
IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

DIVISION OF SECURITIES,
UTAH DEPARTMENT OF COMMERCE,

Plaintiff,

vs.

LIFE PARTNERS, INC., a Texas
corporation, LIFE PARTNERS HOLDINGS,
INC., a Texas corporation, and MARK
BRUCE SUTHERLAND, a Nevada resident,

Defendants.

ORDER REMANDING CASE

Case No. 2:06cv00968

This case came before the court pursuant to a removal by the defendants, Life Partners, Inc., Life Partners Holdings, Inc., and Mark Bruce Sutherland (collectively, "Life Partners") from a proceeding before the Utah Division of Securities. Although the Tenth Circuit has not spoken to the issue of removability of state agency proceedings, this court finds arguments against allowing such removal to be most persuasive. The court, therefore, remands the case to the Utah Division of Securities.

The underlying controversy began when the Division issued an Order to Show Cause to Life Partners, alleging it sold unregistered securities in violation of the Utah Securities Act. Life Partners, claiming that this court had diversity jurisdiction, filed a notice of removal. Perhaps

knowing the court would question the validity of removal from a state agency proceeding, Life Partners requested to brief the issue of removability from a state agency action. The court granted this motion. Life Partners then filed an amended notice of removal, arguing removal was proper based on federal question jurisdiction and that federal law preempted all of the Division's claims. Shortly thereafter, Life Partners filed a motion to dismiss. Rather than respond to Life Partners' motion to dismiss, the Division filed a motion to remand the case.

The Division's motion to remand is well-founded. Removal in a case such as this does not fall within the purview of 28 U.S.C. § 1441(a). On that point, the court finds the rationale of the Ninth Circuit in *Oregon Bureau of Labor and Industries v. U.S. West Communications, Inc.*,¹ to be persuasive. In short, in *Oregon Bureau*, the court pointed out that the plain language of § 1441(a) limits removal to cases before "state court[s]," not other tribunals, such as agencies.² The "functional test" for agency removability adopted by some courts alters both the reach and meaning of § 1441(a) — something the Ninth Circuit was unwilling to do.³ For the reasons stated by the Ninth Circuit in *Oregon Bureau*, this court finds the removal of this case to be improper, and remands the case.

Finally, the Division requests attorneys' fees and costs for improper removal, pursuant to 28 U.S.C. § 1447(c). Even ignoring that the Division failed to submit its request in accordance

¹ 288 F.3d 414 (9th Cir. 2002).

² *Id.* at 417–18.

³ *Id.* at 418–19.

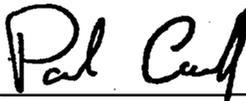
with local rules,⁴ the court denies the Division's request for attorneys' fees on the merits. Although the court ultimately determined Life Partners' removal to be invalid, the court is not convinced Life Partners acted improperly or with bad faith by attempting to remove this case. For one thing, as both parties point out, a circuit split exists with regard to the removability of state agency actions. The removal, therefore, was not entirely without legal basis. Life Partners made colorable, if unsuccessful, arguments at every step. In sum, the court finds attorneys' fees to be unwarranted in this case.

CONCLUSION

The court GRANTS the Division's Motion to Remand [#20], but denies its request for attorney fees and costs. As a result, Life Partners' Motion to Dismiss [#7] is MOOT, and the Clerk's Office is directed to close this case.

DATED this 17th day of January, 2007.

BY THE COURT:



Paul G. Cassell
United States District Judge

⁴ See D.U. Civ. R. 54-2(f).