APPEAL NO. 08-4585

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

State of Ohio ex rel., Dana Skaggs, et al.,

Relators-Appellants

v.

Jennifer L. Brunner
Secretary of the State of Ohio, et al.,

Respondents-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

REPLY BRIEF OF APPELLANTS

John W. Zeiger
Marion H. Little, Jr.
Christopher J. Hogan
ZEIGER, TIGGES & LITTLE LLP
3500 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 365-9900

ATTORNEYS FOR RELATORS-APPELLANTS

TABLE OF CONTENTS

PAGE

Table of Authorities ii

A. Removal Was Improper Because The District Court Lacked Subject Matter Jurisdiction Over The Removed Action And Secretary Brunner Failed To Comply With The Rule Of Unanimity.....1

1. Despite Secretary Brunner's Attempt To Recharacterize Relators' Well-Pleaded Complaint, The Actual Allegations Reveal That Only State Law Claims Are Asserted. 1

2. Even If The District Court's Consent Orders Were Somehow Implicated By Relators' State Law Claims (And They Are Not), No Federal Question Is Presented. 8

3. The "Rule Of Unanimity" Bars Removal 12

a. The Board, Which Is The Ultimate Decision-Making Body, Is Not Merely A "Nominal" Party. 12

b. The Board Entered An Appearance In The Supreme Court Action, Thus Actual Service Of Process Was Unnecessary.....14

c. No Basis For Realignment Of The Parties Existed 16

B. Secretary Brunner Is Not Authorized To Rewrite The Plain Language Of Section 3505.183 Of The Ohio Revised Code. 17

1. Secretary Brunner's Asserted Defense That The District Court's Consent Orders Can Override The Plain And Unambiguous Language Of Section 3505.183 Is Simply Contrary To Law. 18

2. The Plain, Mandatory Language Of Section 3505.183 Reveals That Relators Are Entitled To Mandamus Relief. 22

Conclusion 25

TABLE OF AUTHORITIES

Cases	**Pages**
Brooks v. Nezperce County, 394 F. Supp. 869 (D. Id. 1975)	8
City of Warren v. City of Detroit, 495 F.3d 282 (6th Cir. 2007)	9, 10, 11, 19
Cleveland County Ass'n for Gov't by the People v. Cleveland County Bd. of Comm'rs., 142 F.3d 468 (D.C. Cir. 1998)	21
Folts v. City of Richmond, 480 F. Supp. 621 (E.D. Va. 1979)	16
Harper v. Auto Alliance Intern., Inc., 392 F.3d 195 (6th Cir. 2004)	15
Hicks v. Emery Worldwide, Inc., 254 F. Supp. 2d 968 (S.D. Ohio 2003)	16
Kasper v. Bd. of Election Comm'rs. of the City of Chicago, 814 F.2d 332 (7th Cir. 1987)	20
Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 478 U.S. 501 (1986)	11
Martin v. Wilks, 490 U.S. 755 (1989)	11
McKay v. Thompson, 226 F.3d 752 (6th Cir. 2000)	25
Metcalf v. Watertown, 128 U.S. 586 (1888)	8
People Who Care v. Rockford Bd. of Ed. Sch. Dist. No. 205, 961 F.2d 1335 (7th Cir. 1992)	20
Perkins v. City of Chicago Heights, 47 F.3d 212 (7th Cir. 1995)	19, 20
Prairie Band v. Puckkee, 321 F.2d 767 (10th Cir. 1963)	8
Rittenhouse v. Eisen, 404 F.3d 395 (6th Cir. 2005)	22

Cases	**Pages**
Saxe, Bacon & Bolan, P.C. v. Martindale-Hubbell, Inc., 521 F. Supp. 1046 (S.D.N.Y. 1981)	14
See, e.g., State ex rel. Myles, et al. v. Brunner, 2008-Ohio-5097, ¶ 18 (2008)	23
State ex rel. Barth v. Hamilton County Board of Elections, 65 Ohio St. 3d 219 (1992)	4
State ex rel. Stokes v. Brunner, 2008-Ohio-5392, ¶ 29 (Oct. 16, 2008)	24
State v. Lowe, 112 Ohio St. 3d 507 (2007)	22

Unreported Cases	**Pages**
Arnold v. Drake, 1993 WL 255140 (E.D. La. June 28, 1993)	17
Barcena v. State of Ill., Dept. of Ins., 1992 WL 186068 (N.D. Ill. July 27, 1992)	14
EBI-Detroit, Inc. v. City of Detroit, 279 Fed. Appx. 340 (6th Cir. 2008)	11
Illinois v. Tarkowski, 2006 WL 18916 (N.D. Ill. Jan. 3, 2006)	11
Kralj v. Byers, Case No. 4:06 CV 0368, 2006 U.S. Dist. LEXIS 16404 (N.D. Ohio April 5, 2006)	15
Valinski v. Detroit Edison, 197 Fed. Appx. 403 (6th Cir. 2006)	1, 2, 7, 19

Statutes	**Pages**
42 U.S.C. § 15482(a)(4)	25
Ohio Revised Code Section 3505.181	2
Ohio Revised Code Section 3505.182	2
Ohio Revised Code Section 3505.183	*passim*

A. Removal Was Improper Because The District Court Lacked Subject Matter Jurisdiction Over The Removed Action And Secretary Brunner Failed To Comply With The Rule Of Unanimity.

1. Despite Secretary Brunner's Attempt To Recharacterize Relators' Well-Pleaded Complaint, The Actual Allegations Reveal That Only State Law Claims Are Asserted.

Remarkably, in the more than 18 pages Secretary Brunner expends attempting to recharacterize the Complaint, Brief at 16-34, she fails to even mention its most critical allegation:

> *No federal law claims are asserted*. . . .
>
> [Rec. Entry 3, Complaint ¶ 1 (emphasis added).]

Since Relators are "the master of [their] complaint, . . . where [as here] a choice is made to assert only a state law claim, *the general rule prohibits recharacterizing it as a federal claim*. . . . Federal jurisdiction can therefore generally be avoided by relying exclusively on state law. . . ." Valinski v. Detroit Edison, 197 Fed. Appx. 403, 406 (6th Cir. 2006) (emphasis added) (Merit Brief, ADD-15).[1]

Rather than confront this fatal bar to her claim of federal question jurisdiction, Secretary Brunner attempts to rewrite the Complaint to assert claims that were never alleged. Her efforts fail: the Complaint, *as written*, asserts only a

[1] Under 28 U.S.C. § 1441, the threshold issue is whether the procedural requirements, here specifically the rule of unanimity, were satisfied. They were not, as outlined in the Merit Brief at 17-22 and infra at pp. 14-19. However, given the extent to which Secretary Brunner has sought to rewrite Relators' complaint, it is, perhaps, helpful for the Court's analysis to begin by properly identifying the claims actually advanced.

single state law claim and simply does not state a cause of action that can be the basis of federal question jurisdiction.

Let's examine what the Complaint really says. As an initial matter, the first paragraph of the Complaint could not be clearer:

> No federal claims are asserted; rather, Relators seek a writ requiring Respondents to comply with *the state law statutory requirements* of R.C. 3505.18, 3505.182, 3505.183 and 3505.18 in determining the eligibility of such provisional ballots to be counted.
>
> [Emphasis added.]

Relators announce right up front that they "rely[] exclusively on state law," thereby avoiding any claim of federal jurisdiction. Valinski, 197 Fed. Appx. at 406.

The remainder of the Complaint also reflects that Relators expressly limited their claim to one arising under *state* law. Jurisdiction is predicated *solely* under Article IV, Section 2 of the Constitution of Ohio and Chapter 2731 of the Ohio Revised Code. [Rec. Entry 3, Complaint ¶ 2] Only a single cause of action is asserted; the Complaint seeks nothing more than a state writ of mandamus compelling Secretary Brunner to properly interpret and apply two Ohio statutes, R.C. 3505.183(B)(1)(a) and 3505.181, to preclude the eligibility of provisional ballots that lack affirmations in which the voter included both her name and signature and compelling Secretary Brunner *and the Board of Elections* to reject

such provisional ballots. [Id. at ¶¶ 29-31; Prayer[2]] No federal cause of action is asserted. Indeed, no allegation includes any mention of "constitutional rights," the "Fourteenth Amendment of the United States Constitution," or Consent Orders entered by the United States District Court. Rather, the Complaint asserts a *state* law cause of action seeking a *state* law remedy, a writ of mandamus under a *state* constitution and a *state* statute, compelling *state* officials to comply with *state* law. This exclusively *state* claim simply cannot be tortured into an allegation of a federal question.

Secretary Brunner nonetheless seeks to avoid an Ohio Supreme Court adjudication of her compliance with an Ohio statute by boldly and inaccurately recharacterizing the Complaint. She asserts:

> Appellants have *explicitly* pled three separate federal questions:
>
> (1) They have sought relief for vote dilution under the Fourteenth Amendment to the United States Constitution. [Complaint ¶¶ 4-5];
>
> (2) They contend that the Secretary has violated Directive 2008-101, which she is only obliged to follow by virtue of a federal court order. (Hence, the determination of whether she did in fact violate Directive 2008-101 will inevitably require

[2] Secretary Brunner again misstates the Complaint in asserting "Appellants do not state any cause or action or statutory claim against the board and as such the board has no interest in the result of this case. [Brief, at 28.] To the contrary, Relators seek both mandamus and injunctive remedies against the Board. [Complaint ¶¶ 31,35, 37-39; Prayer C, D.]

interpretation of the federal court's order.) [Complaint ¶¶ 18, 27]; and

(2) They *explicitly* challenge the Court's October 27, 2008 Order, which determined that, as a matter of law, the duty to ensure provisional ballot affirmation forms are complete falls upon the poll workers, not the voters, and therefore incomplete forms reflect poll worker error and cannot be disqualified. [Complaint ¶¶ 32, 34].

[Brief at 17 (emphasis added).]

Let's compare each of Secretary Brunner's three "explicitly pled" "federal questions" to the actual allegations of the Complaint. The inaccuracy of her characterizations is aptly demonstrated by her first asserted basis for a federal question: the Complaint "sought relief for vote dilution under the Fourteenth Amendment to the United States Constitution, [Complaint ¶¶ 4-5]." But this isn't even close to true. Review of the Complaint makes clear that neither paragraphs 4 or 5, nor any other allegation, makes any reference, "explicit" or otherwise, to the Fourteenth Amendment of the United States Constitution. Rather, what paragraphs 4 and 5 do say is clear: as part of the description of the "Parties" to the case, these two paragraphs describe the Relators and explain their standing as voters to bring an Ohio mandamus action under Ohio Supreme Court authority. See State ex rel. Barth v. Hamilton County Board of Elections, 65 Ohio St. 3d 219, 221 (1992) (In a mandamus action relating to an election, "a citizen has the capacity to sue even if the duty only generally affects him.") As both paragraphs allege, Relators bring:

> "this action to assure that [their] vote is *not diluted as a result of the misdirected instructions of the Secretary of State to count provisional ballots that are not lawful or valid under Ohio law*."
>
> [Complaint ¶¶ 4-5 (emphasis added).]

Relators' standing allegations are explicitly limited to vote dilution that is the "*result*" of Secretary Brunner's failure to comply with Ohio law.[3] Nothing is stated or even implied that permits recharacterization of paragraphs 4-5 as seeking "relief for vote dilution under the Fourteenth Amendment to the United States Constitution." [Brief at 17]

Secretary Brunner's characterization of paragraphs 18 and 27 as alleging the "Secretary has violated Directive 2008-101," her second alleged basis for a federal question, similarly misstates the Complaint. [Brief at 17.] In reality, paragraph 18 is part of a series of allegations in paragraphs 17 through 21 asserting that, prior to the election, the Secretary of State interpreted R.C. 3505.183(B)(1)(a) as barring the eligibility to be counted of any provisional ballots that did not contain "the individual's name and signature" but that she changed her instructions after the election based on a request by a lawyer for the Kilroy campaign. Contrary to

[3] Inasmuch as the allegations in Paragraph 4 and 5 relate solely to Relators' standing to bring their mandamus action, the Secretary's analysis of standing in Arkansas and Indiana, and her conclusion that dilution is not "actionable under [Ohio] state law" is simply offpoint. [Brief, at 17-18.] No independent claim for dilution is asserted, either under federal or state law. If it was, it would not be included in the section of the complaint describing the "parties."

Secretary Brunner's claims, nothing in paragraph 18 alleges that she "violated Directive 2008-101." Rather, paragraph 18 simply quotes the provision of Directive 2008-101 mandating that a provisional ballot that lacks a name or signature or both "*shall neither [be] open[ed] nor count[ed],*" to show that the Secretary did, in fact, do an after-the-election about-face. Alleging Directive 2008-101 as a historical indicator of the Secretary's pre-election position is simply not a claim that she violated it.

The same is true of paragraph 27: it simply does not mention Directive 2008-101 either "explicitly" or otherwise. Rather, it expressly alleges that the Secretary will violate the "*mandatory requirements of Ohio's voting statutes. . .* ." when called upon to break the expected tie vote of the Board of Election (which, in fact, she did). [Rec. Entry 3, Complaint ¶ 27 (emphasis added).] Like paragraph 18, the sole focus of paragraph 27 is state law and not Directive 2008-101, which is not even mentioned.

Secretary Brunner's third claim that a federal question lurks in the Complaint fares no better. The Secretary claims that Relators "explicitly challenged the [District] Court's October 27, 2008 Order," citing "[Complaint ¶¶ 32, 34]." But her "explicit challenge to the October 27, 2008 Order" is apparently a silent one -- neither paragraphs 32 and 34, nor any other provision of the Complaint, even mentions the October 27, 2008 Order. Nor do paragraphs 32

and 34 challenge the Order that they fail to mention. Rather, the allegations of paragraph 32 assert that the Secretary's interpretation of R.C. 3505.183(B)(1)(a) as allowing a provisional ballot to be counted "even if it does not include" both the "individual's name and signature" "is erroneous and contrary to the express requirements of *Ohio law*." (Emphasis added.) And paragraph 34 like paragraph 32, makes no reference, direct or otherwise, to the Order of October 27, 2008. Rather, on its face this allegation simply asserts that the two Ohio statutes identified in the preceding two paragraphs (paragraphs 32-33) imposed the duty of properly completing a provisional ballot on the voter and not the poll worker. Just as in paragraph 32, it simply references, and seeks relief solely under, "*Ohio's election laws"* and "*Ohio's election statutes*." [Complaint ¶ 34 (emphasis added).]

Secretary Brunner's three attempts to twist the clear state law allegations of the Complaint are but a simple acknowledgement that no federal question exists unless the Complaint is read to say what it clearly does not allege. But since "[f]ederal courts examine the well-pleaded allegations of the Complaint for a federal question *on its face*, and ignore potential defenses," the efforts of Secretary Brunner to recharacterize the Complaint can be of no avail. Valinski, 197 Fed. Appx. at 406 (emphasis added). Whatever defenses Secretary Brunner may wish to assert under the Fourteenth Amendment, Directive 2008-101, or the Order of October 27, 2008, they are simply not alleged on the face of the Complaint. As the

"masters of their Complaint," id. at 406, Relators have asserted only a single state law claim, stating unequivocally what is otherwise clear from a reading of the Complaint: "[n]o federal law claims are asserted. . . ." [Rec. Entry 3, Complaint ¶ 1.]

Under the well-pleaded complaint rule, this necessarily ends the Court's inquiry. This action was improperly removed.

2. Even If The District Court's Consent Orders Were Somehow Implicated By Relators' State Law Claims (And They Are Not), No Federal Question Is Presented.

But, even if the Complaint could be construed as somehow implicating the District Court's prior consent orders (and it cannot), the result would be no different. Indeed, it has long been settled that federal question jurisdiction does not exist simply because a well-pleaded state-law claim implicates or otherwise calls into question the construction or effect of a prior judgment of a federal court.

"Even if the action were viewed as based upon a prior judgment of this Court, it still would be of no help to the plaintiffs. The fact that a suit involves the construction or effect of a judgment of a federal court does not, for that reason, make it one arising under federal law." Brooks v. Nezperce County, 394 F. Supp. 869, 875 (D. Id. 1975), citing Metcalf v. Watertown, 128 U.S. 586 (1888). In Prairie Band v. Puckkee, 321 F.2d 767 (10th Cir. 1963), the court held:

> *The fact that a suit involves the construction and effect of a judgment of a federal court or tribunal does*

> *not, for that reason, make it one arising under the Constitution or laws of the United States*. . . . The . . . [underlying] judgment undoubtedly has its origin in federal law, in the sense that it was authorized and promulgated thereunder. But the suit does not purport to involve the construction and effect of the federal statute which authorized the judgment or under which it was rendered. Rather, it seeks a declaration of the rights of the parties under a judgment, the execution of which is in no way controlled or conditioned by the federal statute.
>
> [Id. at 770 (emphasis added).]

This lack of jurisdiction is particularly evident where, as here: (1) the federal judgment in question is a consent order; (2) the plaintiff was not a party to the consent order; and (3) on the face of its well pleaded complaint, the plaintiff is presenting purely state law claims. This Court's decision in City of Warren v. City of Detroit, 495 F.3d 282 (6th Cir. 2007) is, once again, directly on point.

In that case, the plaintiff-municipality alleged contract and state statutory claims against the defendant-municipality arising out of the defendant's rate-making for water services. The defendant-municipality removed the case to federal court, contending that the plaintiff's action necessarily presented a substantial disputed question of federal law because the defendant-municipality had previously entered into a consent decree with the United States Environmental Protection Agency under the Clean Water Act that included certain requirements as to defendant's rate-setting for water services. Id. at 286-87. This Court held that

the prior consent decree, even though based on federal EPA law, did not convert plaintiff's state law claims into a federal question:

> At the outset, it is important to note that Warren is not a party to any of the consent judgments, is not bound by the judgments, and is entitled to its own day in court to challenge actions taken under the judgments. . . . The question for this Court is where such disputes may be litigated, specifically, whether the district court had jurisdiction pursuant to 28 U.S.C. § 1441(b) because the instant action arises under federal law due to the EPA case. . . .
>
> Warren's . . . claims are based upon contract law and a Michigan statute that requires rates be "based on the actual cost of service as determined under the utility basis of rate-making." . . .
>
> A substantial disputed question of federal law is not a necessary element of either of Warren's state law claims. . . . . Although a consent judgment is enforceable by the court, *the source of the court's authority to require the parties to act is the parties' acquiescence, not rules of law*. . . . Therefore, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori may not impose duties or obligations on a third party, without that party's agreement. . . . As Warren was not a party to the consent judgments, its contractual rights remain intact. *Because a consent judgment's force comes from agreement rather than positive law, the judgment depends on the parties' authority to give assent*. . . . To the extent that . . . [Michigan statute] restricts Detroit authority to set water rates, Detroit could not consent to an inconsistent judgment. *Therefore, the consent judgments have no impact on whether the disputed costs are reasonably included in the water rates under the contract or are included in the actual cost of service as determined under the utility basis of rate-making under the Michigan*

> *statute, and Warren's claims do not raise a question of federal law*.
>
> [Id. at 286-87 (emphasis added).][4]

See also Illinois v. Tarkowski, 2006 WL 18916, *2 (N.D. Ill. Jan. 3, 2006) ("[a] claim made under state law does not present a federal question simply because the opposing party contends that the claim somehow impacts or undermines an earlier federal ruling") (ADD-1).[6]

---

[4] EBI-Detroit, Inc. v. City of Detroit, Inc., 279 Fed. Appx. 340 (6th Cir. May 22, 2008), which addressed a party's *express* claims against the defendant for abuse of his discretion as a court-appointed special master pursuant to a consent order, does not impact the settled rule, as reflected in City of Warren, that a well-pleaded *state law claim* that implicates or otherwise requires construction of a federal consent order does not raise a federal question.

[6] Accord: Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 478 U.S. 501, 522 (1986) ("Indeed, it is the parties' agreement that serves as the source of the court's authority to enter any judgment at all. … More importantly, it is the agreement of the parties, *rather than the force of the law upon which the complaint was originally based*, that creates the obligations embodied in a consent decree.") (emphasis added); Martin v. Wilks, 490 U.S. 755, 762 (1989), superseded by statute on other grounds, 42 U.S.C. § 2000e-2(n) ("A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.").

Secretary Brunner's unsupported assertion that the state-law claims asserted in Relators' well-pleaded Complaint necessarily implicate and/or require construction of the District Court's prior consent orders is, thus, irrelevant to federal jurisdiction in this case. Even assuming *arguendo* that the state court would be required to construe and/or consider the impact of the District Court's consent orders in addressing Relators' state *statutory* claims, no federal question arises therefrom.

3. The "Rule Of Unanimity" Bars Removal.

Apart from these substantive deficiencies, the notice of removal also was procedurally defective inasmuch as Secretary Brunner failed to satisfy the rule of unanimity. And it is clear that none of the three exceptions she invokes to circumvent this settled rule apply here.

a. The Board, Which Is The Ultimate Decision-Making Body, Is Not Merely A "Nominal" Party.

Secretary Brunner concedes that Relators sought injunctive relief against the Board, and it is likewise undisputed that Relators sought substantive relief against the Board compelling compliance with the General Assembly's legislative mandate for the consideration and counting of provisional ballot applications. [Rec. Entry 3, Complaint pp. 15-16.] Nevertheless, Secretary Brunner declares that the Board is somehow a nominal party, and then cites Rule 17(a) of the Federal Rules of Civil Procedure and a number of cases for the proposition that an action must be

prosecuted in the name of the real party in interest. That may be true, but Rule 17(a) *does not* apply to defendants, or in this case, respondents. Rather, it sets forth the rule for identifying the correct "plaintiff." The remaining subsections of Rule 17 likewise do not afford Secretary Brunner any relief. They address such items as business entities' capacity to sue; who may proceed on behalf of a minor or incompetent person; and the manner of suing a public official. Quite frankly, the significance of Rule 17 or the related case citations is lost upon Relators inasmuch as it is undisputed that the instant Relators are proper parties for prosecuting this action.

So let's be clear. For purposes of the rule of unanimity, the issue is not whether a party is the "real party" in interest under Rule 17, but whether a defendant is either a party or merely a "nominal" party. In this regard, we emphasize that a litigant cannot declare, as Secretary Brunner would have this Court do, that there is a sliding scale of importance among parties and, thus, for example, supposedly less "important" parties can be casually cast into a "nominal" category to avoid the unanimity rule. A litigant's party status is yes or no, black or white, not gray.

So what is a "nominal" party or defendant?" According to Black's Law Dictionary:

> A person who is joined as defendant in an action, not because he is immediately liable in damages or because

> *any specific relief is demanded as against him*, but because his connection with the subject-matter is such that the plaintiff's action would be defective, under the technical rules of practice, if he were not joined.
>
> [(Emphasis added).]

See Barcena v. State of Ill., Dept. of Ins., 1992 WL 186068, at *2 (N.D. Ill. July 27, 1992) (according to *Black's Law Dictionary*, 946 (5th ed. 1979), a nominal defendant is "... a person who is joined as defendant in an action, not because he is immediately liable in damages or because any specific relief is demanded as against him ...") (ADD-4); Saxe, Bacon & Bolan, P.C. v. Martindale-Hubbell, Inc., 521 F. Supp. 1046, 1048 (S.D.N.Y. 1981) ("A party to an action is nominal or formal if no cause of action or claim for relief is or could be stated against him or on his behalf, as the case may be.").

Here, "specific relief was demanded against" the Board, and thus by definition, the Board was not merely a "nominal" party.

b. The Board Entered An Appearance In The Supreme Court Action, Thus Actual Service Of Process Was Unnecessary.

The Secretary of State would next have this Court fashion a new "forum-shopping" exception to the rule of unanimity that would, in many cases, swallow the rule in its entirety. According to Secretary Brunner, in an action involving two defendants, the first defendant can circumvent the rule of unanimity by simply filing a notice of removal before the second defendant is served with process, even

where the first defendant has the ability to contact the other and indeed knows the identity of that defendant's legal counsel; even though the second defendant's legal counsel entered a notice of appearance; and even where neither party has received service of process.

That is, of course, what occurred here: the Secretary of State raced to file a notice of removal, literally within twenty-four hours of the initiation of the litigation before the Supreme Court. She did so with complete indifference as to the consent of, let alone consultation with, the Board.[7] We submit that this Court's precedent may not be so easily circumvented. See, e.g., Harper v. Auto Alliance Intern., Inc., 392 F.3d 195, 201 (6th Cir. 2004) (notice of removal is ineffective unless all defendants have been properly joined in the notice).

Of course, no such exception exists, nor does the case law support such a notion. The two cases cited by Secretary Brunner as permitting a single defendant to effectuate a removal in a multi-defendant case have done so where the other defendants *did not exist* or their *whereabouts were unknown*. See Kralj v. Byers, Case No. 4:06 CV 0368, 2006 U.S. Dist. LEXIS 16404 (N.D. Ohio April 5, 2006) (holding that co-defendant's consent not required for removal because he was not

[7] Secretary Brunner speculates as to the exact time the Board's counsel's Notice of Appearance was filed on November 14. Such speculation is insincere as the certificate of service reflects that it was served, via facsimile, the day before, November 13. [Rec. Entry 12, Motion to Remand, Exhibit A (notice of appearance in Ohio Supreme Court).]

served with amended complaint upon which removal was based, and noting that co-defendants "exhausted all reasonable efforts to obtain his consent" to no avail because his whereabouts were unknown); Hicks v. Emery Worldwide, Inc., 254 F. Supp. 2d 968, 975 (S.D. Ohio 2003) (holding consent for removal not required of co-defendant that was a nonexistent entity).

This is not the case here and we submit the Court should reject Secretary Brunner's request for not just a new exception, but an exception that would swallow the rule in its entirety by allowing a single defendant to unilaterally dictate the removal of an action to federal court where it can file a notice of removal prior to service of process on the other defendants.

c. No Basis For Realignment Of The Parties Existed.

At bottom, the 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). But that is the import of the District Court's decision.

Perhaps this question of realignment is ultimately best answered by a rhetorical question: What is the claim by the Board against Secretary Brunner? The answer, of course, is none. What then is the claim by Relators, first, against the Board and, second, against Secretary Brunner? It is the same as to both: injunctive and substantive relief. [Rec. Entry 3, Complaint pp. 15-16.] The fact

that the Board's counsel or one of its employees, but not the Board itself, disagrees with Secretary of Brunner is hardly grounds for realigning the Board with the parties that sued it, especially given that, as Secretary Brunner now claims, her "tie-breaking authority" is dispositive of the Board's position. The unreasonableness of the Secretary's position is magnified by the posing of another rhetorical question: What if Relators had simply sued the Board but not Secretary Brunner, would there still be a basis for realignment? The answer is obviously no.

Thus, irrespective of the fervor of her arguments, no one can deny—not even Secretary Brunner—that there is, at the very least, "some adverse interest" between Relators and the Board. This is all that is required to render realignment improper, especially where it was specifically done to circumvent the rule of unanimity. See, e.g., Arnold v. Drake, 1993 WL 255140 (E.D. La. June 18, 1993) (Merit Brief, ADD-37.)

In sum, the notice of removal was both substantively and procedurally defective.

B. Secretary Brunner Is Not Authorized To Rewrite The Plain Language Of Section 3505.183 Of The Ohio Revised Code.

The plain and unambiguous language of Section 3505.183(B)(1) makes clear that, except where a voter expressly *declines* to execute an affirmation, a provisional ballot *shall not* be counted where the required affirmation does not

include ***both*** the provisional voter's name ***and*** signature.[8] No provision is made for poll worker error in this ***mandatory*** provision.[9]

This result attains from a simple reading of the statute and the application of its plain and unambiguous language. Indeed, no less than four basic propositions of statutory construction compel this result. [Merit Brief, at 29-41.]

1. Secretary Brunner's Asserted Defense That The District Court's Consent Orders Can Override The Plain And Unambiguous Language Of Section 3505.183 Is Simply Contrary To Law.

Nonetheless, Secretary Brunner ignores these basic rules of statutory construction and seeks to assert as a defense to Relators' claim for mandamus

---

[8] Secretary Brunner is correct that the Complaint challenges affirmation forms that lacked ***both*** signature and printed names but is wrong in asserting that the issue as to ballots with dual defects is "resolved" and "not part of this appeal." [Brief, at 9.] Either defect or both defects in the written affirmation makes the ballot "[in]eligible to be counted" under the mandatory provisions of R.C. 3505.183(B)(1)(1).

[9] Secretary Brunner concedes that if a provisional voter "declines" to sign the affirmation for religious reasons or otherwise, "the election official is required to note that fact on the affirmation form. R.C. 3505.181(B)(6)." (Brief, at 36).] Here, there is no evidence that any of the disputed provisional ballots involve an affirmative declination by the voter to sign. Rather, the provisional ballots at issue here are simply defective; that is why Secretary Brunner attempts to compare a decision by a voter to "decline" to execute the affirmation with a "refusal" to do so. [Brief, at 36.] If the voter fails or refuses to sign the affirmation but does not "decline" to so as indicated by the poll worker's notation on the ballot envelope, R.C. 3505.183(B)(1) expressly states the ballot cannot be counted. As such, Secretary Brunner is wrong in suggesting that ballots without signatures are the functional equivalent to ballots on which the provisional voter's declination is noted.

relief[10] that the District Court's consent orders (which simply memorialized the private agreement of the parties to that particular case) can overwrite this mandatory, statutory language. She is simply wrong.

This Court has previously made this clear. A "consent judgment" entered into by a state entity or subdivision "*lack[s] the power to supersede … [a state] statute*." City of Warren v. City of Detroit, 495 F.3d 282, 287 (6th Cir. 2007). In other words, a state entity or subdivision may not consent to a judgment that is inconsistent with its statutory obligations. Thus, in City of Warren, this Court held: "To the extent that Mich. Comp. Laws § 123.141(2) restricts Detroit's authority to set water rates, *Detroit could not consent to an inconsistent judgment.*" Id. (emphasis added). That is, Secretary Brunner was, and remains, without authority to voluntarily consent to any agreement that is inconsistent with the provisional ballot counting requirements established by the General Assembly.

The Sixth Circuit's view on this is hardly unique. As the Seventh Circuit stated in Perkins v. City of Chicago Heights, 47 F.3d 212, 216 (7th Cir. 1995), "[w]hile parties can settle their litigation with consent decrees, *they cannot agree to 'disregard valid state laws*….'" Perkins v. City of Chicago Heights, 47 F.3d

[10] Under the well pleaded complaint rule, the Secretary's defenses related to the District Court's consent orders that, as here, are not set forth as claims in the complaint cannot be the basis of removal. Valinski, 197 Fed. Appx. At 406 (federal courts are to "ignore potential defenses" not set forth on the face of the well pleaded complaint).

212, 216 (7th Cir. 1995) (emphasis in original) (quoting People Who Care v. Rockford Bd. of Ed. Sch. Dist. No. 205, 961 F.2d 1335, 1337 (7th Cir. 1992) (emphasis added)). In Perkins, the court held a proposed consent decree involving the City of Chicago Heights invalid where the parties' proposed agreement would have contradicted an Illinois statute. Id. at 215. In so holding, the court recognized that parties "cannot consent to do something that they lack the power to do individually", including the modification of state statutory requirements. Id. at 216. Specifically, the court noted:

> [S]ome rules of law are designed to limit the authority of public officeholders …. They may chafe at these restraints and seek to evade them, but they may not do so by agreeing to do something state law forbids.
>
> [Id. at 216.][11]

Likewise, in Kasper v. Bd. of Election Comm'rs. of the City of Chicago, 814 F.2d 332 (7th Cir. 1987), the parties filed a proposed consent decree that would have made several changes to the statutory scheme for canvassing invalid voter registrations. The district court rejected the consent decree and the Seventh Circuit

[11] Perkins recognized a limited exception to the general rule, in noting that a federal court may enter a consent order that conflicts with a state statute *only* "upon properly supported findings that such a remedy is *necessary* to rectify a *violation of federal law*." Perkins, 47 F.3d at 216 (emphasis in original). No such findings are found in the consent orders upon which Secretary Brunner wishes to base her defense. Rather, both the District Court's October 24, 2008 and October 27, 2008 consent orders state only that they are issued per "agreement" of the parties. [Rec. Entry 2, Exhs. A & B to Notice of Removal.]

affirmed the denial, explaining that the consent decree would require the Board of Election Commissioners to violate state law:

> When it is the parties' agreement that serves as the source of the court's authority to enter any judgment at all, *the court may not readily approve a decree that contemplates a violation of law.* The Board may not "consent" to a higher budget or a new organic statute. Its Commissioners could not consent to be free of the threat of removal by the circuit court; it is equally outside the power of the Board to agree to violate state law in other ways. Because a consent decree's force comes from an agreement rather than positive law, the decree depends on the parties' authority to give assent. . . . *A consent decree is not a method by which state agencies may liberate themselves from the statutes enacted by the legislature that created them.*
>
> [Id. at 341-42 (emphasis added) (citations omitted).]

See also Cleveland County Ass'n for Gov't by the People v. Cleveland County Bd. of Comm'rs., 142 F.3d 468, 476 (D.C. Cir. 1998) ("Read on its face, state law denies the Board the authority unilaterally to alter its structure and manner of election *simply by agreeing to do so*.") (emphasis added).

Simply put, the private settlements struck by Secretary Brunner on the eve of the election and memorialized in consent orders do not trump the mandatory prohibitions imposed on the Secretary of State by the Ohio General Assembly. Nor do they afford Secretary Brunner the means she seeks to rewrite the statutes, as she would now, in the middle of the counting of ballots, purportedly on the basis

of complying with consent orders. She simply has no authority to agree to any consent order that requires action directly contrary to the mandatory dictates of Section 3505.183(B)(1)(a). To the degree she has done so, her consent is illegal and void. 15 O Jur. 3d Civil Servants § 378 ("A failure to follow a mandatory provision [such as that in R.C. 3505.183(B)(1)(a)] renders [Secretary Brunner's] act to which it relates illegal and void."]

2. The Plain, Mandatory Language Of Section 3505.183 Reveals That Relators Are Entitled To Mandamus Relief.

> *"[T]he judiciary's job is to enforce the law Congress enacted, not to write a different one that judges think superior."*
>
> [Rittenhouse v. Eisen, 404 F.3d 395, 397 (6th Cir. 2005) (emphasis added).]

It is not the province of a court to rewrite a plain and unambiguous statute. Nor is it the province the Secretary of State to do so. Rather, as the Ohio Supreme Court has recognized, a court's task is simply to "apply the statute as written." State v. Lowe, 112 Ohio St. 3d 507, 509 (2007).

Secretary Brunner dedicates five pages of her brief trying to explain how she would like Section 3505.183(B) of the Ohio Revised Code to read, and why she would prefer to avoid a "technical" reading of the statute's plain, unambiguous and mandatory language. She then spends an additional two pages attempting to establish her "discretion" to unilaterally determine that, when the Ohio General

Assembly chose the word "shall," it didn't actually mean it. Along the way, she makes a calculated effort to avoid any discussion of the four propositions of statutory construction cited in Relators' Brief. These are rules of construction that, once applied to Section 3505.183(B), compel relief in favor of Relators.

But the Ohio General Assembly was careful not to leave the interpretation of this important election statute, which specifically relates to the evaluation and counting of provisional ballots, up to the discretion of an elected official. For good reason, as evidenced by the facts underlying this case. No election official should be permitted to "change" the rules for counting provisional ballots after the votes are cast.

Rather, the General Assembly, using terms that the Ohio Supreme Court has expressly recognized as "mandatory," established a clear demarcation that instructs Ohio boards of elections, free of the influence of political partisanship, as to their specific duties in evaluating and counting provisional ballots. See, e.g., State ex rel. Myles, et al. v. Brunner, 2008-Ohio-5097, ¶ 18 (2008) ("shall contain" in election statute indicates mandatory requirement that must be strictly applied).[12]

[12] Secretary Brunner misstates the record when she asserts that "apparently, some voters signed their names in cursive in the blanks for 'name' and printed their names on the signature line." [Brief, at 40.] No evidence exists to support this claim; rather, the issue is whether a name or signature on the provisional ballot envelope that is not set forth where it belongs (that is, as part of the statutorily required affirmation) is sufficient under Section 3505.183(B)(1)(a). Such random identification outside the affirmation simply fails to meet the statutes' mandate that

The General Assembly made the test simple, having set forth specific objective requirements, including, both the voter's printed name and signature. This makes the end result simple to determine. A ballot satisfying the statutorily-prescribed objective requirements will be counted. If the ballot does not, it will not be counted. It is black or white. The gray area and uncertainty has been eliminated.

Also eliminated was an elected official's discretion to rewrite or "interpret" the statute to accomplish a particular result. The clear, mandatory language in Section 3505.183 leaves no room for interpretation, and Secretary Brunner, in her attempt to re-write this plain language is due no deference. See, e.g., State ex rel. Stokes v. Brunner, 2008-Ohio-5392, ¶ 29 (Oct. 16, 2008) ("[W]e need not defer to the secretary of state's interpretation because it … fails to apply the plain language" of the statute.) Section 3505.183(B)(1) unequivocally instructs boards of election that, except where a voter declines to execute an affirmation, a provisional ballot shall not be counted unless the provisional ballot affirmation contains *both* the voter's name and signature. Contrary to the assertions of Secretary Brunner, this requirement is neither a technicality nor a hyper-technical requirement. Rather, it is the law of Ohio that the people, through their General Assembly, have imposed as a mandatory obligation.

---

the voter's "name and signatures" "shall be included in the written affirmation in order for the provisional ballot to be eligible to be counted."

Under 42 U.S.C. § 15482(a)(4), this determination is expressly reserved to the Ohio General Assembly. It is not the province of the courts or Secretary Brunner to rewrite Section 3505.183's unambiguous, *mandatory* language simply because they disagree with the statutory mandate.[13]

CONCLUSION

For all of the reasons set forth herein and Relators' Merit Brief, the District Court lacked jurisdiction, and this Court should vacate all orders issued by the District Court, and remand this case (a) directly to the Ohio Supreme Court, or (b) to the District Court with instructions that the District Court then immediately remand this case to the Ohio Supreme Court.

In the alternative, should the Court find jurisdiction present, it should reverse the District Court's order granting Secretary Brunner's motion for summary judgment, and order the District Court to grant Relators' motion for summary judgment as to all claims. The Court should further issue a writ of mandamus or

[13] The amici in support of the Secretary offer an assortment of additional arguments not relied upon by the District Court. Each of these arguments is similar in one significant respect: the lack of any case law to support the argument advanced. Instead, the amici interject a series of issues and offer a conclusion, but precious little analysis is provided. Thus, for example, Section 1971 of the Voting Rights Act of 1964 was somehow violated, even though the Sixth Circuit has held that no private cause of action exists. McKay v. Thompson, 226 F.3d 752 (6th Cir. 2000). Similarly, Equal Protection claims are generally advanced, notwithstanding the District Court's conclusion that the constitutionality of Section 3505.183 was not at issue. Suffice it to say, given the time constraints flowing from the expeditious treatment of this appeal, Relators will not guess as to the basis for the conjecture of these amici or manufacture and then address straw arguments.

such other relief: (1) compelling Ohio Secretary of State Jennifer Brunner to correct her office's erroneous instruction to the Franklin County Board of Elections, based on an erroneous interpretation of Section 3505.183(B)(1)(a) of the Ohio Revised Code, and compelling her to advise the county boards of elections that any Provisional Ballot Application cast in the November 4, 2008 election must include both the voter's name and signature in the statutorily required affirmation and if it does not, it is not eligible to be counted; and (2) compelling the Secretary of State and the Franklin County Board of Election to reject any Provisional Ballot Applications as not eligible to be counted if the Application does not include both the name and signature of the voter on the provisional voter affirmation required by Section 3505.183(B)(1)(a).

RESPECTFULLY SUBMITTED this 25th day of November, 2008.

/s/ John W. Zeiger
John W. Zeiger (0010707)
Marion H. Little, Jr. (0042679)
Christopher J. Hogan (0079829)
ZEIGER, TIGGES & LITTLE LLP
3500 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 365-9900
(Fax) (614) 365-7900

Attorneys for Relators-Appellants
Dana Skaggs and Kyle Fannin

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing reply brief complies with the requirements of Fed. R. App. P. 32(a)(7)(B), in that it contains 6,721 words, according to the word processing program. This brief was created and formatted using MS Word 2003 and is in 14-point, Times New Roman Font.

/s/ John W. Zeiger
John W. Zeiger (0010707)

CERTIFICATE OF SERVICE

I certify that on November 25, 2008, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ John W. Zeiger
John W. Zeiger (0010707)

859-001:189320

ADDENDUM

TABLE OF CONTENTS

Illinois v. Tarkowski, 2006 WL 18916 (N.D. Ill. Jan. 3, 2006) ADD-1

Barcena v. State of Ill., Dept. of Ins., 1992 WL 186068
(N.D. Ill. July 27, 1992) ADD-4

Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern Division.

PEOPLE OF THE STATE OF ILLINOIS ex rel. Lisa Madigan, Attorney General of the State of Illinois, and ex rel. Michael Waller, State's Attorney of Lake County, Illinois, Plaintiff,
v.
John TARKOWSKI, Defendant.

No. 05 C 6114.

Jan. 3, 2006.

Evan James Mcginley, Illinois Attorney General, Environmental Bureau North, Chicago, IL, Lisle A. Stalter, Margaret Ann Marcouiller, Lake County State's Attorney Office, Waukegan, IL, for Plaintiff.
John Tarkowski, Wauconda, IL, pro se.

MEMORANDUM OPINION AND ORDER

KENNELLY, J.

***1** In 1999, the federal government sued John Tarkowski, a Wauconda homeowner, alleging that conditions on his property violated federal environmental laws. *United States v. Tarkowski,* Case No. 99 C 7308 (N.D.Ill.) Mr. Tarkowski prevailed at trial, and the ruling in his favor was affirmed on appeal in April 2001. *United States v. Tarkowski,* 248 F.3d 596 (7th Cir.2001). In November 2004, the Illinois Attorney General and the State's Attorney of Lake County sued Mr. Tarkowski in state court, alleging that the same conditions violated Illinois environmental laws. Mr. Tarkowski was served with summons in February 2005. He filed two separate motions to dismiss, both of which were denied, and he took an appeal from the denial of one of the motions. Mr. Tarkowski also took additional procedural steps in state court.

On October 21, 2005, Mr. Tarkowski removed the state court case to this Court. He alleges that the state officials' suit is frivolous and was filed in retaliation for his successful defense of the federal government's suit and for his filing of a Freedom of Information Act case in state court. Mr. Tarkowski also contends that the state officials' suit is barred by the doctrine of *res judicata* as a result of the ruling in his favor in the federal government's suit. Mr. Tarkowski further claims that he has not received and cannot receive a fair hearing in state court, and that the state court has denied him certain federal constitutional protections. He contends that the state officials have conspired with federal officials and others to prevent him from using his property and ultimately to drive him off.

Upon reviewing Mr. Tarkowski's notice of removal, the Court entered an order questioning the existence of jurisdiction and deferring consideration of his motion for appointment of counsel pending determination of whether federal jurisdiction existed. *See* Order of Nov. 11, 2005. A few days thereafter, the state officials moved to remand the case to state court. The Court has considered the parties' memoranda. We conclude that removal of the case to this Court was improper and therefore grant the motion to remand.

Mr. Tarkowski removed the case to this Court based on 28 U.S.C. §§ 1331, 1441, 1443 and 1446. Section 1331 is not a removal statute; section 1446 does not create a right to removal but rather provides the procedures by which removal is accomplished.

Section 1441 permits removal of any suit over which the district courts have original jurisdiction. The federal courts would not have original jurisdiction over the state officials' suit against Mr. Tarkowski. The suit is brought pursuant to state, not federal law, and the parties are not of diverse citizenship. Federal question jurisdiction exists over a state law claim if the claim is really one of federal law. *See Franchise Tax Bd. of State of Calif. v. Construction Laborers Vacation Trust for Southern Calif.,* 463 U.S. 1, 13, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983); *In re County Collector of County of Winnebago, Illinois (Appeal of O'Brien),* 96 F.3d 890, 896 (7th Cir.1996). A claim made under state law may be deemed to arise under federal law if a well-pleaded complaint would establish that the plaintiff's right to relief under state law requires resolution of a substantial question of federal law. *Id.* at 10, 13.A state law claim may not, however, be removed to federal court based on the existence of a federal defense. *Id.* at 10, 14.

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

***2** Having carefully reviewed the state officials' complaint against Mr. Tarkowski, and having considered Mr. Tarkowski's arguments, the Court can only conclude that the claims against Mr. Tarkowski indeed arise under state, not federal law. The fact that the state prohibitions cited in the complaint may be parallel to federal prohibitions does not make the complaint "really" one under federal law. Mr. Tarkowski's claims of *res judicata* and retaliation-defenses he can raise in the state court case, we might add-do not change the fact that the claims against him are made under Illinois, not federal law. A claim made under state law does not present a federal question simply because the opposing party contends that the claim somehow impacts or undermines an earlier federal ruling. *See* *In re County Collector*, 96 F.3d at 897.

Section 1443(1) provides for removal of any state proceeding in which the defendant "is denied or cannot enforce a right under any law providing for the equal civil rights of citizens of the United States."Mr. Tarkowski invokes this provision and contends that his equal protection and due process rights are being violated in state court. But the Supreme Court has held that § 1443(1) applies only if the right allegedly being denied to the removing party arises under a federal law providing for civil rights based on race; it has also required the removing party to show that he cannot enforce that federal right due to some formal expression of state law, such as a state legislative or constitutional provision, as opposed to a denial that is first made manifest in the course of litigation. *See, e.g.,* *Johnson v. Mississippi*, 421 U.S. 213, 219, 95 S.Ct. 1591, 44 L.Ed.2d 121 (1975); *Georgia v. Rachel*, 384 U.S. 780, 792, 803, 86 S.Ct. 1783, 16 L.Ed.2d 925 (1966); *State of Indiana v. Haws*, 131 F.3d 1205, 1209 (7th Cir.1999). Mr. Tarkowski's claims of retaliation and of unfair proceedings in state court do not provide a basis for removing the case against him; a contention that the removing party is being denied or will be denied due process or equal protection because the case against him is a sham, corrupt, or without evidentiary basis does not meet the requirements for removal under § 1443(1). *Johnson*, 421 U.S. at 219; *City of Greenwood v. Peacock*, 384 U.S. 808, 825, 86 S.Ct. 1800, 16 L.Ed.2d 944 (1966). In his response to the motion to remand, Mr. Tarkowski also contends that the state officials have brought their suit in order to prevent him from using the property he resides upon. Assuming that is true (a question the Court need not and does not address), the purported right is not one that arises under a federal law providing for civil rights based on race.

Mr. Tarkowski's final contention concerns a "proposed counter-complaint" that he says was filed with this Court during the pendency of *United States v. Tarkowski*.He attaches to his papers a letter he wrote to the Court on January 1, 2000, in which he noted that he previously had requested appointed counsel and a special prosecutor, and stated that he was enclosing "a *pro se* rough draft prepared Counterclaim for the Court's consideration, subject to revisions if the Special Prosecutor deems it necessary, before filing and serving on the named defendants...." The accompanying "rough draft" was a proposed claim against federal agencies and state officials, including the State's Attorney of Lake County and the Illinois Environmental Protection Agency, for (among other things) conspiracy to deny Mr. Tarkowski his rights. In his response to the motion to remand, Mr. Tarkowski refers to this as a claim that was "filed with the U.S. District Court, but not yet heard."The Court disagrees with this characterization. Mr. Tarkowski's "rough draft" was never filed as a counterclaim in the earlier case. His letter to the Court made it clear that he was offering the document for the consideration of counsel if the Court determined to appoint one, as we did on January 7, 2000, just a few short days after Mr. Tarkowski's letter; he did not request filing of the "rough draft." Neither Mr. Tarkowski nor his appointed counsel took any steps after that date to file a counterclaim or to pursue litigation of the claims included in Mr. Tarkowski's "rough draft." In any event, Mr. Tarkowski's proposed counterclaim in the earlier federal case has no bearing on whether the Court now has jurisdiction over the case brought by the state officials that Mr. Tarkowski has removed from state court. If what Mr. Tarkowski is suggesting is that his contentions regarding the motives and purposes of the state officials should have been determined in this Court, in the context of the earlier lawsuit against him by the federal government, then the time to make that known to the Court would have been before our entry of judgment back in the year 2000, not in 2005.

Conclusion

***3** Mr. Tarkowski's motion for leave to proceed *in*

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

forma pauperis is granted [docket no. 3-1]; his motion for appointment of counsel is denied [docket no. 4-1]. The Court grants the defendants' motion to remand the case for the reasons stated above [docket no. 7-1]. The Clerk is directed to remand this case to the Circuit Court for the Nineteenth Judicial Circuit (Lake County, Illinois).

N.D.Ill.,2006.
People of State of Illinois v. Tarkowski
Not Reported in F.Supp.2d, 2006 WL 18916 (N.D.Ill.)

END OF DOCUMENT

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern Division.

Duane v. BARCENA, Plaintiff,

v.

STATE OF ILLINOIS, DEPARTMENT OF INSURANCE, James W. Schacht, Acting Director of Illinois Department of Insurance in his official capacity, Illinois Automobile Insurance Plan, Richard T. Carson, Manager, agent, servant of Illinois Automobile Insurance Plan, in his official capacity, Defendants.

No. 92 C 2568.

July 27, 1992.

MEMORANDUM OPINION AND ORDER

ZAGEL, District Judge.

***1** Plaintiff Duane Barcena moves the court to remand this case to the Circuit Court of Cook County, pursuant to 28 U.S.C. § 1447(c)(4) and to sanction C. Joseph Yast and Joseph P. Beckman, counsel for the Illinois Automobile Insurance Plan (hereinafter "the Plan"), and Richard T. Carson, for improperly removing this case to federal court. Plaintiff's motion for remand to state court is granted, but its motion for sanctions is denied.

BACKGROUND

On March 19, 1992, Barcena filed suit in the Circuit Court of Cook County, Illinois, against the Illinois Department of Insurance (hereinafter "the DOI"), the Plan and their respective administrators, James W. Schacht and Carson.[FN1] Barcena sought declaratory and injunctive relief as well as compensatory and punitive damages from the defendants for their alleged failure to provide a hearing on his insurance producer's license within 30 days of a court-ordered hearing.

On April 16, 1992, the Plan and Carson filed a petition for removal of Barcena's state court suit to this Court pursuant to 28 U.S.C. § 1441(b) and 28 U.S.C. § 1331. Plaintiff then filed a petition to remand the case and moved for sanctions against Yast and Beckman. The Plan and Carson noted in their sur-reply brief that they filed for removal only after consulting with and obtaining the consent of co-defendants, the DOI and Schacht. In the petition for removal, however, the DOI did not sign the notice of removal; nor for that matter, was the DOI mentioned at all. It was not until May 18, 1992 that the DOI gave written notice to the court of its consent to removal.

DISCUSSION

We begin by addressing the propriety of removal to federal court. First, all defendants must join in the notice of removal:

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure....

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

28 U.S.C. § 1446(a) & (b). In addition, Congress amended 28 U.S.C. § 1447(c) to specify that, "[a] motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a)."

In this case, the plaintiff filed his complaint on March 19, 1992. The Plan and the DOI were served with the complaint on April 3, 1992. The Plan filed a notice of removal on April 16, 1992. Although the Plan filed the notice within 30 days of its receipt of the complaint, the DOI did not consent to removal until

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.

May 18, 1992, more than 30 days after it received notice of the lawsuit. This flaw is a noncurable defect that prevents defendants from removing the case. "As a general rule, all defendants must join in a removal petition in order to effect removal." *Northern Illinois Gas. Co. v. Airco Indus. Gases*, 676 F.2d 270, 272 (7th Cir.1982); *see also* *Fields v. Reichenberg*, 643 F.Supp 777 (N.D.Ill.1986) (failure to have all defendants join in removal petition a noncurable defect); *Hardesty v. General Foods Corp.*, 608 F.Supp. 992 (N.D.Ill.1985) (improper removal because no explanation why only two of four codefendants filed petition for removal).

***2** The Plan's claim that it filed for removal only after consulting with and obtaining the consent of the DOI is unavailing. As the court in *Fellhauer v. City of Geneva*, 673 F.Supp. 1445, 1448 (N.D.Ill.1987) (emphasis in original) emphasized, "[t]he removal statutes require that all defendants communicate their consent *to the court* not to one another." There are only two exceptions to the rule that all defendants must join in the removal petition. The first exception is that nominal parties "need not join in the petition." *Northern Illinois Gas Co.*, 676 F.2d at 272. Nominal parties are generally formal parties like representatives and administrators who are ignored for purposes of determining diversity or for purposes of joining in a removal petition. In *The First National Bank of Chicago v. Mottola*, 302 F.Supp. 785, 793 (1969), residual legatees were not "considered anything more than nominal or formal parties." Furthermore, according to *Black's Law Dictionary*, 946 (5th ed. 1979), a nominal defendant is "... a person who is joined as defendant in an action, not because he is immediately liable in damages or because any specific relief is demanded as against him ..." In this case, specific relief is demanded against the DOI and it is not a residual legatee, a representative or an administrator. Thus, the exception relating to nominal parties is inapplicable here.

The second exception is that when a party takes affirmative action following removal that advances the litigation in the district court, that party may waive its right to object to procedural irregularities in the removal proceedings. In *Lanier v. American Bd. of Endodontics*, 843 F.2d 901 (6th Cir.1988), the plaintiff waived its right to object to removal by engaging in the following affirmative activity: "... plaintiff entered into stipulations, filed requests for discovery, sought to amend her complaint, filed a new lawsuit against the defendant in the federal court demanded trial by jury, and proceeded with discovery." *Id.* at 905; *see also* *Wade v. Fireman's Fund Ins. Co.*, 716 F.Supp. 226, 232 (M.D.La.1989) (plaintiff waived right to object to removal by allowing case to remain on district court's docket for six months, attended status conferences, and participated in discovery). In this case, the Court finds that plaintiff has not waived his right to seek remand by seeking to impose sanctions against the Plan's attorneys. Plaintiff made the motion for sanctions in conjunction with the motion to remand. The sanctions motion related to the conduct of defendants' counsel in seeking remand. Furthermore, plaintiff made his motion for remand within thirty days of the notice of removal and did not conduct discovery or engage in other such affirmative conduct during the 30-day period. In short, the filing of a sanctions motion in conjunction with a motion for remand is an insufficient basis upon which to rest a finding of waiver.

***3** That Barcena waited to introduce his lack of consent argument until his reply brief is irrelevant. What is relevant is that plaintiff did make a motion for remand within thirty days of the notice of removal, even if he initially relied upon other arguments in support of remand.

Finally, sanctions are not appropriate here. The Plan attempted in good faith to remove this case to federal court. Its procedural errors in seeking removal do not warrant the imposition of sanctions.

> FN1. The Plan, when mentioned hereafter, includes its Manager, Richard T. Carson; references to the DOI include its Acting Director, James W. Schacht.

N.D.Ill.,1992.
Barcena v. State of Ill., Dept. of Ins.
Not Reported in F.Supp., 1992 WL 186068 (N.D.Ill.)

END OF DOCUMENT

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.