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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' REPLY MEMORANDUM IN SUPPORT OF 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

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INTRODUCTION

Seeking to invoke this Court's jurisdiction, Defendants removed this case from state court. Then, manifestly demonstrating the *wrongfulness* of that removal, Defendants "move[d] for dismissal under Rule 12(b)(1) for lack of standing"[1] and asserted that "PLAINTIFFS LACK STANDING, SO THE COURT LACKS JURISDICTION."[2] Next, as if they never argued that at all, Defendants have opposed Plaintiffs' Motion to Remand [ECF 15], arguing—again contradictorily—that "subject matter jurisdiction . . . is separate and distinct from the question of whether Plaintiffs have standing."[3] Further, again erroneously, Defendants contend they are entitled to a federal venue—a venue which Defendants themselves have argued does not have jurisdiction in this matter—for a determination of what they consider issues of federal law.

Adding to the glaring inconsistencies in their positions, Defendants have misrepresented that *Plaintiffs* have sought to invoke this Court's jurisdiction.[4]

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[1] Defendants' Motion to Dismiss Amended Complaint [ECF 14] ("Motion to Dismiss"), 10.

[2] Motion to Dismiss, heading I, at 11.

[3] Defendants' Memorandum in Opposition to Plaintiffs' Motion to Remand Case to State Court and for the Award of Attorney Fees [ECF 21] ("Memorandum Opposing Remand"), 3.

[4] Motion to Dismiss, 2.

Hence, Defendants argue, it is the burden of *Plaintiffs*—who never invoked this Court's jurisdiction and who seek a remand to state court—to demonstrate federal jurisdiction.[5]

Because Defendants have refused to acknowledge, and have indeed abdicated, their burden of demonstrating that this Court has jurisdiction, this case must be remanded to state court. Further, Plaintiffs should be awarded their attorney fees because of the objective, patent unreasonableness of Defendants' improper removal of this matter to federal court.

I. DEFENDANTS IMPROPERLY REMOVED THIS CASE TO FEDERAL COURT.

A. ABSENT FEDERAL JURISDICTION, DEFENDANTS ARE NOT ENTITLED TO A FEDERAL FORUM FOR THE DETERMINATION OF ISSUES OF FEDERAL LAW.

In support of their proposition that "Defendants properly removed this case on federal question grounds,"[6] Defendants argue as if—regardless of the federal court's jurisdiction—they have an absolute right to have a federal court decide issues of federal law. Defendants quote only a few words from *Martin v. Franklin Capital*

[5] Memorandum Opposing Remand, 9–14.

[6] Memorandum Opposing Remand, 2.

Corp., 546 U.S. 132, 137 (2005), stating that "the 'removal statute grants defendants a right to a federal forum.' "[7] Defendants omit the next sentence: "A remand is necessary if a defendant *improperly* asserts this right . . . ." 546 U.S. at 137 (emphasis added).

Where federal jurisdiction is lacking, it is entirely appropriate for state courts to determine issues of federal law. The Supreme Court has recognized that state courts can indeed "address issues of federal law, as when they are called upon to interpret the Constitution or . . . a federal statute." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989). *See also Doremus v. Bd. of Educ. of Borough of Hawthorne*, 342 U.S. 429, 434 (1952); *Hill v. Vanderbilt Capital Advisors, LLC*, 834 F. Supp. 2d 1228, 1260 (D.N.M. 2011), *appeal dismissed*, 702 F.3d 1220 (10th Cir. 2012).

B. THE PRESENCE OF AN ISSUE OF FEDERAL LAW IS INSUFFICIENT FOR REMOVAL OF A STATE CASE TO FEDERAL COURT; DEFENDANTS MUST ALSO DEMONSTRATE THE EXISTENCE OF SUBJECT MATTER JURISDICTION, INCLUDING ARTICLE III STANDING.

Defendants misperceive the requirements for proper removal of a case to federal court. They argue, incorrectly, that "a defendant properly removes a case and

[7] Memorandum Opposing Remand, 2.

invokes a federal court's subject matter jurisdiction when plaintiff pleads a colorable claim arising under federal law."[8] The mere existence of a federal claim is insufficient to remove a case from state court to federal court. If the federal court does not have jurisdiction, removal to the federal court is improper. *See, e.g., Polo v. Innoventions Int'l, LLC*, 833 F.3d 1193, 1197 (9th Cir. 2016) ("This case lacked a named plaintiff with Article III standing, and therefore was not properly removed.")

Focusing only on "original jurisdiction" and "federal question jurisdiction," Defendants arrive at the frivolous conclusion that "the only prerequisite to removing this lawsuit was the presence of a colorable claim based on federal law in Plaintiffs' amended complaint."[9] That is flatly wrong. "[R]eliance on the phrase 'original jurisdiction' is not enough, because federal courts have subject-matter jurisdiction only if constitutional standing requirements also are satisfied." *Collier v. SP Plus Corp.*, 889 F.3d 894, 896 (7th Cir. 2018). *See also Katz v. Six Flags Great Adventure, LLC*, No. 18-116, 2018 WL 3831337 (D.N.J. August 13, 2018) (unpublished); *Barnes v. ARYZTA, LLC*, 288 F. Supp. 3d 834, 839 (N.D. Ill. 2017) (" '[T]o say that

[8] Memorandum Opposing Remand, 3.

[9] Memorandum Opposing Remand, 5.

a court is without jurisdiction to decide a case on its merits [yet] has jurisdiction merely to remove the case is to state a contradiction.'" (citation omitted) (first alteration added)).

1. Article III Standing is an Element of Subject Matter Jurisdiction, the Absence of Which Requires Remand of a Removed Case.

Although Defendants argued in their Motion to Dismiss that "PLAINTIFFS LACK STANDING, SO THE COURT LACKS JURISDICTION,"[10] they have changed course radically, now arguing that "standing" and "subject matter jurisdiction" are two completely unrelated—"separate and distinct"[11]—concepts.[12]

The Tenth Circuit Court of Appeals—and every other court considering the issue in the context of the removal of a case to federal court—disagrees. In a case

[10] Motion to Dismiss, heading I, at 11.

[11] Memorandum Opposing Remand, 3.

[12] *Id.*, 3–6. Defendants arrive at their conclusion through a misreading of *Baker v. Carr*, 369 U.S. 186 (1962). Defendants assert that the Supreme Court in *Baker* "carefully distinguished the issue of federal question jurisdiction (i.e., subject matter jurisdiction) from the issue of whether a 'case or controversy' exists." Memorandum Opposing Remand, 3. Contrary to *distinguishing* the issue of jurisdiction from whether a case or controversy exists, the Supreme Court *included* "case or controversy" within its jurisdictional analysis under the heading "Jurisdiction of the Subject Matter." *Baker*, 369 U.S. at 198.

involving a remand to state court after removal to federal court, the Tenth Circuit was unambiguous:

> Our court has repeatedly characterized standing as an element of subject matter jurisdiction.

Hill v. Vanderbilt Capital Advisors, LLC, 702 F.3d 1220, 1224 (10th Cir. 2012) (citing several Tenth Circuit cases and others ruling that Article III standing is an essential part of any analysis of subject matter jurisdiction, including *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1155 (10th Cir. 2005) (referring to standing as a question of subject matter jurisdiction) and *Schutz v. Thorne*, 415 F.3d 1128, 1132 (10th Cir. 2005) (same)). *See also FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) ("standing 'is perhaps the most important of [the jurisdictional] doctrines.' " (citation omitted) (alteration in original)); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341–42 (2006); *St. Louis Heart Ctr., Inc. v. Nomax, Inc.*, 899 F.3d 500, 503 (8th Cir. 2018); *Collier*, 889 F.3d at 895 ("[T]he case was not removable, because the plaintiffs lack Article III standing—negating federal subject-matter jurisdiction"); *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004); *Coyne v. American Tobacco Co.*, 183 F.3d 488, 496 (6th Cir. 1999); *Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590, 592–93 (10th Cir. 1996); *Wheeler v. Travelers Ins. Co.*, 22 F.3d 534, 537 (3d Cir. 1994) (" '[T]he doctrine of standing . . . goes to the subject matter jurisdiction of the district court . . ." (alteration added)).

Defendants make the remarkable argument that "[b]ecause there is no dispute that a federal question appears on the face of the FAC [First Amended Complaint], Defendants' [sic Plaintiffs'] motion to remand should be denied."[13] Defendants further argue, without any support, that "a lack of standing does not warrant remand under section 1447(c); it warrants dismissal."[14] The Tenth Circuit Court (and every other court considering the matter) disagrees:

> Section 1447(c) states that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. 1447(c). Lack of standing divests the court of subject matter jurisdiction, and therefore, *upon determining that [plaintiff] lacked standing to bring his suit, the court should have remanded the matter* to state court pursuant to 1447(c).

Jepsen v. Texaco, Inc., 68 F.3d 483, *2 (10th Cir. 1995) (unpublished) (citations omitted) (emphasis added). *See also Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 87 (1991) (holding that a lack of subject matter jurisdiction in a removed case requires a remand under § 1447(c)); *St. Louis Heart Ctr.*, 899 F.3d at 505; *Coyne*, 183 F.3d at 496; *Smith v. Wisconsin Dept. of Agric., Trade and Consumer Prot.*, 23 F.3d 1134, 1142 (7th Cir. 1994); *Wheeler*, 22 F.3d at 537; *Maine Ass'n of Interdependent Neighborhoods v. Comm'r, Maine Dept. of Human Servs.*,

[13] Memorandum Opposing Remand, 8.

[14] Memorandum Opposing Remand, 19.

876 F.2d 1051, 1053–54 (1st Cir. 1989); *Hill*, 834 F. Supp. 2d at 1260 ("The Tenth Circuit has held that, when lack of standing divests a district court of subject-matter jurisdiction over a case removed to federal court, the matter should be remanded to state court pursuant to 28 U.S.C. § 1447(c).").

2. As the Removing Parties, Defendants Have the Burden of Demonstrating That Plaintiffs Have Article III Standing.

Inexplicably, Defendants argued in their Motion to Dismiss that "[a]s the parties trying to invoke this Court's limited jurisdiction, Plaintiffs have the burden to establish standing."[15] Now, they aggravate that palpable error by stating that "Defendants met their burden of showing the Court *has* subject matter jurisdiction"[16] —after they moved to dismiss for *lack* of subject matter jurisdiction. They also continue to claim that—although Defendants are the removing parties and Plaintiffs seek to have this matter remanded to state court—*Plaintiffs* have the burden of establishing federal court jurisdiction.[17] The law provides just the opposite.

"The party invoking federal jurisdiction bears the burden of establishing these [standing] elements." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). *See also*

[15] Motion to Dismiss, 12.

[16] Memorandum Opposing Remand, 10 (emphasis added).

[17] Memorandum Opposing Remand, 9–14.

DaimlerChrysler Corp., 547 U.S. at 342 n.3. By removing this case to federal court, Defendants have asserted federal jurisdiction[18] and, therefore, have the burden of establishing it.

The Tenth Circuit has held that "[a]s the parties removing this case to federal court, the defendants bear the burden of establishing jurisdiction by a preponderance of the evidence." *Dutcher v. Matheson*, 733 F.3d 980, 985 (10th Cir. 2013). *See also Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154 (10th Cir. 2005); *Collier*, 889 F.3d at 896; *Weber County, Utah v. Purdue Pharma, L.P.*, No. 1:18-cv-00089-RJS, 2018 WL 3747846, *3 (D. Utah August 7, 2018) (unpublished) ("[The removing defendant] bears the burden to show the propriety of removal by establishing that this court enjoys subject matter jurisdiction over the action.").

Because federal courts "presume[ ] that a cause lies outside [the federal court's] limited jurisdiction,"[19] and because Defendants have denied and abdicated their burden of demonstrating this Court's jurisdiction, this matter must be remanded to state court. In *every* case in which a defendant has removed a case to federal court,

[18] Defendants concede that they have "removed this lawsuit and invoked this Court's subject matter jurisdiction." *Id.*, 7.

[19] *Devon Energy Prod. Co., L.P. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1201 (10th Cir. 2012).

then filed a Rule 12(b)(1) motion for lack of subject matter jurisdiction, the case has been remanded to state court. *See St. Louis Heart Ctr.*, 899 F.3d at 502–506; *Collier*, 889 F.3d at 895–97; *Kiefer v. Bob Evans Farms, LLC*, 313 F. Supp. 3d 966, 968 (C.D. Ill. 2018); *Barnes*, 288 F. Supp. 3d at 838; *Mocek v. Allsaints USA Ltd.*, 220 F. Supp. 3d 910, 913 (N.D. Ill. 2016) (holding that because the removing defendant called standing into question, remand was required because "'[a]ny doubt regarding jurisdiction should be resolved in favor of the states.'" (citing *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993)). "[N]o court has afforded that relief [dismissal with prejudice rather than remand] under similar circumstances." *Mocek*, 220 F. Supp. at 914 (alteration added).

II. PLAINTIFFS ARE ENTITLED TO AN AWARD OF ATTORNEY FEES INCURRED IN CONNECTION WITH DEFENDANTS' WRONGFUL REMOVAL.[20]

As would have been clear from the slightest research, no removing defendant invoking, then disavowing, federal jurisdiction has ever achieved anything other than delay, a waste of the court's and parties' resources, and a remand to state court. *See, e.g., Collier*, 889 F.3d at 895–97 (noting that the "dubious strategy" of

[20] If the Court orders an award of fees, Plaintiffs will submit appropriate affidavits describing the attorneys' services and time expended in connection with Defendants' wrongful removal of this case.

defendant who removed case and then moved to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction "resulted in a significant waste of federal judicial resources"). This was an exercise in futility, which the Utah Attorney General's Office can certainly afford, with resort to seemingly unlimited taxpayer resources, but which Plaintiffs and their counsel cannot, and which this Court should not have to, endure.

Throughout these proceedings, Defendants have forged ahead with their futile resistance to remand. In the process, Defendants have misrepresented the applicable principles of law, including (1) their baseless contention that standing has nothing to do with subject matter jurisdiction, (2) their assertion that to remove they need only raise a matter of federal law, and (3) their spurious claim that, after Defendants have removed a state case to federal court, Plaintiffs have the burden to demonstrate federal jurisdiction.

The Court should award fees when, as here, there was no "objectively reasonable basis for seeking removal." *Martin*, 546 U.S. at 141.

> The process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources. Assessing costs and fees on remand reduces the attractiveness of removal as a method for delaying litigation and imposing costs on the plaintiff.

Id.

Defendants resort to *Brahamsha v. Supercell OY*, No. 16-8440, 2017 WL 3037382 (D.N.J. July 17, 2017) (unpublished) for its argument against the award of fees. *Brahamsha* held merely that, in an area of law that was then unsettled respecting Class Action Fairness Act jurisdiction and the appropriateness of remand, it could not be said that it was "incumbent upon Defendant . . . to anticipate how this Court would rule on a Rule 12(b)(1) motion in a currently developing area of law . . . ." That case has no bearing whatsoever on this matter.

The reasoning of another federal district court in almost identical circumstances as here applies with full force:

> [I]f defendant wished to litigate the merits of plaintiff's federal claim in a federal forum, it was free to remove the case and seek to establish federal jurisdiction . . . . But defendant did not pursue that avenue. Instead, defendant tried to have it both ways by asserting, then immediately disavowing, federal jurisdiction, apparently in hopes of achieving outright dismissal, with prejudice, rather than the remand required by § 1447(c). . . . [N]o court has afforded that relief under similar circumstances, and defendant's own authority confirms that remand is "mandatory."
>
> In short, it should have been obvious to defendant, based on well-settled law, that with no party asking for the merits of plaintiff's claim to be decided in federal court, and both sides arguing against federal jurisdiction, the only possible outcome was for the case to end up right back where it started: in state court. Under these circumstances, I have no trouble concluding that defendant lacked an "objectively reasonable basis for seeking removal." . . . Accordingly, plaintiff is entitled to recover her attorneys' fees incurred as a result of removal.

Mocek, 220 F. Supp. 3d at 914–15. *See also Barnes*, 288 F. Supp. 3d at 839–40 and n.3 (adopting the reasoning in *Mocek*, granting an award of fees against Defendant, and noting that "[i]t was incumbent on Defendant . . . to consider the Article III standing issue when it removed the action to this Court.").

CONCLUSION

Because Defendants have failed to carry, and have abdicated, their burden of demonstrating federal jurisdiction, this matter should be remanded to state court. Further, because there was no objectively reasonable basis for removal by Defendants, who have *denied* federal jurisdiction, Plaintiffs should be granted their attorney fees incurred in connection with the removal.

DATED this 15th day of July 2019.

LAW OFFICES OF ROCKY ANDERSON

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CERTIFICATE OF COMPLIANCE WITH WORD-COUNT LIMIT

In compliance with the word-count limit of DUCivR 7-1(a)(3)(C), I certify that the foregoing *Plaintiffs' Reply Memorandum in Support of Motion to Remand Case to State Court and for the Award of Attorney Fees* contains 2,478 words, excluding the items that are exempted from the word count under DUCivR 7-1(a)(3)(C).

DATED this 15th day of July 2019.

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/s/ Ross C. Anderson
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