

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

CIVIL NO: _____

M. P. SOUTHERN, on behalf of himself and
all others similarly situated

Plaintiff

v.

WAKEMED

Defendant

NOTICE OF REMOVAL

Now comes defendant WAKEMED (“WakeMed”) and hereby gives notice of the removal of this complaint to the United States District Court for the Eastern District of North Carolina, Western Division. In support of this removal, WakeMed shows:

1.

The above-styled action was commenced in the General Court of Justice, Superior Court Division for North Carolina in Wake County, on October 16, 2013, as Civil Action File No. 13CV014008, but was not served at that time.

2.

The case stated by Plaintiff’s initial pleading was not removable to federal court.

3.

Plaintiff filed his First Amended Class Action Complaint on or around November 14, 2013, as a matter of course before WakeMed served a pleading responsive to the initial complaint, in accordance with Rule 15(a) of the North Carolina Rules of Civil Procedure. Thereafter, Plaintiff served his pleadings.

4.

The case stated by Plaintiff's First Amended Class Action Complaint was not removable to federal court.

5.

Plaintiff filed his Motion for Leave to File Amended Complaint on or about July 8, 2014. Plaintiff then filed an Amended Motion for Leave to File (a further) Amended Complaint on or around October 9, 2014.

6.

The North Carolina Superior Court Judge signed an Order granting Plaintiff's Motion for Leave to File Amended Complaint on December 24, 2014, allowing Plaintiff to file a Second Amended Complaint (the "Second Amended Complaint"). This Order was filed and entered on January 5, 2015. The Second Amended Complaint was filed on January 5, 2015.

7.

The Second Amended Complaint is the pleading from which it could first be ascertained that this action is one which has become removable.

8.

WakeMed received a copy of the signed Order granting Plaintiff's Motion for Leave to File Amended Complaint and the approved Second Amended Complaint for the first time on December 30, 2014 in an e-mail from Plaintiff's counsel.

9.

In accordance with the provisions of 28 U.S.C. §§ 1441 and 1446, this Notice of Removal is filed within 30 days of receipt by defendant WakeMed of a copy of an amended

pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

10.

This Court has federal question jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1) because this matter arises under and is governed by the Employee Retirement Income Security Act of 1974 (“ERISA”), as amended.

11.

In the Second Amended Complaint, Plaintiff asserts various state law claims against WakeMed, seeking to enforce provisions of an employee welfare benefit plan (the “Plan”). The Plan is an employee welfare benefit plan sponsored and maintained by Plaintiff’s employer, BB&T Corporation, within the meaning of section 3(1) of ERISA, 29 U.S.C. § 1002(1). A true and correct copy of the Plan is attached hereto as Exhibit 1. Plaintiff also wishes to assert claims pursuant to the terms of other applicable “Health Benefit Plans.” As this term is used by Plaintiff, a significant number of these plans are employee welfare benefit plans within the meaning of section 3(1) of ERISA, 29 U.S.C. § 1002(1).

12.

While not stated as such, Plaintiff asserts his state law causes of action as an alternative means to enforce Plan rights under ERISA § 502(a), 29 U.S.C. § 1132(a). *Jarvis v. Stewart*, 2005 WL 3088589, *2 (M.D.N.C. Nov. 17, 2005) (citing *Darcangelo v. Verizon Communications, Inc.*, 292 F.3d 181, 187 (4th Cir. 2002)).

13.

When, as here, a state law cause of action is an alternative means to enforce plan rights, ERISA § 502(a) converts it into a federal claim. *Id.*

14.

A cause of action filed in state court which is preempted by ERISA and which comes within the scope of ERISA § 502(a) is removable to federal court under 28 U.S.C. § 1441 as an action arising under federal law, even when the ERISA-related nature of the action does not appear on the face of the complaint. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987); *Darcangelo*, 292 F.3d at 187.

15.

Some or all of Plaintiff's state law claims are preempted by ERISA; therefore, this action is one over which this United States District Court has original federal question jurisdiction pursuant to 28 U.S.C. § 1331 and/or 29 U.S.C. § 1132(e)(1).

16.

Accordingly, this action is removable to federal court under 28 U.S.C. § 1441 as an action arising under federal law. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987); *Darcangelo*, 292 F.3d at 187.

17.

Venue is appropriate in the Eastern District of North Carolina because the North Carolina General Court of Justice, Superior Court Division, Wake County, is located within this judicial district. *See* 28 U.S.C. § 1441(a).

18.

A true and correct copy of this Notice of Removal will be promptly filed with the General Court of Justice, Superior Court Division for North Carolina, Wake County, as provided by law.

19.

Pursuant to 28 U.S.C. § 1446(a), a true and correct copy of the State Court file, which includes all process, pleadings and orders served on defendant, is attached hereto as Exhibit 2.

20.

A copy of the Notice of Filing of Notice of Removal that is being filed in the Superior Court of Wake County, North Carolina, is attached as Exhibit 3.

WHEREFORE, defendant WAKEMED prays that the above-captioned action now pending against it proceed in this Court as an action properly removed.

This the 20th day of January 2015.

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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing **NOTICE OF REMOVAL** has been served this day by e-mail and by depositing the same in the United States mail, first class, postage prepaid addressed to the other Counsel of Record, identified below:

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This the 20th day of January, 2015.

/s/ William R. Forstner
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