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., SMITH & WESSON SALES COMPANY, SMITH & WESSON, INC., BUDSGUNSHOP.COM, LLC, RED DOT ARMS, INC., ROBERT CRIMO, JR., and ROBERT CRIMO, III, Defendants.	Lead Case No. 1:22-cv-06169 Related Case Nos. 1:22-cv-06178 1:22-cv-06181 1:22-cv-06183 1:22-cv-06171 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 00000497 in the Circuit Court of Lake County, Illinois Hon. Steven C. Seeger

DEFENDANTS SMITH & WESSON BRANDS, INC., SMITH & WESSON SALES COMPANY, AND SMITH & WESSON, INC.'s MOTION FOR LEAVE TO FILE SURREPLY IN OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS

Defendants Smith & Wesson Brands, Inc., Smith & Wesson Sales Company, and Smith & Wesson, Inc. (together, "Smith & Wesson") respectfully move to file a brief surreply in further opposition to Plaintiffs' Motion for Attorneys' Fees and Costs, a copy of which is attached as Exhibit A. As explained in more detail in the proposed surreply, Plaintiffs raised a new argument in their reply and misstate some of Smith & Wesson's arguments (accusing Smith & Wesson of misleading the Court), yet still do not dispute the standard required to obtain fees following remand and still fail to meet that standard.

Wherefore, Smith & Wesson respectfully requests that it be granted leave to file the attached surreply.

Dated: May 31, 2024

Respectfully submitted,

Smith & Wesson Brands, Inc., Smith & Wesson Sales Company, and Smith & Wesson, Inc.

By: /s/ *Kenneth L. Schmetterer*

James Vogts
Andrew Lothson
Brett Henne
Swanson, Martin & Bell, LLP
330 North Wabash, Suite 3300
Chicago, IL 60611
T (312) 222-8517
T (312) 923-8274
T (847) 949-0057
E jvogts@smbtrials.com
E alothson@smbtrials.com
E bhenne@smbtrials.com

Edward S. Scheideman (pro hac vice)
DLA Piper LLP (US)
500 Eighth Street, NW
Washington, DC 20004
T 202.799.4534
E edward.scheideman@us.dlapiper.com

Kenneth Schmetterer
DLA Piper LLP (US)
444 West Lake Street, Suite 900
Chicago, IL 60606
T 312.368.2176
E kenneth.schmetterer@us.dlapiper.com

EXHIBIT A

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

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DEFENDANTS SMITH & WESSON BRANDS, INC., SMITH & WESSON SALES COMPANY, AND SMITH & WESSON, INC.'S SURREPLY IN OPPOSITION TO PLAINTIFFS' MOTION FOR FEES AND COSTS

Plaintiffs, in their Reply Brief, do not dispute the high and exacting standard that must be met to award fees following remand, namely that "if clearly established law ***did not foreclose*** a defendant's basis for removal, then a district court should ***not*** award attorneys' fees." *Lott v. Pfizer, Inc.*, 492 F.3d 789, 793 (7th Cir. 2007) (emphasis added). Plaintiffs raise four points that fall short of the requisite standard.

First, Plaintiffs claim that Smith & Wesson did not have an objectively reasonable basis to remove this action because Judge Easterbrook discussed "relevant authority that ***cut against*** Smith & Wesson's arguments." (ECF 93-1 at 2 (emphasis added).) A case that "cuts against" one of the two grounds asserted for federal officer removal jurisdiction is not one that clearly forecloses federal jurisdiction. Moreover, Judge Easterbrook cited authority that rejected "acting under" federal officer jurisdiction where pure state law claims were supported by alleged failures to comply with federal regulations. But Plaintiffs do not allege here that that Smith & Wesson failed to comply with some ATF regulation in deciding whether its semiautomatic rifle is an NFA machinegun. Rather, Plaintiffs allege that the NFA should be interpreted to include far more weapons than the ATF has ever included. Neither Plaintiffs nor the Seventh Circuit cited a case clearly foreclosing "acting under" federal officer jurisdiction for such a claim. Nor do the cited cases address Smith & Wesson's "directed to" prong of federal removal jurisdiction. Therefore, Plaintiffs cite no caselaw addressing Smith & Wesson's actual theories of removal, let alone show that it is clearly "foreclosed by clearly established law."

Second, Plaintiffs claim for the first time that the lack of consent from all other defendants to Smith & Wesson's removal is evidence that Smith & Wesson "failed to meet even the threshold requirement to attempt a *Grable*-based removal." (ECF 93-1 at 3.) But Plaintiffs neither address Smith & Wesson's arguments asserted in this Court and in the Seventh Circuit as to why the

threshold procedural requirements *were* satisfied, nor cite a single case awarding fees following remand in the event arguments on this point are ultimately rejected. Moreover, the Seventh Circuit did not reject Smith & Wesson's *Grable* argument for failure to obtain the consent of all defendants. (*See* ECF 85 at 9 (rejecting *Grable* argument because "the state suits do not present multiple claims")). And, finally, Plaintiffs' admission before the Seventh Circuit that they seek to have a state court overturn longstanding federal policy underscores the importance of decisions from other district courts—particularly in the absence of any on-point cases in *this* Circuit—denying motions to remand in lawsuits asserting similar purported state law claims involving the manufacture or sale of firearms. *See New York v. Arm or Ally, LLC*, 644 F. Supp. 3d 70, 78–80 (S.D.N.Y. 2022) (finding federal *Grable* jurisdiction because the resolution of state claims requires the State to "demonstrate that the products at issue . . . were 'firearms' or 'component parts' thereof within the meaning of federal law"); *Minnesota v. Fleet Farm, LLC*, 2023 WL 4203088, at *7 (D. Minn. June 27, 2023) (finding *Grable* jurisdiction because "Congress recognized the importance of a consistent, nationwide approach to regulating firearm sales" and "resolution of this case is likely to have a substantial impact on . . . future firearm retailers.").

Third, Plaintiffs reference Smith & Wesson's argument that Plaintiffs' action is 'directed to' the ATF (by interfering with federal agency policy) but still failed to cite to a single case that even addressed (much less clearly foreclosed) this prong of federal officer jurisdiction—and failed to distinguish the legal support for Smith & Wesson's "directed to" prong of federal officer removal; namely, the plain language of the statute (28 U.S.C. § 1442(a)(1)) and case authority recognizing federal officer jurisdiction for state-law claims that collaterally attack federal policy. *Nationwide Investors v. Miller*, 793 F.2d 1044, 1045-48 (9th Cir. 1986); *Wisconsin v. Schaffer*, 565 F.2d 961, 964 (7th Cir. 1977); *Miami Herald Media Co. v. Fla. Dep't of Trans.*, 345 F. Supp.

3d 1349 (N.D. Fla. 2018). By ignoring that authority—much less failing to cite caselaw clearly foreclosing "directed to" federal officer jurisdiction under the claims at issue here—Plaintiffs fail to satisfy their significant burden required to support an award of fees.

Finally, Plaintiffs claim that Smith & Wesson "cherry-picked language . . . in an attempt to once again mislead this Court about Plaintiffs' position." (ECF 93-1 at 4.) Smith & Wesson, far from cherry-picking anything, submitted the entire transcript of the oral argument as an exhibit and referenced the exchange between Plaintiffs' counsel and Judge Hamilton. Plaintiffs admitted that "the logical consequence of [their] arguments" is that "millions of Americans" would "then [be] committing a crime by possessing [Smith & Wesson's] products." (*See* Tr. at 20:5-21:1.) This supports, at the very least, a reasonable basis for Smith & Wesson to call out the federal issue in Plaintiffs' complaints throughout the removal process.

Plaintiffs seek an "injunction issued against Smith & Wesson requiring it to cease its illegal, deceptive and/or negligent marketing campaign." (Compl. ¶ 224.) The deceptive concealment allegedly includes the "failure to identify their M&P rifles as NFA weapons." (Compl. ¶¶ 168, 189-90.) By seeking to enjoin the alleged failure to identify the rifles as NFA weapons, Plaintiffs thereby seek an order *requiring* Smith & Wesson to identify its M&P rifles as NFA weapons (effectively banning their sale). To issue the requested injunction, a court necessarily must decide whether the M&P rifle, in fact, is an NFA weapon. That is why Plaintiffs' quickly acknowledged Judge Hamilton's premise of the federal impact of Plaintiffs' Complaint.

Smith & Wesson in no way misrepresented Plaintiffs' admission. Plaintiffs' attempt to walk away from it does not support an award of fees here.

CONCLUSION

For the foregoing reasons, together with the reasons set forth in Smith & Wesson's opening brief, Plaintiffs' motion for an award of fees should be denied.

Dated: May 31, 2024

Respectfully submitted,

Smith & Wesson Brands, Inc., Smith & Wesson Sales Company, and Smith & Wesson, Inc.

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James Vogts
Andrew Lothson
Brett Henne
Swanson, Martin & Bell, LLP
330 North Wabash, Suite 3300
Chicago, IL 60611
T (312) 222-8517
T (312) 923-8274
T (847) 949-0057
E jvogts@smbtrials.com
E alothson@smbtrials.com
E bhenne@smbtrials.com

Edward S. Scheideman (pro hac vice)
DLA Piper LLP (US)
500 Eighth Street, NW
Washington, DC 20004
T 202.799.4534
E edward.scheideman@us.dlapiper.com

Kenneth Schmetterer
DLA Piper LLP (US)
444 West Lake Street, Suite 900
Chicago, IL 60606
T 312.368.2176
E kenneth.schmetterer@us.dlapiper.com

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2024, I electronically filed **Smith & Wesson's Motion for Leave to File Surreply in Opposition to Plaintiffs' Motion for Attorneys' Fees and Costs** using the court's electronic filing system, which will automatically send notice of filing to all counsel of record.

/s/ *Kenneth L. Schmetterer*