

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

VILLAGE OF SHILOH,

Plaintiff,

v.

NETFLIX, INC., *et al.*,

Defendants.

Case No. 3:21-cv-00807-MAB

DISH DEFENDANTS' AMENDED MOTION TO RECONSIDER REMAND ORDER

Pursuant to Fed. R. Civ. P. 59(e), Defendants DISH Network Corp. and DISH Network L.L.C. (together, "DISH") respectfully request that this Court reconsider its remand order of March 24, 2022 ("Order"). Dkt. 68. In the Order, the Court noted the absence of a "motion or formal request asking this Court to consolidate, stay, or dismiss this case." *Id.* at 13. Under Seventh Circuit precedent, however, the words the Defendants used amount to an effective alternative request for consolidation. As the Defendants put it: "[t]his Court has several case management options that it may exercise in its discretion, including [] consolidating this action, in full or in part, with the *East St. Louis Case . . .*" Dkt. 58 at 2 n.1. The absence of a formal request should not stand in the way of the Court's considering the substantial efficiencies of consolidation and, conversely, the inefficiencies of two separate proceedings on exactly the same subject. As explained below, there is good reason to consolidate this case with the first-filed *East St. Louis* case because the factors favoring consolidation outweigh the comity abstention factors addressed in the Court's Order. Accordingly, DISH respectfully requests that the Court recall its mandate to the state court and grant leave to file a formal motion to consolidate.

I. Background

This Court is already familiar with the relevant facts and procedural posture. This case is identical to an earlier filed case styled *City of East St. Louis v. Netflix, Inc., et al.*, No. 3:21-cv-561 (“*East St. Louis Action*”), which is pending before this Court. This case is duplicative litigation; it asserts the same claims under the same statute on behalf of the same putative class seeking the same relief against five of the same defendants named in the *East St. Louis Action* (*i.e.*, Netflix, Hulu, Disney, DISH, and DIRECTV).

Plaintiff has not disputed that this Court has diversity jurisdiction over this case pursuant to the Class Action Fairness Act (“CAFA”). However, Plaintiff contends that remand is proper under the discretionary doctrine of comity abstention.

In the Order, the Court “acknowledge[d] that remand will result in a situation where duplicative lawsuits are proceeding in state and federal court” and that the *East St. Louis Action* “will remain in this District.” Order at 14. But the Court did not view the situation as something to be resolved *sua sponte* without a formal consolidation request and formal briefing. *Id.* at 15. Consolidation is appropriate, and the arguments made by Defendants amount to an effective request for consolidation. DISH stands ready to make a formal request if the Court will permit one.

II. Argument

A. This Court has jurisdiction to reconsider its remand order.

The threshold inquiry is whether this Court still has jurisdiction to reconsider its remand Order. It does. The Seventh Circuit permits district courts to reconsider their remand orders if those orders are appealable. *See J.O. v. Alton Cmty. Unit Sch. Dist. 11*, 909 F.2d 267, 273–274 (7th Cir. 1990). As the Seventh Circuit explained, “[w]hen we would have jurisdiction to review a remand order, it would be efficient to allow the district court also to retain jurisdiction to

reconsider its order....” *Id.* at 273. Accordingly, “where an exception to the general bar against the nonreviewability of remand orders applies, the district court has the power to reconsider its order during the time for filing a notice of appeal.” *Id.* at 273-74; *see also Hudson United Bank v. LiTenda Mortg. Corp.*, 142 F.3d 151, 158 (3d Cir. 1998) (“[I]f § 1447(d) does not deny an appellate court jurisdiction to review a remand order, it cannot deny the district court jurisdiction to entertain a motion for reconsideration before the notice of appeal is filed.”).

This holding applies equally here. The Order was based on a comity abstention doctrine, and is a reviewable remand order that can be appealed. *See City of Fishers v. Netflix, Inc.*, 5 F.4th 750 (7th Cir. 2021) (finding jurisdiction over appeal of comity-based remand order). Additionally, this motion is brought within the time for reconsideration under Fed R. Civ. P. 59 and the time for an appeal under Fed R. App. P. 4. Thus, this Court has the power to reconsider its Order.

It does not matter that the Court has already issued its letter returning the case to the state court. Dkt. 69. Although the Seventh Circuit did not address this scenario directly, its holding contemplated that reconsideration could occur even if state court proceedings had resumed. *See J.O.*, 909 F.2d at 274 (observing that “both reconsideration and an appeal present the danger that the remand order will be rescinded thereby disrupting state proceedings that may have restarted after the remand”). Other courts have considered the issue and held that transmitting the remand order to the state court does not deprive the federal court of jurisdiction to entertain a motion for reconsideration of a reviewable remand order. *See Academy of Country Music v. Continental Casualty Company*, 991 F.3d 1059, 1064-65 (9th Cir. 2021) (construing precedent and concluding that “the transmittal of a remand order to the state court does not deprive a court of jurisdiction to review that order if review is not barred by § 1447(d)”); *Hudson United Bank*, 142 F.3d at 158 (concluding “that the mailing of a remand order does not divest a district court of jurisdiction to

entertain a motion for reconsideration following a remand order issued under § 1367(c)"). In that circumstance, the district court may "recall[] the remand" and "notify the [state court] that the district court has resumed jurisdiction over the action." *Academy of Country Music*, 991 F.3d at 1070.

B. Defendants' arguments amount to an effective alternative request.

The Seventh Circuit has recognized that a *de facto* request generally suffices for relief. *See Goka v. Bobbitt*, 862 F.2d 646, 648 (7th Cir. 1988) ("defendants opposed the amended complaint in what the district court (J. Aspen) referred to as a '*de facto* motion to dismiss"); *U.S. v. Jones*, 369 F.2d 217, 220 (7th Cir. 1966) (refusal to take witness stand is, "in effect," a request for a continuance). Indeed, the Northern District of Illinois has granted consolidation where defendants expressed their agreement with consolidation in briefs, but no formal motion was ever filed. *See Midwest Community Council, Inc. v. Chicago Park Dist.*, 98 F.R.D. 491, 492 (N.D. Ill. 1983) (granting consolidation, *sua sponte*, where "[b]riefs have been filed in which defendants express their agreement with consolidation but plaintiffs object to one joint trial for both cases"). Here, Defendants have done more: not only have they "express[ed] their agreement with consolidation," as in *Midwest*; they have emphatically stated that "[t]his Court has several case management options that it may exercise in its discretion, including [] consolidating this action, in full or in part, with the *East St. Louis Case . . .*" Dkt. 58 at 2 n.1. They have also explained that Congress sought to promote "efficiencies in the judicial system by allowing overlapping and 'copycat' cases to be consolidated in a single federal court (*id.* at 3), invoked the Court's "duty to avoid duplicative litigation of overlapping class actions in accordance with Congress's objective" (*id.* at 1), distinguished *City of Fishers* on the grounds that it did not implicate such duty (*id.*), and pointed out that, under the case law, consolidation can outweigh comity. *See* Dkt. 40 at 5-6. Plaintiff, too, understood that consolidation was exactly what was being requested, arguing in its motion to

remand that Defendants' judicial efficiency argument lacks merit. Dkt. 46 at 8-9. In short, Defendants made no qualm about consolidation as a requested alternative and there was no obvious reason not to wait for the Court first to resolve its jurisdiction, which is typically the threshold issue, before turning to consolidation in a formal motion. In any event, the Court could have proceeded to consolidate the cases *sua sponte* even without this request, as in *Midwest*. Finally, as mentioned, DISH stands ready to file a formal consolidation motion with the leave of this Court.

C. The factors favoring consolidation outweigh the factors favoring remand.

It is well-established that federal courts have a duty to avoid duplicative litigation, which favors consolidating this case with the *East St. Louis* Action. Federal courts in this District routinely consolidate duplicative cases under these circumstances, and consolidation for pre-trial purposes is in accordance with CAFA's objective of "allowing overlapping and 'copycat' cases to be consolidated in a single federal court." *See* S. Rep. No. 109-14 at 4-5 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 5-6. The comity abstention doctrine does not override the federal policy of avoiding duplicative class actions.

1. Consolidation is appropriate to avoid duplicative litigation.

Consolidation is governed by Fed. R. Civ. P. 42, which permits consolidation of actions that involve "a common question of law or fact." Fed. R. Civ. P. 42(a). It is appropriate to avoid the unnecessary waste of judicial resources and additional cost and delay to the parties. *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 839 (7th Cir. 1999) ("By far the best means of avoiding wasteful overlap when related suits are pending in the same court is to consolidate all before a single judge."); *see also* 9A Charles Alan Wright, et al., Fed. Prac. & Proc. Civ. § 2381 (3d ed.) (the objective of consolidation "is to give the district court broad discretion to decide how cases on its docket are to be tried so that the business of the court may be dispatched with expedition and economy while providing justice to the parties"). "[Consolidation] is a matter committed to

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