

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
CHARLOTTESVILLE DIVISION

EDWARD FENTON,	)	CIVIL ACTION NO.
	)	3:02CV00017
Plaintiff,	)	
	)	
v.	)	
	)	
FOOD LION, INC.,	)	<u>MEMORANDUM OPINION</u>
FOOD LION, LLC, and	)	
DELHAIZE AMERICA, INC.,	)	
	)	
Defendants.	)	JUDGE JAMES H. MICHAEL, JR.

Before the court are: (1) Plaintiff’s Motion for Remand to State Court, filed March 18, 2002; (2) Defendant Delhaize America, Inc.’s Motion to Dismiss, filed March 8, 2002; (3) Defendant Food Lion, Inc.’s Motion to Dismiss, filed March 20, 2002; and (4) Defendant Food Lion, LLC’s Motion to Amend its Petition for Removal, filed April 5, 2002. This court referred the matter to United States Magistrate Judge B. Waugh Crigler on April 1, 2002 for proposed findings of fact, conclusions of law, and a recommended disposition. See 28 U.S.C.A. § 636(b)(1)(B) (West 2002). On May 9, 2002, the parties appeared before the Magistrate Judge for oral argument. The Magistrate Judge returned his Report and Recommendation [“R&R”] on May 15, 2002, recommending that the court (1) grant the plaintiff’s motion for remand; (2) deny Delhaize America, Inc.’s motion to dismiss; (3) deny Food Lion, Inc.’s motion to dismiss; and (4) deny Food Lion, LLC’s motion to amend its petition for removal. The defendants filed timely objections to the Magistrate Judge’s recommendations, and the plaintiff filed a response to those objections. This court has reviewed *de novo* those portions of the R&R to which objections were made. 28 U.S.C.A. § 636(b)(1)(C); FED. R. CIV. P. 72(b). Having thoroughly

considered the R&R, the defendants' objections and the responses thereto, the applicable law, and the entire record, and for the reasons set forth below, the defendants' third objection, wherein the defendants state that Delhaize America, Inc.'s Motion to Dismiss was filed on March 8, 2002, rather than March 19, 2002, shall be sustained; the defendants' remaining objections shall be overruled; the Magistrate Judge's R&R shall be adopted in part and amended in part; and the court shall grant the plaintiff's motion to remand, deny defendant Delhaize America, Inc.'s motion to dismiss, deny defendant Food Lion, Inc.'s motion to dismiss, and deny Food Lion, LLC's motion to amend its petition for removal.

## I.

The plaintiff, Edward Fenton, alleges that, on July 11, 1999, he was a customer in a retail store believed to be Food Lion store number 959 in Fluvanna County, Virginia. The plaintiff further alleges that he slipped on a wet and slippery substance on the floor of the store, severely injuring himself.

The plaintiff commenced this action on June 27, 2001 in the Circuit Court of Fluvanna County, Virginia, against the following defendants: Food Lion, Inc. [hereinafter "Company"], Food Lion, LLC ["LLC"], and Delhaize America, Inc. ["Delhaize"]. The plaintiff alleged that as a proximate result of the defendants' negligence, he sustained serious temporary and permanent injuries, including, *inter alia*, pain, suffering, and emotional distress necessitating past, present, and continuing medical care and expenses, as well as lost income. (Pl.'s Mot. for J. at 1-2.) All three defendants were served with process on January 31, 2002.<sup>1</sup>

---

<sup>1</sup>The LLC previously argued that the Company had not been properly served. The record, however, confirms that all three defendants were personally served, via their registered agent, on January 31, 2002. Moreover, in the Company's motion to dismiss, filed March 20, 2002, the Company conceded that it appeared it had been served.

Although the relationship between the defendants was not apparent during the statutory period for removal, subsequent filings by the defendants have shed some light on the matter.<sup>2</sup> The Company, a North Carolina corporation, operated Food Lion store number 959 at the time of the alleged incident. On or about September 9, 1999, the Company filed an amendment to its Articles of Incorporation, thereby changing its name to “Delhaize America, Inc.” On or about July 1, 2000, Delhaize transferred substantially all of the assets used and liabilities incurred in the operation of the Food Lion division to its wholly-owned subsidiary, the LLC, a North Carolina limited liability company.

Pursuant to the Notice of Removal and Removal Petition<sup>3</sup> filed by the LLC on February 15, 2002, the case was removed to the United States District Court for the Western District of Virginia.<sup>4</sup> The LLC based its removal on the diversity of citizenship between the parties,<sup>5</sup> stating that the plaintiff is a citizen of Virginia, while all of the defendants are, or were,

---

<sup>2</sup>The following company history is based primarily on the affidavit of G. Linn Evans, Assistant General Counsel of the LLC. This affidavit initially was filed to the court on March 8, 2002 as an exhibit to Delhaize’s motion to dismiss. Because the motion and the accompanying affidavit were filed after the statutory period for removal, the information ultimately will have no bearing on the motion to remand the case for the reasons set forth below. However, because the information has not been contested thus far, this summary is included for clarification purposes.

<sup>3</sup>As the R&R points out, in its current form, 28 U.S.C.A. § 1446 requires the filing of a notice of removal, and not a petition of removal. 28 U.S.C.A. § 1446(a) (West 2002). In the interest of fairness, however, this court has considered both the LLC’s notice of removal and its removal petition to determine whether removal was proper.

<sup>4</sup>Although the R&R states that the case was removed on February 18, 2002, the record indicates that the notice of removal was filed on February 15, 2002. No objection was raised on this point, and the R&R shall be adopted with this correction noted. Even with this three day correction, however, the plaintiff’s motion to remand was timely. 28 U.S.C.A. § 1447(c) (West 2002); FED. R. CIV. P. 6.

<sup>5</sup>The amount in controversy is \$500,000.00, which exceeds the requirement for federal jurisdiction. 28 U.S.C.A. § 1332(a) (West 2002).

North Carolina corporations, with a single principal place of business in Salisbury, North Carolina.<sup>6</sup> 28 U.S.C.A. § 1332(a)(1), (c)(1). Next, the LLC filed an answer to the complaint, entitled “Grounds of Defense of Food Lion, LLC” on February 19, 2002.

On March 8, 2002, Delhaize filed a motion to dismiss, claiming that it was an improper party to this lawsuit.<sup>7</sup> On March 18, 2002, the plaintiff filed a motion for remand to state court, claiming that two of the three defendants named in the case had not joined in, or consented to, the removal within thirty days after service of process. The Company then filed a motion to dismiss on March 20, 2002, claiming that it is an improper party to this lawsuit.<sup>8</sup> On April 5, 2002, the LLC filed a motion requesting leave to amend its removal petition to state that it is the only

---

<sup>6</sup>Despite this assertion, it is evident from its company name and North Carolina law that the LLC is a limited liability company. See N.C. GEN. STAT. § 55D-20(a)(1)-(2) (2002). This court additionally notes that, as a limited liability company, the LLC is treated as an unincorporated association for the purpose of determining federal jurisdiction. *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998). It is the citizenship of the members of the organization, therefore, that will determine a limited liability company’s citizenship; neither the state where the entity was formed nor the location of its principal place of business is relevant. *Id.*; *Handelsman v. Bedford Vill. Assocs.*, 213 F.3d 48, 51-52 (2nd Cir. 2000); *JBG/JER Shady Grove, LLC v. Eastman Kodak Co.*, 127 F. Supp. 2d 700, 701 (D. Md. 2001); *Triad Motorsports, LLC v. Pharbco Mktg. Group*, 104 F. Supp. 2d 590, 594 (M.D.N.C. 2000). Because the notice of removal does not allege the citizenship of the members of the LLC, the notice may be defective for this reason alone. Nevertheless, the court need not decide this issue to dispose of the motions before it.

<sup>7</sup>The R&R states that Delhaize’s motion to dismiss was filed March 19, 2002. In their third objection, the defendants point out that the motion to dismiss actually was filed on March 8, 2002. (Defs.’ Obj. to the R&R at 2.) The record confirms that the defendants are correct. Consequently, the defendants’ third objection shall be sustained, and the R&R shall be adopted with this correction noted. Nevertheless, the motion to dismiss and the affidavit attached thereto were filed after the thirty-day statutory period for removal expired. 28 U.S.C.A. § 1446(b).

<sup>8</sup>Although no objection has been made, the R&R states that the Company’s motion to dismiss was filed March 19, 2002, whereas the record reflects that it was filed March 20, 2002. This difference is immaterial, however, and the R&R shall be adopted with the correction noted.

proper party to the suit, and that Delhaize is a nominal party with no assets or liabilities that is not required to join in or consent to the removal.

Of the four motions before the court, the plaintiff's motion for remand was filed second. However, the issue raised thereby speaks to the propriety of removal, and thus, to the jurisdiction of this court, on which the other motions depend. Moreover, the statutory period for removal expired thirty days after the defendants were served on January 31, 2002. 28 U.S.C.A. § 1446(b); FED. R. CIV. P. 6. In reviewing the motion for remand, this court must determine whether the removal was defective *as of the expiration of the statutory period*. Because the other motions were filed after that date, the motion for remand must be considered first, and its disposition will determine the outcomes of the remaining motions.

## II.

### A. *The propriety of the removal:*

This court is called upon to determine whether the case before it was properly removed to federal court when two of the three defendants named in the complaint did not join in or consent to the removal, and the removing defendant failed to demonstrate that their consent was not necessary during the statutory period for removal. For the reasons set forth below, the court finds that the removal was not proper. The court, therefore, shall grant the plaintiff's motion for remand.

Removal of a civil action from state court to federal court requires that the defendant or defendants file a notice of removal within thirty days of receipt of a copy of the claim for relief. 28 U.S.C.A. § 1446 (a)-(b).<sup>9</sup> The notice must set forth the grounds for removal. *Id.* Furthermore, the

---

<sup>9</sup>28 U.S.C.A. § 1446 (a)-(b) states, in pertinent part:

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within

statutory limits to removal must be applied strictly for several policy reasons. First, removal jurisdiction raises a significant federalism concern, because the removal of civil cases to federal court infringes upon state sovereignty. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941); *Mulcahey v. Columbia Organic Chem. Co.*, 29 F.3d 148, 151 (4th Cir. 1994); *Bellone v. Roxbury Homes, Inc.*, 748 F. Supp. 434, 436 (W.D. Va. 1990); *Thompson v. Gillen*, 491 F. Supp. 24, 26 (E.D. Va. 1980). Second, because state courts are typically courts of general jurisdiction while federal courts are courts of limited jurisdiction, federal courts should be strictly limited to cases in which original jurisdiction was conferred upon them and not use removal to expand their jurisdiction further. *Bellone*, 748 F. Supp. at 436; *Thompson*, 491 F. Supp. at 26-27. Finally, and perhaps most importantly, because a court without jurisdiction cannot render a valid judgment, it would be judicially inefficient to allow a case to proceed to conclusion, only to result in a pronouncement of no value. *Thompson*, 491 F. Supp. at 29; *Bellone*, 748 F. Supp. at 436.

For the aforementioned reasons, the provisions for removal of civil cases to federal court must be strictly construed so that federal jurisdiction is not expanded beyond the statutory boundaries. *Bellone*, 748 F. Supp. at 436; *Thompson*, 491 F. Supp. at 26; *see also Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232 (4th Cir. 1993) (“Review of the district court’s denial of the motion to remand

---

which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty 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 .

...

will effectuate Congress' clear intention to restrict removal and to resolve all doubts about the propriety of removal in favor of retained state court jurisdiction.”); *Castle v. Laurel Creek Co.*, 848 F. Supp. 62, 65 (S.D.W. Va. 1994) (“[T]he appropriateness of the restrictive standard [to amendment] is buttressed by the clear and undisputed rule that removal statutes must be strictly construed *against* removal.”) (emphasis in original).

In cases with multiple defendants, courts generally interpret § 1446 to require that all defendants join in, or consent to, the removal of a civil case to federal court. *Bellone*, 748 F. Supp. at 436; *see also* 14B CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE §§ 3723 at 563, 3731 at 258 (3d ed. 1998 & Supp. 2002) (citing cases requiring all defendants to join in, or consent to, a removal). However, as this court recognized in *Bellone*:

[T]hree exceptions to the requirement that all defendants join in or consent to a petition for removal have been recognized: (1) when the non-joining defendant has not been properly served at the time the removal petition is filed; (2) when the non-joining defendant is merely a nominal or formal party; and (3) when the removed claim is separate and independent from other aspects of the lawsuit filed in state court as defined by 28 U.S.C. § 1441(c).

*Bellone*, 748 F. Supp. at 436 (citations omitted); *see also* *N. Ill. Gas Co. v. Airco Indus. Gases*, 676 F.2d 270, 272 (7th Cir. 1982) (recognizing that nominal parties need not join in a removal); *P.P. Farmers' Elevator Co. v. Farmers Elevator Mut. Ins. Co.*, 395 F.2d 546, 548 (7th Cir. 1968) (recognizing exceptions to the requirement that all defendants join in a petition for removal when (i) the non-joining defendant was not properly served; or (ii) the removed claim is a separate and independent claim that has been joined with an otherwise nonremovable claim, and the non-joining defendant is a party only to the nonremovable claim) (citations omitted).

Even though the LLC's removal notice lacked consensual unanimity of the defendants, the

defendants claim that the removal was not defective. The defendants assert that Delhaize and the Company are merely nominal parties, so their consent is not required under the second *Bellone* exception.

The burden, however, is on the party seeking to invoke the jurisdiction of the federal court to demonstrate the propriety of removal. *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921) (citing *Carson v. Dunham*, 121 U.S. 421, 425-26 (1887)); *Mulcahey*, 29 F.3d at 151; *P.P. Farmers' Elevator Co.*, 395 F.2d at 548. In the case at hand, the LLC filed the notice of removal, and neither Delhaize nor the Company joined in, or consented to, the removal. Because the removal notice lacked consensual unanimity of the defendants and failed to explain this omission, it is defective on its face. See *Chesapeake & Ohio Ry. v. Cokrell*, 232 U.S. 146, 151-52 (1914) (stating that the facts justifying removal must be set forth in the removal petition, including sufficient demonstration that a party has been fraudulently joined); *Gableman v. Peoria, Decatur, & Evansville Ry.*, 179 U.S. 335, 337 (1900) (recognizing that when there is more than one defendant to a removal, all defendants must join); *N. Ill. Gas Co.*, 676 F.2d. at 273 (noting that “a petition filed by less than all of the named defendants is considered defective if it fails to contain an explanation for the absence of co-defendants”) (citations omitted); *Egle Nursing Home, Inc. v. Erie Ins. Group*, 981 F. Supp. 932, 934-35 (D. Md. 1997) (same); *P-Nut Carter's Fireworks, Inc. v. Carey*, 685 F. Supp. 952, 953 (D.S.C. 1988) (same); *Parker v. Johnny Tart Enters.*, 104 F. Supp. 2d 581, 583 (M.D.N.C. 1999) (same). The LLC, consequently, carries the burden to cure the defective removal notice by demonstrating either that its co-defendants joined in, or consented to, the removal or that their consent was not required because one of the *Bellone* exceptions applies. *P.P. Farmers' Elevator Co.*, 395 F.2d at 548; *Egle Nursing Home, Inc.*, 981 F. Supp. at 934; see also *N. Ill. Gas Co.*, 676 F.2d. at 273 (finding that, because the state record attached to the removal petition established that the non-

consenting defendant was a nominal party, the removing defendant's amendment to provide this explanation corrected the technically deficient petition); *See also* 14C WRIGHT, MILLER & COOPER § 3739 at 423-24 ("It is also well-settled under the case law that the burden is on the party seeking to preserve the district court's removal jurisdiction . . . to show that the requirements for removal have been met.").

The LLC needed to meet its burden *during the statutory period for removal set out by § 1446(b)*. 28 U.S.C.A. § 1446(b); *P-Nut Carter's Fireworks, Inc.*, 685 F. Supp. at 953 (finding that the petitioning defendant failed to meet its burden because it failed to explain the reason that a co-defendant had not joined in the petition and did not provide a timely cure within the thirty-day period provided for by § 1446); *Egle Nursing Home*, 981 F. Supp. at 934 (same). Neither of the LLC's co-defendants joined in, or consented to, the removal during the thirty-day period.<sup>10</sup> The LLC also failed to demonstrate, or even to suggest, to the court that the non-consenting defendants were nominal parties until after the expiration of the statutory period. Consequently, the LLC failed to meet its burden to demonstrate the propriety of the removal, and the removal remains defective. As the Fourth Circuit recognized, "[it was] Congress' clear intention to restrict removal and to resolve all doubts about the propriety of removal in favor of retained state court jurisdiction." *Marshall*, 6 F.3d at 232; *see also Shamrock Oil & Gas Corp.*, 313 U.S. at 108-09 (finding that: (i) Congress's purpose to restrict the jurisdiction of federal courts on removal was evidenced by the language of the Act of 1887; (ii) Congress's subsequent acts call for strict construction of such legislation; and (iii) "[t]he power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles

---

<sup>10</sup>It is worthy of note that even long after the statutory period had expired, counsel for the LLC stated in oral argument that she had no authority from Delhaize to seek removal. (R&R at 4 n.4).

of the Constitution”); *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 9-10 (1951) (recognizing that Congress intended to abridge the right of removal with the 1948 revision of 28 U.S.C. § 1441(c); *Somlyo v. J. Lu-Rob Enters.*, 932 F.2d 1043, 1045-46 (2nd Cir. 1991) (“In light of the congressional intent to restrict federal court jurisdiction, as well as the importance of preserving the independence of state governments, federal courts construe the removal statute narrowly, resolving any doubts against removability.”) (*citing, inter alia, Shamrock Oil & Gas Corp.*, 313 U.S. at 108). Because the LLC failed to cure the defects of the removal before the expiration of the statutory period, this court must remand the case to state court.

In their sixth objection to the R&R, the defendants argue that the court must consider whether the Company and Delhaize are merely nominal parties, even though the defendants did not present this claim, or any evidence therefor, to the court during the removal period. It is true that federal courts may look to the state record of the proceedings prior to removal for evidence that non-consenting defendants are nominal parties. *N. Ill. Gas Co.*, 676 F.2d at 273 (“In determining whether a removal petition is incurably defective, the court not only examines the specific allegations of the petition itself, but also must scrutinize the record of the state court proceedings.”) (*citing, inter alia, Powers v. Ohio Ry.*, 169 U.S. 92, 101 (1898)); *Wright v Mo. Pac. R.R.*, 98 F.2d 34, 35-36 (8th Cir. 1938) (suggesting that once the state court record is made complete it will show that the consent of the other defendant was not necessary to removal, because he had not been served); *Bellone*, 748 F. Supp. at 437 (stating that the court’s task was “to analyze the relevant statutory provisions and case law on this issue *in light of the known facts in the present case* to determine whether or not [the defendant was], indeed, a nominal party or [was], instead, a real party in interest whose failure to join the petition for removal require[d] the Court to remand the case”) (emphasis added). This does not suggest, however, that a court should consider whether a non-consenting defendant is a nominal party to a suit when there was no evidence in the state record or any filings to the court during the removal

period to suggest that it is.

In *Northern Illinois Gas Co.*, the Seventh Circuit affirmed the holding that the defendant was a nominal party, because the state record attached to the removal petition included the claim that the non-consenting defendant was not a necessary party and should not have been named as a defendant. *N. Ill. Gas Co.*, 676 F.2d at 274. In *Bellone*, this court was able to conclude that the defendant in question was not a nominal party, because two of the principal allegations were (a) the non-consenting defendant was the principal alleged wrongdoer, and (b) it had fraudulently conveyed its assets to the other defendant. *Bellone*, 748 F. Supp. at 437-38.

In both *Northern Illinois Gas Co.* and *Bellone*, the state court records contained sufficient information for the respective court to determine whether the non-consenting defendant was a nominal party. Significantly, in *Northern Illinois Gas Co.*, the Seventh Circuit noted that it did not need to decide whether other factors would have justified permitting amendment of the removal petition if the record had not revealed the reason the other defendant had not joined in the removal. *N. Ill. Gas Co.*, 676 F.2d. at 274 n.2. That is precisely the situation before this court. There is no information, either in the state record or in any documents filed to the court before the expiration of the statutory period for removal, to suggest that Delhaize or the Company are nominal parties. See *Egle Nursing Home*, 981 F. Supp. at 934-35 (deciding to remand the case to state court, because the notice of removal did not state the reason that one defendant did not consent, and there was no state record attached that would suggest an explanation for this omission). This court must make its decision based on the information before it as of the proper time. As of the expiration of the removal period, there was nothing to suggest that the non-consenting defendants are nominal parties to the lawsuit.

In particular, the defendants urge the court to consider the affidavit of G. Linn Evans, Assistant General Counsel of the LLC, as evidence that Delhaize and the Company are nominal

parties. (Defs' Obj. to the R&R at 5.) This affidavit was filed with the court as an exhibit to the motions to dismiss filed by Delhaize and the Company on March 8, 2002 and March 20, 2002, respectively. Because all three defendants were served on January 31, 2002, these motions, as well as the exhibits attached thereto, were filed more than thirty days after service of process and, therefore, are untimely and not properly before the court. 28 U.S.C.A. § 1446(b); FED. R. CIV. P. 6.

For the reasons discussed previously, federal courts cannot extend their jurisdiction beyond the statutory limits. The courts instead must take a restrictive approach to the provisions for removal. In 28 U.S.C.A. § 1446(b), Congress set a time period for removal. If this court were to consider substantive additions to a defective removal after this statutory period, it would undermine the Congressional intent to limit strictly the removal of cases to the federal courts. *See Marshall*, 6 F.3d at 232; *Outdoor World Corp. v. Calvert*, 618 F. Supp. 446, 448 (E.D. Va. 1985). Furthermore, without deadlines like the one set forth in § 1446, jurisdictional questions could cause endless delays before a case could be adjudicated on the merits. The line must be drawn somewhere, and Congress has drawn it. 28 U.S.C.A. § 1446(b).

The procedural rules gave the defendants ample opportunity to demonstrate that the Company and Delhaize were nominal parties either in the Notice of Removal or as a timely amendment thereto. As the court noted in *Thompson v. Gillen*, “[i]t is not too much, in this Court’s view, to expect any lawyer to plead federal jurisdiction with care.” *Thompson*, 491 F. Supp. at 29. This court agrees, and therefore, the motions to dismiss, and the exhibits attached thereto, cannot cure the defective removal.<sup>11</sup> Federal jurisdiction was not justified prior to the expiration of the statutory period for

---

<sup>11</sup>Even if it were proper for the court to consider the evidence, it is still not clear that Delhaize and the Company are necessarily nominal parties, or a single nominal party, as the defendants assert. The plaintiff is not willing to concede this point. Even accepting, *arguendo*, the defendants’ claims that (a) the Company amended its articles of incorporation on or about

removal, so the plaintiffs motion for remand shall be granted.

*B. Attorney Fees and Costs:*

The plaintiff requests attorney fees and costs pursuant to 28 U.S.C.A. § 1447(c) (West 2002), which provides that a federal court remanding a case back to state court “*may* require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.” (emphasis added). Although it is within this court’s discretion to grant such an award, the courts of this circuit generally do so only when the removing party has asserted removal frivolously or in bad faith, or the lack of federal jurisdiction is obvious with even a cursory examination. *See In re Lowe*, 102 F.3d 731, 733 n.2 (4th Cir. 1996) (declining to award attorney fees in a case where there was no bad faith and the lack of federal jurisdiction was not obvious); *Reid v. Boyle*, 2 F. Supp. 2d 803, 809 (E.D. Va. 1998) (same); *Brown v. Wash./Balt. Cellular, Inc.*, 109 F. Supp. 2d 421, 424 (D. Md. 2000) (same); *Clipper Air Cargo, Inc. v. Aviation Prods. Int’l*, 981 F. Supp. 956, 960 (D. S.C. 1997) (declining to award attorney fees, because the claim was not frivolous; a reasonable argument was made for removal); *Benton v. Wash. Radiology Assoc.*, 963 F. Supp. 500, 503 (D. Md. 1997) (declining to award costs and attorney fees because “[s]uch an award would be appropriate only when the nonremovability of the action was obvious”); *Whisenant v. Roach*, 868 F. Supp. 177, 178-79 (S.D.W.

---

September 9, 1999 to reflect a name change to “Delhaize America, Inc.,” so that the two “parties” are in fact the prior and current names of a single corporation, and (b) that Delhaize subsequently transferred substantially all of the assets used and the liabilities incurred in the operation of the Food Lion division to its wholly-owned subsidiary, the LLC, this still may not be sufficient to establish that Delhaize (f/k/a Food Lion, Inc.) is a nominal party. First, Delhaize remains a current North Carolina corporation that was served with process. There is no evidence on the record that Delhaize either was dissolved or liquidated formally pursuant to a bankruptcy proceeding. Second, because the company in question operated store number 959 at the time of the incident from which this claim arises, it may be the principal wrongdoer in this case. *See Bellone*, 748 F. Supp. at 437 (suggesting that these factors may be evidence that a defendant is not a nominal party). Furthermore, as this court noted in *Bellone*, even if a defendant has no assets, “this Court does not believe that its jurisdiction is premised upon the strength or weakness of a given defendant’s financial statements.” *Id.* Regardless, this court need not decide the issue in order to dispose of the motions before it.

Va. 1994) (awarding fees and costs, because the defendants had removed the case in bad faith, and a cursory examination would have revealed that the removal period had already expired). In the present controversy, there is no evidence that the case was removed either frivolously or in bad faith. Moreover, the lack of federal jurisdiction was not obvious to a cursory examination. Rather, it seems possible that, if not for the procedural failures in the LLC's removal, federal jurisdiction might have been appropriate. The parties, therefore, shall bear their own costs in this case.

### III.

Additionally, this court must determine whether the LLC may amend its removal notice after the expiration of the removal period in an attempt to cure the defects noted above. Due to the nature of the defects and the fact that the removal period has elapsed, the court concludes that it may not.

On April 5, 2002, the LLC filed a motion to amend its petition of removal by adding the claims that the LLC is the only proper party and that Delhaize is a nominal party not required to join in or consent to the removal.<sup>12</sup> *See* 14C WRIGHT, MILLER & COOPER § 3733, at 357 (recognizing that “the notice of removal required by Section 1446(b) may be amended freely by the defendant prior to the expiration of the thirty-day period for seeking removal”). Thereafter, amendments will only be allowed that set forth more specifically each ground for removal which had been imperfectly stated in the original petition, rather than to set forth additional or missing grounds for removal. 28 U.S.C. § 1653 (“[d]efective allegations of jurisdiction may be

---

<sup>12</sup>The amendment does not specifically state that the Company should also be considered a nominal party. Perhaps the claim that the LLC is *the only proper party* is intended to imply this. Given the strict requirement of consensual unanimity of the parties and the burden on the party opposing remand, however, it is unlikely that this is sufficient. This may mean that even if the amendment were accepted, the notice of removal would remain defective nonetheless. Regardless, the court need not reach that determination in this case for the reasons set forth below.

amended, upon terms, in the trial or appellate courts”); *see Kinney v. Columbia Sav. & Loan Ass’n*, 191 U.S. 78, 83 (1903) (recognizing that circuit courts have the power to permit the amendment of removal proceedings where there is a technical defect and there are averments sufficient to show jurisdiction); *Barnhill v. Ins. Co. of N. Am.*, 130 F.R.D. 46, 51 (D.S.C. 1990) (stating that “[t]he overwhelming majority of courts allow amendment after expiration of the statutory period for removal only for the purpose of setting forth more specifically *each* ground for removal which had been imperfectly set forth in the original petition, but deny leave to amend to supply missing allegations or to supply new allegations”) (internal citations omitted) (emphasis in original); *Thompson*, 491 F. Supp. at 27 (same). To that end, because removal statutes must be strictly construed, once the relevant statutory period has passed, only minor technical corrections will be allowed, not substantive revisions. *Bellone*, 748 F. Supp. at 436; *Egle Nursing Home*, 981 F. Supp. at 934; *Thompson*, 491 F. Supp. at 28; *see also Castle*, 848 F. Supp. at 65 (accepting the restrictive standard regarding amendment to removal notices after the expiration of the statutory period and, therefore, denying an amendment to allege that the non-diverse party was fraudulently joined).

As the district court in *Barnhill* noted, the following policy considerations require courts to apply a very restrictive view of amendment, particularly after the statutory period for removal has passed:

- (1) preventing federal court infringement upon the rightful independence and sovereignty of state courts;
- (2) ensuring that judgments obtained in a federal forum are not vacated on appeal due to improvident removal;
- (3) reducing uncertainty as to the court’s jurisdiction in the marginal cases, which a more liberal construction of the removal statute would promote;
- (4) allowing amendment of the notice of removal under § 1653 after the thirty day time limit for removal specified in § 1446(b) would “substantially eviscerate” the specific time provision enacted by Congress; and
- (5) conceding that the traditional justification for diversity jurisdiction – state court hostility toward nonresident

defendants – has been significantly reduced since the time diversity jurisdiction was created.

*Barnhill*, 130 F.R.D. at 50-51(internal citations omitted). The LLC filed its motion to amend its removal petition on April 5, 2002, well after the expiration of the thirty-day period for removal. For the reasons listed above, therefore, the restrictive approach to amendments must be applied.

In its original notice of removal, the LLC did not set forth any justification for the lack of consensual unanimity among the defendants. It cannot be said, therefore, that this amendment would simply set forth more specifically the grounds for removal imperfectly set forth in the original petition or notice of removal. Instead, it seeks to set forth the missing allegation that Delhaize is a nominal party whose consent is not needed.

As this court previously has noted, the lack of joinder or consent to the notice of removal by all co-defendants represents a more significant defect than those for which amendments will be allowed after the removal period has expired. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Louth*, 40 F. Supp. 776, 783 (W.D. Va. 1999). An amendment to claim that a co-defendant should be considered a nominal party in order to obviate the need for consensual unanimity is a material and substantive amendment, not a minor technical correction of the type permitted. *Bellone*, 748 F. Supp. at 437 n.1; *Thompson*, 491 F. Supp. at 27-29; *Mason v. Int'l Bus. Machs.*, 543 F. Supp. 444, 446 (M.D.N.C. 1982). Because the statutory deadline has passed, and the proposed amendment sets forth a new allegation that is material and substantive, the LLC's motion to amend shall be DENIED.

#### IV.

Finally, this court is called upon to decide whether the Company and Delhaize are improper parties that should be dismissed from the suit. Based on this court's lack of jurisdiction over the case, the court has no authority to address this question.

On March 8, 2002, defendant Delhaize filed a motion to dismiss, claiming that it is an improper party to the suit. On March 20, 2002, the Company filed a motion to dismiss, consenting to this court's jurisdiction and claiming that it is an improper party to the suit. These motions were both filed after the expiration of the removal period, whereupon this court lacked jurisdiction. The motions to dismiss filed by defendants Delhaize and the Company, therefore, shall be denied without prejudice.

V.

In conclusion, for the preceding reasons, the court shall grant the plaintiff's motion to remand, deny defendant Food Lion, LLC's motion to amend, and deny without prejudice the motions to dismiss of defendants Delhaize America, Inc. and Food Lion, Inc. The defendants' third objection, wherein the defendants state that Delhaize America, Inc.'s motion to dismiss was filed on March 8, 2002, rather than March 19, 2002, shall be sustained; the defendants' other objections shall be overruled; and the Magistrate Judge's R&R shall be adopted in part and amended in part, to reflect the date corrections discussed above.

An appropriate Order this day shall issue.

ENTERED: \_\_\_\_\_  
Senior United States District Judge

\_\_\_\_\_  
Date

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
CHARLOTTESVILLE DIVISION

EDWARD FENTON,	)	CIVIL ACTION NO.
	)	3:02CV00017
Plaintiff,	)	
	)	
v.	)	
	)	
FOOD LION, INC.,	)	<u>ORDER</u>
FOOD LION, LLC, and	)	
DELHAIZE AMERICA, INC.,	)	
	)	
Defendants.	)	JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is accordingly

ADJUDGED, ORDERED AND DECREED

as follows:

1. The Magistrate Judge’s Report and Recommendation, filed May 15, 2002, shall be, and it hereby is, ADOPTED IN PART AND AMENDED IN PART;
2. Of the “Defendants’ Objections to Magistrate Judge Crigler’s Report and Recommendation,” filed May 24, 2002, the third objection, wherein the defendants point out that Delhaize America, Inc.’s Motion to Dismiss was filed on March 8, 2002, rather than March 19, 2002, as the Report and Recommendation states, shall be, and it hereby is, SUSTAINED;
3. The remainder of the objections contained in the “Defendants’ Objections to Magistrate Judge Crigler’s Report and Recommendation,” filed May 24, 2002, shall be, and they hereby are, OVERRULED;

4. The "Plaintiff's Motion for Remand to State Court," filed March 18, 2002, shall be, and it hereby is GRANTED;

5. Defendant Delhaize America, Inc's "Motion to Dismiss," filed March 8, 2002, shall be, and it hereby is, DENIED;

6. Defendant Food Lion, Inc's "Motion to Dismiss," filed March 20, 2002, shall be, and it hereby is, DENIED;

7. "Defendant Food Lion, LLC's Motion to Amend," filed April 5, 2002, shall be, and it hereby is, DENIED; and

8. The Clerk of the Court is instructed to STRIKE this case from the docket of the court.

The Clerk of the Court is further directed to send a certified copy of this Order and the accompanying Memorandum Opinion to all counsel of record and to Magistrate Judge Crigler.

ENTERED: \_\_\_\_\_  
Senior United States District Judge

\_\_\_\_\_  
Date