

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
CLARKSBURG DIVISION**

**WEST VIRGINIA UNIVERSITY
BOARD OF GOVERNORS for and on
behalf of WEST VIRGINIA UNIVERSITY,**

Plaintiff,

v.

**Civil Action No.: 1:08-CV-00041
(Honorable Irene M. Keeley)**

RICHARD RODRIGUEZ,

Defendant.

**PLAINTIFF WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS'
MOTION TO REMAND AND
MOTION FOR COSTS, EXPENSES, AND ATTORNEY FEES**

COMES NOW the plaintiff, West Virginia University Board of Governors for and on behalf of West Virginia University [the "University"], and moves to remand this action to the Circuit Court of Monongalia County, West Virginia. The University further seeks costs and expenses, including attorney fees, incurred as a result of the removal. See 28 U.S.C. § 1447(c).

In support of this Motion, the University avers as follows:

1. The University filed this action in the Circuit Court of Monongalia County, West Virginia on December 27, 2007. The defendant, Richard Rodriguez ["Rodriguez"], removed this action to this Court on January 16, 2008 claiming that the parties are of diverse citizenship. "Notice of Removal" (Jan. 16, 2007). Rodriguez purports to remove the action pursuant to 28 U.S.C. § 1441(a), § 1446, and § 1332 claiming that he was a citizen of Michigan on the date the action was filed. Id. at ¶¶ 2, 4.

2. 28 U.S.C. § 1332 provides in relevant part that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value

of \$75,000, exclusive of interest and costs, and is between ... citizens of different states[.]” “The party seeking to invoke federal court jurisdiction carries the burden of establishing diversity.” McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936) cited in Mylan Pharmaceuticals v. Cunard, No. 1:06-cv-117 (N.D.W.Va. Sept. 5, 2006) (order granting motion to remand). See also Dixon v. Coburg Dairy, Inc., 369 F.3d 811, 816 (4th Cir. 2004). “Further, ‘diversity of citizenship is assessed at the time the action is filed.’” Freeport-McMoRan, Inc. v. K.N. Energy, Inc., 498 U.S. 426, 428 (1991) quoted in Mylan, Id.

3. The University is an arm of the State. Syl. pt. 1, City of Morgantown v. Ducker, 153 W.Va. 121, 168 S.E.2d 298 (1969). Accord Syl. pt. 1, University of West Virginia Board of Trustees v. Graf, 205 W.Va. 118, 516 S.E.2d 741 (1998); Syl. pt. 2, State ex rel. Board of Governors of West Virginia University v. Sims, 134 W.Va. 428, 59 S.E.2d 705 (1950). As such, the University is not a citizen for purposes of diversity citizenship. See e.g. Ristow v. South Carolina Ports Auth., 27 F.3d 84, 89 (4th Cir. 1994), vacated on other grounds 513 U.S. 1011 (1994), quoted in West Virginia ex rel. McGraw v. Minnesota Mining & Mfg. Co., 354 F.Supp.2d 660, 663 (S.D.W.Va. 2005). See also State of West Virginia v. Anchor Hocking Corp., 681 F.Supp. 1175, 1177 (N.D.W.Va. 1987) review denied by 857 F.2d 1469 (4th Cir. 1988). Accordingly, this action is not appropriate for removal based on diversity pursuant to 28 U.S.C. § 1332 and should be remanded to the Circuit Court of Monongalia County.

4. This action should also be remanded as Rodriguez was a citizen of West Virginia at the time this action was filed – December 27, 2007. “In order to be a citizen of a State within the meaning of the diversity statute, [28 U.S.C. § 1332(a),] a natural person must both be a citizen of the United States *and* be domiciled within the state.” Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 828 (1989) (*emphasis in original*) cited in Mylan, No. 1:06-cv-00117 at p.

2. This Court recognizes that “[t]wo elements are necessary to establish domicile: 1) physical presence in the claimed domicile, and 2) an intent to remain there indefinitely.” White v. All America Cable & Radio, Inc., 642 F.Supp. 69, 72 (D.P.R. 1986) (internal citations omitted) quoted in Mylan, Id. Upon information and belief, Rodriguez owned and lived in his West Virginia residence and was a resident of West Virginia on December 27, 2007. Rodriguez was personally served with the Summons and Complaint at his West Virginia residence on December 29, 2007. See Summons, attached as Exhibit “A.” Rodriguez and his family resided in the West Virginia residence for a number of years prior to the filing of this action. Upon information and belief, Rodriguez’s wife and children continue to reside in the West Virginia residence and his children continue to attend school in West Virginia. Furthermore, as late as January 10, 2008, which is two weeks after the filing of this action, Rodriguez sent correspondence providing his West Virginia residence as the return address. See Envelope of correspondence from Rodriguez (Jan. 10, 2008), attached as Exhibit “B.” Therefore, even if the University was a citizen, diversity jurisdiction is still unavailing and this action should be remanded to the Circuit Court of Monongalia County.

5. 28 U.S.C. § 1447(c) provides that “[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of removal.” “The decision whether to award fees and costs under 28 U.S.C. § 1447(c) is discretionary.” Watson v. Charleston Housing Auth., 83 F.Supp.2d 709, 712 (S.D.W.Va. 2000) (internal citations omitted). Moreover, “[b]ad faith is not necessary to support an award of fees and costs under § 1447(c).” In re Lowe, 102 F.3d 731, 733 (4th Cir. 1996) cited in Watson, Id. “The purpose, instead, is to reimburse a party for the costs associated with responding to an improper removal.” Liebig v. DeJoy, 814 F.Supp. 1074, 1077 (M.D.Fla. 1993) cited in Watson,

Id. Rodriguez improperly removed this case under 28 U.S.C. § 1332 despite clear authority that the University, as an arm of the State, is not a citizen for purposes of diversity jurisdiction. Moreover, Rodriguez was clearly a citizen of West Virginia on the date this action was filed making any attempt to remove this action for diversity improper.

WHEREFORE, the plaintiff, West Virginia University Board of Governors for and on behalf of West Virginia University, for the reasons stated above and in the accompanying Memorandum of Law, respectfully request this Honorable Court grant its Motion to Remand as the University, as an arm of the State, is not a citizen for purposes of diversity jurisdiction under 28 U.S.C. § 1332, or, in the alternative, as the defendant, Richard Rodriguez, was a citizen of West Virginia when this action was filed. The University further seeks reimbursement for costs, expenses, and attorney fees incurred by the University as a result of the removal pursuant to 28 U.S.C. § 1447(c).

**WEST VIRGINIA UNIVERSITY
BOARD OF GOVERNORS for and on
behalf of WEST VIRGINIA
UNIVERSITY,**

By Counsel,

/s/ Jeffrey M. Wakefield
Thomas V. Flaherty (WV Bar No. 1213)
Jeffrey M. Wakefield (WV Bar No. 3894)
Jaclyn A. Bryk (WV Bar No. 9969)
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Post Office Box 3843
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Telephone: (304) 345-0200
Facsimile: (304) 345-0260

STATE OF WEST VIRGINIA, COUNTY OF MONONGALIA TO-WIT:

07-C-851

I Executed the within Summons in my balliwick by delivering a true copy thereof to the within name Richard Rodriguez.

☒ **PERSONAL SERVICE**

Being unable to make Personal Service, a copy was delivered in the following manner:

- ☐ Delivered to _____ of said corporation, in person and he/she then, being a resident of said County and State.
- ☐ Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above: _____
- ☐ Posted on front door or such other door as appears to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)
- ☐ **NOT FOUND**

Given under my hand this 29 day of Dec, 20 07

Joseph C. Bartolo, Sheriff of Monongalia County, West Virginia

By

Dep Bise

Process Server or Deputy for Joseph C. Bartolo, Sheriff

N.R. 12/28/07 9:50AM (BH)

N.R. 12/29/07 3:50-LEFT NOTICE (BH)

EXHIBIT

"A"

fedex.com 1800.GoFedEx 1800.463.3339

FedEx US Airbill

Express

Tracking # 8640 2190 0750

From 1-18-08

Sender's Name Knight Rider Inc Phone 304 544 4444

Address 3900 CHASE DRIVE

City Washington State 98006

2 Your Internal Billing Reference

Carrier UPS Mailer Phone 304 293 3031

Company West Virginia University

Department School of Medicine

Address 105 School Hall

City Martinsburg WV 26155



8640 2190 0750

FedEx
TRK# 8640 2190 0750
0200

PRI - 11:00 AM
PRIORITY OVERNIGHT
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END # 63327 111AM08 NGWA

1. Service Type

2. Special Handling

3. Packaging

4. Signature Required

5. Insurance

6. Restricted Delivery

7. Signature Required

8. Signature Required

9. Signature Required

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This pouch is resealable

EXHIBIT

"B"

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**Civil Action No.: 1:08-CV-00041
(Honorable Irene M. Keeley)**

RICHARD RODRIGUEZ,

Defendant.

CERTIFICATE OF SERVICE

I, Jeffrey M. Wakefield, hereby certify that on January 18, 2008, I electronically filed the
“PLAINTIFF WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS’ MOTION
TO REMAND AND MOTION FOR COSTS, EXPENSES, AND ATTORNEY FEES” and
“PLAINTIFF WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS’
MEMORANDUM OF LAW IN SUPPORT OF MOTION TO REMAND AND MOTION
FOR COSTS, EXPENSES, AND ATTORNEY FEES” with the Clerk of the Court using the
CM/ECF system, which will send notification of such filing to the following:

Sean P. McGinley, Esq.
DiTrapano, Barrett & DiPiero
604 Virginia Street, East
Charleston, West Virginia 25301
Counsel for Defendant
E-mail: mcginley@dbdlaw1.com

and I hereby certify that I have mailed, by United States Postal Service, the documents to the
following non-CM/ECF participants this 18th day of January, 2008:

R. Ethan Davis, Esq.
Marvin A. Robon, Esq.
Barkin & Robon, Ltd.
1701 Woodlands Drive
Suite 100
Maumee, Ohio 43537

/s/ Jeffrey M. Wakefield
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