

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION**

ACME IRON & METAL COMPANY, a d/b/a §
of TXALLOY, INC., and §
MAYFIELD PAPER COMPANY, INC., §
ON THEIR OWN BEHALF AND §
ON BEHALF OF THOSE §
SIMILARLY SITUATED, §
Plaintiffs, §

v. §

CIVIL ACTION NO.:
6:14-CV-00045-C

REPUBLIC WASTE SERVICES OF TEXAS, §
LTD., sometimes d/b/a §
TRASHAWAY SERVICES and §
DUNCAN DISPOSAL, §
Defendant. §

**PLAINTIFFS’ MOTION TO STRIKE REPUBLIC’S AMENDED STATEMENT OF
JURISDICTION IN SUPPORT OF NOTICE OF REMOVAL**

TO THE HONORABLE JUDGE OF SAID COURT:

Come now Plaintiffs Acme Iron & Metal Company (a d/b/a of Txalloy, Inc.) and Mayfield Paper Company, Inc. (collectively “Plaintiffs”), on their own behalf and on behalf of those similarly situated, and file this Motion to Strike Defendant Republic Waste Services of Texas, Ltd.’s (“Republic”) Amended Statement of Jurisdiction in Support of Notice of Removal (Doc. 8).

Three hundred twenty-three (323) days after Republic removed this case to federal court, Republic purported to unilaterally “amend” its statement of jurisdiction to allege a new basis for federal jurisdiction, claiming diversity under 28 U.S.C. § 1332(a). Republic’s Amended Statement of Jurisdiction should be stricken for two independent reasons: (i) a party may not make allegations of new bases for federal jurisdiction after the 30-day period for removal in 28

U.S.C. § 1446(b) has passed; and (ii) Republic did not file a motion and obtain leave of court to amend its jurisdictional allegations, as required under 28 U.S.C. § 1653.

Pursuant to Local Rule 7.1(d), Plaintiffs are submitting a separately filed Brief setting forth Plaintiffs' contentions of fact and law, along with argument and authorities.

Wherefore, premises considered, Plaintiffs Acme Iron & Metal Company (a d/b/a of Txalloy, Inc.) and Mayfield Paper Company, Inc. pray that this Court enter an order striking Republic's Amended Statement of Jurisdiction in Support of Notice of Removal and granting such other and further relief to which Plaintiffs may be justly entitled.

Respectfully Submitted,

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COUNSEL FOR PLAINTIFFS

CERTIFICATE OF CONFERENCE

Pursuant to Local Rule 7.1(b), I hereby certify that conferences were held on this opposed motion on July 21-22, 2015, via email, between James A. Hemphill and Patrick R. Cowlshaw. Counsel for Defendant stated that this Motion to Strike is opposed, and the matter is therefore presented to the Court for determination.

/s/ James A. Hemphill

James A. Hemphill

CERTIFICATE OF SERVICE

I hereby certify that this document was served on counsel of record for Defendant via the Court's CM/ECF system on this 23rd day of July, 2015 as follows:

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**PLAINTIFFS’ BRIEF IN SUPPORT OF MOTION TO STRIKE REPUBLIC’S
AMENDED STATEMENT OF JURISDICTION
IN SUPPORT OF NOTICE OF REMOVAL**

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**COUNSEL FOR PLAINTIFFS
July 23, 2015**

Plaintiffs Acme Iron & Metal Company (a d/b/a of Txalloy, Inc.) and Mayfield Paper Company, Inc. (collectively “Plaintiffs”), on their own behalf and on behalf of those similarly situated, respectfully show the Court as follows:

INTRODUCTION AND SUMMARY

Plaintiffs filed suit against Republic Waste Services of Texas, Ltd. (“Republic”) in the District Court of Tom Green County, Texas on June 30, 2014, seeking to recover overcharges billed to Republic’s commercial customers between 2000 and 2014. On the last possible day (30 days after Plaintiffs filed suit in state court), Defendant Republic Waste Services of Texas, Ltd. (“Republic”) removed the case to this Court, citing only the federal Class Action Fairness Act (28 U.S.C. § 1332(d)) as a basis for jurisdiction. Three hundred twenty-three (323) days later, Republic purported to unilaterally “amend” its statement of jurisdiction to allege a new basis of federal jurisdiction, claiming diversity under 28 U.S.C. § 1332(a). Republic’s purported amendment should be stricken because it is both substantively and procedurally improper:

- *Substantive Defect:* A party may not make allegations of new bases for federal jurisdiction after the 30-day period for removal in 28 U.S.C. § 1446(b) has passed. Republic’s alleged amendment of its jurisdictional statement is at least 323 days too late.
- *Procedural Defect:* A party may not unilaterally “amend” the basis for removal jurisdiction after the 30-day removal period is passed, under 28 U.S.C. § 1653. Such amendment requires a motion and leave of court.

A. A Removing Party May Not Assert New Grounds for Removal More than Thirty Days After Filing of the Purportedly Removable Pleading.

A party seeking removal to federal court must remove a case to federal court “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.” 28 U.S.C. § 1446(b). Republic’s removal was timely, because it was filed within the 30-day period;

however, it was substantively improper because it misinterpreted Republic's citizenship under CAFA, the sole stated basis for federal jurisdiction (as set forth in Plaintiffs' previously filed Motion to Remand, Doc. 9). But Republic's purported amended jurisdictional statement is both untimely and improper.

Republic claims to have filed its amended jurisdictional statement pursuant to 28 U.S.C. § 1653. Section 1653 of Title 28 allows "[d]efective allegations of jurisdiction" to be amended "upon terms." After the expiration of the 30-day removal period, amendment is allowed only to cure technical defects, *not* to assert new grounds for federal jurisdiction. *Stafford v. Mobil Oil Corp.*, 945 F.2d 803, 805-06 (5th Cir. 1991).

After the thirty day period has expired however, a party may only amend defective allegations of jurisdiction pursuant to 28 U.S.C. § 1653. Section 1653 does not permit a removing party to assert additional grounds of jurisdiction not included in the original pleading.

Fuller v. Exxon Corp., 131 F.Supp.2d 1323, 1327 (S.D. Ala. 2001) (citing, *inter alia*, *Stafford v. Mobil Oil*). As stated by Wright & Miller:

[M]ost cases indicate that defendants may amend the notice only to set out more specifically the grounds for removal that already have been stated, albeit imperfectly, in the original notice. ... In most circumstances, however, defendants may not add completely new grounds for removal

14C Wright, Miller & Cooper, *Federal Practice & Procedure* § 3733 (4th ed. 2009). This rule is uncontroverted by Republic; indeed, the one case relied on by Republic illustrates that § 1653 only permits amendments that cure technical defects. *See Aburto v. Midland Credit Mgmt., Inc.*, CIV.A.308-CV-1473-K, 2009 WL 2252518, at *8 (N.D. Tex. July 27, 2009) (permitting defendant to amend removal notice to include state of corporate citizenship).

Republic's original notice of removal cited CAFA as the sole basis for jurisdiction. CAFA has its own particular jurisdictional rules, including how the citizenship of unincorporated associations is determined; CAFA also allows aggregation of class members' damages claims for

amount in controversy purposes and sets its own minimum amount in controversy. CAFA is a basis for federal jurisdiction wholly different than, and independent from, traditional diversity jurisdiction. In *Geismann v. Aestheticare, LLC*, 622 F.Supp.2d 1091 (D. Kan. 2008), a party removed on the basis of diversity jurisdiction under 28 U.S.C. § 1332(a) and then, more than 30 days later, purported to amend its jurisdictional statement to invoke CAFA jurisdiction under 28 U.S.C. § 1332(d). The court rejected the attempt:

[T]his shift affects a substantial change in the theory of jurisdiction [T]he amended notice of removal constitutes a new ground for removal. Although this is a matter of first impression, the Court's conclusion is consistent with the opinions of other courts which have described Sections 1332(a) and 1332(d) as independent bases of jurisdiction. [citations omitted] Because Section 1653 does not permit the addition of a new ground for removal through amendment of the notice of removal, the Court overrules Aestheticare's motion to amend the notice of removal.

Geismann v. Aestheticare, 622 F.Supp.2d at 1098-99; *see also Victoriano v. Classic Residence Mgmt., LP*, 14CV2346-LAB JLB, 2015 WL 3751984, at *5 (S.D. Cal. June 15, 2015) (holding that § 1332(a) and CAFA are "separate and distinct" bases for jurisdiction, finding amended notice of remand defective, and remanding).

The same analysis applies here. Republic removed under Section 1332(d), and then 323 days later attempted to assert a wholly different basis of jurisdiction under Section 1332(a). Republic's attempt is improper under Section 1653 and is far past the deadline for removal. Its purported amended statement of jurisdiction is without merit and should be stricken.

B. Republic Failed to Obtain Leave of Court to Amend, as Required by § 1653.

Not only should Republic's amendment be stricken on substantive grounds, as described above, it should also be stricken on procedural grounds. Republic improperly filed its amended jurisdictional statement, rather than seeking leave from the Court and conferring with Plaintiffs. As one district court has recently explained, "filing an Amended Notice [of Removal] beyond the

thirty-day period—without leave—is a procedural defect, and sufficient grounds for rejecting it.” *Victoriano*, 14CV2346-LAB JLB, 2015 WL 3751984, at *4 (collecting cases); *see also Watkins v. Terminix Intern. Co., Ltd. P'ship*, 96-3053, 1997 WL 34676226, at *2 (10th Cir. May 22, 1997) (“[D]efendant may, if the facts permit, seek leave of court to amend its notice of removal under 28 U.S.C. § 1653”); *Muhlenbeck v. KI, LLC*, 304 F.Supp.2d 797, 799 (E.D. Va. 2004) (“After the thirty-day removal period, a defendant may amend its removal petition with leave of court, pursuant to 28 U.S.C. § 1653”).¹

CONCLUSION AND PRAYER

Wherefore, premises considered, Plaintiffs Acme Iron & Metal Company (a d/b/a of Txalloy, Inc.) and Mayfield Paper Company, Inc. pray that this Court enter an order striking Republic’s Amended Statement of Jurisdiction in Support of Notice of Removal and granting such other and further relief to which Plaintiffs may be justly entitled.

¹ Of course, because Republic did not timely invoke “traditional” diversity jurisdiction under Section 1332(a), even a procedurally proper motion to amend its jurisdictional statement would have been substantively improper.

Respectfully Submitted,

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/s/ James A. Hemphill
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**ORDER GRANTING
PLAINTIFFS' MOTION TO STRIKE REPUBLIC'S
AMENDED STATEMENT OF JURISDICTION**

Came before this Court Plaintiffs' Motion to Strike Defendant Republic Waste Services of Texas, Ltd.'s Amended Statement of Jurisdiction in Support of Notice of Removal (Doc. 8) After consideration of the pleadings, cited authorities, and argument of counsel, the Court finds that the motion is meritorious and should be granted.

It is therefore ORDERED that Plaintiffs' Motion to Strike Defendant Republic Waste Services of Texas, Ltd.'s Amended Statement of Jurisdiction in Support of Notice of Removal is hereby GRANTED. Defendant Republic Waste Services of Texas, Ltd.'s Amended Statement of Jurisdiction in Support of Notice of Removal is hereby STRICKEN.

Signed this ____ day of _____, 2015.

HON. SAM R. CUMMINGS
JUDGE PRESIDING