

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

MOHAMMAD HAMED, <i>by his authorized</i>)	
<i>agent</i> WALEED HAMED,)	
)	CIVIL NO. SX-12-CV-99
Plaintiff,)	
v.)	
FATHI YUSUF and UNITED CORPORATION,)	ACTION FOR DAMAGES,
)	INJUNCTIVE AND
)	DECLARATORY RELIEF
Defendants.)	JURY TRIAL DEMANDED
_____)	

PLAINTIFF'S OPPOSITION
TO DEFENDANTS' MOTION FOR SUR-REPLY

Plaintiff submits this memorandum in opposition to defendants' *motion for leave to file a sur-reply*, as filed November 14, 2012. (DE 37)

I. Introduction

Plaintiff (again) notes, as he did in his remand motion, that plaintiff's counsel has no problem litigating in federal court here. That said however, no sur-reply is necessary because no matter how much the plaintiff might wish to agree to it, this Court simply lacks subject matter jurisdiction. No volume of additional briefing by defendants can alter this -- all it can do is further delay this cause.

The concept of *waiver* that defendants argue is "black letter law" clearly goes only to non-jurisdictional remand situations. That is because of the following four basic concepts of federal jurisdiction:

Rule 1: A party cannot "create" federal court jurisdiction where there is none. *U.S. Const., Art. III.*

Rule 2: Two parties cannot get together and create federal jurisdiction where there is none, no matter what devices they employ. *Id.*

Rule 3: A party can never forfeit or "waive" its way to federal jurisdiction if none exists otherwise. *Arbaugh v. Y & H. Corp.*, 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006).

Rule 4: Because the first three rules are undeniable, if plaintiff acquiesced to this nonsense, this case could be remanded any time up to judgment if things go badly for defendants. 28 U.S.C. § 1447(c) And plaintiff expects such will be the case.

With these in mind, the plaintiff will address the defendants' arguments.

II. Defendants' Argument

The cases defendants cite in support of the instant motion all stand for a *completely* different proposition than stated in their motion. They hold only that remand can be waived on a ***non-jurisdictional*** issue to prevent injustice. The defendants' argument that these waiver cases apply to a ***jurisdictional*** remand is simply wrong.

In this regard, plaintiff refers the Court to the following concise discussion of basic federal jurisdictional law as to waiver of remand -- from a 2012 decision by the U.S. District Court for the District of Columbia in *Busby v. Capital One, N.A.*, 841 F.Supp.2d 49, 52-53 (D.D.C. 2012):

Federal courts are courts of limited jurisdiction and, therefore, the law presumes that "a cause lies outside of [the court's] limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994); *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288–89, 58 S.Ct. 586, 82 L.Ed. 845 (1938). According to the removal statute, a defendant may properly remove to federal court an action brought in a state court when original subject-matter jurisdiction exists in the form of diversity [or a federal question]. 28 U.S.C. § 1441(a); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). . . .

Courts must strictly construe removal statutes. *Williams v. Howard Univ.*, 984 F.Supp. 27, 29 (D.D.C.1997) (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 107–09, 61 S.Ct. 868, 85 L.Ed. 1214 (1941)). The court must resolve any ambiguities concerning the propriety of removal in favor of remand. *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 411 (11th Cir.1999); *Nwachukwu v. Karl*, 223 F.Supp.2d 60, 66 (D.D.C.2002).

When the plaintiff makes a motion to remand, the defendant bears the burden of proving federal jurisdiction. *Kokkonen*, 511 U.S. at 377, 114 S.Ct. 1673; *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97, 42 S.Ct. 35, 66 L.Ed. 144 (1921); *Nat'l Org. for Women v. Mut. of Omaha Ins. Co.*, 612 F.Supp. 100, 101 (D.D.C.1985).

If a defect in removal procedures or lack of subject-matter jurisdiction becomes apparent at any point prior to final judgment, the removal court must remand the case to the state court from which the defendants originally removed the case. 28 U.S.C. § 1447(c). **A plaintiff might waive the right to a remand on the basis of procedural defects by supplementing a complaint, litigating a summary judgment motion, or proceeding in a trial.** *Koehnen v. Herald Fire Ins. Co.*, 89 F.3d 525, 528 (8th Cir.1996); *Medlin v. Andrew*, 113 F.R.D. 650, 652 (M.D.N.C.1987). In contrast, merely engaging in offensive or defensive litigation (such as limited discovery) especially when the plaintiff has already filed a motion for remand, does not forfeit the right to a remand. *Medlin*, 113 F.R.D. at 652–53. **In the event that the federal court lacks subject-matter jurisdiction, remand is mandatory.** *Republic of Venez. v. Philip Morris, Inc.*, 287 F.3d 192, 196 (D.C.Cir.2002); *Johnson–Brown v. 2200 M St. LLC*, 257 F.Supp.2d 175, 177–78 (D.D.C.2003). (Emphasis added.)

As the court concluded at 841 F.Supp. 53-54:

It is important to note that the plaintiff has waived only her objection to the procedural defects in the defendants' notice of removal; objections that are based on a court's lack of subject-matter jurisdiction may not be forfeited or waived by any party.

In sum, while timeliness can be waived,¹ jurisdiction cannot.

III. The Defendants' *Grable* Argument

The defendants' instant motion appears to be a roundabout way for them to once again make their *Grable*² argument that there is a federal question "embedded" in this case. Plaintiff will not go into that argument again as this Court is obviously quite familiar with the issue and the reason that *Grable* does not *even arguably* apply here, as

¹ See *Bank of America Nat. Ass'n v. Derisme*, 743 F.Supp.2d 93, 100 (D.Conn. 2010).

² *Grable & Sons Metal Products v. Darue Eng'g*, 545 U.S. 308, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005)

noted in *Gardiner v. St. Croix Dist. Governing Bd. of Directors*, 859 F.Supp.2d 728, 732-733 (D.V.I. 2012) (Lewis, J.):

However, “a case may [also] arise under federal law ‘where the vindication of a right under state law necessarily turn[s] on some construction of federal law.’ ” *Merrell Dow*, 478 U.S. at 808, 106 S.Ct. 3229 (quoting *Franchise Tax Board of State of Cal. v. Constr. Laborers*, 463 U.S. 1, 9, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983)). This is so as long as “the plaintiff’s right to relief necessarily **depends** on a substantial question of federal law.” *Franchise Tax Board*, 463 U.S. at 28, 103 S.Ct. 2841. In describing this basis for “arising under” federal jurisdiction, the Supreme Court in *Grable & Sons Metal Products v. Darue Eng’g*, 545 U.S. 308, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005), explained that federal courts may exercise jurisdiction over state-law claims with an embedded issue of federal law only when the state-law claim contains a federal issue that is “disputed” and “substantial,” and when the exercise of federal jurisdiction is “consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331.” *Id.* at 313–14, 125 S.Ct. 2363. Accordingly, the “appropriateness of a federal forum to hear an embedded issue could be evaluated only after considering the ‘welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judiciary.’ ” *Id.* at 314, 125 S.Ct. 2363 (quoting *Franchise Tax Board*, 463 U.S. at 8, 103 S.Ct. 2841). In *Grable*, the Supreme Court made clear that “the presence of a disputed federal issue and the ostensible importance of a federal forum are never necessarily dispositive; **there must always be an assessment of any disruptive portent in exercising federal jurisdiction.**” *Grable*, 545 U.S. at 314, 125 S.Ct. 2363. In sum, in stressing the “**slim category**” of cases where federal jurisdiction is properly exercised over a federal-law issue embedded within a state-law claim, the Supreme Court made clear that “**it takes more than a federal element ‘to open the ‘arising under’ door.’** ” *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 701, 126 S.Ct. 2121, 165 L.Ed.2d 131 (2006). (Emphasis added.)

Clearly that reasoning applies with equal force to the erroneous claims of federal jurisdiction in this case.

IV. No Waiver

One additional observation is in order -- even if this motion **did** actually allege a defect in removal **procedure**, this would not have been a situation where waiver would

have applied. Most importantly, the plaintiff submitted his motion for remand before any other motions. The holding in *Newport v. Dell Inc.*, 2008 WL 2705364, 4-5 (D.Ariz. 2008) responds to the case regarding waiver cited by defendants, *Koehnen v. Herald Fire Ins. Co.*, 89 F.3d 525, 528 (8th Cir.1996), where the court in *Newport* explained:

Dell Defendants argue that Plaintiff waived her argument for remand by amending her Complaint while the Motion for Remand was pending. The cases cited by Dell Defendants in support of this argument are not controlling, however, nor are they applicable to the facts of this case. In two of the cases cited by Dell Defendants- *Koehnen v. Herald Fire Ins. Co.*, 89 F.3d 525, 528 (8th Cir.1996) and *Riggs v. Plaid Pantries, Inc.*, 233 F.Supp.2d 1260, 1271 (D.Or.2001)-the plaintiffs affirmatively sought the jurisdiction of the federal court by filing motions for leave to amend, motions for order of default and/or motions for default judgment **prior to seeking remand**. The *Koehnen* court-on which the *Riggs* court relied-found that the plaintiff had engaged in "affirmative federal court conduct," **such that "remand in this matter would be offensive to fundamental principles of fairness."** 89 F.3d at 528. **That is not the case here. Plaintiff did not engage in any affirmative federal court conduct prior to filing her Motion for Remand.** Plaintiff's First Amended Complaint was an amendment as of right, filed in lieu of a response to Defendants' Motions to Dismiss. In the First Amended Complaint, Plaintiff specifically alleges that she is in the process of challenging the Court's jurisdiction via her Motion to Remand. (Doc. No. 33, ¶ 3.) Because Plaintiff's First Amended Complaint was filed after her Motion to Remand as a defensive maneuver responsive to the filing of Defendants' Motions to Dismiss, the Court sees no reason why it offends the fundamental principles of fairness to consider the Motion for Remand. Accordingly, the Court recommends that Dell Defendants' waiver argument be rejected. (Emphasis added.)

Second, there is no unjust outcome here – there is no prejudice to the defendants.

Third, there is no "gaming" of the system, as the plaintiff is simply moving the case forward while this Court addresses the (first filed) remand issue.

V. Conclusion

For the reasons set forth herein, the plaintiff respectfully requests that the motion to file a sur-reply be denied.

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Dated: November 15, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 2012, I filed the foregoing with the Clerk of the Court, and delivered by ECF to the following:

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