UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Amy Yontef and David Yontef, h/w	:	
Plaintiffs	:	CIVIL ACTION NO.: 2:14-cv-00163-GP
v.	:	
P.F. Chang's China Bistro, Inc.	:	
Defendant	:	
	:	

PLAINTIFFS' REPLY MEMORANDUM
IN SUPPORT OF PLAINTIFFS' MOTION TO DISMISS

Defendant P.F. Chang's China Bistro, Inc. (hereinafter "Defendant") incorrectly asserts that Plaintiffs are attempting to evade federal jurisdiction and defeat removal. As discussed herein, Plaintiffs have recognized colorable claims against Defendant's manager on duty, Carrie Ardavino (hereinafter "Ms. Ardavino") as slip and fall claims against managers in their individual capacity have been recognized by the Eastern District of Pennsylvania, and Pennsylvania appellate courts. Moreover, there is no prejudice if this matter is dismissed and the second lawsuit filed in Philadelphia County proceeds, because all of the discovery accomplished to date is applicable to the Philadelphia Court of Common Pleas action, and there are no issues that have been litigated and lost by Plaintiffs in this action.

I. REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO DISMISS

Under the standard set forth in Fed. R. Civ. P 41(a) (2), the Court in exercising its discretion in ruling on a motion for voluntary dismissal considers: (1) the Defendant's expense in preparing for trial; (2) the Plaintiffs' lack of diligence; (3) the Plaintiffs' reason for moving for dismissal; (4) whether a motion for summary judgment is pending; and (5) the excessive and duplicitous expense of defending a second action. See Thomas v. Amerada Hess Corp., 393 F.

Supp. 58, 70 (E.D. Pa. 1975). Whether voluntary dismissal should be granted depends upon the facts and circumstances of the case. See Miller v. Trans World Airlines, Inc., 103 F. R. D. 20, 21 (E.D. Pa. 1984).

Plaintiffs recognize that the Court will view Plaintiffs' motion as a motion for joinder of a non-diverse party and remand pursuant to 28 U.S.C. §1447(e). Under the standard set forth in Hensgens v. Deere & Co., 833 F. 2d, 1179 (5th Cir. 1987) the following factors need to be considered in ruling on such a motion: (1) the extent to which the purpose of the amendment is merely to defeat federal jurisdiction; (2) whether Plaintiffs have been dilatory in asking for amendment; (3) whether Plaintiffs will be significantly injured if amendment is not allowed; and (4) any other factors bearing on the equities. As discussed below, all of these factors weigh in favor of Plaintiffs.

A. Defendant Cannot Credibly Allege that Ms. Ardavino has been Fraudulently Joined as a Party

Defendant is claiming that Plaintiffs are attempting to add Ms. Ardavino as a party merely to defeat federal jurisdiction, which is tantamount to claiming that Ms. Ardavino is being fraudulently joined. However, Defendant bears a heavy burden of proving fraudulent joinder. This standard for remand under 28 U.S.C. §1447(e) has been enunciated in Batoff vs. State Farm Insurance Company, et al., 977 F.2d 848 (3d Cir. 1992) as follows:

> A district court must consider a number of settled precepts and ruling on a petition to remand a case to state court for lack of diversity jurisdiction. When a non-diverse party has been joined as a defendant, then, in the absence of substantial federal question, the removing defendant may avoid remand *only* by demonstrating that the non-diverse party was fraudulently joined. But the removing party carries a "heavy burden of persuasion" in making this showing. Steel Valley Authority vs. Union Switch and Signal Division, 809 F.2d 1006, 1012, 108 S.Ct.739, 98 L.Ed.2d 756 (1998); See also, Boyer vs. Snap On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990) Cert. Denied, 112 L.Ed.2d 1046, 111 S.Ct.959 (1991). It is logical that it should have this burden, for removal statutes

> "are to be strictly construed against removal and all doubts should be resolved in favor of remand." Stell Valley, 809 F.2d at 1010 (citing Abels vs. State Farm Fire and Casualty Co., 770 F.2d 26 (3d Cir. 1985).Joinder is fraudulent "where there is no reasonable basis in fact, or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendants or seek a joint judgment." Boyer, 913 F.2d at 111 ("quoting Abels, 770 F.2d at 32"). But "if there is even a possibility that a state court would find the complaint states a cause of action against anyone of the resident defendants, the federal court must find that joinder was proper and remand the case to state court." Boyer, 913 F.2d at 111 (quoting Coker vs. Amoco Oil Company, 709 F.2d 1433, 1440-41 (11th Cir. 1983). Furthermore, we recently have held that "when there are colorable claims or defenses asserted against or by diverse and non-diverse defendants alike, the court may not find that the non-diverse parties were fraudulently joinded based on its view of the merits of those claims or defenses." Boyer, 913 F.2d at 113 (citing , 913 F.2d at 113 (citing Chesapeake and Ohio Railway Co. vs. Cockrell, 232 U.S. 146, 34 S.Ct.278, 58 L.Ed.544 (1914). Id, emphasis supplied.
>
> .

The standard for resolving a motion for remand, in response to a claim of fraudulent joinder, is that the plaintiff need only demonstrate a colorable claim. Yet, the term "fraudulent joinder" is somewhat misleading because the doctrine requires neither a showing of fraud nor joinder in one sense. To establish fraudulent joinder, a party must demonstrate either fraud in the recitation of jurisdictional facts or the absence of any possibility that the opposing party has stated in a claim under the state law against the party alleged to be fraudulently joined. A claim of fraudulent joinder must be pleaded with particularity and supported by clear and convincing evidence. Even if the motive to join the non-diverse party is to defeat diversity jurisdiction, there is no fraudulent joinder unless there clearly can be no recovery under state law on the alleged cause of action or on the facts as they exist when the motion to remand is heard. The post-removal joinder of non-diverse defendants destroys diversity jurisdiction and requires remand, even when the newly joined defendants are not indispensable. See, e.g., 16 Moore Fed Practice §104.14 (2005 Edition).

Courts should not find a joinder to be fraudulent "[s]imply because we come to believe that, at the end of the day, a state court would dismiss the allegations against a defendant for failure to state a cause of action." Lyall v. Airtran Airlines, Inc., 109 F. Supp. 2d 365, 367-68 (E.D. Pa. 2000). Rather, a finding of fraudulent joinder occurs only where the plaintiff's claims are "wholly insubstantial and frivolous." Batoff, supra. at 852; see also Lunderstadt v. Colafella, 885 F.2d 66, 70 (3d Cir. 1989). "In other words, a finding of fraudulent joinder is usually reserved for situations where recovery from the nondiverse defendant is a clear legal impossibility." West v. Marriot Hotel Servs., Inc., No. 10-4130, 2010 WL 4343540, *3 (E.D. Pa. Nov. 2, 2010). "Fraudulent joinder should not be found simply because plaintiff has a weak case against a non-diverse defendant." Boyer, supra. at 111.

Since the enactment of 28 U.S.C. §1447(e) which governs joinder of parties after removal, the standard for remand has become more liberal. This is reflected in Carter vs. Dover Corp., Rotary Lift Division, 753 F.Supp 577 (E.D. Pa. 1991) wherein the plaintiff sought to amend his complaint after removal under §1447(e) to name non-diverse defendants in a products liability action. The Eastern District permitted plaintiff to do so, remanded the case, and held as follows:

> Virtually every court to address the joinder question, since the enactment of 1447(e) views the statute as signaling a departure from a strict Rule 19 analysis in providing for a flexible, broad discretionary approach of the type prescribed in Hengens. This includes courts in the 3d Circuit and the 9th Circuit, where Takede, on which the court in Steel Valley relied was decided. See: E.G. Zawacki vs. Pentac Inc., 745 F.Supp. 1044 (M.D. Pa., 1990); St. Louis Trade Diverters, Inc. vs. Constitution State Insurance Co., 738 F.Supp., 1269 (E.D. Mo. 1990; Rivera vs. Duracell USA, 1990 U.S. Dist. LEXIS 16260 (S.D.N.Y., 1990); Todd vs, Societe BIC, 1990 U.S. Dist. LEXIS 16293 (N.D.I11.1990); Hughes vs. Promark Lift, Inc., 751 F.Supp. 985 (S.D.Fla.1990)(joinder of defendant who services truck lift in wrongful death action against manufacturer permitted and case remanded). Id at 579-580.

Pursuant to the above-referenced legal standards, this Court must now evaluate whether Plaintiffs' claims against Ms. Ardavino rise above a "clear legal impossibility" and are, therefore, non-fraudulent. As set forth below, not only are Plaintiffs' slip and fall claims against Ms. Ardavino, Defendant's manager, colorable, they are specifically recognized by recent Eastern District rulings.

B. Managers like Ms. Ardavino are Routinely Identified in Slip and Fall Cases in their Individual Capacity as Party Defendants

Defendant cannot seriously allege that Ms. Ardavino, the manager, is not a proper party. Had Ms. Ardavino and her position at Defendant's establishment been properly identified in Defendant's requisite Initial Disclosures (as discussed later in this Memorandum) Ms. Ardavino would have been a proper party pursuant to Fed. R. Civ. P. 20, which provides that "all persons…may be joined in one action as defendants, if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences." To that end, it is notable that the claim against Ms. Ardavino as the manager of the restaurant is not merely colorable, but has been expressly recognized as actionable pursuant to Eastern District precedent. In Wilson vs. Acme Markets, Inc., 2005 U.S. Dist. LEXIS 9655 (E.D. Pa. 2005), the Eastern District ruled that in a fall down action, the store manager is a proper party and if she is non-diverse, remand is appropriate:

> Plaintiff allegedly suffered injuries in a slip-and-fall accident in a grocery store owned and controlled by the defendants Acme Markets, Inc. and Albertson's, Inc. He brought suit in the Philadelphia Court of Common Pleas against those two entities, and also named as a defendant a gentleman named Hutz, alleged to be the store manager at the time... I have concluded that the case should be remanded to the Philadelphia Court of Common Pleas. Plaintiff's complaint undeniably alleges potentially valid claims against the individual defendant Hutz. Id.

More recently, the Eastern District recognized the relevant claims that could be brought against a manager for a slip and fall condition in Rubino v. Genuardi's Inc., 2011 U.S. Dist. LEXIS 9735, 11-13 (E.D. Pa. Jan. 31, 2011):

> Here, Plaintiff's claims against the store manager, Defendant Baverle, were not wholly insubstantial or frivolous….negligence claims against a store manager relating to a slip-and-fall incident are colorable under Pennsylvania law. See Beck v. Albertson's, Inc., No. Civ. A. 05-5064, 2005 U.S. Dist. LEXIS 28848, 2005 WL 3111782, at *3 (E.D. Pa. Nov. 18, 2005) (Dubois, J.) (citing Myers v. Penn Traffic Co., 414 Pa. Super. 181, 606 A.2d 926, 928 (Pa. Super. Ct.1992)) (discussing duty of care owed by store owners and their agents to patrons). In Beck, following removal of the plaintiffs' negligence action by the defendant store in which the slip-and-fall occurred, the district court granted a motion to remand because the "[d]efendants failed to sustain their heavy burden of demonstrating that plaintiffs fraudulently joined" the non-diverse store manager. 2005 U.S. Dist. LEXIS 28848, [WL] at *4. Similarly, in Wilson v. Acme Markets, Inc., No. Civ. A. 05-01586-JF, 2005 U.S. Dist. LEXIS 9655, 2005 WL 1201000 (E.D. Pa. May 18, 2005) (Fullam, J.), the district court granted the plaintiff's motion to remand a slip-and-fall negligence action filed against a store and the non-diverse store manager. 2005 U.S. Dist. LEXIS 9655, [WL] at *1. Judge Fullam held that remand was necessary because the "complaint undeniably allege[d] potentially valid claims against the individual defendant," and thus the defendants had not proved that the store manager was fraudulently joined to avoid diversity jurisdiction. Id.

Therefore, Defendant's assertion that Plaintiffs have no legal theory in support of their claims against Ms. Ardavino, a manager, in a slip and fall case, is contradicted by recent Eastern District precedent. Furthermore, the substantive allegations against Ms. Ardavino are supported by her own deposition testimony which was only obtained several weeks ago. As manager of the Defendant's Plymouth Meeting, Pennsylvania restaurant, where this incident occurred in June 2012, Ms. Ardavino was responsible for the serving staff, including overseeing the training of the staff (see p. 13-14, Ardavino deposition). Training regarding inspections of the floor of the restaurant was not proactive but, instead, dangerously reactive. Indeed, Ms. Ardavino described the disorganized training in the following manner: "On the job as we go doing it, as they see us

do it, telling them now to do it as we are doing it" (see p. 22 Ardavino deposition). When asked how she instructed her servers to inspect the restaurant for hazards to business invitees (which would include Plaintiff) Ms. Ardavino stated if she noticed debris on the floor or noticed the floor was dirty, all she would do would be to address the issue with her subordinates (see p. 32, Ardavino deposition).

Ms. Ardavino also admitted she observed water on the floor and that this is what caused Plaintiff to slip, fall, and fracture her right patella. Five witnesses in total have also testified to seeing water on the floor. They include Ms. Ardavino, the defendant's host on duty Zachary Dove, Plaintiff Amy Yontef, and two other patrons, Suzanne Merves and Gary Granier. Defendant cannot and does not dispute this. What remains a factual dispute is the size of the water spill on the floor. Ms. Ardavino testified that she was in charge of holding "safety meetings" with her servers, hosts and back waiters. When asked if she had a plan or an outline for each meeting, Ms. Ardavino testified that the meetings were held on an *ad hoc* basis and that safety meetings were driven by what employees noticed in the restaurant (p. 67, 68 Ardavino deposition). There was no official floor inspection program in place at the restaurant (p. 66 Ardavino deposition). Accordingly, significant slip and fall liability can be attributed to Ms. Ardavino's negligence as a manger, just as it did with the managers in Wilson and Rubino.

Therefore, Plaintiffs are well within their rights to allege that not only did Defendant fail to have a reasonable system of inspections in place and failed to instruct its employees insofar as remediating slip and fall hazards, but also that the manager on duty, Ms. Ardavino, was negligent by her failure to ensure that the restaurant was safe for patrons and, *inter alia*, negligent for her failure to have her subordinates conduct reasonable inspections. As the manager of the restaurant, Ms. Ardavino was responsible for the safety conditions of the floor of the restaurant, including but not limited to use of proper cleaning devices and techniques in removing water

from the floor in a timely manner and not creating a dangerous condition of the premises. In addition, Ms. Ardavino was obligated to make timely inspections and warn of dangerous conditions, properly train and supervise employees in the maintenance of the restaurant, and correct conditions of the floor which would allow accumulation of water. Plaintiffs have alleged in their Complaint recently filed in Philadelphia County these causes of action directly against Ms. Ardavino, and have similarly alleged that Ms. Ardavino breached these duties, and others on the date of the incident (as well as at other times) through systematic breaches of duty and by failing to perform her correct supervisory and management functions. These are actionable claims. Pennsylvania state and federal courts have recognized that a supervisor has a duty of reasonable care towards the consumer. See, e.g. Pearson vs. MacNeil and Anthony R. Temple, M.D., 1996 U.S. Dist. LEXIS 5361 (E.D.Pa. 1996); see also Wicks vs. Milzoco Builders, Inc., 470 A.2d 86, 504 Pa. 614 (1983), Roethlein vs. Portnoff Law Assoc. Ltd., 81 A.3d 816 (Pa. 2013). Since these are independent torts committed by Ms. Ardavino, although Plaintiffs may proceed against the employer (Defendant) for these torts, under the doctrine of *respondeat superior*, Ms. Ardavino remains the primary tortfeasor and negligence allegations may be pled against her directly. National Mutual Insurance Company vs. PECO, 443 F.Supp.1140, 147 (E.D. Pa. 1997). Thus, Ms. Ardavino's status as a party-defendant in the lawsuit is important, colorable, recognized, and non-fraudulent.

C. The Joinder of Ms. Ardavino as a Party Defendant at this Juncture is due to Defendant's Failure to Provide Requisite Initial Disclosures, and Failure to Properly Answer Plaintiffs' Discovery Requests

Defendant's Response in Opposition implies that Plaintiffs' request to dismiss so as to join Ms. Ardavino as a defendant is improperly untimely. This is meritless, given Defendant's failure to properly identify Ms. Ardavino in Defendant's Initial Disclosures, as well as Defendant's failure to provide full and complete discovery responses. Fed. R. Civ. P.

26(a)(1)(A)(i) required Defendant to disclose the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claim or defenses, unless the use would be solely for impeachment (the latter of which is inapplicable, as Ms. Ardavino, a manager, could not ever be considered an impeachment witness). Thus, Defendant had no ability to withhold pertinent information regarding its own manager. However, Defendant did not disclose that to Plaintiffs, nor did it disclose Ms. Ardavino's address, nor the "subject of the discoverable information". See Exhibits "A" and "B" to Plaintiffs' Motion to Dismiss Complaint.

Furthermore, despite Defendant's obligation – and failure - to provide the aforementioned information about Ms. Ardavino at the onset of the litigation via Initial Disclosures, it is notable that Plaintiffs asked specific questions about employee/manager responsibilities in their Interrogatories which, if answered by Defendant, would have revealed Ms. Ardavino's identity and role months ago. However, Defendant chose to not disclose this information in their answers to Interrogatories. Accordingly, Plaintiffs did not learn of Ms. Aravino's significant involvement (and associated culpability) until her deposition on April 29, 2014. As soon as Plaintiffs learned of Aravino's responsibilities at Defendant's establishment (as well as her address), Plaintiffs immediately—not dilatorily—filed the request for dismissal due to the claim against Ms. Ardavino pursuant to Pennsylvania law on May 14, 2014. See, e.g. Rubino. Therefore, any timeliness argument raised by Defendant is undercut by Defendant's systemic failure to provide pertinent information regarding Ms. Ardavino in its Initial Disclosures and in its responses to Plaintiffs' discovery requests.

D. Failure to Dismiss would Result in Great Prejudice to Plaintiffs, and Litigation in the Philadelphia Court of Common Pleas Provides No Prejudice to Defendant because Discovery will not be Repeated

It is not Defendant who will suffer prejudice if Ms. Ardavino cannot be joined and if this case cannot proceed in Philadelphia. Without remand, Plaintiffs will be forced to litigate two lawsuits in two separate court systems, both arising out of the same underlying incident. City Line-Hamilton Builders LLC, 2013 WL 1286187, at 8 ("Litigating this matter twice may injure Plaintiffs to some degree by expending resources to fight the same fight in two for a and the possible risk of conflicting decisions."); Kahhan v. Mass. Cas. Ins. Co., 2001 WL 1454063, at 1-3 (E.D. Pa. Nov. 14, 2001) (finding remand appropriate because Plaintiff would be injured by being "forced to litigate two lawsuits at the same time.")

Defendant's hollow assertion that it will suffer legal prejudice is without merit. Courts generally grant dismissal under Rule 41(a)(2) unless the defendant would suffer prejudice other than the prospect of a second lawsuit or some tactical disadvantage. Kellmer v. Raines, No. 09-5253, 2012 U.S. App. LEXIS 6746 at p. 8 (D.C. Cir. March 30, 2012). In re Paoli R. R. Litig., 916 F. 2d 829, 863 (3d Cir. 1990). "). A tactical advantage is not sufficient basis for denial. Campus Dimensions, Inc., v. On-Campus Marketing Concepts, Inc., No. 94-649, 1994 WL 470188 at 2 (E.D. Pa. 1994). Here, no prejudice can be demonstrated by Defendant.

Plaintiffs have filed a virtually identical case against Defendant in Philadelphia County, with the exception of adding Ms. Ardavino as a defendant. Thus, the discovery already conducted and attorney work product generated in litigating the instant action will not be wasted when opposing the suit in Philadelphia County. The instant action has been pending since only mid-January 2014. The pretrial and dispositive motion deadlines have not yet passed, and the parties have agreed to extend discovery pursuant to this Court's Second Amended Scheduling Order. The instant action is not on the eve of trial. The prospect of another lawsuit does not

amount to prejudice sufficient to preclude this Court from granting dismissal. This is distinct from the case where a defendant is ready for trial in one court and then told no trial would go forward, but the proceedings would be restarted in another court. The depositions can be used in the state court action. The defenses are the same in both cases. There are no duplicative motions. No dispositive motion has been filed. Even if a motion for summary judgment had been filed, that is insufficient reason to release voluntary dismissal. See Wright and Miller, Federal Practice and Procedure §2367 (1995). There is no attempt to sidestep existing court orders. Plaintiffs have not lost an issue in federal court. All that is occurring is that the case proceeds in state court, rather than federal court. There will be no duplication of discovery proceedings, which is a factor that District Courts often consider, as made clear in Septa v. American Universal Insurance Co., 1988 U.S. Dist. LEXIS 1932 (E.D. Pa. 1988):

> While the dispute between Plaintiff and Defendant has not reached a final determination, the discovery material compiled up to this time will be of value in any subsequent litigation involving the same parties and subject matter. See Miller, supra, 103 F.R.D at 20-21. Therefore, Plaintiffs motion to dismiss without prejudice pursuant to Rule 41(a)(2) will be granted subject to the condition that Plaintiff agree that any discovery material compiled up to this time in this action may be used in any subsequent litigation involving the same parties and subject matter to the same extent as if such discovery material were originally instituted in that litigation. Id.

Therefore, there is no prejudice to Defendant if this case proceeds in the Philadelphia Court of Common Pleas, whereas simultaneous litigation by Plaintiffs in two separate venues involving identical underlying facts would result in significant prejudice including the needless waste of judicial and party resources.

E. Defendant's Claim for Costs is Meritless, No Discovery will Need to be Duplicated, and this Case is Only being Dismissed at this Time because of Defendant's Systemic Failure to Properly Identify Ms. Ardavino

This Court has stated that it will evaluate Plaintiffs' Motion not in the context of Rule 41(a)(2), but rather under 28 U.S.C. §1447(e). As such, Defendant's argument that it is entitled to attorney's fees is moot. Nevertheless, out of an abundance of caution, Plaintiffs will address the issue of costs/fees under Rule 41(a) (2).

It is clear that Plaintiffs do not seek to sidestep federal jurisdiction or any orders from this Court. Rather, Plaintiffs only seek to preserve their legal rights in state court against Ms. Ardavino, a non-diverse defendant, whose identity, role, and residentiary status was kept from Plaintiffs by Defendant's failure to comply with its requirements associated with Initial Disclosures, as well as its responses to Plaintiffs' discovery requests. This is not vexatious or unnecessary litigation which would warrant payment of Defendant's costs/fees. The test of whether the circumstances of any particular case warrant an award of costs turns on prejudice to Defendant, which cannot be proven by Defendant in this case. See, e.g. Ross v. Infinity Indemnity Ins. Co., 2013 U.S. Dist. LEXIS 81480, No. 12-5050 (E.D. Pa. 6/10/13). The costs awarded under the Rule 41(a)(2) are determined according to the "continuing value" test. Under this test, a defendant can only recover costs for "the preparation of work product rendered useless by the dismissal of [plaintiff's previous action]." Esquivel v. Arau, 913 F. Supp. 1382, 1388 (C.D. Cal. 1996) (alteration in original) (quoting Koch v. Hankins, 8 F.3d 650, 652 (9th Cir. 1993). A defendant cannot therefore recover for work which continues to have value in the second forum. The test ensures that the amount awarded is narrowly tailored to compensate the defendant for extra costs incurred by the shift in forums. There will not be extra costs incurred in this matter, just as there were no additional costs in Septa v. American Universal, wherein the District Court refused to grant attorney fees and costs.

> There is no indication that a voluntary dismissal of this action will cause the Defendant to suffer any prejudice so as to mandate the denial of Plaintiffs' motion for a voluntary dismissal. The fact that Plaintiffs intend to renew the action in

> State court is not a sufficient reason to deny the motion to dismiss. Miller v. Trans World Airlines, Inc., 103 F.R.D. 20, 21 (E.D. Pa. 1984). Requiring Plaintiffs to pursue its claim against [the non-diverse] Defendant in this court and its claims against [the diverse defendant in State court would be inconsistent with the policy of judicial economy. Miller, supra 103 F.R.D. at 22., Sox v. Estes Express Lines, 92 F.R.D. 71, 73 (D.S.C. 1981). Therefore, Septa's motion for dismissal without prejudice pursuant to Fed.R.Civ.P. 41(a)(2) will be granted. The question remains however as to whether the Court should impose any conditions on the dismissal as requested by Defendant, specifically, whether the Court should condition dismissal on plaintiffs' payment of attorney's fees, costs and expenses. There is no question that Rule 41(a)(2) authorizes a court to award costs and attorney's fees as a condition of voluntary dismissal without prejudice. John Evans, supra, 95 F.R.D at 191. The purpose of such an award is to compensate the Defendant for having incurred the expense of trial preparation without the benefit of a final determination of the controversy. Id. … The Court finds no reason to grant attorney's fees or costs in this action as a condition of dismissal. Id.

In accord, Young vs. Johnson & Johnson Corp., No. 05-2393, 2005 U.S. Dist. LEXIS 26232 (E.D. Pa. November 2, 2005). Therefore, costs and attorney fees should not be awarded to Defendant in this case.

II. CONCLUSION

Ms. Ardavino is a proper party, and a colorable claim has been asserted against her in the action filed in Philadelphia County. As she is a non-diverse defendant, this case should be remanded to the state court. Defendant can show no prejudice. For all referenced and previously-filed reasons, Plaintiffs respectfully request that this Court grant their Motion to Dismiss, and deny Defendant's request for attorney fees and costs.

Respectfully submitted,

CARPEY LAW, P.C.

By: _____
Stuart A. Carpey, Esquire
Attorney for Plaintiffs

Amy Yontef and David Yontef, h/w	:	UNITED STATES DISTRICT COURT
	:	EASTERN DISTRICT OF PENNSYLVANIA
	:	
	:	CIVIL ACTION NO.:
Plaintiff	:	2:14-cv-00163-GP
	:	
v.	:	
	:	
P.F. Chang's China Bistro, Inc.	:	
	:	
Defendant	:	
	:	

CERTIFICATE OF SERVICE

TO: Eileen Ficaro, Esquire
Kaufman Dolowich Voluck
1777 Sentry Park West
Gwynedd Hall, Suite 301
Blue Bell, PA 19422

I, Stuart A. Carpey, Esquire, hereby certify on June 6, 2014, a copy of Plaintiff's Reply Memorandum in Support of Plaintiff's Motion to Dismiss has been served in accordance with Fed. R. Civ. P 5(d)(3) and E.D. Penn. Civ. R. 5.1.2(3)(d) on all parties not served electronically. All other parties will be electronically served by the court in accordance with E.D. Penn. Civ. R. 5.1.2.

CARPEY LAW, P.C.

BY: _____
Stuart A. Carpey, Esquire
Attorney for Plaintiffs