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

VILLAGE OF SHILOH,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 3:21-CV-00807-MAB
	)	
NETFLIX, INC., et al.	)	
	)	
Defendants.	)	

PLAINTIFF VILLAGE OF SHILOH'S MEMORANDUM IN OPPOSITION TO DISH DEFENDANTS' AMENDED MOTION TO RECONSIDER REMAND ORDER

Defendant Dish has always been aware that it is being sued by multiple Illinois municipalities for failing to pay fees owed by video service providers pursuant to 220 ILCS 5/21/-801. Despite that knowledge, Dish – and the other defendants in this matter – never moved to consolidate the two actions. Instead, they chose to litigate each case on its own. That was a tactical decision they made and with which they must live. Dish is not entitled to a mulligan.[1]

A motion for reconsideration is not an opportunity to escape the consequences of prior litigation decisions or to get a do-over. The Court did not misapprehend anything in ruling on the motion to remand, there has been no intervening change in the law. Dish's motion should be denied. Furthermore, as all defendants have filed motions to dismiss in state court rather than move for a stay, the renewed argument to maintain the removal has been waived.

I. Dish ignores the standard for motions to reconsider.

Motions to reconsider are rarely granted. They are only appropriate where the court failed to apprehend an issue, decided an issue not presented, or if there has been a material intervening

[1] Dish concedes that a remand on the basis of comity abstention is discretionary. Doc. 73, p. 9. Certainly, the fact that only Dish of the four Defendants is seeking reconsideration of this Court's remand order is a factor that militates against this Court's recall of its remand letter.

change in law. *Dunmore v. Shicker*, No. 3: 16-CV-171-MAB, 2020 U.S. Dist. LEXIS 87713, at *2 (S.D. Ill. May 19, 2020):

> Reconsideration of an interlocutory order is only appropriate when a court has misunderstood a party, made a decision outside the adversarial issues presented to the court by the parties, made an error not of reasoning but of apprehension, or where a significant change in the law or the facts has occurred since the submission of the issue to the court.

The only possible way to fit the pending motion into this framework is that the Court failed to apprehend that Dish wanted to consolidate this case with the *East St. Louis* case. But the Court clearly addressed this issue *to the extent it was mentioned in Dish's briefing*. *See* Order granting remand dated March 24, 2022 (Doc. 68) at 12-13. There was no misapprehension or misunderstanding. And at any rate, because Dish never presented a motion to consolidate, that "adversarial issue" was never "presented to the court by the parties."

Dish's motion reflects a misunderstanding of the purpose of a motion for reconsideration as the majority of its motion (pp. 5-11) simply reargues against remand based on comity interests or makes a legal argument in favor of consolidation (Point Heading II.C, "The factors favoring consolidation outweigh the factors favoring remand.").

Dish's attempt to escape the consequences of its own litigation decisions should be rejected and the motion should be denied.

II. Because not all the defendants seek reconsideration, removal is impossible.

It is controlling Circuit and Supreme Court precedent that "each non-nominal defendant" join in seeking removal from state to federal court. *See Hummel v. Surgitek/Medical Eng'g Corp.*, Case No. 91 C 3510, 1991 U.S. Dist. LEXIS 11453, at *1-2 (N.D. Ill. Aug. 16, 1991) (citing cases); 28 U.S.C. § 1446(b)(2)(A). While it is true that all defendants originally sought removal, and originally opposed remand, it is only Dish that seeks reconsideration. Because, as

argued *infra*, each of the other defendants has abandoned efforts to maintain removal. Dish may not unilaterally do so and the motion must be denied.

III. Dish has waived reconsideration by seeking a dispositive ruling from the state court.

With this case having been remanded to state court, Dish apparently regrets its earlier litigation decisions and wants a do-over. Dish wants to pull this case back from the state court and combine it with the *East St. Louis* action, which is currently in the midst of a pending motion to dismiss.

But Dish – and the other defendants in the action – have all submitted to the jurisdiction of the state court and have all moved to dismiss. Rather than move that court of general jurisdiction for some stay of proceedings, each defendant – *including Dish* – elected to seek a ruling from that court.[2] **Exhibit A** (Dish Motion to Dismiss), **Group Exhibit B** (other defendants' motions to dismiss). By seeking a dispositive ruling from the state court, Dish has waived any right to seek reconsideration. *See Ellis v. Coventry Capital I LLC*, No. 08 cv 3083, 2008 U.S. Dist. LEXIS 76450, at *10 (N.D. Ill. Sep. 24, 2008)("A defendant may waive the right to seek removal where the defendant takes action in state court that evinces an intent by the defendant to have the state court decide the case on the merits, such as by filing a motion to dismiss or asserting a counterclaim."). And because the other defendants have also moved to dismiss the state court action and waived the right to seek remand, there can be no unanimity as required to maintain removal. 28 U.S.C. § 1446(b)(2)(A).

[2] This Court specifically highlighted the option to ask the state court for a stay when it ordered remand: "Perhaps [defendants] will ask the state court judge to stay this case once it is remanded." Order of March 24, 2022 [Doc. 68] at 14. No defendant acted on that option.

IV. Dish has never – to this day – moved for consolidation and cannot do so by way of a motion to reconsider.

Whatever remains of this Court's jurisdiction following remand, it does not extend to entertaining new motions to consolidate.

Dish now says it "stands ready" to move to consolidate, and begs this Court to vacate its remand so that (presumably) such a motion can be filed. Motion to Reconsider at 2. But Dish waited until it lost the motion for remand to "stand up." That is not how federal litigation works.

To restate the obvious, Dish never moved to consolidate. It cannot drop possibilities as to how the case *could* be managed into a brief and hope the Court *sua sponte* decides to act upon one of many possible case management decisions absent a motion. And as clear proof that the Court did not "misapprehend" anything, the Court clearly engaged with the case management suggestion casually dropped into Dish's earlier briefing. *See* Order granting remand dated March 24, 2022 (Doc. 68) at 12-13. The Court's prior analysis shows the importance of filing a written motion when a party seeks an order from the Court.

To the extent this Court *could* have *sua sponte* consolidated the two cases, it did not. Nor was it an abuse of discretion to fail to take *sua sponte* action on a hypothetical case management suggestion dropped in a brief contesting a motion to remand. None of Dish's cases cited for the proposition that a "*de facto* request" suffices for relief are on point or support reconsideration. *See* Amended Motion for Reconsideration (Doc. 73) at 4-5. *Goka v. Bobbitt*, 862 F. 2d 646, 648 (7th Cir. 1998) does indicate that the District Court used the phrase *de facto* motion to dismiss. However, the District Court's Memorandum and order makes clear that it ruled on quite definite requests filed by the Defendants. It used that phrase to indicate its belief that, although the subject document raised substantive reasons to oppose the Plaintiff's motion for leave to amend his complaint, it would treat that opposition as a motion to dismiss. *Goka v. Bobbitt*, 625 F.

Supp. 319, 324 & n. 1. (N.D. Il. 1985). Thus *Goka*, is entirely inapposite. And in *U.S. v. Jones*, 369 F. 2d 217 (7th Cir. 1966), the opinion makes it evident that the movant made a verbal request to continue a trial setting for one day because "he would have his evidence" then. Id. at 220. Dish made no such clear request for relief, whether verbal or written. Finally, *Midwest Community v. Chicago Park*, 98 F.R.D. 491 (N.D. Il. 1983) involved a spontaneous suggestion by the District Court as to whether two lawsuits should be consolidated. The parties then briefed the issue but there simply was disagreement among the parties as to the scope of consolidation that should occur. Id. at 492, 500. It is apparent that *Midwest Community* involved a robust and fully briefed suggestion of consolidation broached by the District Court; thus, that case provides no support for the notion that a vague reference in a brief to the possibility of consolidation can somehow be treated as a motion.

A litigant must take a position—it cannot ride the fence. By not moving to consolidate but instead briefing the motion to remand and then filing a motion to dismiss in state court, Dish made tactical decisions and now must live with the results.

V. The case for remand remains compelling.

There is no compelling reason to disturb or revisit this Court's remand order.

First, there can be no argument on reconsideration that factors favoring consolidation under Fed. R. Civ. P. 42 can trump the Seventh Circuit's ruling in *City of Fishers*, as applied by this Court, using its discretion. To the extent Dish does argue this, it is simply rehashing arguments already made and rejected, and the issue is not appropriately brought under a motion to reconsider.

Second, there is no compelling reason to disturb this Court's comity analysis. From a practical view, in interpreting Illinois law, all federal courts from this Court to the Supreme Court must be guided by how the Illinois Supreme Court would interpret Illinois law. The best

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