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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

EPILEPSY ASSOCIATION OF UTAH, a Utah non-profit corporation; CHRISTINE STENQUIST; DOUGLAS ARTHUR RICE; TRUCE, a Utah non-profit corporation; NATHAN KIZERIAN; SHALYCE KIZERIAN; ANDREW TALBOTT, M.D., Plaintiffs, v. GARY R. HERBERT, Governor of the State of Utah, in his official capacity; JOSEPH K. MINER, M.D., MSPH, Executive Director, Utah Department of Health, in his official capacity, Defendants.	**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE TO FILE OVER-LENGTH MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO REMAND CASE TO STATE COURT AND FOR THE AWARD OF ATTORNEY FEES** Case No.: 2:19-cv-00360-DBP Magistrate Judge Dustin B. Pead

Normally, Plaintiffs and their counsel would not oppose the filing by Defendants' counsel of an overlength memorandum. In fact, Plaintiffs previously stipulated to the filing by Defendants of an overlength Motion to Dismiss.[1] Then Defendants filed a 42-page Motion to Dismiss Amended Complaint [ECF 14].

As it turned out, Plaintiffs stipulated to far more rope than required for Defendants to hang themselves. Defendants—who have the burden as the removing parties[2] to demonstrate that this action could originally have been properly filed in this Court,[3]—filled dozens of pages with strenuous argument that, pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, this Court does *not* have subject matter

[1] Defendants' Stipulated Motion for Leave to File Over-Length Motion to Dismiss [ECF 11].

[2] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *Kiefer v. Bob Evans Farms, LLC*, 313 F. Supp 3d 966, 968 (C.D. Ill. 2018) ("The burden of proving federal jurisdiction is on the Defendants—the parties which removed this action to federal court.").

[3] 28 U.S.C. § 1441(a) ("Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have *original* jurisdiction, may be removed by the defendant or the defendants . . . ." (emphasis added); *Northeastern Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n., Inc.,* 707 F.3d 883, 890 (7th Cir. 2013) ("A case filed in state court may be removed to federal court only when the case originally could have been filed in federal court." (citing 28 U.S.C. § 1441(a))).

jurisdiction in this case. Hence, Defendants themselves have already betrayed any pretense that their removal of this case was appropriate.

Pursuant to 28 U.S.C. § 1447 (c),[4] the only appropriate course is for remand of this matter to the state court from which it was removed. *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 89 (1991) ("The statute [28 U.S.C. 1447(c)] declares that, where subject matter jurisdiction is lacking, the removed case shall be remanded."); *Hill v. Vanderbilt Capital Advisors, LLC*, 702 F.3d 1220, 1225–26 (10th Cir. 2012).

DUCivR 7-1(b)(2)(C) limits opposition memoranda related to motions not listed in DUCivR 7-1(b)(2)(A) and (B) to 2,500 words or, in the alternative, ten pages. That limit applies to Defendants' opposition memorandum to Plaintiffs' Motion to Remand Case to State Court and for the Award of Attorney Fees ("Motion to Remand") [ECF 15]. Plaintiffs' Motion to Remand is significantly shorter than the limit provided by DUCivR 7-1(a)(3)(C)—particularly with the text of the motion in 14-point font.

[4] 28 U.S.C. § 1447(c) provides, in part, as follows:

> If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

There is no good reason for Defendants to again significantly exceed the length permitted by this Court's local rule. This time, Defendants did not seek the stipulation of Plaintiffs' counsel to the filing of an overlength memorandum. Also, leave of the Court to file an overlength memorandum was not sought by Defendants until they filed their motion[5] at the last minute, after 5 p.m. on the Friday night prior to their Monday deadline for filing an opposition memorandum. That motion seeks leave to file a memorandum 250% longer than the local rule permits—25 pages to respond to Plaintiffs' relatively concise, simple motion and supporting memorandum.

Defendants have no basis for their request to submit such a long opposition memorandum. They argue that the motion to remand "involves important and complex issues,"[6] but then assert, groundlessly, that "Defendants have a statutory right to a federal forum on these federal questions."[7] This Court should not once

[5] Defendants' Motion for Leave to File Over-Length Memorandum in Opposition to Plaintiffs' Motion to Remand Case to State Court and for the Award of Attorney Fees ("Defendants' Motion") [ECF 18].

[6] Defendants' Motion, 2.

[7] *Id.*

again deviate from its own local rule relating to the length of memoranda to permit dozens of pages of that sort of baseless argument.

There is *no* statutory right like that to which Defendants make reference. They would likely cite to an applicable statute if there were one, but they have not. Defendants cite for their argument *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 137 (2005), yet *nowhere* in *Martin* is there *any* mention of a right to have a federal court make a decision regarding federal law when Defendants themselves argue the federal court has *no jurisdiction* to decide the matter. Defendants' argument is a bizarre, circular non sequitur. The discussion in the portion of *Martin* cited by Defendants relates to the standard for the award of attorney fees if a case, as here, has been wrongly removed from state court to federal court.

The United States Supreme Court has made clear that where the federal district courts may not originally have jurisdiction in a case, but a state court finds that it has jurisdiction, the state court may rule on federal issues, including constitutional matters:

> [T]he state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even *when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute*. . . .
>
> Although the state courts are not bound to adhere to federal standing requirements, *they possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that*

> *rest on their own interpretations of federal law*. . . . Indeed, inferior federal courts are not required to exist under Article III, and the Supremacy Clause explicitly states that "the Judges in every State shall be bound" by federal law. U.S. Const., Art. VI, cl. 2.

ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) (emphasis added). *See also Hill v. Vanderbilt Capital Advisors, LLC*, 834 F. Supp. 2d 1228, 1260–61 (D.N.M. 2011), *appeal dismissed*, 702 F.3d 1220 (10th Cir. 2012) ("This remand leads to the unusual situation where the New Mexico courts will 'have to rule on federal questions that the federal courts presently lack the power to address . . . .'"); *Smith v. Wisconsin Dept. of Agric., Trade and Consumer Protection*, 23 F.3d 1134, 1142 (7th Cir. 1994) ("[S]ome consider it odd that a state court might have the authority to hear a federal constitutional claim in a setting where a federal court would not . . . ." but "§ 1447(c) says that a case removed to federal court 'shall be remanded' to the state court if it is discovered that the federal court lacks subject matter jurisdiction.").

This is a simple matter, not requiring even ten pages for Defendants to respond to Plaintiffs' Motion to Remand. The issue in a nutshell is as follows:

1. Defendants removed this case.
2. Defendants therefore have the burden to show that the case could originally have been filed in federal district court.
3. Instead of meeting that burden, Defendants filed a Rule 12(b)(1) motion to dismiss, arguing that this Court does *not* have subject matter jurisdiction.

4. Hence, this case *must* be remanded to state court and Plaintiffs should be awarded their attorney fees.

Defendants' latest request for leave to file yet another extremely overlength memorandum should be denied. Quite enough time, expense, and inconvenience to the Court and Plaintiffs has been occasioned by Defendants' facially unreasonable removal of this matter from state court.

DATED this 6th day of June 2019.

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