

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHARLOTTE ANN MAASSEN and  
WERNER MAASSEN,

Plaintiffs,

v.

NOVARTIS PHARMACEUTICALS  
CORPORATION,

Defendant.

No. C-14-0116 MMC

**ORDER DENYING PLAINTIFFS' MOTION  
TO REMAND; VACATING HEARING**

Before the Court is plaintiffs Charlotte Ann Maassen and Werner Maassen's "Motion to Remand Plaintiffs' Complaint to State Court," filed February 7, 2014, and amended February 11, 2014. Defendant Novartis Pharmaceuticals Corporation ("NPC") has filed opposition, to which plaintiffs have replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court deems the matter suitable for determination thereon, VACATES the hearing scheduled for March 14, 2014, and rules as follows.

Plaintiffs filed the instant action in state court on January 6, 2014, naming therein one defendant, NPC. Two days later, NPC removed the action, asserting the Court has jurisdiction because the parties are diverse in citizenship and because plaintiffs, by the

1 nature of the allegations made in the complaint, are necessarily seeking damages in  
2 excess of \$75,000.<sup>1</sup> See 28 U.S.C. § 1332(a) (providing district court has diversity  
3 jurisdiction where “the matter in controversy exceeds the sum or value of \$75,000,  
4 exclusive of interest and costs and is between . . . citizens of different States”).

5 In its notice of removal, NPC states that, as of the time of removal, it had not been  
6 served with the summons and complaint. By the instant motion, plaintiffs contend such  
7 removal is procedurally improper because it occurred prior to plaintiffs’ having effectuated  
8 service of process on NPC.

9 Removals are governed by 28 U.S.C. § 1441(a), which provides as follows: “Except  
10 as otherwise expressly provided by Act of Congress, any civil action brought in a State  
11 court of which the district courts of the United States have original jurisdiction, may be  
12 removed by the defendant or the defendants, to the district court of the United States for  
13 the district and division embracing the place where such action is pending.” See 28 U.S.C.  
14 § 1441(a). Here, as noted, NPC asserts the Court has diversity jurisdiction over plaintiffs’  
15 complaint, and plaintiffs do not dispute NPC’s showing regarding either the citizenship of  
16 the parties or the amount in controversy. As noted, however, plaintiffs contend NPC  
17 nonetheless is precluded from removing the action until it has been served with process. In  
18 support thereof, plaintiffs rely on 28 U.S.C. § 1446(b), which, in relevant part, provides as  
19 follows: “The notice of removal of a civil action or proceeding shall be filed within 30 days  
20 after the receipt by the defendant, through service or otherwise, of a copy of the initial  
21 pleading setting forth the claim for relief upon which such action or proceeding is based, or  
22 within 30 days after the service of summons upon the defendant if such initial pleading has  
23 then been filed in court and is not required to be served on the defendant, whichever period  
24 is shorter.” See 28 U.S.C. § 1446(b).

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27 <sup>1</sup>Plaintiffs allege, *inter alia*, that a result of a defective drug manufactured and sold by  
28 NPC, plaintiff Charlotte Ann Maassen has “suffered osteonecrosis of the jaw, including  
pain, exposed bone, infection, and disfigurement.” (See Compl. ¶¶ 2, 21, 25.)

1 Although § 1446(b) sets forth the deadlines by which a defendant must remove a  
2 complaint, and ties those deadlines to service of process, see Murphy Brothers, Inc. v.  
3 Michetti Pipe Stringing, Inc., 526 U.S. 344, 347-48 (1999) (holding 30-day deadline to  
4 remove set forth in § 1446(b) is “triggered by” service of summons and complaint and not  
5 by earlier “receipt of the complaint unattended by any formal service”), plaintiffs fail to cite  
6 any authority supporting their argument that § 1446(b) prohibits a defendant from removing  
7 a complaint prior to such service.<sup>2</sup> Further, the courts that have considered the issue have  
8 found service of process is not a prerequisite to removal. See, e.g., Delgado v. Shell Oil  
9 Co., 231 F.3d 165, 177 (5th Cir. 2000) (interpreting § 1446(b) as allowing defendant named  
10 in state court complaint to remove action irrespective of whether defendant had been  
11 served); Whitehurst v. Wal-Mart, 306 Fed. Appx. 446, 448 (11th Cir. 2008) (holding  
12 “nothing in the removal statute, or any other legal provision, requires that a defendant be  
13 served with the complaint before filing a notice of removal”); City of Ann Arbor Employees’  
14 Retirement System v. Gecht, 2007 WL 760568, \*9 (N.D. Cal. March 9, 2007) (holding issue  
15 of whether removing defendant had been “served” prior to removal was “immaterial,”  
16 because “[p]rocedurally, [the removing defendant] could remove whether or not he had  
17 been ‘served’”). The Court finds such authorities persuasive, and, consequently, finds  
18 plaintiffs have failed to show the subject removal was procedurally improper.

19 In their reply, plaintiffs, relying on 28 U.S.C. § 1447(e), argue that the Court has  
20 discretion to remand the complaint. Section 1447(e) provides: “If after removal the plaintiff  
21 seeks to join additional defendants whose joinder would destroy subject matter jurisdiction,  
22 the court may deny joinder, or permit joinder and remand the action to the State court.”  
23 See 28 U.S.C. § 1447(e). Plaintiffs assert that, if the instant action is remanded, they will  
24 then move in state court to have it consolidated with another action they previously filed  
25 therein against a physician and a hospital, both citizens of California. Section 1447(e),

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27 <sup>2</sup>In their reply, plaintiffs cite several cases in which the court addressed the question  
28 of whether a defendant, who had been served with process, waited too long to remove an  
action; those courts had no occasion to consider, and did not consider, whether a  
defendant is precluded from removing an action before service of process.

1 however, applies when a plaintiff in a removed action seeks to join a non-diverse defendant  
2 while the case is pending in the federal court. See Yniques v. Cabral, 985 F.2d 1031, 1035  
3 (9th Cir. 1993) (holding “[s]ection 1447(e) and Rule 19 in combination expand the district  
4 court’s options for dealing with an attempt to join a necessary, non-diverse party where the  
5 case has been removed to federal court”). Under those circumstances, if the district court  
6 exercises its discretion to allow such joinder, by which diversity is destroyed, the district  
7 court is required to remand the case to state court. See id. Here, plaintiffs have not moved  
8 to amend to add a non-diverse defendant, and, consequently, § 1447(e) is inapplicable.

9 Accordingly, the motion to remand is hereby DENIED.

10 **IT IS SO ORDERED.**

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12 Dated: March 6, 2014

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14 MAXINE M. CHESNEY  
15 United States District Judge