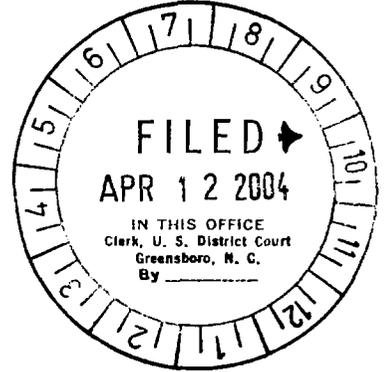


**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

KAPLAN EARLY LEARNING COMPANY, )  
 )  
 )  
 Plaintiff, )  
 v. )  
 )  
 MIDBAR KODESH TEMPLE, RED )  
 APPLE LEARNING CENTER, LLC, )  
 DENISE SCHNITZER, and KAREN )  
 MARANO, )  
 )  
 Defendants. )

1:03CV714



**RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This matter is before the court on Plaintiff's Motion to Remand [5-1]. Since there has been no consent, the court must deal with the motion by way of a recommended disposition. For the reasons discussed herein, the court will recommend that Plaintiff's Motion to Remand be granted.

**FACTS**

On March 19, 2002, Plaintiff filed an action in Forsyth County Superior Court against Defendant Midbar Kodesh Temple. On May 30, 2002, Defendant Midbar Kodesh Temple filed an answer. On December 20, 2002, with leave of court, Plaintiff filed an amended complaint, naming Red Apple Learning Center, LLC, Denise Schnitzer, and Karen Marano as additional Defendants. On January 9, 2003, Defendant Midbar Kodesh Temple filed an answer to Plaintiff's amended

complaint.

On July 28, 2003, pro se Defendant Denise Schnitzer removed the case to this court based on diversity jurisdiction. On August 13, 2003, Plaintiff purported to file a voluntary notice without prejudice of all claims against all Defendants under Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure. On August 27, 2003, Plaintiff filed a motion to remand the case to Forsyth County Superior Court “out of an abundance of precaution . . . if for any reason, voluntary dismissal will not stand.” The motion to remand was filed on the ground that not all Defendants consented to removal. Defendants have responded to the motion and the matter is ripe for disposition.

## **DISCUSSION**

I first consider whether Plaintiff filed a proper voluntary dismissal under Rule 41(a)(1)(i). Under the Federal Rules of Civil Procedure, there are only two ways in which a plaintiff may dismiss an action without the consent of the court. First, as long as the adverse party has not responded to a complaint with an answer or a motion for summary judgment, Rule 41(a)(1)(i) allows a plaintiff to dismiss an action solely by filing a notice of dismissal with the court. Otherwise, in order to dismiss the cause of action, Rule 41(a)(1)(ii) requires a plaintiff to file with the court “a stipulation of dismissal signed by all parties who have appeared.”<sup>1</sup> Here, despite Plaintiff’s

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<sup>1</sup> This circuit’s court of appeals has noted that, “[n]otwithstanding the appeal of a bright-line test, a number of courts have rejected such a rigid approach to interpreting the rules.” *Camacho v. Mancuso*, 53 F.3d 48, 51 (4<sup>th</sup> Cir. 1995) (collecting cases). The

assertion in its Rule 41(a)(1)(i) notice of dismissal that the notice was filed before any Defendant filed an answer or a motion for summary judgment, the Rule 41(a)(1)(i) notice of dismissal was in fact filed after Defendant Midbar Kodesh Temple filed an answer to both the original complaint and the amended complaint. Furthermore, there is no indication that Defendant Midbar Kodesh Temple has stipulated to dismissal. Thus, the purported voluntary dismissal under Rule 41(a)(1)(i) was improvidently filed. It is therefore recommended that the court strike the voluntary dismissal and consider Plaintiff's alternatively filed motion to remand. See *Madrazo v. Blue Dolphin Communications of North Carolina, L.L.C.*, No. 1:00CV6, 2000 WL 33422619, \*3 (W.D.N.C. Mar. 02, 2000); *Moore v. Davis*, 72 F.R.D. 96 (M.D.N.C. 1976).

Here, Defendant Denise Schnitzer removed the case to this court based on diversity jurisdiction. It is undisputed, however, that all Defendants have not consented to the removal. It is well settled under the judicially created "rule of unanimity" that all defendants who may properly join in a notice of removal must join

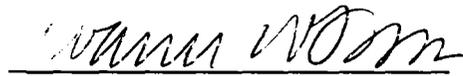
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*Camacho* court observed, for example, that several circuits have liberally interpreted Rule 41(a)(1)(ii) to hold that, in the absence of a written stipulation signed by the parties and filed with the court, an oral stipulation before the court is sufficient to meet the requirements of Rule 41(a)(1)(ii). In this case, however, there is no indication of either a written or an oral stipulation to dismissal by Defendant Midbar Kodesh Temple. Instead, Defendant Midbar Kodesh Temple simply argues for remand based on lack of consent by all Defendants.

in or consent to the notice of removal; otherwise, the removal is defective.<sup>2</sup> The “rule of unanimity” does not require all defendants to sign the notice of removal; it does require, however, that each defendant consent to the notice of removal. See *Martin Oil Co. v. Philadelphia Life Ins.*, 827 F. Supp. 1236, 1237 (N.D. W. Va. 1993); *Mason v. International Bus. Machs., Inc.*, 543 F. Supp. 444, 446 (M.D.N.C. 1982). Here, because not all Defendants consented to removal, removal was clearly improper, and the case should therefore be remanded to state court.

### **CONCLUSION**

Based on the foregoing, IT IS RECOMMENDED that Plaintiff’s notice of voluntary dismissal be stricken as improvidently filed, that Plaintiff’s motion for remand be GRANTED, and that this case be REMANDED to the Superior Court of Forsyth County.



WALLACE W. DIXON  
United States Magistrate Judge

Durham, NC

April 9, 2004.

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<sup>2</sup> In this circuit, the requirement that all defendants join has three exceptions. A defendant need not join if: (1) it had not been served with process at the time the removal petition was filed; (2) it is merely a nominal or formal party defendant; or (3) the removed claim is independent of one or more nonremovable claims against the nonjoining defendants. *Creekmore v. Food Lion, Inc.*, 797 F. Supp. 505, 507 n.2 (E.D. Va. 1992) (citing *Mason v. International Bus. Machs., Inc.*, 543 F. Supp. 444, 446 n.1 (M.D.N.C. 1982)). Defendants have not argued, nor is there any reason to find, that any one of these three exceptions applies here.