

2009 WL 2610459 (C.D.Cal.) (Trial Motion, Memorandum and Affidavit)  
United States District Court, C.D. California,  
Southern Division.

Arthur SMELT and Christopher Hammer, Plaintiffs,  
v.  
UNITED STATES OF AMERICA, State of California, and Does 1 through 1,000, Defendants.

No. SACV09-00286 DOC (MLGx).  
August 17, 2009.

**United States of America's Memorandum in Opposition to Plaintiffs' Motion to Deem the Complaint Filed *Nunc Pro Tunc* and the Fee Waiver Granted**

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The United States of America, by its undersigned counsel, responds as follows to "Plaintiffs' Motion to Deem the Complaint Filed *Nunc Pro Tunc* and the Fee Waiver Granted" (Doc. 41):

1. Plaintiffs' motion is based entirely on what the parties allegedly "understood" regarding the filing of this action and its removal to federal court. In truth, however, no such "understanding" ever existed. As explained in the accompanying declaration of counsel, the United States at no time agreed to the initial filing of this action in state court, and counsel for the parties did not communicate regarding its removal to federal court until after the United States had transmitted its Notice of Removal to this Court. (*See* Declaration of W. Scott Simpson ¶¶ 2-4 (Attachment 1 hereto).) Thus, there was no "understanding" between the parties regarding the filing of this action in State court or its removal to this Court.

2. In any event, any such understanding between counsel would have been entirely void and ineffective. As stated in the United States' motion to dismiss, a federal court, after removal of a case from state court, "has no more jurisdiction than the state court" did before removal. *See Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1431 (9th Cir. 1984). No agreement of counsel could provide otherwise, given that "officers of the United States possess no power through their actions to ... confer jurisdiction on a court in the absence of some express provision by Congress." *See United States v. New York Rayon Importing Co.*, 329 U.S. 654, 660, 67 S. Ct. 601, 91 L.Ed. 577 (1947); *see also United States v. Judge*, 944 F.2d 523, 525 (9th Cir. 1991) ("[I]t is well-established that litigants cannot confer [subject matter] jurisdiction by consent where none exists.").

3. Further, permitting the kind of "understanding" posited by the plaintiffs would be totally inappropriate, aside from the jurisdictional difficulty. Permitting the parties to a dispute to agree beforehand that plaintiff would file a lawsuit in state court and that defendant would thereafter remove to federal court would allow the plaintiff to sidestep all pre-filing requirements in federal court, including the payment of a federal filing fee. The plaintiffs should not be allowed to do so here.

4. Plaintiffs are also asking for relief that makes no sense procedurally. They ask this Court to *grant* a fee waiver request that was actually filed in a *different* case, and that a *different* judge of this Court has already *denied*. Indeed, they seek an order granting a fee waiver request when no such request is currently pending before the Court. Plaintiffs cite no authority or precedent for such novel action, and the United States is aware of none. Rather than seeking such extraordinary relief, plaintiffs could have appealed the denial of their fee waiver requests in Case No. SACV08-01244 UA. *See Andrews v. King*, 398 F.3d 1113, 1118 (9th Cir. 2005) ("The denial of a motion to proceed *IFP* is appealable as a final judgment under 28 U.S.C. § 1291.") (citing *Roberts v. United States Dist. Ct.*, 339 U.S. 844, 845, 70 S. Ct. 954, 94 L.Ed. 1326 (1950)). But they did not do so.

5. Lastly, plaintiffs' motion violates at least two important Local Rules of this Court. First, no conference of counsel has occurred regarding this motion pursuant to Local Rule 7-3. And second, plaintiffs' motion is not noticed for hearing as required by Local Rule 6-1.

Accordingly, "Plaintiffs' Motion to Deem the Complaint Filed *Nunc Pro Tunc* and the Fee Waiver Granted" should be denied.

Dated: August 17, 2009

Respectfully submitted,

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