UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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DANIEL WILLIAMS, *et al.*,

Plaintiffs,

Case No.: 05-CV-836S(F)

v.

BEEMILLER, INC. d/b/a HI-POINT FIREARMS, *et al.*,

ORAL ARGUMENT REQUESTED

Defendants.

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REMOVING DEFENDANTS' REPLY IN SUPPORT OF RULE 72(B) OBJECTIONS TO MAGISTRATE JUDGE'S REMAND RECOMMENDATION

Pursuant to Fed.R.Civ.Proc. 72(b) and Rules 7.1(c) and 51.1(e) of the Western District Local Rules, Beemiller, Inc. d/b/a Hi-Point Firearms, MKS Supply, Inc., Charles Brown, and International Gun-A-Rama, Inc. ("Removing Defendants"), by and through counsel, respectfully submit the following reply in support of their objections to the Magistrate Judge's June 29, 2006 ruling regarding Plaintiffs' motion to remand:

ARGUMENT

In their objections to the Magistrate Judge's remand ruling, Removing Defendants set forth detailed analyses of: 1) the standard of review and dispositive nature of the Magistrate Judge's decision, 2) their compliance with the rule of unanimity, 3) their contention that Defendant Caldwell was fraudulently joined to defeat diversity, and 4) the Magistrate Judge's award of fees and costs under § 1477. Rather than undertaking a reasoned attempt to distinguish these arguments and the cases supporting them, however, Plaintiffs' response primarily consists of dismissive, self-serving statements that Removing Defendants' arguments are simply

"inapplicable." Such statements cannot carry the day, and Plaintiffs' motion to remand should accordingly be denied.

I. Plaintiffs' Argument That The Magistrate Judge's Ruling Is Non-Dispositive Fails To Account For Numerous Rulings To The Contrary.

In issuing his ruling, the Magistrate Judge acknowledged that circuit court authority such as In re U.S. Healthcare, 159 F.3d 142, 145-146 (3rd Cir. 1998), has held that remand rulings are dispositive, and thus, his ruling "...should be treated as a recommendation" should this Court rule likewise. *See,* Doc. No. 31, M.J. Foschio ruling, fn. 1. *See also,* Vogel v. U.S. Office Products Co., 258 F.2d 509, 517 (6th Cir. 2001); First Union Mort. Corp. v. Smith, 229 F.3d 992, 995 (10th Cir. 2000). Despite this implied invitation to this Court to address this issue, Plaintiffs suggest that by even raising it, Removing Defendants are attempting to "deprive Magistrate Judge Foschio's work from receiving the deference it deserves." Removing Defendants are, of course, doing no such thing, as the standard of review is a threshold issue whenever one court reviews a prior ruling.

Removing Defendants cited recent case law from every circuit court to have addressed the issue, as well as from district courts within six other circuits (including the Second Circuit), holding that remand orders are dispositive.[1] Plaintiffs, on the other hand, rely upon a litany of pre-In re U.S. Healthcare cases,[2] along with the Magistrate Judge's own decisions acknowledging the split in authority on the dispositive/non-dispositive issue. Moreover,

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[1] While Plaintiffs take the position that the Courts holding remand orders to be dispositive fail to apply "sound logic" and do not adhere to the "sensible view," the fact remains that: 1) courts within the Second Circuit and all over the nation agree with the Removing Defendants, and 2) every single circuit court to have considered the issue has concluded that remand orders are dispositive.

[2] Including Acme Elec. Corp. v. Sigma Instr., Inc., 121 F.R.D. 26 (W.D.N.Y. 1988), which involved the review of a magistrate judge's ruling on a motion for leave to amend that would have destroyed subject matter jurisdiction rather than a motion to remand.

Plaintiffs cite E.I. duPont de Nemours & Co. v. United Steel, Paper, & Forestry, Doc. No. 65, Case No. 05-CV-317S (W.D.N.Y. 2005), to suggest that this district has considered the weight of authority to the contrary but held fast to its non-dispositive position. Plaintiffs, however, fail to notify the Court that the objecting party in duPont never asked the Court to apply a *de novo* standard, and the Court never directly addressed the issue. *See,* Case No. 05-CV-317S, Doc. Nos. 32 and 39. Thus, it is undeniable that neither the Second Circuit nor this district has squarely addressed the dispositive nature of remand rulings in light of the growing body of applicable case law, and Removing Defendants request that this Court do so now.

II. Plaintiffs Misconstrued The Removing Defendants' Position Regarding Unanimity.

Rather than addressing Removing Defendants' actual argument--that they obtained the required unanimity--Plaintiffs create a straw man by arguing the existence of a rule of unanimity, which was never in dispute. A fair reading of Removing Defendants' objections demonstrates that they do not take issue with such a rule itself, but only with its application; *i.e.,* from whom is unanimous consent required? Here, Removing Defendants obtained the unanimous consent of all defendants actually or constructively known to them as having been served, and Plaintiffs should not be permitted to benefit from their own delay--accidental or intentional--in filing the required proofs of service.

Removing Defendants cited a surplus of authority to support their position that unanimity is required only from those defendants whom Removing Defendants "knew or should have known, in the exercise of reasonable diligence, had been served." *See,* Laurie v. Nat'l Rd. Pass. Corp., 2002 U.S.Dist.LEXIS 11838, *4 (E.D.Pa. 2002). *See also,* Doc. No. 34, Removing Defendants' objections, pgs. 6-9. Rather than making any effort to distinguish any of these cases, Plaintiffs instead make the outlandish assertion that Removing Defendants "ignore law

from the Second Circuit." The Second Circuit, however, has not ruled on this issue, and Plaintiffs' brief is noticeably devoid of citation to any such ruling. Removing Defendants, on the other hand, cited authority from within this district that directly supports the fact that unanimity is required only of those defendants reflected in the public record as having been served. *See, e.g.*, Barlett v. Hoseclaw, 1995 U.S.Dist.LEXIS 14729, *5-6 (W.D.N.Y. 1995).[3] As a result, Removing Defendants had unanimous consent from all defendants from whom such consent was required.

III. Plaintiffs' Claims Against Caldwell Are Time-Barred, And This Court Has Diversity Jurisdiction Over This Case.

The validity of Plaintiffs' claims against Caldwell is highly disputed, because one of the few things on which the parties agree is that this Court's subject matter jurisdiction hinges on Caldwell's status as a party. Plaintiffs attempt to bolster their side by setting up yet another straw man. Removing Defendants, however, do not take the preposterous position that Plaintiffs could never have sued the shooter/Caldwell over the shooting of Daniel Williams. Obviously, Plaintiffs could have sued Caldwell before the expiration of the statute of limitations, but they failed to do so. Thus, all Removing Defendants are arguing is that, because Plaintiffs did not timely sue Caldwell, his status should be disregarded for jurisdictional purposes.[4]

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[3] Regardless of the Court's ultimate decision on the issue, Removing Defendants' argument is based on an abundance of applicable case law and as such is a far cry from "spurious."

[4] Plaintiffs wholly fail to address the authority cited by Removing Defendants which prevents them from avoiding the one-year statute of limitations by re-packaging their claim from an intentional tort to something other than what it really is. *See*, Doc. No. 34, Removing Defendants' objections, pg. 12-14. Moreover, Plaintiffs ignore the holding in Boice v. Burnett, 425 A.D.2d 980, 981, 667 N.Y.S.2d 100, 100-101 (3rd Dept. 1997). *Id.* at pg. 16.

A. Plaintiffs cite no authority to permit the application of N.Y. C.P.L.R. § 213-b in the absence of a well-pled intentional tort claim.

Plaintiffs attempt to salvage their time-barred claims by relying on Cavanaugh v. Watanabe, 10 Misc.3d 1043, 1044-45, 806 N.Y.S.2d 848, 849 (N.Y.Sup.Ct. 2005) (action involving claims for intentional torts of battery and intentional infliction of emotional distress).[5] Cavanaugh, however, turned directly on the existence of the well-pled intentional tort claims, and there are no such claims alleged by Plaintiffs. Thus, Cavanaugh is inapplicable to the matter at hand.

B. Even if Plaintiffs had pled an intentional tort claim against Caldwell, such claim would still be time-barred.

Although Plaintiffs did not plead an intentional tort claim against Caldwell, they focus their response on the hypothetical issue of whether the requirements of N.Y. C.P.L.R. § 213-b would be satisfied if they had. Even if Plaintiffs alleged the missing claims, however, such requirements would still not be met, because Caldwell was convicted only of attempted assault

> Plaintiff cites no authority to support his contention that the decedent's conviction of attempted assault in the second degree can be considered as the 'subject crime' for purposes of N.Y. C.P.L.R. § 213-b and indeed none appears to exist.

Newell v. LaGattuta, 9 Misc.3d 1119A, 1119A, 808 N.Y.S.2d 919 (N.Y.Sup.Ct. 2005) (action involving claim for intentional tort of assault). *See also,* Doc. No. 25, Allan Affidavit, Ex. 6 (Caldwell convicted only of attempted assault).

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[5] While Cavanaugh is readily distinguishable from the matter at hand, it should also be noted that the case was not decided until after Removing Defendants removed this case from state court. Thus, the only authority at the time of removal on this specific issue was Newell, and Newell plainly states that Plaintiffs' claims against Caldwell cannot stand (and thus diversity jurisdiction exists).

IV. Plaintiffs Have Not Demonstrated That An Award Of Fees And Costs Is Appropriate.

In their objections, the Removing Defendants cited recently-issued case law from the United States Supreme Court adopting a standard of objective reasonableness for awarding costs and fees under § 1477(c). *See,* Martin v. Franklin Capital Corp., ___ U.S. ___, 126 S.Ct. 704, 711 (2005). The Removing Defendants also engaged in a thorough analysis of subsequent decisions applying this standard. The Plaintiffs, however, fail to even mention, let alone apply, this standard, choosing instead to rely on outdated, distinguishable case law and conclusory assertions regarding the alleged "spuriousness" of the Removing Defendants' arguments. Nevertheless, it is undeniable that:

1. Not a single argument set forth by the Removing Defendants is contrary to controlling case law within this circuit,

2. Every argument is in accordance with rulings from within this circuit and all over the country, and

3. The Removing Defendants had an "objectively reasonable" basis for removing this case, regardless of the ultimate success of such.

Therefore, Removing Defendants' good faith and objectively reasonable arguments necessarily preclude an award of fees and costs to Plaintiffs with respect to the removal.

CONCLUSION

Removing Defendants properly exercised their right to remove this action from state to federal court. They obtained the unanimous consent of all necessary parties and diversity jurisdiction exists. Plaintiffs have made no showing to the contrary, the Magistrate Judge's recommendations should be rejected, and Plaintiffs' motion to remand should be denied.

Dated: Dayton, Ohio
August 16, 2006

Respectfully submitted,

/s/ Scott L. Braum

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CERTIFICATE OF SERVICE

Scott L. Braum, an attorney, certifies that, on this 16th day of August 2006, he caused to be filed via the ECF system for the United States District Court for the Western District of New York the foregoing:

REMOVING DEFENDANTS' REPLY IN SUPPORT OF RULE 72(B) OBJECTIONS TO MAGISTRATE JUDGE'S REMAND RECOMMENDATION

He further certifies that a copy of said filing is also being served on all counsel of record via the Court's electronic notification system and via U.S. Mail, Postage Prepaid to:

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