IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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DOROTHY BEAVER, individually and as
Special Administrator of the Estate of
ARTHUR BEAVER, deceased;
DOROTHY BACKSTROM, individually and as
Special Administrator of the Estate of
JOHN BACKSTROM, deceased;
KAROLYN OUTCALT, individually and as
Special Administrator of the Estate of
DOLORES HOLETON, deceased;
GERALDINE GOULET, individually and as
Special Administrator of the Estate of
CLAYTON W. GOULET, deceased;
ADELE OTTO, individually and as
Special Administrator of the Estate of
BEN OTTO, deceased;
LYNN FOX, individually and as
Special Administrator of the Estate of
ORVIL M. SMITH, deceased;
LYNN FOX, individually and as
Special Administrator of the Estate of
ROBERT C. SMITH, deceased; and
EDITH POTTS, individually and as
Special Administrator of the Estate of
RICHARD J. POTTS, deceased,

OPINION and ORDER

Plaintiffs,

10-cv-375-wmc

v.

EXXON MOBIL CORPORATION, SUNOCO, INC.,
TEXACO DOWNSTREAM PROPERTIES, INC.,
FOUR STAR OIL AND GAS COMPANY, BP
PRODUCTS NORTH AMERICA, INC., TRONOX,
LLC, HOVLAND'S, INC., SHELL CHEMICAL L.P.,
ASHLAND CHEMICAL COMPANY DIVISION OF
ASHLAND, INC., (f.k.a. CLAIBORNE GASOLINE
COMPANY) and SHELL OIL COMPANY,

Defendants.

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This civil tort action was originally filed in the Circuit Court of the County of Eau Claire, Wisconsin, on July 9, 2009. On July 8, 2010, just one day before the one-year, absolute bar to removal, all defendants except Shell Chemical L.P., Shell Oil Company and Hovland's Inc. filed a notice of removal in this court claiming the existence of subject matter jurisdiction based solely on complete diversity pursuant to 28 U.S.C. § 1332(a). On July 26, 2010, the remaining defendants consented to the removal. Now before the court is plaintiffs' motion to remand the case as improperly removed. For the reasons that follow, that motion will be granted.

Plaintiffs assert three separate grounds for remand: (1) not all defendants properly joined in the removal of the action within the one-year deadline for filing a notice of removal; (2) defendants cannot show that the one, non-diverse defendant, Hovland's Inc., was joined fraudulently; and (3) more than 30 days had passed since defendants were made aware of viable grounds for removal rendering their notice of removal untimely. Although the latter two grounds may also have merit, the court agrees with plaintiffs on the first and need go no further. The failure of all defendants to join in the notice of removal renders it defective. By the time the remaining defendants filed consents to join in that notice of removal, the one-year time bar had passed. Even if the statute allows an equitable estoppel exception to the one-year filing deadline, the circumstances of this case would not warrant application of such an exception. Therefore, removal was improper and remand is warranted.

DISCUSSION

1. **Defendants' removal was untimely under § 1446(b)**

In relevant part, the federal removal statute provides:

> If 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, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. § 1446(b). Thus, under § 1446(b), there are two deadlines: (1) a "30-day" deadline, which requires removal within 30 days of first receiving a document showing the case may be removed; and (2) a "1-year deadline," which sets a final date of removability for certain diversity cases at "1 year after commencement of the action."

This action commenced in state court on July 9, 2009. There is no dispute that the only notice of removal filed before the 1-year deadline passed failed to include all defendants. The Shell defendants and Hovland's did not join the July 8, 2010 notice of removal, but instead consented to removal beyond the one-year deadline, on July 16, 2010. As defendants acknowledge, this means that the original notice of removal was defective when it was filed. *Northern Illinois Gas Co. v. Air.co Industries Gases, a Division of Airco, Inc.*, 676 F.2d 270, 273 (7th Cir. 1982). Nonetheless, defendants contend that removal was timely because *a* notice of removal was filed before the one-year period and all defendants joined that notice of removal within 30 days of the day they became aware that the case might be removable. In other words, according to defendants, the one-year limitation on removal requires only that some subset of defendants file a notice of removal within the year.

Even if it is a defective notice, defendants say removal is valid so long as all defendants consent to join the removal within the 30 day period set out in the statute.

There is some superficial appeal to defendants' position. By filing a notice of removal in federal court and the originating state court, removal has been accomplished in the sense that the jurisdiction has been removed from the state court and shifted to the federal court. Arguably then, the filing of the notice, evan a defective one, satisfies § 1446(b), because the case *was* removed within one year after commencement.

The problem with this argument is that it has already been made and rejected with regard to the 30-day deadline, which after all only requires that notice of removal be *filed* within 30 days of receipt of the pleading or from the date "it may be first ascertained" that the case is removable. 28 U.S.C. § 1446(b). Despite this apparently simple, straightforward requirement of a filing, courts require that all defendants join within 30 days. As one district court in this circuit explained, "[t]he rule is that all defendants over whom the state court has acquired jurisdiction must join in the notice of removal," which "require[s] that each defendant who has been served must at least communicate his or her consent to the court within thirty days after his or her receipt of the initial pleading containing the removable claim." *Martin v. Harshbarger*, 1994 WL 86020, at *2 (N.D. Ill. Mar. 14, 1994); *see also Smith v. Health Ctr. Of Lake City, Inc.,* 252 F. Supp. 2d 1336, 1339 (M.D. Fla. 2003) (quoting *Nathe v. Pottenberg*, 931 F. Supp. 822, 825 (M.D. Fla. 1995)) (all served defendants must join notice before expiration of 30-day deadline). In other words, although the rule requires only "removal" within 30 days (indeed, only the filing of a notice of removal), courts nevertheless require *proper* removal within that deadline.

Both deadlines are relatively arbitrary -- the one-year bar particularly so since it applies only to diversity cases -- but once imposed, there appears no sound basis to require all defendants to join removal within 30 days and relieve them from doing so within one year. If anything it would be far more reasonable to allow other defendants to join a timely filed notice beyond the 30-day deadline than to require unanimous participation within 365 days.

Defendants argue that their position finds support in the language of the statute, which requires the "notice" to be filed within the 30 day deadline but requires the "case" to be removed within one year. There are a number of problems with this argument. First, defendants' emphasis on the term "case" takes them nowhere. The focus of § 1446(b) is on accomplishing "removal," and it is that term, not "notice" or "case," which drives the outcome here. The Seventh Circuit Court of Appeals explained in *Northern Illinois Gas Co.* that "[a]s a general rule, all defendants must join in a removal petition in order to effect removal." *Id.* at 272. In other words, filing a defective notice of removal does not accomplish "removal" of a case, or at least does so only "improvidently," until all defendants timely joined. *Id.* This court is unable to discern (and can find no case law supporting) a principled distinction between an absolute, 30-day deadline for all defendants to join in a removal "notice" and a one-year deadline to join in removal of the "case." If anything, the one-year deadline to accomplish removal reads and acts as an absolute bar.[1] Nor is there a principled basis for requiring one defendant to sacrifice their 30-day period, if necessary, to file an

[1] Of course, neither deadline constitutes a jurisdictional bar in the sense that a failure to remove may be waived, if not asserted, without depriving the court of subject matter jurisdiction. *In re Amoco Petroleum Additives Co.,* 964 F.2d 706, 713 (7th Cir. 1992); *Balazik v. County of Dauphin,* 44 F.3d 209, 213 (3rd Cir. Pa. 1995).

inadequate notice of removal within the 1-year period (to effectuate the removal of the "case") while allowing the remaining defendants to enjoy the full 30 days to which the statute otherwise entitles them.

Second, defendants' case law falls far short of supporting their position. Certainly, the cases establish that the 30-day rule serves the purpose of allowing defendants to "investigate the appropriateness of removal" and applies individually to each defendant. *McKinney v. Board of Trustees of Mayland Community College*, 955 F.2d 924, 928 (4th Cir. 1992). In addition, the cited cases establish that "[a] removal petition may be amended freely within the thirty day period," *Northern Illinois Gas Co.*, 676 F.2d at 273, and several cases say that defendants may join a removal petition already filed if done within the 30-day period, *In re Bridgestone/Firestone, Inc.*, 128 F. Supp. 2d 1198, 1200 n.1 (S.D. Ind. 2001); *Mechanical Rubber & Supply Co. v. American Saw* & Mfg. Co., 810 F. Supp. 986, 989 (C.D. Ill. 1990); *Esposito v. Home Depot U.S.A., Inc.*, 436 F. Supp. 2d 343, 345 (D.R.I. 2006); *Lloyd v. Cabell Huntington Hosp., Inc.*, 58 F. Supp. 2d 694, 697 (S.D. W.Va. 1999); *Michaels v. State of New Jersey*, 955 F. Supp. 315, 320-22 (D.N.J. 1996); *Freeman v. Bechtel*, 936 F. Supp. 320, 325 (M.D.N.C. 1996); *Clyde v. National Data Corp.*, 609 F. Supp. 216, 218 (N.D. Ga. 1985).

None of these cases, however, address the interplay between the 30-day rule and the 1-year rule. Indeed, defendants identify no case that does. The only case that the court could find that even remotely touches on the issue is *Wisconsin v. Amgen, Inc.*, 516 F.3d 530, 534 (7th Cir. 2008). In *Amgen*, defendants filed their third notice of removal more than two years after the original lawsuit had been filed in state court but shortly after a False Claims

Act complaint was unsealed against the defendants. *Id.* at 531. Although the court of appeals concluded that remand was appropriate, it did so on grounds other than timeliness. *Id.* at 531-34. With respect to the question of timeliness, the court of appeals observed that:

> If the State of Wisconsin filed a paper in its state court suit that revealed for the first time that the suit was removable—maybe it decided to add a federal claim to its state law claims—then removable it would be, though more than 30 days had passed since the suit was filed. Otherwise a plaintiff could defeat removal by holding its federal claim in reserve when it filed its original suit and springing it on the defendant when the 30-day deadline for removing the case had expired.

Id. at 534. Of course, this discussion is concerned with "add[ing] a federal claim," taking it outside the realm of the 1-year rule, which applies only to removal on the grounds of diversity. When diversity is the jurisdictional basis, however, the statute itself allows removal within 30 days "from which it may first be ascertained" that a case is removable "*except* that a case may not be removed [under § 1332] more than 1 year after commencement of the action." 28 U.S.C. § 1446(b).

2. **Defendants are not entitled to invoke the doctrine of equitable estoppel on these facts**

Alternately, defendants contend that even if the one-year deadline bars late filed consents to join, the deadline should be deemed "equitably tolled" upon the filing of the original defect notice here. As an initial matter, it is not settled law whether equitable tolling applies to the one-year deadline. As discussed below, district courts across the country are divided on the matter, with some holding that the one-year bar can never be equitably tolled and others holding that tolling may apply in cases evidencing fraudulent joinder or other

types of forum manipulation. The usual rationale for applying equitable estoppel is that the one-year limitations period was not designed to allow a plaintiff to engage in forum manipulation. *Shiver v. Sprintcom, Inc.*, 167 F. Supp. 2d 962, 962 (S.D. Tx. 2001) (time for removal extended after plaintiff dismissed his first suit after removal, refiled in state court with non-diverse defendant and then "non-suited" that defendant on the eve of trial); *Morrison v. National Benefit Life Ins. Co.*, 889 F. Supp. 945, 947 (S.D. Miss. 1995) (extended time for removal beyond one-year deadline after plaintiffs denied that the amount in controversy satisfied § 1332 until after one-year deadline passed and then requested $1.9 million); *Leslie v. BancTec Service Corp.*, 928 F. Supp. 341, 347 (S.D.N.Y. 1996) (declining to apply one-year limitations period because defendant would not have had to file an untimely, third notice of removal "had it not been for the plaintiff's tactics").

Courts concluding that there is no equitable estoppel exception refer to the plain language of the statute and evidence of congressional intent, which suggests Congress intended to set a flat rule preventing removal of diversity cases once well-established in state court, regardless of the reasons behind any delay in removal. *See, e.g., Barnett v. Sylacauga Autoplex*, 973 F.Supp. 1358, 1362 (N.D. Ala 1997) (concluding that Congress did not intend to allow exceptions to the one-year limitations period); *Jones v. H&S Homes, LLC*, 2008 WL 4600999, at *2 (M.D. Ala. Oct. 15, 2008) (same); *Advanta Technology Ltd. v. BP Nutrition, Inc.*, 2008 WL 4619700, at *4 (E.D. Mo. 2008) (concluding that the one-year limit is "jurisdictional" and unambiguously sets a one-year bar to removal).

Within this circuit, there is no binding precedent either for or against applying an equitable exception to the one-year limitations period. *Omi's Custard Co. v. Relish This, LLC*,

2006 WL 2460573, at *3 (S.D. Ill. 2006) (stating same, but deciding case on other grounds). Indeed, this court found only one case within this circuit even addressing whether § 1446(b) is subject to an equitable exception, *Kite v. Richard Wolf Medical Instruments Corp.*, 761 F. Supp. 597, 601 (S.D. Ind. 1989). In that case, the court concluded that an equitable exception applied to § 1446(b), reasoning that "[i]f the Court were to grant remands in cases such as this, the effect would be to encourage plaintiffs to manipulate the removal process and undermine Congressional intent to provide a federal forum to defendants who expediently seek removal." *Id.* The court applied the exception in that case because the plaintiff first added a diversity-destroying defendant after removal, then, after the one-year deadline to remove passed, agreed to dismiss that defendant. *Id.*

Only one court of appeals has taken up the issue directly. In *Tedford v. Warner-Lambert Co.*, 327 F.3d 423 (5th Cir. 2003), the Fifth Circuit held that equitable estoppel applied to the one-year limitation, explaining that although "Congress may have intended to limit diversity jurisdiction [with the passage of the one-year limitations period], . . . it did not intend to allow plaintiffs to circumvent it altogether." *Id.* at 427; *but see Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1097 n.12 (11th Cir. 1994) (in different context, court took position that legislative history showed that "[C]ongress knew when it passed the one year bar on removal that some plaintiffs would attempt to defeat diversity by fraudulently (and temporarily) joining a non-diverse party").

Whether or not support for its existence can be found in the language or legislative history of § 1446(b), this court understands the argument for an equitable estoppel exception to the § 1446(b) one-year limitation based on evidence of plaintiffs' bad faith

joining of a non-diverse party or other blatant manipulation. *Compare Caterpillar Inc. v. Lewis*, 519 U.S. 61, 69 (1996) (quoting 28 U.S.C. § 1446(b) ("No case, however, may be removed from state to federal court based on diversity of citizenship 'more than one year after commencement of the action.'") *with Cybernetics & Services, Inc. v. Hitachi Data Systems Corp.*, 2009 WL 2151197, at *2 (M.D. Fla. July 16, 2009) (acknowledging that "the principles governing the fraudulent joinder doctrine provide some basis to conclude that" in some circumstances tolling might be warranted despite the fact that "plain language of the removal statute admits of no exceptions to its time strictures").[2]

Even if an equitable estoppel exception could be read into the statute, however, it would not apply in this case. Those courts applying the equitable estoppel exception do so under very narrow circumstances. For example, its application in *Tedford*, 327 F.3d at 427-28, arose out of an egregious and blatant attempt to manipulate the forum. The plaintiff

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[2] The commentary to the amendment adding the rule explains that the amendment "establish[es] a one-year limit on removal based on diversity jurisdiction as a means of reducing the opportunity for removal after substantial progress has been made in the state court. The result is a modest curtailment in access to diversity jurisdiction." H.R. Rep. No. 100-889 at 72, 1988 U.S.C.C.A.N. 5982, 6032.

> The amendment addresses problems that arise from a change of parties as an action progresses toward trial in state court. The elimination of parties may create for the first time a party alignment that supports diversity jurisdiction. Under section 1446(b), removal is possible whenever this event occurs, so long as the change of parties was voluntary as to the plaintiff. Settlement with a diversity-destroying defendant on the eve of trial, for example, may permit the remaining defendants to remove. Removal late in the proceedings may result in substantial delay and disruption.

H.R. Rep. No. 100-889 at 72, 1988 U.S.C.C.A.N. 5982, 6032-33. Given both the language of the statute and this legislative history, there is reason to decline to read an equitable exception into the statute. *Cf. U.S. v. Brockamp*, 519 U.S. 347 (1997) (holding that courts cannot toll time limitations in 26 U.S.C. § 6511 for equitable reasons because Congress did not intend to allow any equitable exception to the rule).

there originally included in the lawsuit a non-diverse defendant against which she had no cognizable claim and added another non-diverse party "hours after" learning that the defendant intended to remove the case. *Id.* Then, she prepared a notice of nonsuit against the new non-diverse defendant before the one-year deadline passed, but post-dated and waited to file it after the deadline passed. *Id.* Throughout, the defendants remained vigilant in attempting to remove the case. *Id.*

Courts have declined to apply *Tedford* to less egregious (or more uncertain) attempts at forum manipulation, and a defendant's failure to pursue removal vigilantly can also undermine application of this exception. Thus, in *Baby Oil, Inc. v. Cedyco Corp.*, 654 F. Supp. 2d 508 (E.D. La. 2009), the court held that a fraudulent joinder exception to the one-year rule must be balanced with the "general rule that removal jurisdiction is to be strictly construed." *Id.* at 517. In that case, defendants maintained that plaintiff fraudulently included two non-diverse defendants, having (1) already bought the interest that was the subject of the suit against one of the defendants and (2) failed to take any action regarding its claims against the other defendant. The *Baby Oil* court declined to apply an exception to the removal before it because (1) the plaintiff's actions did not amount to "blatant forum manipulation"; (2) the defendant did not assert its removal rights "vigilantly," waiting more than three years to depose the person most familiar with transactions between the plaintiff and a non-diverse defendant; and (3) the action had made substantial progress in state court. Similarly, in *Foster v. Landon*, 2004 WL 2496216, at *2-3 (E.D. La. Nov. 4, 2004), the court declined to apply an equitable exception to the one-year rule because the facts of the case did

not demonstrate an "egregious, clear pattern of forum manipulation," but rather merely gave rise to an "aroma of manipulation."[3]

In this case, the parties argue vigorously about plaintiffs' reason for including Hovland's as a defendant. That plaintiffs' counsel actions amounted to fraudulent joinder, however, is less than certain. This case involves claims that exposure to benzene-containing rubber solvents at a Uniroyal facility caused blood cancer to the decedents. Plaintiffs' purported basis for suing Hovland's has to do with its alleged failure to install proper ventilation at that Uniroyal facility. Plaintiffs claim that Hovland's may have installed certain piping at the factory in 1956 or in the 1960s related to ventilation. Although defendants cast doubt on whether plaintiffs could support a claim against defendants in light of the scant information they have tying Hovland's work with any ventilation problems in the factory, their position comes down to an argument that plaintiffs were not able to unearth enough information about things that happened some 50 years ago. Plaintiffs' attempt to include a claim against Hovland's on what may prove dubious grounds does not amount to the sort of egregious forum manipulation that would support a defense of estoppel.

Moreover, defendants' efforts to remove this case in a timely fashion were far from "vigilant." This case was filed in July 2009, and defendants have been aware for some time that the claims against Hovland's might be too weak to survive. In a related case against the

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[3] In particular, although the plaintiff delayed a few months in sending a demand letter and medical records indicating that the federal jurisdictional amount was satisfied, it was not transparent the delay was an attempt to keep the case in state court. *Id.* The court "decline[d]" to "engage in speculation to interpret the cause of the Plaintiff's conduct" and instead remanded the case as improperly removed. *Id.* at 3.

same defendants involving the same issues for the same facility, Hovland's prevailed at summary judgment against those plaintiffs *in May 2008. Christ v. Exxon Mobil Corporation*, Eau Claire County Case No. 2006CV000420. Defendants say that they did not remove this case immediately because *in October 2009*, plaintiff identified a new witness who might have information about Hovland's work at Uniroyal. Defendants provide no excuse for waiting until *July 2010* to remove other than it acted shortly after this "new" witness was deposed in June 2010. But this begs the question as to why defendants waited eight months after learning of the new witness to depose him, especially in light of their suspicions of fraudulent joinder. Such feet-dragging cannot be called "vigilance." Ultimately, the assertion of an equitable defense must be proved by the party asserting it. Here, the facts advanced are far less egregious than cases applying equitable estoppel and defendants are partly to blame for their delay in removing this case. Thus, plaintiffs are entitled to remain in state court.

3. **Attorney fees are not warranted**

Because all defendants failed to join in the notice of removal before the one-year period under § 1446 had passed, the case was improperly removed and must be remanded. Plaintiffs seek attorney fees for the removal. Under 28 U.S.C. § 1447(c),

> [i]f 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.

"Absent unusual circumstances," the Supreme Court has explained, an award of attorney's fees under § 1447(c) made be made only where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141

(2005); *see also, id.* at 140 ("The appropriate test for awarding fees under § 1447(c) should recognize the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied.")

Plaintiffs contend that costs and fees are warranted because defendants did not timely file a proper notice of removal and have no good excuse for their delay. Plaintiffs also maintain they had a "meritorious" (now settled) claim against Hovland's. According to plaintiffs, defendants' late attempt to remove the case is nothing more than an attempt to avoid state court review of a motion for judgment for failing to file a timely answer. Although this court found removal was improper here, it is not prepared to say there was no "objectively reasonable basis" for seeking removal under the present circumstances. Defendants' arguments for -- (1) a broader reading of the one-year rule as allowing late-comers to join an otherwise seemingly valid removal notice beyond that date, and (2) for application of equitable estoppel to an arguably suspicious joinder -- are reasonable enough that defendants were allowed to attempt removal without penalty. While defendants may well have had ulterior motives for removal as plaintiffs suggest, so too may plaintiffs, and this court is not required, nor is it in a position, to assess either side's motivations on this limited record. The test is whether defendants' position is "objectively reasonable," not whether their subjective intent was proper. This test defendants pass.

ORDER

IT IS ORDERED that plaintiff's motion to remand this case to state court, dkt. #22, is GRANTED without costs to either side. The clerk of court is directed to REMAND this case to the Circuit Court for Eau Claire County, Wisconsin.

Entered this 29th day of March, 2011.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge