

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

BRAND ENGAGEMENT NETWORK, INC.,

Plaintiff,

V.

RALPH WRIGHT BREWER III, AFG COMPANIES, INC., AUTOMOTIVE FINANCIAL GROUP, INC., AFG TECHNOLOGIES, LLC A/K/A TRONIX, CAREGARD WARRANTY SERVICES, INC., SOUTHWEST COLONIAL REINSURANCE, LTD., DELAPORTE LEARNING INC., PRIME RESERVE PLUS, INC., DAIDAX, INC., (FKA PATHWAI, INC., AND BEN AUTOMOTIVE INC.),

Defendants.

CIVIL ACTION NO. 3:25-cv-114

JURY TRIAL DEMAND

**DEFENDANT AFG COMPANIES, INC.'S
MOTION TO REMAND AND BRIEF IN SUPPORT**

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Defendants AFG Companies, Inc. files this Motion to Remand and Brief in Support.

Defendant AFG Companies, Inc. respectfully shows the Court as follows:

INTRODUCTION

Maurice Fitzpatrick (“Fitzpatrick”), through a Motion to Intervene filed in this case and a Notice of Removal filed in *AFG Companies, Inc. v. Maurice Fitzpatrick*, Cause No. 24-11876-442, 442nd District Court, Denton County, Texas (the “Denton County Case”), has attempted to effectuate the consolidation of an unrelated state court matter into this action. Fitzpatrick’s attempt suffers from a number of procedural deficiencies requiring the Court’s untangling.¹ Out of an abundance of caution, Defendant AFG Companies, Inc. files this Motion to Remand so that its state court action against Fitzpatrick may proceed unimpeded. Defendant AFG Companies, Inc. asks the Court to issue an order remanding the Denton County Case because: (1) any attempt to remove the Denton County Case was untimely; (2) Defendant AFG Companies, Inc.’s Original Petition does not present a federal question subject to removal; and (3) Fitzpatrick has attempted to remove the Denton County Case to the incorrect district.

RELEVANT FACTS

1. Fitzpatrick is a former employee of Defendant AFG Companies, Inc. Fitzpatrick was previously employed by AFG for a little over six months from approximately March 2024 through October 2024.

2. On December 19, 2024, Defendant AFG Companies, Inc. filed the Denton County Case alleging that after his termination from AFG, Fitzpatrick was improperly interfering with its customer and vendor relationships, had retained AFG property in the form of a laptop computer,

¹ Fitzpatrick failed to file a separate federal action as required by 28 USC § 1446(a) and has also failed to comply with LR 81.1. As such, AFG files this Motion to Remand out of an abundance of caution and does not concede that removal was effectuated by Fitzpatrick.

and was misusing AFG's proprietary information. The Court subsequently issued a temporary restraining order enjoining Fitzpatrick from the conduct of which AFG Companies, Inc. complained.²

3. On December 27, 2024, counsel for AFG Companies, Inc., Leslie M. Sanderson, emailed the Original Petition and Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction along with the issued Temporary Restraining Order to Fitzpatrick using the same email address used by Fitzpatrick to contact AFG's customers and vendors.

4. On January 6, 2025, Fitzpatrick filed a Special Appearance in the Denton County Case. On January 8, 2025, Fitzpatrick filed his Answer to Original Petition (Subject to Special Appearance).

5. On January 8, 2025, Fitzpatrick was served with the Original Petition and Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction and the Temporary Restraining Order pursuant to the Denton Court's Order Granting Motion for Substitute Service.³

6. On January 16, 2025, the Denton Court issued a Temporary Injunction enjoining Fitzpatrick from engaging in the conduct of which AFG Companies, Inc. complained.

7. On February 11, 2025, Fitzpatrick filed a Notice of Removal purporting to have removed the Denton County Case to the Northern District of Texas, Dallas Division. Upon receiving the Notice of Removal, the Denton County Court administratively closed the Denton County Case. Fitzpatrick has not filed a separate federal action for the Denton County Case.

² Exhibit A, Plaintiff's Original Petition and Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction.

³ Exhibit B, Return of Service.

Instead, in conjunction with his Motion to Intervene filed in this case on February 12, 2025, he has attached the Notice of Removal of the Denton County Case and sought consolidation with this matter.

8. In doing so, Fitzpatrick has failed to properly remove the Denton County Case, created confusion that requires the Court's untangling, and caused the parties to incur unnecessary attorney's fees.

9. For the reasons set forth below, AFG Companies, Inc. asks the Court to issue an order remanding the Denton County Case.

ARGUMENT

10. The procedure for removal is set forth by 28 U.S.C. §1446." *Johnson v. Heublein, Inc.*, 227 F.3d 236, 240 (5th Cir.2000). 28 U.S.C. §1446(b) provides:

The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter. If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. §1446(b). When considering a motion to remand, "[t]he removing party bears the burden of showing that federal jurisdiction exists and that removal was proper." *See Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir.2002); *accord DaimlerChrysler*

Corp. v. Cuno, 547 U.S. 332, 342 n. 3, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006); *In re Hot-Hed Inc.*, 477 F.3d 320, 323 (5th Cir.2007); *Guillory v. PPG Indus., Inc.*, 434 F.3d 303, 308 (5th Cir.2005); *Boone v. Citigroup, Inc.*, 416 F.3d 382, 388 (5th Cir.2005); *Garcia v. Koch Oil Co. of Tex. Inc.*, 351 F.3d 636, 638 (5th Cir.2003); *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 919 (5th Cir.), *cert. denied*, 534 U.S. 993, 122 S.Ct. 459, 151 L.Ed.2d 377 (2001). “This extends not only to demonstrating a jurisdictional basis for removal, but also necessary compliance with the requirements of the removal statute.” *Albonetti v. GAF Corp. Chem. Group*, 520 F.Supp. 825, 827 (S.D.Tex.1981); *Smith v. Baker Hughes Int'l Branches, Inc.*, 131 F.Supp.2d 920, 921 (S.D.Tex.2001). Because removal raises significant federalism concerns, the removal statutes must be strictly and narrowly construed, with any doubt resolved against removal and in favor of remand. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09, 61 S.Ct. 868, 85 L.Ed. 1214 (1941); *Gasch v. Hartford Accident & Indem. Co.*, 491 F.3d 278, 281-82 (5th Cir.2007); *In re Hot-Hed Inc.*, 477 F.3d at 323; *Bosky v. Kroger Tex., LP*, 288 F.3d 208, 211 (5th Cir.2002); *Beiser v. Weyler*, 284 F.3d 665, 674 (5th Cir.2002); *Manguno*, 276 F.3d at 723.

A. Any Attempted Removal Was Untimely

11. The chronology of activity in the Denton County Case, included above, leaves no doubt that any removal attempted by Fitzpatrick through his Notice of Removal and Motion to Intervene was untimely.

12. Fitzpatrick was served with process in the Denton County Case on January 8, 2025.⁴ As a result, he was required to accomplish removal on or before February 7, 2025. Fitzpatrick filed his Notice of Removal in the Denton County Case on February 11, 2025 and his

⁴ Exhibit B.

Motion to Intervene in this case a day later on February 12, 2025.

13. As such, remand of the Denton County Case is required because any attempted removal of the Denton County Case was untimely.

B. The Denton County Case Does Not Present a Federal Question Subject to Removal

14. Remand is further required, because AFG Companies, Inc.'s Original Petition and Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction ("Original Petition") in the Denton County Case does not present a claim arising under federal law subject to removal.

15. Under 28 U.S.C. § 1441(a), any civil action over which a federal court would have original jurisdiction may be removed from state to federal court. *See Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 103 S.Ct. 2841, 2845, 77 L.Ed.2d 420 (1983). As noted above, the removing party bears the burden of showing that subject matter jurisdiction exists and that the removal procedure was properly followed. *Manguno v. Prudential Property and Casualty Insurance Co.*, 276 F.3d 720, 723 (5th Cir. 2002); *see also Coury v. Prot*, 85 F.3d 244, 248 (5th Cir. 1996) ("[T]here is a presumption against subject matter jurisdiction that must be rebutted by the party bringing an action to federal court."). Removal jurisdiction depends on the plaintiff's state court pleadings at the time of removal. *Beneficial National Bank v. Anderson*, 539 U.S. 1, 123 S.Ct. 2058, 2062, 156 L.Ed.2d 1 (2003).

16. AFG's Original Petition asserts three affirmative claims, (1) misappropriation of trade secrets under the Texas Uniform Trade Secrets Act; (2) breach of contract; and (3) tortious interference with existing contracts and/or prospective business relationships. None of AFG's

claims arise under federal law.⁵

17. Fitzpatrick's Notice of Removal is clear that the bases for removal are his alleged federal defenses to AFG's claims. However, case law is clear that defenses do not give rise to removal: Even an inevitable federal defense does not provide a basis for removal jurisdiction. *Bernhard v. Whitney National Bank*, 523 F.3d 546, 551 (5th Cir. 2008). Congress only provided for removal of a case from state to federal court when a plaintiff's complaint alleges a claim "arising under" federal law, within the meaning of § 1331. *See* 28 U.S.C. § 1441; *Beneficial National Bank*, 123 S.Ct. at 2062. A case "arises under" federal law if it appears from the face of a well-pleaded complaint that the cause of action is created by federal law. *Beneficial National Bank*, 123 S.Ct. at 2062.

18. That is clearly not the case here. Because AFG's claims do not arise under federal law, they are not subject to removal.

C. Denton County Case Removed to the Incorrect District Court

19. Section 1441(a) provides that the case may be removed "to the federal district court for the district and division embracing the place where such action is pending." "Section 1441(a) and not the ordinary federal venue statute, 28 U.S.C. § 1391, governs venue in removed cases." *Collin County v. Siemens Business Servs., Inc.*, 250 Fed. App'x 45, 51-52 (5th Cir. 2007); *see also Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 665-66 (1953) ("[E]ven on the question of venue, § 1391 has no application to this case because this is a removed action. The venue of removed actions is governed by 28 U.S.C. (Supp. V) § 1441(a).". This is the only venue provision applicable to removed claims, and claims may not be removed to any other federal district court.

⁵ Exhibit A.

20. Fitzpatrick has attempted to remove the Denton County Case to the Northern District of Texas, Dallas Division. However, the correct removal venue for a case pending in Denton County is the Eastern District of Texas, Sherman Division. 28 U.S.C.A. § 124 (c)(3).

21. As a result, the attempted removal is improper and, to the extent actually removed, should be subject to remand on this additional basis.

D. The Court Should Award AFG Companies, Inc.'s Attorneys' Fees and Expenses

22. Because Fitzpatrick has improperly removed, or attempted to remove, this action, the Court should award AFG its just costs and expenses, including its attorneys' fees, incurred as a result of the removal. 28 U.S.C. § 1447(c) ("An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal."); *see also Schulz v. Amalgamated Mgmt. Corp.*, No. 3:99CV 0433D, 1999 WL 242700, * 2 (N.D. Tex. April 19, 1999) ("Plaintiffs shall recover the 'fees and costs incurred in federal court that would not have been incurred had the case remained in state court.' ") (quoting *Avitts v. Amoco Prod. Co.*, 111 F.3d 30, 32 (5th Cir. 1997)). Because this removal or attempted removal is improper on numerous grounds, AFG requests that the Court allow it to file an application for attorneys' fees and costs. *See, e.g., Rivet v. Regions Bank of Louisiana, F.S.B.*, 200 F.3d 816, 1999 WL 1095660, at *7 (5th Cir. 1999) (finding no error in district court's retention of jurisdiction to determine amount of attorneys' fees after deciding remand).

PRAYER

Defendant AFG Companies, Inc. respectfully requests that this Court grant Defendant AFG Companies, Inc.'s Motion to Remand the Denton County Case, award the parties' attorney's fees as requested herein, and grant Defendant AFG Companies, Inc. any other relief to which it may be justly entitled.

Respectfully submitted,

SCHEEF & STONE, LLP

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CERTIFICATE OF CONFERENCE

This is to certify that a conference was attempted with counsel for Plaintiff Brand Engagement Network Inc.. At the time of the filing of this Motion, counsel for Plaintiff Brand Engagement Network Inc., had not yet responded.

This is to certify that a conference was held with Maurice Fitzpatrick. Mr. Fitzpatrick has advised that he is opposed to the relief sought in this Motion.

/s/ Leslie Sanderson

Leslie Sanderson

CERTIFICATE OF SERVICE

I certify a true and correct copy of this document was delivered pursuant to Federal Rules of Civil Procedure to all parties or counsel of record as indicated below, on March 13, 2025:

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