

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<input checked="" type="checkbox"/> FILED	<input type="checkbox"/> LODGED
<input type="checkbox"/> RECEIVED	<input type="checkbox"/> COPY
SEP 27 2002	
CLERK U.S. DISTRICT COURT DISTRICT OF ARIZONA	
BY <u> </u>	DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Adam and Catherine Bertrand, a) married couple for themselves) and on behalf of their son, a) minor, Benjamin Cole Bertrand,)	No. CV-01-2431-PHX-PGR
Plaintiffs,)	ORDER
vs.)	
Aventis Pasteur Laboratories,) Inc. et al.,)	
Defendants.)	

Plaintiffs, Adam and Catherine Bertrand, filed this action on behalf of themselves and their son, Benjamin Bertrand (Ben), for neurological injuries allegedly resulting from vaccine injections. Pending before this Court are plaintiffs' Motion to Remand (**docs. 17 & 19**) and Motion for Costs (**doc. 17-2**).

BACKGROUND

Plaintiffs are the parents of Ben Bertrand, who is four years old. Ben was born healthy and developed normally for about fourteen months. Within a few weeks of his fourteen month "well baby" check up, Ben stopped talking, playing, and avoided eye

(75)

1 contact. By eighteen months his development had changed
2 dramatically for the worse.

3 Ultimately, toxic metal screening tests showed that Ben
4 suffered from mercury toxicity. Plaintiffs allege that he was
5 exposed to the mercury through the mercury-based preservative,
6 Thimerosal, which had been added to several of the sixteen
7 pediatric vaccine injections he received between birth and
8 fourteen months of age.

9 On November 13, 2001, plaintiffs filed a Complaint in
10 Maricopa County Superior Court. The Complaint alleges five
11 causes of action: (1) strict products liability; (2) breach of
12 warranty; (3) negligence; (4) consumer fraud; and (5) battery.
13 Plaintiffs named various vaccine manufacturers and Ben's
14 healthcare providers as defendants.

15 On December 13, 2001, defendant Aventis Pasteur ("Aventis")
16 removed the action on the basis of federal question and diversity
17 jurisdiction pursuant to 28 U.S.C. 1441(b) and (c).¹ Plaintiffs
18 filed this Motion to Remand on January 14, 2002. Defendants
19 argue that removal was appropriate because the National Childhood
20 Vaccine Injury Act of 1986 (the "Vaccine Act"), a federal
21 statute, presents a federal question. With respect to diversity,
22 defendants claim that Ben's healthcare providers are "sham
23 defendants" fraudulently named in an effort to break diversity.
24 Thus, if the "sham defendants" are dismissed then diversity
25 exists.

26

27

28 ¹ The Court notes that all defendants collectively responded to the Motion to Remand.

1 **DISCUSSION**

2 **A. The Vaccine Act**

3 The Vaccine Act sets forth a method for compensation for
4 vaccine-related injuries or death. 42 U.S.C. § 300aa-11.
5 Congress enacted the Vaccine Act to streamline the process of
6 seeking compensation for vaccine-related injuries and to avoid
7 the inconsistency, expense, and unpredictability of the tort
8 system. See *Shalala v. Whitecotton*, 514 U.S. 268, 270, 115 S.Ct.
9 1477, 1478 (1995) ("For injuries and death traceable to
10 vaccinations, the Act establishes a scheme of recovery designed
11 to work faster and with greater ease than the civil tort
12 system").

13 The Vaccine Act specifically prevents plaintiffs from
14 initiating lawsuits against vaccine administrators or
15 manufacturers in state or federal court for unspecified amounts
16 of damages unless they first file a timely petition in the Court
17 of Federal Claims. 42 U.S.C. § 300aa-11(a)(2)(A). Petitions
18 filed in the Court of Federal Claims are assigned to a special
19 master familiar with Vaccine Act litigation. 42 U.S.C. § 300aa-
20 11 & 300aa-12(d). The Vaccine Act specifically directs courts to
21 dismiss causes of action that were not first filed in the Court
22 of Federal Claims. 42 U.S.C. § 300aa-11(a)(2)(B). After
23 proceeding through the Court of Federal Claims, a claimant may
24 pursue a civil tort action in either state or federal court. 42
25 U.S.C. § 300aa-21(a).

26 **B. Removal**

27 Removal is a procedure created by federal statute that
28 permits defendants in state court lawsuits to remove the case to

1 federal court if the plaintiff's action could have been properly
2 filed in federal court. The statutes related to removal are to
3 be strictly construed. See *Salveson v. Western States Bankcard*
4 *Ass'n*, 731 F.2d 1423, 1426 (9th Cir. 1984). The defendant's
5 right to remove and the plaintiff's right to choose the forum are
6 not equal, and uncertainties are resolved in favor of remand.
7 See *Gaus v. Miles, Inc.* 980 F.2d 1043, 1045-46 (9th Cir.
8 1979) (holding federal question jurisdiction must be rejected when
9 any doubts exist as to initial removal rights).

10 Section 1441 presents four essential elements for
11 determining whether removal is proper: (1) only a civil action
12 brought in state court may be removed; (2) the civil action must
13 be one which the district courts of the United States have
14 original jurisdiction; (3) only the defendant, or defendants, may
15 remove; and (4) the action must be removed to the district court
16 for the district and division embracing the state court action.
17 28 U.S.C. § 1441. At issue in the pending case is the second
18 element - whether this Court has original jurisdiction.

19 As an initial matter, the Court notes that it is unable to
20 find any binding precedent dealing with the specific issue before
21 this Court. Moreover, while the parties have provided several
22 cases and secondary source material for the Court's review, none
23 of them address Ninth Circuit or Arizona law. This appears to be
24 a case of first impression for this jurisdiction.

25 **C. Federal Question Jurisdiction**

26 Defendants argue that federal question jurisdiction exists
27 because the Vaccine Act governs plaintiffs' Complaint. The
28 presence or absence of federal question jurisdiction is governed

1 by the "well-pleaded complaint rule," which provides that federal
2 question jurisdiction exists only if a federal question is
3 affirmatively and distinctly presented on the face of the
4 plaintiff's properly pled complaint. See *Rivet v. Regions bank*
5 of Louisiana, 522 U.S. 470, 475, 118 S.Ct. 921, 925 (1998); see
6 also *Caterpillar Inc., v. Williams*, 482 U.S. 386, 392, 107 S.Ct.
7 2425, 2429 (1987). This rule permits plaintiff to avoid federal
8 jurisdiction by forgoing a potential federal claim and relying
9 exclusively on state law, unless the state claims are completely
10 preempted. See *Rivet*, 522 U.S. at 475, 118 S.Ct. at 925; see
11 also *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804,
12 809 n. 6, 106 S.Ct. 3229, 3233, n. 6 (1986) ("Jurisdiction may not
13 be sustained on a theory that the plaintiff has not advanced").

14 A defense is not part of a plaintiff's properly pled
15 statement of his or her claim. See *Rivet*, 522 U.S. at 475, 118
16 S.Ct. at 925; see also *Metropolitan Life Ins. Co. v. Taylor*, 481
17 U.S. 58, 63, 107 S.Ct. 1542, 1546 (1987); *Gully v. First Nat.*
18 *Bank in Meridian*, 299 U.S. 109, 112 S.Ct. 96, 97 (1936).
19 Therefore, "a case may not be removed to federal court on the
20 basis of a federal defense, . . . even if the defense is
21 anticipated in the plaintiff's complaint, and even if both
22 parties admit that the defense is the only question truly at
23 issue in the case." *Rivet*, 522 U.S. at 475, 118 S.Ct. at 925,
24 (quoting, *Franchise Tax Bd. of Cal. v. Construction Laborers*
25 *Vacation Trust for Southern Cal.*, 463 U.S. at 14, 103 S.Ct. at
26 2848).

27 However, an "independent collorary" to the well-pled
28 complaint rule is that "a plaintiff may not defeat removal by

1 omitting to plead necessary federal questions." *Rivet*, 522 U.S.
2 at 475, 118 S.Ct. at 925. Should this Court determine that
3 plaintiff artfully pled claims in this way, it may uphold removal
4 even though no federal question appears on the face of the
5 complaint. See *id.*

6 Defendants contend that the Vaccine Act is a procedural bar
7 to plaintiffs' claims, not a defense. Plaintiffs disagree.
8 Under the facts presented, whether the Vaccine Act is a
9 procedural bar or defense is a distinction without a difference.
10 The artful pleading doctrine permits removal only where federal
11 law completely preempts a plaintiff's state law claim. See
12 *Rivet*, 522 U.S. at 475, 118 S.Ct. at 925. (Emphasis added); see
13 also *Metropolitan Life Ins. Co.*, 481 U.S. at 65-66, 107 S.Ct. at
14 1547-48. (upholding removal based on the preemptive effect of §
15 502(a)(1)(B) of the Employee Retirement Income Security Act of
16 1974); *Avco Corp v. Machinists*, 390 U.S. 557, 560, 88 S.Ct. 1235,
17 1237 (1968). Typically federal preemption is considered a
18 defense, but "[o]nce an area of state law has been completely
19 pre-empted, any claim purportedly based on that pre-empted state
20 law claim is considered, from its inception, a federal claim, and
21 therefore arises under federal law." *Caterpillar*, 482 U.S. at
22 393, 107 S.Ct. at 2430. Accordingly, to conclude a federal
23 question exists, this Court must first determine whether the
24 Vaccine Act completely preempts any state law claims. See *id.*

25 Congress could have created an exclusive federal remedy for
26 vaccine-related injuries or death when it enacted the Vaccine
27 Act. Instead, however, it supplemented state tort remedies with
28 the requirement that claims first be exhausted in the Court of

1 Federal Claims prior to pursuing litigation in state court. 42
2 U.S.C. § 300aa-11(a)(2)(A); 42 U.S.C. § 300aa-21(a). Thus,
3 Congress recognized that a state court would likely have to apply
4 federal law in considering whether a vaccine-related claim is
5 covered by the Vaccine Act. Accordingly, this Court cannot
6 conclude that the Vaccine Act *completely preempts* state law in
7 this area. See *Rivet*, 522 U.S. at 475, 118 S.Ct. at 925
8 (emphasis added); see also *Metropolitan Life Ins. Co.*, 481 U.S.
9 at 65-66, 107 S.Ct. at 1547-48.

10 That plaintiffs' state law claims implicate issues under the
11 Vaccine Act does not require the Court to find federal question
12 jurisdiction exists. This Court recognizes that plaintiffs'
13 failure to file a petition to exhaust at the Court of Federal
14 Claims may ultimately result in the dismissal of all or portions
15 of the Complaint. However, pending before this Court is a Motion
16 to Remand, not a Motion to Dismiss. Because there is not
17 complete preemption, the state court is the appropriate body to
18 address exhaustion and assess the merits of plaintiffs' case.

19 Defendants also contend that because plaintiffs' Complaint
20 states that the FDA approved warnings were inadequate, a federal
21 question necessarily exists. Essentially, defendants argue that
22 as a matter of law, FDA approved warnings are considered
23 adequate. Thus, in implicating the FDA approved warnings a
24 federal question is raised. This argument was raised for the
25 first time at oral argument. It was not raised in the Notice of
26 Removal or the opposition to the Motion to Remand. Because the
27 matter was not briefed by defendant, plaintiff did not have an
28

1 adequate opportunity to reply. Therefore, the Court will not
2 consider the issue in its analysis.

3 In addition, defendants argue that federal question
4 jurisdiction exists because the Complaint raises substantial
5 federal issues. While there are certainly federal issues to be
6 addressed, they are not of such a substantial nature as to
7 establish federal question jurisdiction. As noted above,
8 Congress clearly anticipated actions covered under the Vaccine
9 Act may be heard in state court, following exhaustion at the
10 Federal Court of Claims. The federal issues raised were
11 certainly not substantial enough for Congress to completely
12 preempt any state law.

13 **D. Diversity Jurisdiction**

14 For removal of an action from state court to be valid based
15 on diversity jurisdiction, the action must be between the
16 citizens of different states and the amount in controversy must
17 exceed \$75,000.00. 28 U.S.C. § 1332. Diversity jurisdiction
18 requires complete diversity; meaning, every plaintiff must be
19 diverse from every defendant. 28 U.S.C. § 1332.

20 Defendants argue that diversity exists because the doctor
21 defendants are "sham" defendants such that the Court should
22 consider them fraudulently joined. Fraudulent joinder occurs
23 when a nondiverse party is added solely to deprive the federal
24 courts of jurisdiction. See *Ritchey v. Upjohn Drug Co.*, 139 F.3d
25 1313, 1318 (9th Cir. 1998). A claim of fraudulent joinder must
26 be pled with particularity and supported by clear and convincing
27 evidence. See *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 550
28 (5th Cir. 1981). The party alleging fraudulent joinder bears the

1 burden of proving the alleged fraud. See *Pampillona v. RJR*
2 *Nabisco*, 138 F.3d 459, 461 (2nd Cir. 1998); see also *Jernigan v.*
3 *Ashland Oil Co.*, 989 F.2d 812, 815-16 (5th Cir. 1993); *Boyer v.*
4 *Snap-On Tools Corp.*, 913 F.2d 108, 111 (3rd Cir. 1990). In
5 ruling on removal based on fraudulent joinder, the district court
6 is obligated to evaluate all of the factual allegations in the
7 light most favorable to the plaintiff. See *id.* In addition, any
8 uncertainties as to the current state of controlling substantive
9 law must also be resolved in favor of plaintiff and against the
10 defendant. See *Dodson v. Spiliada Maritime Corp*, 951 F.2d 40,
11 42-43 (5th Cir. 1992).

12 To establish that an instate defendant has been fraudulently
13 joined, the removing party must show either that (1) there is no
14 possibility that the plaintiff would be able to establish a cause
15 of action against the instate defendant in state court, or (2)
16 there is an outright fraud contained in the plaintiff's pleading
17 of jurisdictional facts. See *Ritchey*, 139 F.3d at 1318. At
18 issue in this case is whether a cause of action can be asserted
19 against the doctor defendants.

20 The ultimate question is whether there is a reasonable basis
21 for predicting that state law might impose liability on the
22 doctor defendants. If that possibility exists, a good faith
23 assertion of this expectancy in state court is not a sham and is
24 not fraudulent in law or fact.

25 In this case, the doctor defendants are citizens of the
26 State of Arizona, and thus are not diverse from plaintiffs, who
27 are also citizens of Arizona. Without these doctor defendants,
28

1 complete diversity would exist between the parties to this
2 action, and this Court would have diversity jurisdiction.

3 Defendants assert two arguments to support their position
4 that the doctor defendants were fraudulently joined.² First,
5 they claim that "the doctor defendants are sham defendants
6 because the Vaccine Act requires dismissal for a civil action
7 when no petition has been filed in the Vaccine Court." Second,
8 defendants contend plaintiffs are unable to state a cause of
9 action against the doctor defendants under Arizona law.

10 *A. Applicability of the Vaccine Act*

11 Defendants maintain there is no possibility that plaintiffs
12 can state a claim against the doctor defendants because the
13 Vaccine Act requires them to first file claims for vaccine-
14 related injuries in the Court of Federal Claims. Plaintiffs
15 however, contend that the Vaccine Act does not apply in this case
16 for two reasons. First, they maintain that Thimerosal is an
17 "adulterant" or "contaminant" and thus, specifically exempt from
18 the Vaccine Act. 42 U.S.C. § 300aa-33(5). Second, they argue
19 that the Vaccine Act only applies to those directly injured as a
20 result of a vaccine, and not those filing suit in a
21 representative capacity. Thus, Ben's parents, suing on behalf of
22 themselves, are specifically prevented from seeking damages under
23 the Vaccine Act.

24 *a. Thimerosal as an Adulterant or Contaminant*

25 The term vaccine-related injury "does not include an
26 illness, injury, condition or death associated with an adulterant

27 ² The Court notes that defendants primarily rely on arguments more
28 suitable to a Motion to Dismiss rather than a Motion to Remand.

1 or contaminant intentionally added to a vaccine." 42 U.S.C. §
2 300aa-33(5). The terms "adulterant" or "contaminant" are not
3 specifically defined by the Vaccine Act. Plaintiffs rely on
4 medical dictionary definitions of adulterant to argue that
5 Thimerosal, when used as a component of a vaccine is an
6 "adulterant" or "contaminant." Defendants, on the other hand,
7 argue that Thimerosal is used as an FDA approved preservative in
8 vaccines, to prevent bacterial contaminants from weakening or
9 debasing vaccines, and is thus the opposite of an adulterant.

10 The weight of authority supports defendants' position. It
11 appears that every federal court to have ruled on the issue has
12 held that injuries resulting from Thimerosal contained in
13 vaccines are vaccine-related under the meaning of the Act. See
14 *Liu v. Aventis Pasteur*, No. A-02-CA-395-SS, 2002 WL 31007709
15 (W.D.Tex. August 23, 2002) (holding the injuries were vaccine
16 related in a motion to dismiss); *Owens v. Am. Home Prods. Corp.*
17 203 F. Supp.2d 748 (S.D.Tex. 2002); see also *McDonald v. Abbott*
18 *Labs*, 02-77 (S.D.Miss. Aug. 1, 2002); *Collins v. Am. Home Prods.*
19 *Corp*, 01-979 (S.D.Miss. Aug. 1, 2002); *Stewart v. Am. Home Prods.*
20 *Corp.*, 02-427 (S.D.Miss. Aug. 1 2002) (denying motion to remand
21 and granting motion to dismiss); *Strauss v. American Home Prod.*
22 *Corp*, Cause No. G-02-226 (S.D. Tex. June 11, 2002) (finding
23 injuries from Thimerosal are "vaccine-related" under the Vaccine
24 Act); *Blackmon v. American Home Prod. Corp.*, Cause No. G-02-179
25 (S.D.Tex. May 8, 2002) (same); *Owens v. American Home Prod.*
26 *Corp.*, 203 F.Supp.2d 748 (S.D.Tex. 2002) (same). Additionally,
27 the Department of Health and Human Services has taken the

28

1 position that Thimerosal is not an adulterant or contaminant of
2 vaccines.

3 This Court need not determine whether Thimerosal is an
4 adulterant or contaminant. Doing so would go beyond plaintiffs'
5 Complaint and assess potential defenses. See *King v. Aventis*
6 *Pasteur*, 210 F.Supp.2d 1201, 1210 (D.Ore. 2002). This Court is
7 obligated to evaluate remand based on the following standard:
8 When a removing defendant alleges the district court has
9 diversity jurisdiction on the basis of fraudulent joinder, "the
10 federal court first adopts a strict presumption against removal,
11 and then asks whether there is an 'any chance' that a state court
12 would find a viable cause of action." *Salveson*, 731 F.2d at
13 1426, quoted in, *King*, 210 F. Supp.2d. at 1210. In asserting
14 this argument, defendants essentially request this court ignore
15 this standard in favor of the standard used in a motion to
16 dismiss. See *King*, 210 F. Supp.2d at 1210. On this basis,
17 defendants have failed to establish diversity jurisdiction.

18 *b. The Vaccine Act's Applicability to Ben's Parents*

19 Assuming the Vaccine Act encompasses Thimerosal, the Act
20 only applies to persons who have sustained a vaccine-related
21 injury or death. 42 U.S.C. § 300aa-11(a)(9). In fact,
22 compensation for injuries to family members are specifically
23 exempt from the Act. "Compensation awarded . . . may not
24 include . . . compensation for other than the health, education,
25 or welfare of the person who suffered the vaccine related injury
26 with respect to which the compensation is paid." 42 U.S.C. §
27 300aa-15(d)(2). Accordingly, under the Vaccine Act, the parents
28 of an injured child are not permitted to file a petition except

1 in a representative capacity. 42 U.S.C. § 300aa-11(b)(1)(A); see
2 also *Schafer v. American Cyanamid*, 20 F.3d 1, 5, (1st Cir. 1994);
3 *Head v. Secretary of Health and Human Serv.*, 26 CF. Ct. 546 n. 1
4 (1992).

5 Here, the plaintiffs filed the Complaint for "themselves and
6 on behalf of" their son. The claims of Adam and Catherine
7 Bertrand for their own injuries, as parents of the injured child,
8 are not covered by the Vaccine Act. Therefore, Ben's parents
9 have no means of compensation for their own damages under the
10 Vaccine Act and must rely on state claims. Accordingly, state
11 causes of action may reasonably exist against the doctor
12 defendants.

13 2. *Failure to State a Claim under Arizona Law*

14 Additionally, defendants maintain there is no possibility
15 plaintiffs can state claims against the doctor defendants under
16 Arizona law. In support of this theory, defendants reason that
17 the Arizona Medical Malpractice Act (Malpractice Act) "bars"
18 plaintiffs from "pursuing claims against doctors for products
19 liability and breach of warranty."

20 The Malpractice Act simply requires that a claim which is
21 described by the Act's definition of "malpractice" falls under
22 the Malpractice Act and be governed by its provisions, regardless
23 of whether or not the plaintiff labeled the claim "malpractice."

24 Plaintiffs acknowledge that whether the doctor defendants'
25 failure to warn about the dangers of Thimerosal amount to a
26 "malpractice" claim are, in fact, arguable. However, plaintiffs
27 correctly point out that such allegations "[a]rguably do amount
28 to a 'malpractice' as that term is defined under the

1 [Malpractice] Act, and, as a result, such a claim arguably falls
2 under the [Malpractice] Act." That a claim may fall under the
3 Malpractice Act, however, does not necessarily mean that such a
4 claim is barred by it.

5 Second, plaintiffs recognize breach of warranty claim does
6 not fall under the Malpractice Act because it is not a
7 "malpractice claim" as defined by the statute.³ Defendants, on
8 the other hand, argue that because the breach of warranty claim
9 does not fall into the definition of malpractice no cause of
10 action exists.

11 In order to establish fraudulent joinder on this basis,
12 defendants must show that the cause of action is absent
13 "according to the settled rules of the state." See *Morris v.*
14 *Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001).
15 Defendants have failed to sustain their burden in this regard.
16 Defendants have not cited any Arizona authority holding that a
17 breach of warranty claim cannot be asserted against a doctor or
18 corporate healthcare provider. While it is likely that an
19 Arizona court may not permit a breach of warranty cause of action
20 under these circumstances, this Court is obligated to decide the
21 matter based upon well "settled rules of the state." See *id.*
22 Defendants have a rather high burden to overcome before this
23 Court can determine that fraudulent joinder renders the case
24 removable and defendants have not overcome this burden.

25

26 ³ [A]n action for injury or death against a licensed healthcare provider
27 based upon such provider's alleged negligence, misconduct, errors or omission,
28 or breach of contract in the rendering of health care, medical services, nursing
services or other health related services, without express or implied consent.
. . . Ariz. Rev. Stat. § 12-561(2).

1 **E. Attorneys' Fees**

2 Plaintiffs request this Court grant them attorneys' fees and
3 costs associated with their Motion to Remand. Under 28 U.S.C. §
4 1447(c), "[a]n order remanding the case may require payment of
5 just costs and any actual expenses, including attorneys' fees,
6 incurred as a result of the removal." The Court, however, may
7 refuse to award plaintiff fees and costs when the defendant had a
8 legitimate or colorable legal ground for removal or when remand
9 was based on procedural defects. See *Teitelbaum v. Soloski*, 843
10 F. Supp. 614, 616 (C.D. Cal. 1994).

11 Plaintiffs Motion merely requested fees and costs. It did
12 not provide any argument as to why fees and costs would be
13 appropriate under the circumstances presented. Accordingly,
14 plaintiffs' Motion for Fees and Costs is denied without
15 prejudice. Plaintiff may refile the Motion specifically
16 addressing the merits of the issue and provide the Court with a
17 Statement of Costs at that time.

18 **CONCLUSION**

19 In reviewing the relevant authority governing the Vaccine
20 Act as it relates to both federal question and diversity
21 jurisdiction, this Court concludes that remanding the matter to
22 state court is appropriate. There is no federal question
23 jurisdiction because the Vaccine Act does not completely preempt
24 state law. Moreover, the Court cannot conclude that the doctor
25 defendants were fraudulently named in an effort to break
26 diversity.

27 IT IS ORDERED that plaintiff's Motion to Remand (**docs. 17 &**
28 **19**) is GRANTED.

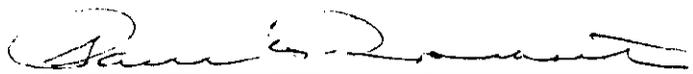
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS FURTHER ORDERED that plaintiff's Motion for Costs (doc. 17-2) is DENIED without prejudice.

IT IS FURTHER ORDERED that plaintiffs shall refile their Motion for Fees and Costs on or before **October 15, 2002**. Defendants may then file a response. No reply will be permitted.

IT IS FURTHER ORDERED that the Clerk of Court is to remand this matter to state court for further adjudication. This Court will retain jurisdiction as to the award of fees and costs.

DATED this 23rd day of September, 2002.


Paul G. Rosenblatt
United States District Judge

RICHARD H. WEARE
DISTRICT COURT EXECUTIVE / CLERK OF COURT
UNITED STATES COURTHOUSE
230 NORTH FIRST AVENUE, ROOM 1400
PHOENIX, ARIZONA 85025-0093

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
OFFICE OF THE CLERK

RONNIE HONEY
CHIEF DEPUTY CLERK
UNITED STATES COURTHOUSE
230 NORTH FIRST AVENUE, ROOM 1400
PHOENIX, ARIZONA 85025-0093

WILLIAM M. MCCOOL
CHIEF DEPUTY CLERK
JAMES A. WALSH COURTHOUSE
44 E. BROADWAY BOULEVARD, ROOM 202
TUCSON, ARIZONA 85701-1711

September 27, 2002

Michael Jeanes, Clerk
Maricopa County Superior Court
201 West Jefferson
Phoenix, Arizona 85003-2205

ATTN: Supervisor, Lower Level File Room

RE: REMAND TO MARICOPA COUNTY SUPERIOR COURT

District Court Case Number: CIV 01-2431 PHX PGR
Superior Court Case Number: CV 2001-19657

Dear Mr. Jeanes:

Enclosed is a certified copy of the Order entered in this Court on September 27, 2002 remanding the above case to Maricopa County Superior Court for the State of Arizona.

Sincerely,

RICHARD H. WEARE, DCE/CLERK OF COURT


Deputy Clerk

Enclosure

pc: All Counsel of Record
Judicial Administrator
Civil Court Administration
4th Floor, CCB
201 West Jefferson
Phoenix, AZ 85003-2205