

UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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STATE OF WISCONSIN,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Case No. 07-1999
	)	
DEY, INC.,	)	
	)	
Defendant-Appellant.	)	
	)	

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**PLAINTIFF-APPELLEE'S MOTION TO STRIKE  
SUBSTANTIVE JURISDICTION PORTIONS OF DEY'S BRIEF  
REGARDING WHICH THE DISTRICT COURT MADE NO RULING**

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Plaintiff-Appellee State of Wisconsin requests the Court strike those portions of Defendant-Appellant Dey's brief which relate to its substantive jurisdiction argument.

Dey improperly reargues its substantive jurisdiction position that Section 31 U.S.C. § 3732 of the False Claims Act creates original jurisdiction. (Dey Br. at 16-29) The District Court based its decision to award fees *solely* on the timeliness issue, not on the propriety of Dey's Section 3732 argument:

In this case, after two previous unsuccessful attempts to remove this case, defendant Dey sought to remove for a third time, relying on a theory of questionable merit, *knowing full well that under this court's interpretation of § 144[6](b), neither the qui tam complaint nor the order unsealing it could qualify as grounds for timely removal in this case.* Defendant Dey's argument *in defense of its timeliness* has been rejected by every court to consider it, including now this one. Consequently, I cannot help but conclude that defendant Dey removed the case without an objectively reasonable ground for doing so, for the purpose of prolonging litigation or increasing plaintiff's costs in prosecuting the case.

(BA019-20) (emphasis added) The award of fees was made *assuming* that jurisdiction would have existed absent timeliness concerns:

Even if the statute were to confer jurisdiction under these circumstances, defendant Dey's removal would fail because it is untimely under 28 U.S.C. § 1446(b).

(BA014) As Dey admits, the "District Court never reached a determination on Dey's jurisdictional basis for removal . . . ." (Dey Br. at 38)

Now the question is whether the filing of the federal qui tam action three years *after* Wisconsin initiated its purely state law-based suit is ground for removal under § 3732(b). I find it doubtful that § 3732(b) supports such a result, but *I need not make a definitive ruling on that question.*

(BA014) (emphasis added). Thus, Dey's inclusion of argument regarding substantive jurisdiction is improper for two reasons: because it is not germane to the issue under review—the award of fees; and because this Court has no final decision from the District Court regarding the jurisdictional argument to review. Thus, the portions of Dey's brief which relate to its substantive jurisdiction argument, including pages 17 through 29 of its brief should be stricken.

Dated this 17th day of September, 2007.

  
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