersigned finds that while Shipley did not include a specific dollar amount in her complaint and refused in her admissions request to admit or deny that the damages in her case exceeded $75,000, her assertions regarding the extent of her injuries suffice to establish by a preponderance of the evidence that, at the time of removal on October 11, 2018, the amount in controversy exceeded the jurisdictional amount. *Thompson v. Ortensie*, 2017 U.S. Dist. LEXIS 174959, 2017 WL 4772741 (S.D. Ala. Oct. 23, 2017) ("Courts may use judicial experience and common sense in determining whether the minimum amount in controversy is satisfied.")

C. Citizenship of the Defendants

The Court's next inquiry is whether complete diversity exists. As note, *supra*, Shipley initially argued in her motion to remand that this case was improperly removed because Defendant Helping Hands Therapy was incorporated in Alabama, and all of its "nerve centers" are located in Alabama. In response, Defendants offered unrebutted evidence that Helping Hands Therapy, LLC, was not incorporated until March 2018 and that Shipley was treated on September 2016 by New Hope, LLC, d/b/a Helping Hand Therapy, and its employee Sarah

Beaugez, PT. Defendants also presented sworn testimony that the members of New Hope, LLC, are Jia Liu, Roshonda Lankford, and Bailing Wang, and that at the time this action was commenced, they were citizens of Georgia, Mississippi, and Georgia respectively. (Doc. 18-1)

The rule for diversity jurisdiction is "that the citizenship of an artificial, unincorporated entity generally depends on the citizenship of all the members composing the organization." *Rolling Greens, MHP, L.P. v. Comcast SCH Holdings, L.L.C.*, 374 F.3d 1020, 1021 (11th Cir. 2004) (per curiam) (citing *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195-96 (1990)); *see also Americold Realty Trust v. Conagra Foods, Inc.*, 136 S. Ct. 1012, 1016 (2016) ("So long as . . . an entity is unincorporated, we apply our 'oft-repeated rule' that it possesses the citizenship of all its members." (reaffirming Carden)). Accordingly, "to sufficiently allege the citizenships of . . . unincorporated business entities, a party must list the citizenships of all the members of [those] entities." Rolling Greens, 374 F.3d at 1022; accord *Mallory & Evans Contractors & Eng'rs, LLC v. Tuskegee Univ.*, 663 F.3d 1304, 1305 (11th Cir. 2011). In this case, Shipley has made no effort to rebut Defendants' showing with respect to New Hope, LLC. Instead, in its reply, Shipley questioned the citizenship of Defendant Beaugez. Defendants contend that Beaugez is a citizen of Mississippi, while Shipley contends that Beaugez is a citizen of Alabama.

Courts have held that, "[f]or diversity purposes, a person is a citizen of the state in which he is domiciled." *Slate v. Shell Oil Co.*, 444 F. Supp. 2d

1210, 1214 (S.D. Ala. 2006). A person's domicile is "the place of 'his true, fixed, and permanent home and principal establishment, and to which he has the intention of returning whenever he is absent therefrom. . . .'" *McCormick*, 293 F.3d at 1257-58 (quoting *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974)).[2] This Court, in *Slate*, stated that the determination of one's domicile is a "totality of the circumstances" analysis in which no single factor carries greater weight than another. *Slate*, 444 F. Supp. 2d at 1215. The *Slate* court included several indicia that can be considered, including:

> . . . the state(s) where civil and political rights are exercised, where taxes are paid, where real and personal property are located, where driver's and other licenses are obtained, where mail is received, where telephone numbers are maintained and listed, where bank accounts are maintained, where places of business or employment are located, and where memberships in local professional, civil, religious or social organizations are established.

Id.

Finally, a person may only have one domicile at a time, and there is a presumption that, once a person establishes their domicile, they are considered a citizen thereof until they have effectively manifested

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[2] All Fifth Circuit decisions handed down prior to the close of business on September 30, 1981, are binding on the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209, (11th Cir. 1981).

a new one. *Id.* To establish that one's domicile has changed, two things must be proven: "(1) physical presence at the new location, and (2) intent to remain there indefinitely." *Id.* at 1216; *see also McCormick*, 293 F.3d at 1258 (noting that "a change of domicile requires [a] concurrent showing of (1) physical presence at the new location with (2) an intention to remain there indefinitely.").

At the evidentiary hearing, Defendant Beaugez was the only witness called to testify. Beaugez testified that she was born in Mississippi, reared in Mississippi, attended school in Mississippi, and has spent her entire life living in Mississippi except limited periods during which she resided in Colorado and Alabama. According to Beaugez, she relocated from Mississippi to Alabama in September 2016 because she was in a romantic relationship with someone residing in Demopolis, Alabama. She moved into that individual's home, and on March 9, 2017, she obtained an Alabama's Driver's license and registered to vote in Alabama. (Pls. ex. 2, 3). Both documents bear the Demopolis, Alabama address.

Beaugez testified that the relationship soured, and on September 7, 2017, she relocated to Lucedale, Mississippi, with the intent to make Mississippi her home. Beaugez further testified that she obtained employment and rented a home in Lucedale, Mississippi. Defendants offered a Direct TV order form that reflects that Beaugez had cable service installed at her Lucedale, Mississippi residence on September 9, 2017, along with a pay stub from her employer at the time, George Regional Health

System dated October 12, 2017.[3] (Def.'s exs. 8, 9; Doc. 35-1 at 77-78). The pay stub bears the same Lucedale, Mississippi address as the Direct TV order form. (Doc. 35-1 at 78). Additionally, Defendants presented Beaugez's Mississippi vehicle registration which reflects that she registered her vehicle in Mississippi on September 29, 2017. (Def. ex. 2; Doc. 35-1 at 2). These documents are consistent with Beaugez's testimony that, after her romantic relationship soured in September 2017, she relocated from Alabama to Mississippi on September 6, 2019, with the intention of remaining in Mississippi.

Beaugez testified that in November 2017, she had a change of heart and decided to return to Alabama to give the relationship another try. As she had done before, Beaugez relocated to Alabama and lived in her romantic partner's home in Demopolis, Alabama. She ended the relationship a second (and allegedly final) time in March, 2018, and relocated back to Mississippi. Beaugez's 2017 tax records reflect that in July 2018, Alabama and Mississippi state tax returns were filed on her behalf for the time periods during which she worked in both states during 2017. (Def.'s exs. 5, 6; Doc. 35-1 at 6-26). The tax returns bear a Louisville, Mississippi address and are consistent with Beaugez's testimony that, after the second attempt at her relationship failed, she relocated back to Mississippi.

As noted, *supra*, the law in this Circuit provides that once a person establishes a domicile, it

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[3] Defendants also presented a Hepatitis B Vaccine form (Def. ex. 7) that reflects that Beaugez was administered he vaccine at her workplace in Lucedale, Mississippi on September 19, 2019.

continues until the person establishes a new domicile. To effect a change of one's legal domicile, there must be a change in residence, and there must be an intention to remain there. *See McCormick*, 293 F.3d at 1258. Based on the preponderance of the evidence presented, including the straight forward testimony of Beaugez, the undersigned finds that Beaugez was domiciled in Mississippi, not Alabama, when this lawsuit was filed on October 12, 2017, and as a result, complete diversity of citizenship existed at that time.[4]

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[4] At the hearing, Shipley submitted various documents to establish that Beaugez was a citizen of Alabama when the lawsuit was filed; however, the documents do not change the outcome. For example, when Beaugez was issued a traffic ticket in Marengo County, Alabama on July 14, 2017, she presented an Alabama driver's license that listed a Demopolis address. (Plaintiff's exs. 2, 5; Doc. 35 at 1-5). The document does not conflict with Beaugez's testimony that at the time, she was residing in Alabama and had the intention to be here. Further, the document reflecting that Beaugez was registered and voted in Alabama during the December 2017 election does not conflict with Beaugez's testimony and supporting documents that, for a near three month period, namely September 2017 through some point in November 2017, she returned to Mississippi following the breakup of her romantic relationship, and was not only domiciled in Mississippi, but intended to make it her home. At that point, she took a job in Mississippi, rented a house in Mississippi, and had her utilities turned on in Mississippi. It was only after Beaugez decided to attempt a reconciliation, which ultimately proved to be unsuccessful, that she returned to Alabama. Following the unsuccessful reconciliation, Beaugez again returned to Mississippi in March 2018 with the intent to remain there. The fact that she received a second Alabama traffic citation on July 27, 2018 (Plaintiff's ex. 6; Doc. 35 at 6), and at the time, presented her Alabama driver's license that listed a Demopolis address is of no moment given her testimony and supporting

D. Timeliness

Notwithstanding the Court's finding that diversity jurisdiction existed at the time of removal, the inquiry does not end there. In her reply filed on December 8, 2018 (doc. 21), Shipley argues for the first time that the removal was untimely because Defendants did not discover any new facts about the case between the filing of the complaint and the removal; thus, the case should have been removed much earlier. (*Id.*). Upon removal of an action to federal court, 28 U.S.C. § 1447(c) implicitly recognizes two bases upon which a district court may order a remand: "when there is (1) a lack of subject matter jurisdiction or (2) a defect other than a lack of subject matter jurisdiction." *Hernandez v. Seminole Cty.*, 334 F.3d 1233, 1236-37 (11th Cir. 2003) (citation omitted). Section 1447(c) provides, in pertinent part, that:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made *within 30 days* after the filing of the notice of removal under section 1446(a). If at any time before final judgment it

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documents that, at the time, she had relocated back to Mississippi and acquired a residence and employment in Mississippi, that she was passing through Alabama en route to somewhere else, and that she had not yet renewed her Mississippi license, which expired while she was still living in Alabama in January 2018. (Def. exs. 3, 4, 5, 6; Doc. 35-1 at 3-26). Thus, her Alabama driver's license was the only valid license she possessed at the time. (Plf. exs. 1, 2, 3; Doc. 35 at 1-3).

> appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.

28 U.S.C. § 1447(c) (emphasis added).

Courts have repeatedly held that the timeliness of removal is a procedural defect, not a jurisdictional one, *see Pretka*, 608 F.3d at 751-52, and that failure to comply with § 1447(c) waives any objection to a procedural defect. *RC Lodge, LLC v. SE Property Holdings, Inc.*, 2012 U.S. Dist. LEXIS 98199, 2012 WL 2898815, *6 (S.D. Ala. July 16, 2012)(citing *Wilson v. General Motors Corp.*, 888 F.2d 779, 781 n.1 (11th Cir. 1989)). The Court has broad discretion to decide whether a party has waived a procedural defect. *See Piper Jaffray & Co. v. Severini*, 443 F. Supp. 2d 1016, 1020 (W.D. Wis. 2006)("[a] district court has broad discretion in deciding whether a plaintiff has waived its right to object to procedural irregularities in removal proceedings."); *Premier Holidays Int'l, Inc. v. Actrade Capital, Inc.*, 105 F. Supp. 2d 1336, 1339 (N.D. Ga. 2000) ("this court has the discretion to deny remand even where the removal is untimely").

In this case, there is no question that Shipley filed her motion seeking remand within thirty days of Defendants' removal. However, while the Notice of Removal expressly alleged that it was timely filed, the sole issue raised in Shipley's remand motion was related to subject matter jurisdiction, namely that complete diversity of citizenship was lacking. No

procedural defects were raised. It was only in Shipley's reply, filed some fifty-four days after the Notice of Removal, that Shipley asserted that the removal was untimely.

Courts are split over the issue of whether the timely filing of a motion to remand alleging a procedural defect, such as lack of unanimity, is sufficient to preserve a timeliness or other procedural objection under § 1447(c). In *Northern California Dist. Council of Laborers v. Pittsburgh-Des Moines Steel Co.*, 69 F.3d 1034 (9th Cir. 1995), the Ninth Circuit held that where the plaintiff's remand motion was filed within thirty days, but no defect in the removal procedure was ever raised until a reply brief filed more than thirty days after the removal petition, the plaintiff had waived any procedural objections. The court reasoned that "the purpose of the 30-day time limit is to resolve the choice of forum at the early stages of litigation, and to prevent the shuffling of cases between state and federal courts after the first thirty days." *Id.* at 1038 (citations and internal quotation marks omitted). The court thus concluded that the defect in removal must be raised "promptly," or the statutory purpose would be defeated. *Id.*

The Fifth Circuit took the opposite view in *BEPCO, L.P. v. Santa Fe Minerals, Inc.*, 675 F.3d 466, 471 (5th Cir. 2012). In *BEPCO*, the Fifth Circuit rejected "any suggestion that the timing of the presentation of a removal defect -- rather than the submission of the remand motion -- is what matters for a timeliness analysis under § 1447(c)." *Id.* There is no controlling precedent in this circuit, but in *RC Lodge*, 2012 U.S. Dist. LEXIS 98199, the

court discussed the conflict. In that case, the plaintiffs' motion to remand only raised lack of subject matter jurisdiction; however, fifty-two days later, plaintiffs argued that remand was required because all of the defendants had not consented to the removal. In *RC Lodge*, the court recognized the conflict and observed:

> The Fifth Circuit found section 1447(c) unambiguous in this respect, 675 F.3d at 471, but the Court is not so sure. After all, the sort of motion to remand that must be filed within 30 days of removal is specifically described as one "on the basis of any defect" in removal procedure. A motion to remand that asserts no defect in removal procedure cannot easily be characterized as one made "on the basis" of such a defect. In the Court's view, this language renders the statute at least ambiguous and so opens the door to examination of its purpose in order to resolve the ambiguity. The Ninth Circuit considered that purpose and found it to bolster its reading of the statute. 69 F.3d at 1038.

RC Lodge, 2012 U.S. Dist. LEXIS 98199.

The court in *RC Lodge* ultimately decided that it was not necessary to resolve the issue because the defendant had not argued that the plaintiffs' consent argument was untimely under § 1447(c). *See RC Lodge*, 2012 U.S. Dist. LEXIS 98199. Several courts that have resolved the issue have endorsed the reasoning set forth in *Pittsburg-Des Moines* and have held that an attack on the timeliness of removal, first raised more than thirty days after a notice of

removal, is waived. *See Engh v. SmithKline Beecham Corp.*, 2007 U.S. Dist. LEXIS 85882, 2007 WL 4179361, *2 (D. Minn. Nov. 20, 2007) (court refused to entertain the plaintiffs' argument that remand was necessary due to untimeliness of the removal notice when plaintiff's first raised the issue in its reply brief almost two months after the removal notice was filed.); *Hoste v. Shanty Creek Mgmt., Inc.*, 246 F. Supp. 2d 776, 780 (W.D. Mich. 2002) (holding that the plaintiff's assertion of untimeliness was untimely when first raised thirty-six days after the notice of removal was filed, despite the timely filing of a remand motion.); *see also Clark v. USAA Cas. Ins. Co.*, 2015 U.S. Dist. LEXIS 155947, 2015 WL 7272305, *2 (M.D. Fla. Nov. 18, 2015)(court held that the plaintiff waived any objection to the timeliness of a removal where the issue was not raised in his motion to remand but was instead raised for the first time at a hearing four months later.); *Robinson v. Affirmative Ins. Holdings, Inc.*, 2013 U.S. Dist. LEXIS 28306, 2013 WL 838285, *2 (N.D. Ala. Mar. 1, 2013) (by filing a motion to remand challenging only the amount in controversy, plaintiff expressly waives any objection to defendants' untimely removal.); *accord Harris v. JLG Indus.*, 2016 U.S. Dist. LEXIS 9195, *28 (S.D. Ala. Jan. 11, 2016), *report and recommendation adopted by*, 2016 U.S. Dist. LEXIS 9196 (S.D. Ala. Jan. 27, 2016).

In this action, Defendants argue that Shipley waived the timeliness argument because it was not raised in her motion to remand, but was instead raised fifty-four days after the filing of the Notice of Removal. Because the timeliness of a removal is a

procedural, rather than a jurisdictional defect, it must be raised within thirty days of the Notice of Removal. Shipley failed to timely raise the timeliness of the removal; therefore, based on the rationale of *Pittsburg-Des Moines*, 69 F.3d 1034, the undersigned finds that Shipley waived the timeliness argument. Thus, her motion to remand is due to be denied.

III. CONCLUSION.

For the reasons set forth above, the undersigned **RECOMMENDS** that Plaintiff's Motion to Remand (Doc. 10) be **DENIED**.

Notice of Right to File Objections

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to this recommendation or anything in it must, within fourteen (14) days of the date of service of this document, file specific written objections with the Clerk of this Court. *See* 28 U.S.C. § 636(b)(1); **Fed. R. Civ. P.** 72(b); S.D. Ala. GenLR 72(c). The parties should note that under Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may

review on appeal for plain error, if necessary, "in the interests of justice." *11th Cir. R. 3-1*. In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the Magistrate Judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the Magistrate Judge is not specific.

DONE this **19th** day of **June, 2019**.

/s/ SONJA F. BIVINS
UNITED STATES
MAGISTRATE JUDGE