

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

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|----------------------------|---|-----------------------------|
| ROBERTA CLARK, |) | |
| Plaintiff, |) | |
| v. |) | CIVIL ACTION: |
| PLANNED PARENTHOOD |) | Case No.: 2:14-cv-01939-SLB |
| SOUTHEAST, INC; PLANNED |) | |
| PARENTHOOD OF GEORGIA, |) | |
| INC.; PLANNED PARENTHOOD |) | |
| OF ALABAMA; DR. AQUA DON |) | |
| E. UMOREN, MD.; PYHSICIANS |) | |
| LABORATORY SERVICE, INC., |) | |
| AND DR. MICHAEL B. |) | |
| ROHFLING, MD. |) | |
| Defendants. |) | |

PLAINTIFF’S MOTION TO REMAND THIS CASE TO THE CIRCUIT COURT
OF JEFFERSON COUNTY, ALABAMA-BIRMINGHAM DIVISION AND
MEMORANDUM OF LAW

COMES NOW, the Plaintiff, Roberta Clark, by and through her undersigned counsel, hereby files this Motion to Remand, in concurrent with Memorandum of Law and in support of Plaintiff’s position that this Court lacks subject matter jurisdiction because there is no diversity of citizenship; the plaintiff states the following:

I. UNDISPUTED STATEMENTS OF FACT

1. On August 9, 2012, Robert Clark filed her original Complaint in the Circuit Court of the Tenth Judicial Circuit in Jefferson County, Alabama Birmingham Division, Case No. 10-CV 2012-1045 alleging medical malpractice against

defendants, Dr Aqua E. Don Umoren and Planned Parenthood of Alabama, Inc., and Planned Parenthood of Georgia, Inc.

2. On January 21, 2013, Plaintiff, Roberta Clark filed her first amendment to the complaint adding defendant, Planned Parenthood South East, Inc., hereafter referred to as (Planned Parenthood) **Plaintiff's Exhibit 1.**

3. On February 19, 2013, defendants, Planned Parenthood and Dr Umoren filed their answers to Plaintiff's complaint. **Plaintiff's Exhibit 2.**

4. On July 14, 2014 following a status conference, the Circuit Court issued an order directing the case against defendants' Planned Parenthood and Dr Umoren to mediation. Mediation was unsuccessful. **Plaintiff's Exhibit 3.**

5. On September 2, 2014, Plaintiff Roberta Clark filed an Amended Complaint ("Second Amended Complaint") naming as additional defendants Physicians Laboratory Service, Inc. ("PLS") and Dr. Rohlfing. **Plaintiff's Exhibit 4.**

6. On September 11, 2014, defendants, Dr Michael Rohlfing was served with Plaintiff's second amended complaint. **Plaintiff's Exhibit 5.**

7. On September 19, 2014, defendants, Planned Parenthood and Dr Umoren filed a Rule 12 (b) (6) Motion to dismiss and/or motion to strike Plaintiff's amended complaint on the basis of statute of limitation, that motion is currently set for hearing on November 11, 2014 in the Circuit Court of Jefferson County. **Plaintiff's Exhibit 6.**

8. On October 10, 2014, defendant, Dr Michael B Rohlring filed his Notice of Removal, pursuant to 28 U.S.C. §§ 1332(a), 1441(b) and 1446(a) and (b) (1), the basis of diversity of citizenship.

9. Also on October 10, 2014, defendants, Planned Parenthood of Southeast, Inc and Dr Aqua-Don Umoren collectively filed their Consent to Removal (**Defendant's Exhibit D to Notice of Removal**) on the basis of diversity of citizenship.

10. The last paragraph of Defendants' Exhibit D-Consent to Removal, specifically, asserted that "*At the time the Complaint of this action was filed, Dr Umoren was a citizen of Nigeria and has remained a citizen of Nigeria at all times, thereafter*". Id.

11. Other than defendants' claim that at the time Plaintiff's complaint was filed in 2012, that Dr Umoren was a citizen of Nigeria, there is no other ground asserted by defendants as basis for removal.

12. On October 13, 2014 Plaintiff's counsel sent a letter to defendants' attorneys informing them of Dr Umoren's dual citizenship with Nigeria and United States of America. **Plaintiff's Exhibits 7.**

13. The October 13, 2013 letter was following by a telephone conversation with defense counsel, Mr McCallum who represents Dr Umoren and Planned Parenthood. The October 13, 2013 was followed by a the telephone conversation

with Attorney McCallum, during which defense counsel admitted that Dr Umoren is indeed a United States citizen, having dual citizenship with Nigeria. **Plaintiff's Exhibits 8.**

14. Also on October 13, 2014, Plaintiff's counsel memorialized the telephone conversation with Attorney McCallum via e mail correspondence confirming conversation, the fact that defense counsel admitted that Dr Umoren is indeed a dual citizen of Nigeria and the United States of America. **Plaintiff's Exhibit 8.**

15. Both, correspondence, of October 13, 2014, Plaintiff's **Exhibits 7 and 8**, urged all defendants to voluntarily withdraw the removal petition because of lack of diversity of citizenship.

16. On October 17, 2014, counsel for Dr Umoren sent a letter to plaintiff's counsel stating that they are unable to confirm or deny Dr Umoren's dual citizenship with United States and Nigeria. Specifically, Attorney McCallum's letter in part states that “ *Because of difficulties in communicating with Dr. Umoren, we can neither confirm or deny that he presently maintains a dual citizenship with the United States of America.*”. **Plaintiff's Exhibit 9.**

17. The defense counsel blamed inability of communication with Dr Umoren as the reason for not being able to confirm or admit Dr Umoren's dual citizenship with United States of America and Nigeria. **Plaintiff's Exhibit 9.**

18. Dr Umoren's consent to Dr Rohlfing's removal petition only stated that Dr Umoren was a citizen of Nigeria, the consent did not mention that Dr Umoren has in the past or may be at present possesses a dual citizenship with Nigeria and the United states. **Defendant's Exhibit D-Dr Umoren consent to Removal.**

19. There is evidence that Dr Umoren was a citizen of United States of America at the time Plaintiff, Roberta Clark's complaint was filed on August 9, 2009 and that he has remained a citizen of United States of America at all times thereafter. **Plaintiff's Exhibits 7 and 8 but see, Plaintiff's Exhibit 9.**

20. There is no evidence that Dr Umoren has renounced his United States citizenship. **Plaintiff's Exhibit 9**

21. It is also undisputed that Dr Umoren initially came to United States to attend college; he attended Loyola College in Chicago after which he attended University of Illinois Medical School, obtaining his medical degree in 1978. **Plaintiff's Exhibit 10, Umoren, depo. pp. 165-166.** After completing his residency program including internship in California in OB/GYN at Charles Drew/Martin Luther King Hospital, Dr Umoren worked for 6 months in California before moving to Nigeria in 1984 to start establish his own private Hospital. **Plaintiff's Exhibit 10, Umoren, depo. pp. 166-167.** Dr Umoren worked in Nigeria from 1984 to 1998 before moving back to Tuscaloosa, Alabama where he lived and worked until he

moved back to Nigeria again in 2002. **Plaintiff's Exhibit 10, Umoren, depo. pp. 165-166.**

22. Dr Umoren testified that in 2003, he left Nigeria, moved back to Fallbrook, California until he retired from full practice in 2008, left California and moved to Nigeria. **Plaintiff's Exhibit 10, Umoren, depo. pp. 13-14.**

23. Dr Umoren also testified that after he left California in 2008 to establish a permanent residence in his Country of birth, Nigeria. **Plaintiff's Exhibit 10, Umoren, depo. pp. 162-163.**

24. After moving from United States in 2008 to establish a permanent residence in Nigeria, Dr Umoren testified that he returned to United States sometime in 2008, this time to State of Alabama to work. **Plaintiff's Exhibit 10, Umoren, depo. pp. 14-16.**

25. Dr Umoren testified that he has been the Medical Director at Huntsville Women Center for Ten years. **Plaintiff's Exhibit 10, Umoren, depo. pp. 11-12.** He also worked in Montgomery Alabama clinic since 2012. **Plaintiff's Exhibit 10, Umoren, depo. p. 12.**

26. Also in his answers to plaintiff's interrogatories filed with the initial complaint, when asked to give his permanent address, Dr Umoren gave Nigeria as his permanent address in the following answer: **Plaintiff's Exhibit 11, Interrogatory No. 4**

Plaintiff Interrogatory No. 4:

“For each non corporate defendant, Dr Aqua Don E Umoren, please identify yourself fully, giving your full name, current residence address, name of practice, office address and specialty that you practice in medicine?”

Answer: Aqua Don E Umoren, resides in Nigeria since 2008, He practices part-time at Alabama Women’s Reproductive Health in Huntsville, Alabama at 612 Madison Street, SW.

27. Furthermore, a 2002 and 2004 court records show that Dr Umoren filed a petition for Chapters 7 and 13 Bankruptcy petitions in the United States District Court for the Western District of Alabama cases nos. 02-73935-CMS7 AND 04-70049-CMS13, respectively. **Plaintiff’s Exhibit 9.**

ARGUMENT AND MEMORANDUM OF LAW

I. STANDARD OF REVIEW

It is well-settled the party invoking the jurisdiction of federal court has the duty to establish that federal jurisdiction does exist. *Fitzgerald v. Seaboard Sys. R.R.*, 760 F.2d 1249, 1251 (11th Cir. 1985), citing, *Basso v. Utah Power and Light Co.*, 495 F.2d 906 (10th Cir.1974). The applicable standard for review for the Courts in Removal petition is well stated in the portion of Eleventh Circuit’s opinion quoting the Tenth Circuit in *Fitzgerald v. Seaboard Sys. R.R.*, where the Court states the following:

“Rule 12(h) (3) of the Federal Rules of Civil Procedure provides that “whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” A court lacking jurisdiction cannot render judgment but must dismiss the cause at any stage of the proceedings in which it becomes apparent that

jurisdiction is lacking.... The party invoking the jurisdiction of the court has the duty to establish that federal jurisdiction does exist, ... but, since the courts of the United States are courts of limited jurisdiction, there is a presumption against its existence.... Thus, the party invoking the federal court's jurisdiction bears the burden of proof....

If the parties do not raise the question of lack of jurisdiction, it is the duty of the federal court to determine the matter sua sponte.... Therefore, lack of jurisdiction cannot be waived and jurisdiction cannot be conferred upon a federal court by consent, inaction or stipulation....” (Citation omitted)

Furthermore, because the ultimate burden on the issue of jurisdiction rests with the party invoking federal jurisdiction, the removal statutes are strictly construed against removal, generally speaking, all doubts about removal must be resolved in favor of remand. *See, Shamrock Oil and Gas Corp. v. Sheets*, 313 U.S. 100, 61 S.Ct. 868, 85 L.Ed. 1214 (1941); *Butler v. Polk*, 592 F.2d 1293 (5th Cir.1979); *Paxton v. Weaver*, 553 F.2d 936 (5th Cir.1977).

II. DEFENDANTS FAILED TO ESTABLISH THE EXISTENCE OF FEDERAL COURT JURISDICTION

In the instant case, defendants’ only and sole basis for invoking federal court jurisdiction is erroneously premised on the existence of complete diversity of citizenship at the time of filing plaintiff’s original and First Amended Complaint. (*Defendants’ Exhibit D-Consent to Removal, see also, defendants brief*). In the consent for removal petition, (*Defendant’s Exhibit D*) defendants stated two grounds for the existence of complete diversity; first, that at the time of the filing

of the Original and First Amended Complaints, and at all times pertinent hereto, Defendant Planned Parenthood Southeast, Inc. “PPS” is a citizen of the State of Georgia for the purposes of determining diversity and second, that at the time of the filing of the Original and First Amended Complaints, and at all times pertinent hereto, Dr. Umoren was and is a citizen of the country of Nigeria, and he has resided in Nigeria since 2008. (*See Defendants’ Exhibit D-Consent to Removal, see also defendants’ pleading*)

Plaintiff submits that defendants’ reliance on Dr Umoren’s Nigeria citizenship as ground for the existence of complete diversity is without merit and was pled in bad faith. **Plaintiff’s Exhibit 9, see also, Plaintiff’s Exhibits 7 and 8.**

In their petition for removal, filed on October 10, 2014, defendants did not inform the Court that they were uncertain about Dr Umoren’s citizenship; rather, defendants unequivocally asserted that Dr Umoren was a Nigeria citizen at the time of filing plaintiff’s original Complaint and Amended Complaint to invoke this court’s jurisdiction. (*Defendant’s Exhibit D-Notice of Consent to Removal*) However, after plaintiff’s counsel confronted defendants’ counsel, Attorney Charles McCallum with information about Dr Umoren’s dual citizenship/dual nationality with Nigeria and United States, the fact that Dr Umoren still carries and travels with United States passport, defense counsel admitted in a telephone conversation on October 12, 2014, that Dr Umoren has dual citizenship with

Nigeria and United States. **Plaintiff's Exhibit 7.** Counsel's telephone conversation was memorialized in an email correspondence. **Plaintiff's Exhibits 8.** On October 17, 2014, there was slight shift in defense counsel's position in a letter to plaintiff's counsel stating that defense counsel can neither confirm nor deny that Dr Umoren presently has a dual citizenship with the United States of America. **Plaintiff's Exhibits 9.** Defense counsel blamed their inability to confirm or deny Dr Umoren's United States citizenship on "difficulties in communicating with Dr. Umoren". **Plaintiff's Exhibits 9.**

Given defendants' admission of existence of United States citizenship at a point in time, if not at present, the question or inquiry before the court in order to have jurisdiction in the instant case is to ascertain the citizenship of the litigants. A federal court not only has the power but also the obligation at any time to inquire into jurisdiction whenever the possibility that jurisdiction does not exist arise. *Fitzgerald v. Seaboard Sys. R.R.*, 760 F.2d 1249, 1251 (11th Cir. 1985), citing, *Basso v. Utah Power and Light Co.*, 495 F.2d 906 (10th Cir.1974) Furthermore, under a well established federal law, dual nationality or dual citizenship of an individual does not confer jurisdiction upon federal district court under 28 U.S.C. § 1332(a)(2). See also, *Sadat v. Mertes*, 615 F.2d 1176 (7th Cir. 1980).

The facts and issues of citizenship in the instant case are analogous to a large extent to the issues separately addressed in *Fitzgerald v. Seaboard Sys. R.R.*, 760

F.2d 1249, 1251 (11th Cir. 1985) and *Sadat v. Mertes, 615 F.2d 1176 (7th Cir. 1980)*. In both cases the Courts found federal jurisdiction to be lacking and the cases were remanded accordingly. *Id.*

In *Fitzgerald v. Seaboard Sys. R.R, supra*, the district court *Sua sponte* raised the issue of whether diversity jurisdiction, despite the fact that both parties wanted to keep the case in federal court. The defense counsel in *Fitzgerald v. Seaboard Sys. R.R* admitted that he erroneously overlooked the principal place of business of Seaboard. *Id* at 1251. The plaintiff's counsel argued that the presiding federal court lacked the power to look behind the pleadings and the pre-trial order of the district court which found diversity jurisdiction arguing that the location of the principal place of business of the Seaboard could be in Tennessee, Virginia, or Georgia and urged that Eleventh Circuit that there was no legal basis to remand a case to the district court for a factual determination of the location of the principal place of business of the Seaboard, the Court disagreed. *Id.* The Eleventh Circuit held that the district court can base its decision on jurisdiction upon information known to the court which was derived from sources outside the record and unknown to the plaintiff. As a result, the Eleventh Circuit remanded the case of *Fitzgerald v. Seaboard Sys. R.R* to the district court for a determination of jurisdiction question. The Eleventh Circuit held that a federal court not only has the power but also the obligation at any time to inquire into jurisdiction whenever

the possibility that jurisdiction does not exist arise. *Id.* at 1251. Furthermore, in *Fitzgerald v. Seaboard Sys. R.R.*, the Eleventh Circuit stated It is axiomatic that federal jurisdiction can never be created by the parties. Even though a particular litigant or both litigants in a case may for some reason desire to be in federal court, there is an obligation to admit the lack of jurisdiction where it does not exist and to make inquiry when jurisdiction is uncertain. *Fitzgerald v. Seaboard Sys. R.R.*, 760 F.2d 1249, 1251 (11th Cir. 1985) citing, *Philbrook v. Glodgett*, 421 U.S. 707, 95 S.Ct. 1893, 44 L.Ed.2d 525 (1975); *City of Kenosha, Wisconsin v. Bruno*, 412 U.S. 507, 511, 93 S.Ct. 2222, 2225, 37 L.Ed.2d 109 (1973)

In *Sadat v. Mertes*, *supra*, the Seventh Circuit, citing, Hart & Wechsler's *The Federal Courts and the Federal System*, 835 (2d ed. 1973), stated that "The first duty of counsel is to make clear to the court the basis of its jurisdiction as a federal court. The first duty of the court is to make sure that it exists." *Id.* at 1188. (*see also*, *Fed. R. Civ. P. 12(h)(3)* whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.)

Therefore, in filing their petition for removal, defendants are under a duty to disclose to the court all information known to them regarding Dr Umoren's dual citizenship/nationality in so far as the issue of existence of possibility of Dr Umoren's dual nationality with Nigeria and United States of America, the

defendants failed to inform the court accordingly. (*Defendants' Exhibit D*) but see, **Plaintiff's Exhibits 7, 8 and 9.**

The issue of Dr Umoren's dual nationality or dual citizenship with Nigeria and United States is central to the determination of whether or not complete diversity exists in this case. *Sadat v. Mertes*, 615 F.2d 1176 (7th Cir. 1980). Dr Umoren's status as of August 9, 2012, the date of commencement of Roberta Clark's lawsuit determines whether federal diversity jurisdiction exists. *Id.* 1180. 28 U.S.C. section 1332 (a)(1) creates the federal courts' jurisdiction over actions between citizens of different states and for a natural person to fall within that provision, he or she must be (1) a citizen of United States and (2) a citizen of a particular State. Thus, a person may not sue or be sued in a diversity case if he or she is a citizen of the United States, but not a citizen of a particular state. *Id.* at 1180 *See also Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir.), *cert. denied*, 419 U.S. 842, 95 S.Ct. 74, 42 L.Ed.2d 70 (1974); *Scoggins v. Pollock*, 727 F.2d 1025 (11th Cir.1984).

In *Sadat v Mertes*, *Supra*, the Seventh Circuit held that, Sadat, a dual national of Egypt and United States who resided in Egypt at the time of the commencement of the action can not invoke federal jurisdiction on the basis of diversity under section 28 U.S.C. 1332(a). The Court held that Sadat, a dual national of Egypt and United States seeking to invoke federal jurisdiction was not a

citizen of any state of the United States at the time of the commencement of the action because he resided in Egypt; therefore, diversity jurisdiction did not exist under section 1332(a). The Seventh Circuit also found that in matters of diversity jurisdiction, only the American nationality of the dual citizen is recognized under 28 U.S.C. § 1332(a); thus United States citizens who are domiciled abroad “are neither citizens of any state of the United States nor citizens of a foreign state for purpose of removal” Id. See also, *Action S.A. v Marc Rich & Co*, 951 F.2d 504, 507 (2nd Cir. 1991). *Cresswell v Sullivan & Cromwell*, 922 F.2d 60, 68, (2d Cir. 1990)

In the instant case, based on defendants’ position that Dr Umoren was domiciled in Nigeria at the time of filing plaintiff’s complaint and at all time thereafter (**Defendants’ Exhibit D**), coupled with defense counsel’s representation that either Dr Umoren presently maintains a dual citizenship with Nigeria and United States of America or has at one maintained a United States citizenship; the defendants have failed to show affirmatively that jurisdiction of this court exists, at a minimum defendants have created uncertainty with on the existence of this court’s jurisdiction in this case. **Plaintiff’s Exhibit 9**. The jurisdiction of the circuit court fails, unless the necessary citizenship affirmatively appears in the pleadings or elsewhere in the record *Mansfield, Coldwater & Lake Michigan Ry. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884).

Although, defense counsel stated that they could neither confirm nor deny that Dr Umoren presently maintains a dual citizenship with Nigeria and United States of America, however, there is no evidence before this court to show that Dr Umoren has renounced or lost his United States citizenship. If Dr Umoren has at one point renounced or lost his United States citizenship, the burden is on defendants to show to the court and provide evidence of such expatriation act performed by Dr Umoren that will be tantamount to losing of his United States citizenship. *Vance v. Terrazas*, 444 U.S. 252, 100 S.Ct. 540, 62 L.Ed.2d 461 (1980), see also, 8 U.S.C. § 1481(a) (1982) (amended 1986). Under 8 U.S.C. § 1481 the loss of American citizenship required a voluntary performance of an expatriating act enumerated in the Statute.¹

¹ **8.U.S.C § 1481. Loss of nationality by native-born or naturalized citizen; voluntary action; burden of proof; presumptions**

(a)

A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality-

(1)

obtaining naturalization in a foreign state upon his own application or upon an application filed by a duly authorized agent, after having attained the age of eighteen years; or

(2)

taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof, after having attained the age of eighteen years; or

(3)

entering, or serving in, the armed forces of a foreign state if (A) such armed forces are engaged in hostilities against the United States, or (B) such persons serve as a commissioned or non-commissioned officer; or

(4)

(A)

accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, after attaining the age of eighteen years if he has or acquires the nationality of such foreign state; or

(B)

accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, after attaining the age of eighteen years for which office, post, or employment an oath, affirmation, or declaration of allegiance is required; or

It is also important to note that Dr Umoren who obtained his medical degree at University of Chicago in 1978, became board certified in 1988 in Obstetrics and Gynecology by American Board of Medical Specialties, (ABMS) has worked on and off in the United States since 1988, mostly in the United States from 1998 until his semi-retirement in 2008. **Plaintiff's Exhibit 11, Interrogatories, Nos. 4, 5, 7, 9, 10 and 11.** In fact, since 2008, Dr Umoren's employments have been mostly working in various abortion clinics in the State of Alabama, including serving as the Medical Director for co-defendant, Planned Parenthood since 2008. **Plaintiff's Exhibit 11, Interrogatories Nos. 9.** Moreover, given the change in Immigration and Naturalization policy of the federal government post-911 and considering statutory provisions of Title 8-Aliens and Nationality of Federal Statutory provisions on Immigration and Registration of Aliens, *8 U.S.C. 1302, 8*

(5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(6) making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense; or

(7) committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States, violating or conspiring to violate any of the provisions of section 2383 of title 18, or willfully performing any act in violation of section 2385 of title 18, or violating section 2384 of title 18 by engaging in a conspiracy to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, if and when he is convicted thereof by a court martial or by a court of competent jurisdiction.

(b) Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after September 26, 1961 under, or by virtue of, the provisions of this chapter or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this chapter or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

U.S.C. 1304, 8 U.S.C 1308; it is inconceivable that defendant, Planned Parenthood did know, the citizenship/nationality of immigrant/Alien status of Dr Umoren, its Medical Director. Again, because the defendants in this case have the burden of showing that federal jurisdiction exists, which they have not, this case is due to be remanded, or at a minimum, the Court should direct Dr Umoren to show affirmatively on the record, his current immigrant status, whether he is currently a United States citizen or an immigrant with a work visa or a permanent resident of the United States, these information must be affirmatively shown on the record for the court to ascertain the existence of federal jurisdiction. *Mansfield, Coldwater & Lake Michigan Ry. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884). See also, *Fitzgerald v. Seaboard Sys. R.R.*, 760 F.2d 1249, 1251 (11th Cir. 1985) and 8 U.S.C 1481.

In making a jurisdictional assessment, a federal court is not limited to the pleadings; it may look to any record evidence, and may receive affidavits, deposition testimony or live testimony concerning the facts underlying the citizenship of the parties. See, e.g. *Jones v. Landry*, 387 F.2d 102 (5th Cir.1967), see also, *Fitzgerald v. Seaboard Sys. R.R.*, 760 F.2d 1249, 1251 (11th Cir. 1985)

Finally, defendants' argument that this case is removable at the time of filing the original complaint and the amended complaint is without merit. There is no diversity of citizenship at anytime during the pendency of this case in the State

Court. In fact, if Dr Umoren is found to be a domiciliary of Nigeria based on his representation that he left United States and moved to Nigeria in 2008 to establish his permanent residence in Lagos Nigeria and the court finds that he is a dual citizen of the United States and Nigeria, Dr Umoren would not be a citizen of any State and could not sue in a Federal Court on that basis diversity jurisdiction because of his dual nationality. *Sadat v. Mertes*, 615 F.2d 1176 (7th Cir. 1980).

Interesting enough, on the basis of his employment and work history, the only State in the United States that can be considered as Dr Umoren's domiciliary is the State of Alabama where he has been working since 2008. Whether Dr Umoren is considered a citizen of Nigeria with dual citizenship with United States and Nigeria or a citizen of State of Alabama where he has maintained employment in various clinics since 2008, either way there is no diversity of citizenship.

Finally, Plaintiff has incurred Attorneys' fees and cost in conjunction with the filing of this motion for remand. If this motion is granted, plaintiff respectfully requests this Court to enter an order requiring defendants to pay just cost and actual attorney expenses incurred as a result of the removal. **See 28 U.S.C 1447(c)**.

For all of the reasons stated above and in light of foregoing memorandum of law, Roberta Clark's case should be remanded to Jefferson County, Alabama Circuit Court-Birmingham Division for adjudication, defendants have failed to carry their burden that federal court jurisdiction exists, the records show lack of

diversity of citizenship at the commencement of this case and the case is not removable.

Wherefore, premises considered, Roberta Clark respectfully requests this Court to:

1. Remand this case back to Jefferson County Circuit Court-Birmingham Division.
2. Award reasonable attorneys' fees and costs incurred in conjunction with preparing this Motion For Remand; and
3. Grant any other relief as the Court deems just and proper/

Respectfully submitted,

/s/ Adedapo T. Agboola
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record in this case, and/or I hereby certify that I have mailed the foregoing by United States Postal Service on this the 10th day of October, 2014, to:

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