UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS DIVISON

DARREN BAILEY, Plaintiff, Vs. GOVERNOR JAY ROBERT PRITZKER, in his own capacity, Defendant.	)	Case No. 3:20-cv-00474

MEMORANDUM IN SUPPORT OF EMERGENCY MOTION TO REMAND

DARREN BAILEY by and through his undersigned attorneys, states as follows:

INTRODUCTION

The Defendant's Notice of Removal is perhaps the most outrageous invocation of federal jurisdiction imaginable. Defendant has taken Plaintiff's Complaint, which raises nothing but questions concerning Defendant's authority under certain Illinois statutes, and contrived federal questions where none exist. Given the Defendant's prior actions in connection with the underlying state court case, including a request for supervisory review and a specious motion to transfer venue, it is clear he is intent on forum shopping and wants nothing more than to derail state court proceedings. This Court should not countenance such an egregious attempt to neuter a state court.

In short, the Notice of Removal is beyond frivolous and reeks of bad faith, and this Court should immediately remand this matter to the Circuit Court, Clay County, Illinois for disposition.

I. BACKGROUND

Plaintiff commenced his action in the Circuit Court, Clay County, Illinois on April 23, 2020, seeking relief from certain executive orders and declarations issued by the Defendant in connection with the COVID-19 pandemic. Specifically, in his initial complaint, Plaintiff sought multiple forms of relief: (1) a judgment declaring the scope of and limitations on the Defendant's authority under the Illinois Emergency Management Agency Act (the "IEMAA") and (2) an injunction excusing Plaintiff's compliance with certain so-called "stay at home" orders Defendant issued under the auspices of the IEMAA.

At the conclusion of a hearing in this case on April 27, 2020, the Court entered its temporary restraining order which found that Plaintiff was not subject to certain of the "stay at home" orders Defendant issued. In that respect, the Court concluded Defendant's authority to exercise emergency powers under the IEMAA terminated 30 days following Defendant's March 9, 2020 disaster declaration. The Defendant immediately sought appellate review and further asked for direct review by the Illinois Supreme Court. In tandem with his request for direct review by the Illinois Supreme Court, Defendant asked the Supreme Court to issue a supervisory order concerning the scope of Defendant's authority under the IEMAA.

Following Defendant's appeal, Plaintiff agreed to vacatur of the temporary restraining order, thus mooting Defendant's request for appellate review. However,

Defendant persisted in his motion for entry of a supervisory order, and the Illinois Supreme Court denied that motion on May 11, 2020.

Defendant filed a motion to transfer the case on May 13, 2020, on the basis of *forum non conveniens*. The Circuit Court denied the motion to transfer and all but officially recognized it as Defendant's attempt at forum shopping.

In the midst of Defendant's procedural machinations to strip the Clay County Circuit Court of jurisdiction, Plaintiff filed his first amended complaint. The relief Plaintiff seeks is precise and his requests go solely to construction of Illinois statutes:

I. A declaration that the Defendant's April 30, 2020 proclamation is void for failing to meet the definition of a disaster as defined in the Illinois Emergency Management Agency Act;

II. A declaration finding that Defendant had no authority under the Illinois Emergency Management Agency Act to utilize emergency powers after April 8, 2020;

III. A declaration that the Illinois Department of Public Health Act governs Defendant's actions; and

IV. Injunctive relief enjoining Defendant from enforcing the executive orders described in the first amended complaint on the basis of Defendant's lack of statutory authority.

The relief requested in the first amended complaint is not predicated, in any respect, on alleged violations of rights conferred under the United States Constitution or any federal statutes. Nor does the first amended complaint contain any suggestion by

Plaintiff that his federal civil rights have been violated by Defendant's proclamations and executive orders. Instead, Plaintiff states only that Defendant's proclamations and executive orders exceed authority conferred by the Illinois legislature.

On May 15, 2020, the Circuit Court in Clay County directed Plaintiff to file his motion for summary judgment on or before May 18, 2020, and instructed Defendant to file his response no later than noon on May 21, 2020. The Court further scheduled a hearing on the motion for summary judgment for May 22, 2020.

Defendant did not file a response to Plaintiff's motion for summary judgment, but, instead, removed the action to this Court.

II. ARGUMENT

A. This Court Lacks Subject Matter Jurisdiction.

This Court's jurisdiction over removed cases is limited to only those matters over which it would have original jurisdiction. 28 U.S.C. §1446(a). Because Plaintiffs' state-law claims do not "arise under" federal law, *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 807 (1986), there is no federal question jurisdiction, and this case should be immediately remanded. *See* 28 U.S.C. §1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). *See also Merrell Dow Pharm, Inc. v. Thompson,* 478 U.S. 804, 106 S. Ct. 3229 (1986) (finding removal improper because no federal cause of action appeared in the complaint).

This case turns exclusively on Illinois law – specifically Illinois statutes and the authority conferred on Defendant pursuant to those statutes. Nowhere does Defendant suggest, nor could he, that a court must refer to federal law in order to determine whether Defendant's actions exceeded the authority conferred upon him by the Illinois legislature. Instead, Defendant appears to claim that the effects of his actions impact Plaintiff's rights and interests under the United States Constitution and certain Acts of Congress. Thus, Defendant posits the action is properly removable. He is wrong.

Defendant cannot dispute that Plaintiff's causes of action do not arise under federal law, yet he advances the canard that Plaintiff's claims have some "embedded" federal law issues that justify removal. *See Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 312 (2005) (concerning treatment of state law claims containing "embedded" federal issues). Defendant does not grasp that only a "slim category" of cases qualify for federal jurisdiction under *Grable*, *see Gunn v. Minton*, 568 U.S. 251, 258 (2013), and the claims here clearly do not. Where federal law does not create the cause of action, "federal jurisdiction over a state law claim will [only] lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Id.* at 258.

First, no federal claim is "necessarily raised." That standard requires that the federal question be an "essential element" of the plaintiff's "*claim*." *Grable*, 545 U.S. at 315); *accord Manning v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 772 F.3d 158, 163, 165 (3d Cir. 2014), *aff'd*, 136 S. Ct. 1562 (2016). The *Grable* exception is for state causes of

action where the state rule of decision turns on federal law. Here, the matters Defendant raises as predicates for federal jurisdiction are irrelevant to Defendant's authority under applicable Illinois statutes and resolution of Plaintiff's causes of action.

Second, the issue is not "actually disputed" because Plaintiff has not asked the Circuit Court to make any determination whether Defendant's actions contravene Plaintiff's federal rights. Instead, he only asserts that Defendant's *ultra vires* state law based actions have the effect of restricting Plaintiff's activities. Once again, Plaintiff's complaint and first amended complaint do not so much as hint that he seeks a resolution on the basis of infringement of rights conferred under the United States Constitution.

Third, not only are the issues Defendant raises not "substantial" within the contemplation of *Grable,* they are non-existent in this context. Whether or not Defendant's actions infringe on rights existing under the United States Constitution is irrelevant to and mentioned nowhere in Plaintiff's complaint or first amended complaint. In other words, a decision concerning the impact of Defendant's actions on Plaintiff's rights under the United States Constitution are neither here nor there in this situation.

Fourth, any issue about the construction of the Illinois Emergency Management Agency Act and the Illinois Department of Public Health Act, i.e., the core of Plaintiff's causes of action, is not "capable of resolution in federal court without disrupting the federal-state balance." In that respect, Plaintiff's causes of action are grounded exclusively in and predicated on the construction of Illinois statutes. Did Defendant have the authority to take certain actions under Illinois statues? That question goes to the heart

of the interests of the State of Illinois and has no bearing on federal interest. In short, "the court must consider 'the degree to which federal law [is] in the forefront of the case and not collateral, peripheral or remote.'" *Krause v. Phila. Soul*, No. CIV.A. 09-1132, 2009 WL 1175625, at *2 (E.D. Pa. Apr. 30, 2009) (quoting *Merrell Dow*, 478 U.S. at 814 n.11). In this case, federal law is not simply collateral, peripheral, or remote: its appearance in this case is a pure contrivance.

Curiously, Defendant relies on *Compagnie Francaise de Navigation a Vapeur v. State Bd. Of Health,* 186 U.S. 380 (1902) for the proposition that "Federal courts have long exercised jurisdiction over alleged challenges to *ultra vires* state quarantine orders." *Notice of Removal* at 4, ¶7. The Defendant seems to suggest that the only matters at issue in the complaint were alleged *ultra vires* quarantine orders and that those orders alone. The most charitable way to describe Defendant's reliance on that case is that it is misleading. Defendant chose to conceal from this Court the actual averments at issue: "It was averred that the action of the board was not authorized by the state law, and if it was such law was void because repugnant to the provision of the Constitution of the United States conferring upon Congress power 'to regulate commerce with foreign nations . . ." *Id.* at 382-83. No such allegations appear in Plaintiff's complaint of first amended complaint. Therefore, *Compagnie Francaise de Navigation a Vapeur* is hardly dispositive here as Defendant suggests.

Defendant's reliance on the Court's jurisdiction under 28 U.S.C. §1343 is completely misplaced. The text of section 1343 demonstrates its inapplicability in the case at bar. Under section 1343, the district courts have original jurisdiction over a

specifically defined set of claims: (a) to recover damages related to section 1985 of title 42; (b) to redress deprivation of rights secured by the United States Constitution or an Action of Congress; and (c) to recover damages or secure equitable relief under federal civil rights legislation. *See* 28 U.S.C. §1343(a). Not one of those jurisdictional hooks exist in this case, and Defendant is relying on a complaint that does not exist in the record. Plaintiff has sought declaratory and injunctive relief based exclusively on limitations on Defendant's authority set forth in Illinois statutes. Neither the complaint nor the first amended complaint make any references to the United States Constitution or Acts of Congress. Defendant has done nothing more than create a roadmap for a hypothetical civil rights complaint.

B. Expedited Relief is Essential.

Under § 1447(c), the Court may remand the case "at any time" based on the lack of subject matter jurisdiction. When a district court discovers a jurisdictional defect in an improperly removed case, the court should remand the case immediately. *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 217 (3d Cir. 1999). Likewise, once a party raises by motion a failure in the predicates for removal, an immediate remand is appropriate.

Given this Court's lack of subject matter jurisdiction, as well as the expedited schedule for the state court proceeding as established by the Circuit Court, this Court should remand this matter *immediately*, without awaiting an opposition from Defendant. Nothing he would say could salvage this removal.

Any delay in resolving this motion would substantially prejudice Plaintiff. Indeed, Defendant's vexatious conduct has already resulted in delays and expenditure of time and resources responding to calls for intervention by the Illinois Supreme Court and specious motions to transfer venue. Beyond that, Defendant notified the state court of his removal just a day before the scheduled hearing on Plaintiff's motion for summary judgment and mere hours before his response to the motion was due. Defendant improperly used the notice of removal to dodge what he clearly anticipated would be an adverse decision in the Circuit Court, and this Court should reject his dilatory machinations.

C. Plaintiff is Entitled to Attorneys' Fees Under 28 U.S.C. § 1447(c)

Under 28 U.S.C. § 1447(c), "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." "Absent unusual circumstances, courts may award attorney's fees under §1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005). "Conversely, when an objectively reasonable basis exists, fees should be denied." *Id.* A party seeking fees need not establish that a notice of removal was frivolous. Rather, an award of attorney fees is entirely appropriate where "the assertion in the removal petition that the district court had jurisdiction was, if not frivolous, at best insubstantial." *Mints v. Educ. Testing Serv.*, 99 F.3d 1253, 1261 (3d Cir. 1996).

Here, Defendant's notice of removal is far worse than insubstantial—it is frivolous. His entire theory of jurisdiction rests on the utterly false assertions that Plaintiff is seeking vindication of violation of his federal rights. On that basis, this Court should assess Plaintiff's attorney fees against the Defendant.

III. CONCLUSION

For the foregoing reasons, this Court should (a) grant Plaintiff expedited relief, (b) remand this case immediately to the Circuit Court, Clay County, Illinois, and (c) award Plaintiff his attorney fees, costs and expenses associated with his response to the instant Notice of Removal.

Respectfully submitted,

SILVER LAKE GROUP, LTD.

/s/ Steven M. Wallace

By :_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies on the 21st day of May, 2020, that a true and correct copy of the above and foregoing pleading was served by electronic filing in the CM/ECF system of the United States District.

/s/Steven M. Wallace