UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

STATE OF OHIO, ex rel. DANA SKAGGS, et al.,	:	
	:	**Case No. 2:08 cv 1077**
Relators,	:	
	:	**Judge Frost**
vs.	:	
	:	**Magistrate Judge Kemp**
JENNIFER L. BRUNNER SECRETARY OF THE STATE OF OHIO, et al.,	:	
Respondents.	:	

RELATORS DANA SKAGGS AND KYLE FANNIN'S MEMORANDUM IN OPPOSITION TO RESPONDENT OHIO SECRETARY OF STATE JENNIFER BRUNNER'S MOTION TO REALIGN PARTIES

A party's removal is improper, irrespective of whether a federal question is presented, if all defendants have not concurred in removal. See, e.g., Williams ex rel. McIntosh v. City of Beverly Hills, 2007 WL 2792490, *3 (E.D. Mo. Sept. 24, 2007). Relators submit—and their well-pleaded Complaint makes clear—that no federal question is presented in this case. But, in any event, Ohio Secretary of State Jennifer Brunner's ("Secretary Brunner") improper removal fails to get past the threshold "rule of unanimity," which requires the consent of all Respondents in this case. For the reasons fully set forth in Relators' Motion to Remand, Secretary Brunner, having failed to obtain the consent of Respondent Franklin County Board of Elections (the "Board") to removal, has failed to meet the rule's specific requirements. Thus, her removal is ineffective as a matter of law.

Now, in a blatant attempt to avoid the rule of unanimity, Secretary Brunner asks the Court to realign the "Board" as a Relator, even though the Board is the party that ultimately has to count the ballots at issue in this case, and even though the Board is a party *against whom*

Relators seek interim injunctive relief. Simply put, the Board is adverse to Relators, and Secretary Brunner has asserted no basis for her requested realignment.

As the case law makes clear, re-alignment of a defendant is improper where the defendant sought to be realigned has "some adverse" interests with the plaintiff. This is particularly true where a party seeks realignment only to avoid the rule of unanimity. See, e.g., Arnold v. Drake, 1993 WL 255140, *4 (E.D. La. June 28, 1993) (rejecting realignment, in rule of unanimity context, because the defendant sought to be realigned as plaintiff had "some adverse interests" with the plaintiff). The mere fact that a defendant shares the plaintiff's "desire to return to State court jurisdiction" does not justify realignment. Folts v. City of Richmond, 480 F. Supp. 621, 624 (E.D. Va. 1979).

In this case, the adversity between Relators and the Board, as well as the similarity of interest between Secretary Brunner and the Board, is clear:

- The Board is the party ultimately charged with evaluating and counting the ballots and provisional ballot applications at issue in this case. In addition, because of the Board's tie votes with respect to motions directly related to the Ohio statutory issues presented in this lawsuit, Secretary Brunner's tie-breaking vote ultimately will dictate *the Board's decision*. See Ohio Rev. Code § 3501.11(X). As a result of this tie-breaking procedure, the position of both the Board and Secretary Brunner will presumably be the same.[1]

- Relators seek interim injunctive relief enjoining the Board from opening Provisional Ballot Application envelopes pending resolution of the merits of Relators' state law mandamus claims.

In sum, Relators and the Board obviously have adverse interests in this case. Indeed, the issues that make Relators adverse to Secretary Brunner make them equally adverse to the Board. Secretary Brunner's motion for realignment should be denied.

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[1] Notably, although Secretary Brunner will cast the tie-breaking vote, the ultimate decision, with respect to the disputed issues, remains *the Board's*. Thus, the Board, as the ultimate decision-making body, has a "demonstrated interest in the outcome of the case," and it is not merely a "nominal" party. See Local Union No. 172 Int'l Ass'n of Bridge, Structural Ornamental and Reinforcing Ironworkers v. P.J. Dick Inc., 253 F. Supp. 2d 1022, 1027 (S.D. Ohio 2003) (Sargus, J.)

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon all counsel of record by means of the Court's CM/ECF system on this 16th day of November, 2008.

/s/ John W. Zeiger
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