

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SAGUN TULI, M.D.)	
Plaintiff)	CIVIL ACTION NO. _____
v.)	
GARY M. VOTOUR, and)	
AUTOMATTIC, INC.)	JURY TRIAL DEMANDED
Defendants)	

NOTICE OF REMOVAL

PLEASE TAKE NOTICE that Defendant Gary M. Votour hereby removes the above-captioned action from the Middlesex County Superior Court of the Commonwealth of Massachusetts (Superior Court Action No. 2013-00607) to this Court pursuant to 28 U.S.C. §§ 1441 and 1446. Mr. Votour states as follows:

Introduction

1. On or about February 19, 2013, an action was commenced in the Middlesex County Superior Court of the Commonwealth of Massachusetts, captioned *Sagun Tuli, M.D. v. Gary M. Votour and Automattic, Inc.*, Civil Action No. 2013-00607. Attached hereto as Exhibit A is a true copy of all process, pleadings, and orders served upon or otherwise provided to Mr. Votour. In this suit, Plaintiff Dr. Tuli asserts that Mr. Votour made false and defamatory statements about her in his online blog, "Open Letter to Dr. Tuli." Mr. Votour denies that he made any defamatory statements about Dr. Tuli.

2. Federal jurisdiction exists over this removal action under 28 U.S.C. § 1441 because this action could have been filed originally in this Court pursuant to 28 U.S.C. § 1332. As explained below, diversity jurisdiction exists over this action because the Plaintiff is in

complete diversity with all of the Defendants against whom relief can be granted and the amount in controversy exceeds the sum of \$75,000.

Parties are Jurisdictionally Diverse

3. Plaintiff Sagun Tuli alleges that she is a resident of Chestnut Hill, Massachusetts, Middlesex County. (Compl. ¶ 4.)¹

4. Defendant Gary M. Votour is a resident of Columbia, South Carolina. (Compl. ¶ 5.)

5. Defendant Automatic, Inc. (“Automatic”) is a Delaware corporation (*see* Exhibit B, business entity report from Delaware Secretary of State) with its principal place of business in California (Compl. ¶ 6). A review of the state court docket reveals that Defendant Automatic has not been served with process. Moreover, Plaintiff’s counsel has confirmed to Mr. Votour’s attorneys that Defendant Automatic has not been served. Therefore, Automatic need not consent to this removal pursuant to 28 U.S.C. § 1446(b) and need not be considered as part of the jurisdictional analysis. *See Montana v. Abbot Labs.*, 266 F. Supp. 2d 250, 260 (D. Mass. 2003). (“in cases involving multiple defendants, all defendants *who have been served* must join or assent in the removal petition.”) (emphasis added); *Miranti v. Lee*, 3 F.3d 925, 929 (5th Cir. 1993) (“[a] defendant may remove a case without joinder of a non-served” defendant); *Novick v. Bankers Life Ins. Co. of N.Y.*, 410 F. Supp. 2d 98, 100, *vacated on other grounds*, 450 F. Supp. 2d 196 (E.D.N.Y.2006) (finding it well-recognized that “rule of unanimity is excused” where “the non-joining defendants have not been served with service of process at the time the removal petition is filed”) (quotations and citation omitted). Although Automatic has not yet been served and, therefore, need not be considered, its presence in this suit would not destroy diversity in any event because it is a citizen of Delaware and California.

¹ The Complaint is Exhibit A.3 to this filing.

Amount in Controversy Requirement is Satisfied

6. In calculating the amount in controversy, a federal court must examine relevant state law in determining the nature and extent of the damages which may be awarded. *See Stewart v. Tupperware Corp.*, 356 F.3d 335, 339 (1st Cir. 2004).

a. In defamation cases, Plaintiff generally can seek actual damages, which are compensatory for the alleged wrong that has been done. Actual injury may include, among other things, out-of-pocket expenses, harm inflicted by impairment of reputation and standing in the community, personal humiliation, mental anguish and suffering, damages for alienation of friends and physical illness, or lost wages and benefits.

b. Massachusetts law precludes the award of punitive or exemplary damages in cases of defamation. *See* Mass. Gen. Laws ch. 203, § 93. In addition, counsel is aware of no statute that specifically permits an award of attorneys' fees for a successful plaintiff in a defamation case.

7. According to Plaintiff's Civil Action Cover Sheet, which was filed along with her Complaint, Plaintiff is demanding \$100,000 in damages from Mr. Votour.² There are no allegations in the Complaint that contradict the demand contained in the Civil Action Cover Sheet or suggest that Dr. Tuli is seeking less than this amount in compensatory damages. The Civil Action Cover Sheet may be considered in determining the amount in controversy. *See, e.g., Salvail v. Relocation Advisors, Inc.*, C.A. No. 11-10500-RGS, 2011 WL 1883861, at *1 n.1 (D. Mass. May 17, 2011); *Colonial Wholesale Bev. Corp. v. Labatt United States*, No. 2003-12068-RCL, 2004 U.S. Dist. LEXIS 9967, at *2 (D. Mass. Apr. 27, 2004) (threshold amount for removal satisfied by reference to plaintiff's civil action cover sheet); *Kenney v. Hoover*, 909 F.

² Plaintiff's Civil Action Cover Sheet is located at Exhibit A.2. According to the instructions on the Civil Action Cover Sheet, plaintiffs are instructed to furnish "a full, itemized and detailed statement of the facts on which plaintiff relies to determine money damages."

Supp. 34, 36 (D. Mass. 1995) (assuming that amount in controversy alleged in civil action cover sheet properly used to determine whether requirements for removal were satisfied); *Sok v. U.S. Fid. & Guar. Co.*, No. 91-12028, 1992 U.S. Dist. LEXIS 6195, at *1-2 (D. Mass. Apr. 27, 1992) (amount in controversy demonstrated through allegations in civil action cover sheet and demand letter where original complaint did not set forth amount in controversy pursuant to state court rules); *see also Williams v. Litton Loan Servicing*, 2011 WL 3585528, at *6 (D. Mass. Aug. 15, 2011) (opining that “civil action cover sheets may be considered in determining the amount in controversy,” but stating that “the court is aware of no authority for basing an amount in controversy determination solely on a civil action cover sheet when it is contradicted, albeit implicitly, by the complaint itself”) (citations omitted).

8. An article in the *Boston Globe* concerning this case confirms that Dr. Tuli is “demanding \$100,000 for the damage she said the blog post had done to her career” in connection with this litigation. (Liz Kowalczyk, *Doctors firing back at patients’ online critiques: Lawsuits target harsh Web posts*, *Boston Globe*, March 31, 2013 (Exhibit C at 2).)

9. Although Mr. Votour denies that Dr. Tuli is entitled to any relief whatsoever and denies that Dr. Tuli was damaged, the \$100,000 of damages claimed in Plaintiff’s Civil Action Cover Sheet is consistent with the substance of her allegations in the Complaint, thus satisfying the amount in controversy requirement.

a. Dr. Tuli is a board-certified and professionally published neurosurgeon (Compl. ¶ 4); at times relevant to this action, she worked at Brigham and Women’s Hospital in Boston (Compl. ¶ 1). In the wake of her high-profile litigation against the hospital (and, potentially, in the wake of the publication of Mr. Votour’s blog), she left

her job at Brigham and Women's Hospital in 2011 (Exhibit C at 6), and now, she works at the MetroWest Medical Center. (Exhibit C at 2.)

b. Dr. Tuli alleges that Mr. Votour's allegedly defamatory statements caused her "significant harm" (Compl. ¶ 3), "damaged [her] personal and professional reputation" (Compl. ¶ 9), and caused her to be "held...up to public scorn and ridicule, and damaged her good name and reputation" (Compl. ¶ 24). Dr. Tuli also alleges that patients have refused to hire her as a result of Mr. Votour's allegedly defamatory statements, thus causing her harm. (Compl. ¶ 21.)

c. The blog in which these allegedly defamatory statements appear was published on March 2, 2010. (Compl. ¶ 7.) Dr. Tuli became aware of the blog shortly thereafter (no later than March 11, 2010, when Dr. Tuli's attorneys sent a letter to Mr. Votour demanding that the blog be taken down). (Compl. ¶ 16.) Mr. Votour ultimately removed the blog on or about February 26, 2013; however, Mr. Votour does not admit or concede that any statements previously contained in this blog were defamatory. Accordingly, Dr. Tuli is likely to assert that any damages caused by the allegedly defamatory statements contained in this blog accrued for a period of approximately three years, damaging her professional reputation and her finances throughout this period.

d. While she worked at Brigham and Women's Hospital, she earned a substantial base salary of \$400,000 per year, plus a bonus (the bonus is based on the doctor's revenue collection, according to the Complaint filed by Dr. Tuli against Brigham and Women's Hospital in 2007). *See Tuli v. Brigham & Women's Hosp.*, 656 F.3d 33, 44 (1st Cir. 2011) (noting that Dr. Tuli earned \$400,000 per year); Complaint ¶ 80, Docket No. 1:07-cv-12338 (D. Mass.). Given the high level of her compensation and her

allegations of substantial harm to her professional reputation and to her ability to attract patients over the course of three years (which would have harmed her bonus), her claim of damage of \$100,000 is consistent with the description of harm contained in the Complaint.

e. In addition to the harms specifically described in her Complaint, it appears that Dr. Tuli may have hired an online reputation manager to help improve her search engine results after the allegedly defamatory blog was published. (Kevin Pho, M.D., *How a doctor's online reputation survived a front page newspaper story*, MedPage Today's KevinMD.com, available at <http://www.kevinmd.com/blog/2013/04/doctors-online-reputation-survived-front-page-newspaper-story.html>, April 5, 2013 (Exhibit D at 3).) These services are expensive – ranging up to \$10,000 per month, according to a recent article in the *New York Times* (Nick Bilton, *Erasing the Digital Past*, *N.Y. Times*, April 1, 2011 (Exhibit E at 4) – and arguably, Dr. Tuli may assert that this is part of her damages associated with Mr. Votour's blog.

10. Plaintiff is also seeking injunctive relief. However, any claim for injunctive relief is moot because Mr. Votour has removed the blog that Dr. Tuli claims is offensive. If Plaintiff somehow contends that the claim for an injunction is not moot, then the value of the injunction can also be used to measure the amount in controversy.

11. Therefore, based on the foregoing, the amount in controversy in this case exceeds the sum of \$75,000. *See* 28 U.S.C. § 1332.

12. As noted above, Defendant Automattic has not yet been served and need not be considered for this analysis. However, in the alternative, the Court can exercise supplemental jurisdiction over claims against Defendant Automattic pursuant to 28 U.S.C. § 1367 because the

claim against Automattic – in which Plaintiff seeks to enjoin Automattic from displaying Mr. Votour’s allegedly defamatory blog – is obviously related to the claim against Mr. Votour such that it forms part of the same case or controversy under Article III of the United States Constitution.³ Moreover, and in the alternative, the Court can also disregard Defendant Automattic inasmuch as Dr. Tuli does not have a viable cause of action against Automattic because her claim against Automattic is moot (and thus joinder of Automattic is fraudulent or unlawful) and/or may be barred by federal statute.

Procedural Requirements for Removal are Satisfied

13. Venue is proper in this District pursuant to 28 U.S.C. § 1391.
14. This case is not a “nonremovable action” under 28 U.S.C. § 1445.
15. This Notice is timely. Mr. Votour was served with a copy of the Complaint in the Middlesex Superior Court action no earlier than April 9, 2013, fewer than 30 days prior to the filing of this Notice. *See* 28 U.S.C. § 1446(b); *see also* *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-48 (1999) (time period for removal begins to run upon receipt of formal service).
16. Pursuant to Local Rule 81.1, within 28 days after filing this notice for removal, Mr. Votour will file certified or attested copies of all records and proceedings in the state court and a certified or attested copy of all docket entries in the state court.
17. A copy of this Notice will be filed with the Clerk of the Middlesex County Superior Court as required by 28 U.S.C. § 1446(d).
18. Written notice of the filing of this Notice will be given to the adverse party as required by 28 U.S.C. §1446(d).

³ None of the exceptions to supplemental jurisdiction in 28 U.S.C. § 1367(b) or 28 U.S.C. § 1367(c) applies here.

19. Mr. Votour requests to proceed *in forma pauperis*. A separate request and affidavit will accompany this notice of removal.

20. Mr. Votour demands a jury trial on all issues so triable.

WHEREFORE, Defendant Gary M. Votour respectfully requests that the United States District Court for the District of Massachusetts exercise jurisdiction over this action.

Respectfully Submitted,

Gary M. Votour

By his attorneys,

/s/ Adam J. Hornstine

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Dated: April 26, 2013

CERTIFICATE OF SERVICE

I, Adam J. Hornstine, hereby certify that a true copy of this document was served upon the following this twenty-sixth day of April 2013, by certified mail, return receipt requested:

David H. Rich
Ian J. Pinta
TODD & WELD LLP
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/s/ Adam J. Hornstine
Adam J. Hornstine