UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

DATA SALES CO., INC.,	:	CIVIL ACTION
	:	
Plaintiff,	:	JURY TRIAL DEMANDED
	:	
VS.	:	
	:	
VOLUMEDRIVE, INC.,	:	
	:	
Defendant.	:	NO.: 3:13-CV-02626-RDM

DEFENDANT'S BRIEF IN OPPOSITION TO
PLAINTIFF'S MOTION TO REMAND

AND NOW, comes the Defendant, VOLUMEDRIVE, INC. ("Defendant"), by and through its counsel, Comitz Law Firm LLC, and hereby submits this Brief in Opposition to Plaintiff, DATA SALES CO., INC.'s ("Plaintiff") Motion to Remand.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiff is a Minnesota company with its principal place of business in Burnsville, Minnesota. Defendant is a Pennsylvania corporation with its principal place of business in Clarks Summit, Lackawanna County, Pennsylvania.

On September 20, 2013, Plaintiff filed a Complaint in the Luzerne County Court of Common Pleas at No. 11138 of 2013 ("Complaint") (see Exhibit "A" to Plaintiff's Notice of Removal). Plaintiff failed to "properly serve" Defendant with its Complaint in accordance with the Pennsylvania Rules of Civil Procedure.

Additionally, on September 20, 2013, Plaintiff filed a Motion for Writ of Seizure ("Motion"). A hearing on the Motion was scheduled for October 21, 2013 before the Honorable President Judge Thomas F. Burke in the Luzerne County Court of Common Pleas.

It was not until October 14, 2013, Columbus Day, a federal holiday, that a Pennsylvania constable provided the Defendant with a copy of the Motion and notice of the October 21st hearing. This was the first time that the Defendant was provided notice of the Motion and the hearing.

On October 21, 2013, Defendant appeared at the hearing on the Motion without counsel, and President Judge Burke continued the hearing to October 24, 2013 to allow Defendant to secure counsel.

On October 23, 2013, Defendant secured the undersigned counsel, and subsequently the Notice of Removal was electronically filed with the Middle District on October 23, 2013, and with the Luzerne County Court of Common Pleas on October 24, 2013.

On October 24, 2013, President Judge Burke issued a Disposition indicating that jurisdiction no longer rests with the Luzerne County Court of Common Pleas in light of the filing of the Notice of Removal.

II. LAW & ARGUMENT

REMOVAL WAS PROPER IN THIS ACTION BECAUSE PLAINTIFF FAILED TO SERVE DEFENDANT WITH ITS COMPLAINT IN ACCORDANCE WITH THE PENNSYLVANIA RULES OF CIVIL PROCEDURE

Title 28 U.S.C. § 1441 governs the removal of civil actions, and provides:

> (a) *Generally*.--Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) *Removal based on diversity of citizenship*.--(1) In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded. (2) A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441(a), (b)(1)-(2). Title 28 U.S.C. § 1446 governs the procedure for the removal of civil actions, and provides in pertinent part:

> (b) *Requirements; generally*.--(1) The notice of removal of a civil action or proceeding shall 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, or within 30 days after the service of summons upon the defendant if such initial pleading has then been

> filed in court and is not required to be served on the defendant, whichever period is shorter.
> …
> (B) Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.

28 U.S.C. § 1446(b)(1), 1446(b)(2)(B).

Here, the Complaint was never properly served upon the Defendant as of the filing of the Notice of Removal and hence removal is proper. Even Plaintiff acknowledges it did not properly serve the Defendant of its Complaint. See Motion to Remand at Paragraph 6. However, the Plaintiff would have this Honorable Court believe that despite its very best efforts, it has been unable to effectuate service of the Complaint upon the Defendant.

The Plaintiff has put the cart before the horse. If the Plaintiff was able to provide the Motion to the Defendant via a constable, then why not the Complaint via a sheriff. In point of fact, the Plaintiff failed miserably in utilizing the tools available to it in serving original process upon the Defendant.

Pennsylvania Rule of Civil Procedure 402(a) provides:

> (a) Original process may be served
>
> (1) by handing a copy to the defendant; or
>
> (2) by handing a copy
>
> (i) at the residence of the defendant to an adult member of the family with whom

> he resides; but if no adult member of the family is found, then to an adult person in charge of such residence; or
>
> (ii) at the residence of the defendant to the clerk or manager of the hotel, inn, apartment house, boarding house or other place of lodging at which he resides; or
>
> (iii) at any office or usual place of business of the defendant to his agent or to the person for the time being in charge thereof.

Pa.R.C.P. 402(a). Pennsylvania Rule of Civil Procedure 400(a) provides that "original process shall be served within the Commonwealth only by the sheriff." Pa.R.C.P. 400(a). Pennsylvania Rule of Civil Procedure 401(a) states: "Original process shall be served within the Commonwealth within thirty days after the issuance of the writ or the filing of the complaint." Pa.R.C.P. 401(a).

This issue presented here is similar to that addressed in the case of Vanderwerf v. Glaxosmithkline, PLC., CIV.A. 05-1315, 2005 WL 6151369 (E.D. Pa. May 5, 2005) (a copy of which is attached as **Exhibit "1"** to this Brief in Opposition).

In Vanderwerf, plaintiffs initially brought the action in the Philadelphia County Court of Common Pleas. The non-forum defendant removed the case to the Eastern District, and plaintiffs subsequently filed a motion to remand. Id. at *1. The Court in Vanderwerf noted the parties' respective positions – the basis of

plaintiffs' motion to remand was the presence of a forum defendant (a citizen of the Commonwealth of Pennsylvania where the state action was filed), and the defendants argued that removal was proper under 28 U.S.C. § 1441(b) "because there was no properly served in-state defendant in the action at the time of removal." Id.

The Court in Vanderwerf denied plaintiffs' motion to remand, and in so doing, stated the following applicable legal principles:

> Diversity of citizenship actions, such as this one, are removable "only if none of the parties in interest properly joined and *served* as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b) [emphasis in original]. **Under this provision, the presence of an unserved defendant with residence in the forum state does not defeat removal where there is complete diversity of citizenship**.

Id. (emphasis added) (internal citations and footnote omitted).

Having found (1) that the forum defendant had not been served at the time of the filing of the notice of removal (a fact which was admitted by the plaintiffs in their motion to remand, similar to the Plaintiff's admission in this case that the Complaint has not been properly served on the Defendant – see Motion to Remand at Paragraph 6), and (2) that the action meets the requirements for diversity of citizenship jurisdiction, the Court in Vanderwerf concluded that the case was properly removed under 28 U.S.C. § 1441(b). Id. Similarly, in this case, it is respectfully submitted that this Court should deny Plaintiff's Motion to Remand.

PLAINTIFF'S RELIANCE ON *MILLER VS. PIPER AIRCRAFT* AND *ALLEN VS. GLAXOSMITHKLINE* IS MISPLACED INSOMUCH AS THE MATERIAL FACTS OF THOSE CASES ARE DISTINGUISHABLE FROM THE INSTANT CASE

In Miller v. Piper Aircraft, Inc., CIV. 08-5961, 2009 WL 1033585 (E.D. Pa. Apr. 14, 2009), plaintiff initially filed a complaint in the Philadelphia Court of Common Pleas on December 16, 2008 against the defendants, Lycoming, Avco, and Textron. On December 24, 2008, only eight (8) days after the filing of the Complaint and before the end of the thirty (30) day period within which service had to be effectuated pursuant to Pa.R.C.P. 401(a), Textron removed the case to the United States District Court for the Eastern District of Pennsylvania. Miller, 2009 WL 1033585, *1. Eventually, on January 6, 2009, only twenty one (21) days after the Complaint was filed, service of process was effectuated upon Lycoming and Avco. Id. at * 3.

The Eastern District framed the issue as follows: "…the conflict presented herein involves [p]laintiff's assertion that Textron improperly had the within matter removed merely eight days after [p]laintiff filed his [c]omplaint and before the Lycoming County Sheriff had an opportunity to serve said [c]omplaint upon Lycoming and Avco." Id. at * 2.

In Miller, plaintiff argued that defendant Textron engaged in an improper "race to the courthouse" by having the case removed before service of process could be effectuated by plaintiff.

In this case, the Plaintiff is not making this assertion. In fact, Plaintiff's Complaint was filed on September 20, 2013, along with the Motion for Writ of Seizure. The Pennsylvania Rules of Civil Procedure mandate that "original process shall be served within the Commonwealth within thirty days after the issuance of the writ or the filing of the complaint." See Pa.R.C.P. 401(a). The Complaint was **not** served within the requisite thirty (30) day time period, or on or before Monday, October 21, 2013. **Notably, as of the date of the filing of this Brief in Opposition on November 12, 2013, the Complaint has still not been served on the Defendant, some fifty three (53) days after it was filed**.

In addition, the Miller Court briefly addressed the Vanderwerf case, and aptly pointed out as follows:

> In *Vanderwerf v. GlaxoSmithKline, P.L.C., et al.,* C.A. 05-1315, Doc. No. 16 (May 5, 2005), the Honorable Mary A. McLaughlin denied the remand request of a plaintiff whose case had been removed by a non-forum defendant before the forum defendant had been served. However, *Vanderwerf* is distinguishable from the matter herein, in that the thirty-day period within which Plaintiff Vanderwerf should have effectuated service upon her forum defendant, expired on the day the non-forum defendant filed its Notice of Removal. **As such, the plaintiff therein was given the full period of time allotted by Pa.R.C.P. No. 401(a) to effectuate service**

> **but failed to do so**. Had the non-forum defendant not filed their Notice of Removal on that date, they would have lost the right to do so. Such is not the case here.

Miller, 2009 WL 1033585, *3 n. 4 (emphasis added).

In this case, the Plaintiff filed its Complaint on September 20, 2013, and has yet to be served thereby violating rules 401(a), 400(a) and 402(a) of the Pennsylvania Rules of Civil Procedure. The propriety of removal is determined as of the date of removal. See 14B C.A. Wright, A.R. Miller, E.H Cooper & J.E. Steinman, Federal Practice & Procedure § 3723 (4th ed. 2009). Accordingly, Defendant's Notice of Removal is proper and Plaintiff's Motion to Remand should be denied.

Similarly, in Allen v. GlaxoSmithKline PLC, CIV.A. 07-5045, 2008 WL 2247067 (E.D. Pa. May 30, 2008), the defendant GSK removed the case to federal court before plaintiff had an opportunity to serve the complaint. Id. at *4. As discussed above, the Plaintiff in this case failed to serve Complaint within the requisite thirty (30) day time frame, and in fact, has failed to serve the Complaint upon the Defendant as of the date of the filing of this brief. Thus, unlike the plaintiff in Allen, the Plaintiff here has had ample opportunity to effectuate service of the Complaint, yet it has failed to do so.[1]

[1] If Plaintiff was unable to effectuate service by sheriff under the rules, the next step is to seek leave of Court to effectuate alternative means of service such as via publication. This requires the service seeking party to motion the Court in

In North v. Precision Airmotive Corp., 600 F. Supp. 2d 1263 (M.D. Fla. 2009), the Court dealt with the removal of a state action before any of the forum defendants had been served. The Court noted that "[p]laintiff simply did not effect service on either of the two properly joined forum defendants before Precision LLC removed." Id. at 1267. Also relevant was the fact that "[p]laintiff had still failed to effect service on any [d]efendant for almost a month after it filed suit." Id. at 1267, n. 5.

The Court noted that Precision's argument was that at the time of removal, no forum defendants had been "properly joined and served" pursuant to the clear and unambiguous language of 28 U.S.C. § 1441(b), and thus removal was proper. Id. at 1267. The Court, therefore, concluded that, in a completely diverse case, "a non-forum defendant that has not yet been served may remove a state court action to federal court under Section 1441(b) notwithstanding the fact that the plaintiff has already joined, but not yet served, a forum defendant." Id. at 1270. In so concluding, the Court emphasized:

> Hewing closely to the unambiguous text of Section 1441(b), the majority of courts, including the Southern District of Florida, have concluded that a non-forum defendant may remove despite the fact that the plaintiff has joined, but not yet served, a forum defendant. *See, e.g., McCall v. Scott,* 239 F.3d 808, 813 n. 2 (6th Cir.2001); *Vitatoe v. Mylan Pharm., Inc.*, Case No. 08-

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accordance with Pa.R.C.P. 430. Plaintiff failed to even consider the leave of Court requirement mandated by this rule or discuss it in its Motion to Remand.

> CV-85, 2008 WL 3540462 (N.D.W.Va. Aug. 13, 2008); *Valerio v. SmithKline Beecham Corp.*, Case No. 08-60522-CIV, 2008 WL 3286976 (S.D.Fla. Aug. 7, 2008); *Masterson v. Apotex Corp.*, Case No. 07-61665-CIV, 2008 WL 2047979 (S.D.Fla. May 13, 2008); *Johnson v. Precision Airmotive, LLC*, Case No. 07-CV-1695, 2007 WL 4289656 (E.D.Mo. Dec. 4, 2007); *Waldon v. Novartis Pharm. Corp.*, Case No. 07-01988, 2007 WL 1747128 (N.D.Cal. June 18, 2007); *Thomson v. Novartis Pharm. Corp.*, Case No. 06-6280, 2007 WL 1521138 (D.N.J. May 22, 2007); *Clawson v. FedEx Ground Package Sys., Inc.*, 451 F.Supp.2d 731 (D.Md.2006); *Ott v. Consol. Freightways Corp. of Del.*, 213 F.Supp.2d 662 (S.D.Miss.2002); *Mask v. Chrysler Corp.*, 825 F.Supp. 285 (N.D.Ala.1993); *Wensil v. E.I. DuPont De Nemours and Co.*, 792 F.Supp. 447 (D.S.C.1992); *Republic Western Ins. Co. v. Int'l Ins. Co.*, 765 F.Supp. 628 (N.D.Cal.1991); *Windac Corp. v. Clarke*, 530 F.Supp. 812 (D.Neb.1982); *see also* 14B Wright, Miller & Cooper, *Federal Practice and Procedure* § 3723 at 624 (3d ed. 1998).

North, 600 F. Supp. 2d at 1268.

DEFENDANT'S NOTICE OF REMOVAL WAS PROPER INSOMUCH AS DIVERSITY OF CITIZENSHIP EXISTS AND THE AMOUNT IN CONTROVERSY IS IN EXCESS OF $75,000

"In order to remove a case from state court to the district court, federal jurisdictional requirements must be met. Medlin v. Boeing Vertol Co., 620 F.2d 957, 960 (3d Cir.1980). The district court has removal jurisdiction where there is diversity of citizenship among the parties and the amount in controversy exceeds the sum or value of $75,000, exclusive of costs and interests...." Ferranti v. Daimler Chrysler Corp., 4:06-CV-1801, 2006 WL 3827507 (M.D. Pa. Dec. 28,

2006) (quoting James v. Elec. Data Systems Corp., 1998 WL 404817, at *2 (E.D.Pa.1998)).

As pointed out in Defendant's Notice of Removal, Plaintiff's Complaint alleged that it is a Minnesota company with its principal place of business in Burnsville, Minnesota, and that Defendant is a Pennsylvania corporation with its principal place of business in Clarks Summit, Pennsylvania. See Exhibit "A" to Notice of Removal at Paragraphs 1-2. Thus, for purposes of federal diversity jurisdiction, Plaintiff is a citizen of Minnesota, and Defendant is a citizen of Pennsylvania, so complete diversity exists.

As detailed in Defendant's Notice of Removal, Plaintiff's Complaint contains four (4) counts:

1. Count I for Breach of Contract requests monetary damages in the amount of $116,118.48, plus interest, costs of suit, the return of the Leased Equipment (as that term is defined in the Complaint), and attorneys' fees.

2. Count II for Unjust Enrichment requests monetary damages in the amount of $116,118.48, plus interest, costs of suit, the return of the Leased Equipment, and attorneys' fees.

3. Count III for Replevin requests possession of the Leased Equipment (which Plaintiff alleges is valued at $116,118.48 – see Exhibit "A" to Notice of Removal at Paragraph 14), attorneys' fees, costs and damages for the alleged unjust retention, and all costs of suit.

> 4. Count IV for Replevin requests possession of the Collateral (which Plaintiff alleges is valued at $107,635.00 – see Exhibit "A" to Notice of Removal at Paragraph 43), attorneys' fees, costs and damages for the alleged unjust retention, and all costs of suit.

See Complaint. Accordingly, Plaintiff's Complaint alleges that the amount in controversy exceeds $75,000, exclusive of costs and interest. Therefore, diversity of citizenship jurisdiction exists, and Defendant's removal was proper pursuant to 28 U.S.C. § 1441.

BECAUSE REMOVAL WAS PROPER PLAINTIFF'S REQUEST FOR ATTORNEY FEES AND COSTS MUST BE DENIED

For the reasons detailed herein, removal was proper. Accordingly, Plaintiff's request for attorney fees and costs pursuant to 28 U.S.C. §1447(c) must be denied.

However, assuming this Court finds removal to be improper, Plaintiffs' request for costs, actual expenses and attorneys' fees should be denied because Defendant in this case had an objectively reasonable basis for removal. Title 28 U.S.C. § 1447(c) provides in pertinent part:

> …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.A. § 1447. The Supreme Court has held that "[a]bsent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the

removing party lacked an objectively reasonable basis for seeking removal." Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005); First Am. Title Ins. Corp. v. JP Morgan Chase & Co., 384 F. App'x 64, 66 (3d Cir. 2010).

In this case, Defendant had an objectively reasonable basis for seeking removal given the procedural facts as they were presented. As detailed above, Plaintiff filed its Complaint and Motion for Writ of Seizure on September 20, 2013. A hearing on the Motion was set for October 21, 2013. The thirtieth (30th) day for Plaintiff to effectuate service of the Complaint pursuant to Pa.R.C.P. 401(a) was October 21, 2013.

The Complaint was not served by October 21st and has still yet to be served. Defendant appeared at the hearing on October 21st, without counsel, and Judge Burke instructed the Defendant to secure counsel and continued the hearing until October 24, 2013. Defendant secured counsel and removed the case on October 23, 2013. Accordingly, Defendant had an objectively reasonable basis for removing the case to the Middle District, and Plaintiff's request for costs, actual expenses and attorneys' fees should be denied.

III. CONCLUSION

For all of the foregoing reasons, Defendant requests that this Honorable Court denies the relief requested in Plaintiff's Motion to Remand.

Respectfully submitted,

COMITZ LAW FIRM, LLC

DATED: November 12, 2013 BY: */s/ Jonathan S. Comitz*

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