

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

Joseph CASIAS, Plaintiff,

v.

WAL-MART STORES, INC., and Troy
ESTILL, Defendants.

No. 1:10-cv-781

Hon. Robert J. Jonker

PLAINTIFF'S MOTION FOR LEAVE TO FILE A REPLY BRIEF

Daniel W. Grow (P48628)
DANIEL W. GROW, PLLC
515 Ship St., Suite 208
St. Joseph, MI 49085
(296) 519-8222
(888) 977-6310 (fax)
dwg@danielwgrowpllc.com

Scott Michelman
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
1101 Pacific Avenue, Suite 333
Santa Cruz, CA 95060
(831) 471-9000
(831) 471-9676 (fax)
smichelman@aclu.org

Daniel S. Korobkin (P72842)
Michael J. Steinberg (P43085)
Kary L. Moss (P49759)
AMERICAN CIVIL LIBERTIES UNION FUND OF
MICHIGAN
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6800
(313) 578-6811 (fax)
dkorobkin@aclumich.org
msteinberg@aclumich.org

Attorneys for Plaintiff

Michael P. Palmer (P71753)
BARNES & THORNBURG LLP
600 1st Source Bank Center
100 North Michigan Street
South Bend, IN 46601-1632
(574) 233-1171
(574) 237-1125 (fax)
michael.palmer@btlaw.com

Kelly A. Powis (P71876)
BARNES & THORNBURG LLP
171 Monroe Avenue, N.W., Suite 1000
Grand Rapids, MI 49503-2694
(616) 742-3984
(616) 742-3999 (fax)
kelly.powis@btlaw.com

Attorneys for Defendants

Pursuant to Local Civil Rule 7.3(c), by this motion Plaintiff seeks leave to file a reply brief in support of his motion to remand.

In accordance with Local Civil Rule 7.1(d), Plaintiff's counsel contacted Defendants' counsel by telephone on September 15, 2010 to seek concurrence in this motion but was unable to ascertain whether this motion will be opposed.

As explained below, Plaintiff believes that his motion to remand is a dispositive motion and, as such, he may file the reply brief by right pursuant to Local Civil Rule 7.2(c). In an abundance of caution, however, he files this motion seeking leave of the Court to file the brief.

I. Plaintiff May File a Reply Brief by Right Under Local Civil Rule 7.2(c).

The local rules provide that a movant may file a reply brief in support of any dispositive motion, W.D. Mich. L. Civ. R. 7.2(c), but may not file a reply brief in support of a nondispositive motion without leave of the court, W.D. Mich. L. Civ. R. 7.3(c). "Dispositive motions are motions for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, to involuntarily dismiss an action, *and other dispositive motions as defined by law.*" W.D. Mich. L. Civ. R. 7.2(a) (emphasis added).

To determine whether a motion not specifically listed in Local Rule 7.2(a) is included within "other dispositive motions as defined by law," this Court has followed the Sixth Circuit's "functional equivalency test to see if a particular motion has the same practical effect as a recognized dispositive motion." *Costello v. Patterson Dental Supply, Inc.*, No. 5:06-CV-213, 2007 WL 4178942 at *3 (W.D. Mich. Nov. 20, 2007) (quoting *Vogel v. U.S. Office Prods. Co.*, 258 F.3d 509, 517 (6th Cir. 2001)). In *Vogel*, the Sixth Circuit held that a remand motion is

dispositive. *Vogel*, 258 F.3d at 517. "The practical effect of remand orders and orders to dismiss can be the same; in both, cases are permitted to proceed in state rather than federal court." *Id.*

In light of *Vogel*'s holding that a remand motion is dispositive, Plaintiff may file a reply brief by right pursuant to Local Civil Rule 7.2(c).

II. Alternatively, Plaintiff Seeks Leave to File a Reply Brief.

Should this Court be unpersuaded that a motion to remand is a "dispositive motion as defined by law" under Local Civil Rule 7.2(a), Plaintiff seeks leave to file a reply brief under Local Civil Rule 7.3(c).

There are two reasons why leave should be granted. First, in their response brief (dkt. # 15), Defendants rely heavily on an "exception" to the general rule that "employees who participate in tortious acts are subject to liability even if acting on behalf of their employer." Defs.' Br. in Opp. at 6-7. Defendants did not discuss or rely upon this exception in their notice of removal (dkt. # 1), and as a result Plaintiff did not have an opportunity to explain in his opening brief (dkt. # 10) why the exception does not apply to this case. It is now clear, however, that Defendants intend for federal subject-matter jurisdiction in this case to be based on this "exception" to the general rule. Plaintiff's reply brief explains why the exception applies only to claims of tortious interference with contractual relations, not claims of wrongful discharge – the tort at issue in this case.

Second, regardless of whether Plaintiff's motion to remand is "dispositive" within the meaning of the local rules, the motion is important because it challenges this Court's jurisdiction to hear the case. *See* Mot. to Remand (dkt. # 9) at 1 (moving for remand based on lack of subject-matter jurisdiction). "The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is

inflexible and without exception." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (brackets and quotation marks omitted). If this Court were to deny Plaintiff's remand motion in error, its subsequent adjudication of his claims on the merits would be *ultra vires*. *See id.* at 101. To avoid that possibility, Plaintiff asks that the Court give him a full and complete opportunity to explain why remand to state court is required. That explanation is set forth in Plaintiff's reply brief, which Plaintiff requests be accepted for filing.

Dated: September 16, 2010

Respectfully Submitted,

DANIEL W. GROW, PLLC
515 Ship Street, Suite 208; St. Joseph, MI 49085
(296) 519-8222

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
1101 Pacific Avenue, Suite 333; Santa Cruz, CA 95060
(831) 471-9000

AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
2966 Woodward Avenue; Detroit, MI 48201
(313) 578-6800

By: /s/ Scott Michelman