

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS**

KEELY ROBERTS, individually and as  
parent and next friend of C.R. and L.R., and  
JASON ROBERTS, individually and as  
parent and next friend of C.R. and L.R.,

*Plaintiffs,*

v.

SMITH & WESSON BRANDS, INC., *et al.*,

*Defendants.*

Lead Case No. 1:22-cv-06169

Related Cases: 1:22-cv-06171

1:22-cv-06178

1:22-cv-06181

1:22-cv-06183

1:22-cv-06185

1:22-cv-06186

1:22-cv-06190

1:22-cv-06191

1:22-cv-06193

1:22-cv-06359

1:22-cv-06361

Lead Case Removed from Case No. 22 LA  
00000487 in the Circuit Court of Lake  
County, Illinois

Hon. Steven C. Seeger

**PLAINTIFFS' MOTION FOR LEAVE TO FILE REPLY**

Plaintiffs in *Roberts v. Smith & Wesson, Inc.*, and in each case related to it, respectfully move this Court for leave to file a Reply Brief in Further Support of Plaintiffs' Motion for Attorneys' Fees and Costs Incurred as a Result of Removal, in the form attached as Exhibit 1. In support, Plaintiffs state as follows:

1. On April 8, 2024, the United States Court of Appeals for the Seventh Circuit affirmed the Court's remand decision and directed the Court to "consider whether [Defendants Smith & Wesson Brands, Inc., Smith & Wesson Sales Company, and Smith & Wesson, Inc. (collectively, "Smith & Wesson")] must reimburse the plaintiffs' costs and fees occasioned by the unjustified removal and appeal." (Dkt. 85 at 9.)

2. On April 30, 2024, the Court ordered Plaintiffs to file any motion for fees and costs by May 10, 2024, and Smith & Wesson to file any response to that motion by May 17, 2024. (Dkt. 87.) The Court did not set a date for a reply brief.

3. Smith & Wesson's Opposition to Plaintiffs' Motion for Fees and Costs makes a number of misrepresentations in an attempt to manufacture "an objectively reasonable basis to remove this action." (Dkt. 90 at 1.) The purpose of the attached five-page reply is to correct some of these misrepresentations.

4. WHEREFORE, Plaintiffs respectfully request leave of this Court to file a Reply Brief in Further Support of Plaintiffs' Motion for Attorneys' Fees and Costs Incurred as a Result of Removal, in the form attached as Exhibit 1.

Dated: May 28, 2024

Respectfully Submitted,

*/s/ Alla Lefkowitz*

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# **Exhibit 1**

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Hon. Steven C. Seeger

**REPLY BRIEF IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR  
ATTORNEYS' FEES AND COSTS INCURRED AS A RESULT OF REMOVAL**

Plaintiffs have spent thousands of hours—and hundreds of thousands of dollars—responding to Defendants Smith & Wesson Brands, Inc., Smith & Wesson Sales Company, and Smith & Wesson, Inc. (collectively, “Smith & Wesson”)’s attempt to twist facts and doctrine to generate more than a year of delay before this Court and the United States Court of Appeals for the Seventh Circuit. Now, in an attempt at revisionist history, Smith & Wesson has *again* sought to rely on misrepresentations and cherry-picked quotes to avoid being held accountable for its misuse of the federal officer removal statute and its blatant attempt to stall this litigation. A number of these misrepresentations require correction, to ensure that the record remains clear and accurate.

*First*, Smith & Wesson incorrectly claims that “[r]elevant authority readily confirms that [it] had an objectively reasonable basis to remove this action,” Opp. at 1, despite both this Court and the Seventh Circuit finding the opposite to be true. This Court is well aware of its own Remand Order, which soundly rejected Smith & Wesson’s arguments based on the significant weight of the case law, and the Seventh Circuit’s similar holdings, which were issued within *days* of the oral argument.

The transcript of the Seventh Circuit oral argument that Smith & Wesson provided as Exhibit A to the Opposition (Dkt. 91) makes clear that Smith & Wesson did not have an objectively reasonable basis to remove these actions. A minute or so into the argument, Judge Easterbrook stopped Smith & Wesson’s counsel to raise the fact that *no* relevant authority supported Smith & Wesson’s position, saying: “You come to us and say that Smith & Wesson acted under federal law, and I find it extremely hard to square with the Supreme Court’s holding in *Watson* against *Philip Morris*. So I hope you will address that issue, rather than talk about your defense on the merits.” Decl. of Kenneth Schmetterer, Exhibit A at 3:21-4:2. Judge Easterbrook continued to point out the relevant authority that cut against Smith & Wesson’s arguments, saying: “I don’t understand why monitored is different than *Watson* against *Philip Morris* or *Lu Junhong* against *Boeing* or *Martin* against *Petersen Health Operations*, just to go through the local cases.” *Id.* at 4:19-23. And like this Court, Judge Easterbrook was not persuaded by Smith & Wesson’s repeated emphasis on the “special relationship” that it claims to have with the ATF, saying: “That’s bureaucratese. It didn’t work in *Watson*, it didn’t work in *Lu Junhong*, where as you recall the FAA delegated to Boeing, certification of compliance. . . and we held that was not enough.” *Id.* at 5:11-18.

*Second*, Smith & Wesson focused its Opposition on case law that purportedly supports its *Grable* argument, which the Seventh Circuit did not even address in its decision. As made clear at argument, the panel recognized that Smith & Wesson had failed to meet even the threshold requirement to attempt a *Grable*-based removal. *See id.* at 15:23-16:3 (Judge Easterbrook confirming with Plaintiffs’ counsel that Plaintiffs were not giving up their argument that “all defendants failed to join the removal,” noting that it is “[h]ard to see how [the Seventh Circuit] reach[es] *Grable* without first resolving that”). And of course, as this Court recognized, there simply is no federal issue in these cases that is necessary to the resolution of any of the Plaintiffs’ claims. Mot. at 8–9 (citing Dkt. 66).

*Third*, Smith & Wesson claims that Plaintiffs’ Motion “does not even address Smith & Wesson’s argument that Plaintiffs’ action is ‘directed to’ the ATF.” Opp. at 3. But Smith & Wesson then cites the *very* page of the Motion where Plaintiffs addressed it: “Moreover, Smith & Wesson provided no legal support whatsoever, nor could it, for its argument on appeal that Plaintiffs’ claims were actually directed at the ATF. Indeed, Smith & Wesson did not cite a single case involving removal under the federal-officer removal statute that even remotely resembled its novel theory.” Mot. at 11-12.

*Finally*, Plaintiffs’ counsel never “admitted in open court that Plaintiffs are seeking to have a state court overturn longstanding federal policy.” *See* Opp. at 2. The transcript makes clear that Plaintiffs’ counsel began her argument by saying: “[T]o correct the record, the [P]laintiffs are not seeking to challenge any determination that the Smith & Wesson M&P rifle is not a machine gun under the National Firearms Act. There is no such determination that has been made by the [ATF]. There’s also no such thing as a global determination made by the [ATF] that all AR-15 rifles are not machine gun[s].” Exhibit A at 15:3-10. Ignoring this clear statement and Plaintiffs’ extensive

briefing on this issue, Smith & Wesson instead cherry-picked language from a short exchange between Plaintiffs' counsel and Judge Hamilton in an attempt to once again mislead this Court about Plaintiffs' position. *See Opp.* at 3, 9. The entire exchange with Judge Hamilton went as follows:

Q: Ms. Lefkowitz, you would agree that you are asking for a declaration, in one form or another, that the defendant's product is a machine gun under the National Firearms Act?

A: We actually—neither of the complaints actually, in the declaratory relief, specifically ask—

Q: You're alleging that's what they are and that's one of the reasons why the marketing campaign was deceptive, correct?

A: That's correct.

Q: I don't want to quibble about this.

A: That's correct.

Q: So first of all, I mean the theory is that millions of Americans then are committing a crime by possessing those products, correct?

A: Uh, I don't think the—I mean, that is certainly a defense.

Q: That is the logical consequence of the arguments you're making, correct?

A: Correct.

Q: Alright. May or may not be correct. We'll see. But we know that the federal government has not tried to enforce that provision against these sorts of assault rifles for decades.

Exhibit A at 20:5-21:5. When reviewed in context, it is clear that Plaintiffs' counsel attempted to provide a simple answer to Judge Hamilton without, using Judge Hamilton's own words, "quibbl[ing]" with the premise of his question. Plaintiffs' counsel's short response at argument does not substitute for Plaintiffs' full briefing before this Court and the Seventh Circuit, which



makes Plaintiffs’ position abundantly clear.<sup>1</sup> Indeed, the Motion to Remand filed by the *Turnipseed* Plaintiffs clearly explained that Smith & Wesson’s attempts to characterize these suits as “criminaliz[ing] the possession of AR-15 weapons” was incorrect and had already been rejected by a District of Nevada court in *Parsons v. Colt’s Manufacturing Co.*, No. 2:19-cv-01189-APG-EJY, 2020 WL 1821306, at \*6 (D. Nev. April 10, 2020). *See* Motion to Remand at 13 n.10, *Turnipseed v. Smith & Wesson*, No. 1:22-cv-6539 (N.D. Ill. Dec. 17, 2022) (Dkt. No. 26).

As in *Parsons*, the allegations and requests for relief—damages and an injunction against unfair and deceptive marketing—against Smith & Wesson here are far narrower than criminalizing the possession of AR-15 weapons. A state court determination in a private civil tort suit that Smith & Wesson’s M&P rifles constitute “machineguns” would not, as a matter of law, have any impact on how a *federal agency*—the ATF—categorizes such weapons, particularly when there is no such request for declaratory relief. And, in turn, such a state court ruling would obviously not bind the Federal Government to pursue criminal prosecutions of the possessors of such weapons.

\* \* \*

This Court and the Seventh Circuit have already correctly rejected Smith & Wesson’s efforts in its removal briefing to misrepresent the nature of Plaintiffs’ claims. Plaintiffs respectfully request that this Court yet again reject Smith & Wesson’s misrepresentations.

### CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs’ motion for attorneys’ fees and costs incurred as a result of Smith & Wesson’s “unjustified removal and appeal” (Dkt. 85 at 9).

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<sup>1</sup> This point in relation to criminalization was not material to—or even mentioned in—the Seventh Circuit’s decision.

Dated: May 28, 2024

Respectfully Submitted,

/s/ Alla Lefkowitz

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