**CASE NO. 08-4585**

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**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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**STATE OF OHIO ex rel. DANA SKAGGS, ET AL.,**
**Relators-Appellants,**

**v.**

**JENNIFER L. BRUNNER,**
**Defendant-Appellee.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, CASE NO. 2:08-CV-1077**

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# BRIEF OF DEFENDANT-APPELLEE JENNIFER L. BRUNNER

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## STATEMENT REGARDING ORAL ARGUMENT

Under Ohio law, no provisional ballot may be opened and counted until all provisional ballots are ready to be opened and counted. R.C. 3505.183(D). Furthermore, the boards of elections must certify their final vote tallies from the November 4, 2008 general election by Tuesday, November 25, 2008. R.C. 3505.32(A). Therefore, even though this case concerns vital issues and may determine whether thousands of Ohioans will be disenfranchised as a result of mere technical errors on provisional ballot envelopes, the importance of officially certifying the November 2008 general election is of utmost importance, and the Secretary agrees that oral argument in this case should be waived. If, however, this Court believes that oral argument would aid it in reaching a decision in this case, the Secretary stands ready to participate.

## ISSUES PRESENTED FOR REVIEW

1. Whether the District Court correctly concluded that it is has federal question jurisdiction to hear this case.

2. Whether the District Court correctly ruled that the otherwise proper provisional ballots cast by registered and eligible electors in the proper precincts must be counted notwithstanding the absence of a printed name or signature on the envelope containing the ballot.

## INTRODUCTION

The Plaintiffs in this case seek to disenfranchise approximately 1,000 Ohioans who cast provisional ballots in Franklin County. Even though these voters are properly registered to vote and cast ballots in the appropriate precinct, the Plaintiffs seek to disqualify their ballots because of minor technical errors in the manner in which their provisional ballot envelopes were completed. The Plaintiffs seek to use the power of the State to simply disqualify votes because voters did not follow technical rules in completing the provisional ballot affirmation form printed on the provisional ballot envelope provided them at their polling location. These errors were not corrected by poll workers even though the poll workers had an affirmative legal duty to do so.

This Court should affirm the decision of the district court and refuse to disenfranchise voters based upon a hyper-technical reading of Ohio's statutes concerning provisional ballots.

## STATEMENT OF THE CASE

On November 13, 2008, Appellants Dana Skaggs and Kyle Fannin filed an original action in mandamus against Secretary of State Jennifer Brunner in the Ohio Supreme Court. The Complaint also listed the Franklin County Board of Elections as a nominal defendant, although none of the allegations was addressed to the Board and no specific relief was sought against the Board.

What the Complaint did seek was an Order compelling Secretary Brunner to reject approximately 1,000 provisional ballots cast in Franklin County by eligible voters on November 4, 2008 due to alleged technical defects on the provisional ballot envelope. Although there has never been any question as to the eligibility and qualifications of the voters who cast these ballots, the Appellants argued that the Secretary had a clear legal duty to reject the ballots because of alleged defects in the provisional ballot affirmation forms (a form printed on the face of the provisional ballot, the envelope in which each provisional ballot is stored until the Board verifies the voters eligibility).[1]

[1] It should be noted that use of the term "provisional ballot *application*" is inconsistent with the statutory text of both the Ohio Revised Code and HAVA. A voter is not required to "apply" for a provisional ballot, but is entitled to one upon the execution of a written affirmation. R.C. 3505.181(B); 42 U.S.C. 15482(a)(2). Indeed the fact that a provisional ballot was provided to each of the voters involved in this case serves to support the conclusion that no fatal defects were present in the affirmation forms, as it would have constituted poll worker error for the poll worker to provided a provisional ballot to these voters had they not first executed a satisfactory written affirmation.

The Plaintiffs originally sought a judicial order requiring the Ohio Secretary of State to instruct the Franklin County Board of Elections to reject four different categories of provisional ballots:

1) Ballots which had the voter's printed name but no signature;

2) Ballots which had the voter's signature but no printed name;

3) Ballots which had both a printed name and signature but in the wrong locations;

4) Ballots which did not show whether the voter provided proper identification to the poll worker before casting a provisional ballot.

The Plaintiffs eventually admitted in district court that the State could not legally reject ballots of the fourth category, that is, where the form did not show whether the voter provided proper identification. The Plaintiffs acknowledged that a poll worker has a mandatory duty to indicate that ID information, on the provisional ballot envelope.

Appellants alleged that the Secretary's decision to count these provisional ballots was a violation of her own Directive 2008-101, which governs the counting of provisional ballots. Directive 2008-101, issued October 24, 2008, was adopted as an Order of the District Court on that same day, in the case, *Northeast Ohio Coalition for the Homeless v. Brunner*. [Case No. 2:06-cv-896, R. 142]. The Complaint also sought an order that would compel the Secretary to reject

provisional ballots that were "defective" as a result of poll worker error. However, the District Court had previously issued, on October 27, 2008, an Order stating that "no provisional ballot cast by an eligible elector should be rejected because of a poll worker's failure to comply with duties mandated by R.C. 3505.181, which governs the procedure for casting a provisional ballot." Accordingly, on October 28, 2008, the Secretary issued Directive 2008-103, stating "pursuant to the court order, I hereby instruct the boards of elections **that ballots may not be rejected for reasons that are attributable to poll worker error**, including a poll worker's failure to sign a provisional ballot envelope or failure to comply with any duty mandated by R.C. 3505.181, (emphasis added in original). The Complaint thus presented a direct challenge to the legitimacy of not only the Secretary's direction to the board, but also to the validity of the District Court's order.

Based on these facts, and before the Supreme Court of Ohio served the summons upon the Board of Elections, the Secretary filed a Notice of Removal from the Supreme Court of Ohio to the federal District Court for the Southern District of Ohio.[2] Both the Appellants and the Board of Elections filed motions to remand [RR. 11, 12], which the District Court denied on November 17, 2008. [R. 20]. At the same time, the District Court granted the Secretary's motion to realign the parties, re-designating the Board of Elections as a plaintiff.

[2] The Secretary of State removed this case to federal district court at 9:06 a.m. on November 14, 2008. The Franklin County Board of Elections did not file a notice of appearance in the Ohio Supreme Court until November 14, 2008. The Ohio Supreme Court does not show the time the notice of appearance was actually filed.

After denying the motion to remand, the District Court conducted a hearing on Appellants' motion for a temporary restraining order. However, before the Court could issue its decision, Appellants withdrew the motion. Instead, the parties agreed to file cross-motions for summary judgment the next day, November 18, 2008.

On November 20, 2008, the District Court granted summary judgment in favor of the Secretary, and denied the motions filed by Appellants and the Board. [R. 41]. Appellants then filed their Notice of Appeal. Although the district court found there was virtually no likelihood of success on the merits, it granted an injunction pending appeal prohibiting the Franklin County Board of Elections from processing any provisional ballots until November 28, 2008 at 9:00 a.m. The reason the district court granted the injunction was because once a provisional ballot is opened, it cannot be separated from the other ballots cast in the election.

## STATEMENT OF FACTS

The Complaint in this case seeks to disenfranchise approximately 1,000 Franklin County voters who cast provisional ballots on November 4, 2008 *and who were in fact properly registered and eligible to vote* and cast their ballots in the correct precinct. Appellants have not alleged that any of the provisional ballots in question were fraudulent, or cast by ineligible voters, or cast in the wrong precinct. Rather, the argument is that these voters should be disenfranchised because Appellants believe there were disqualifying technical errors made on the provisional ballot affirmation Forms that accompanied the ballots themselves, errors made by election officials, not voters.

Under the Help America Vote Act, 42 U.S.C. 15301 et seq. ("HAVA"), a person must be permitted to cast a provisional ballot if the person's name does not appear on the list of eligible voters for the polling place or if an election official asserts that the person is not eligible to vote. In Ohio, a voter may cast a provisional ballot by executing a written affirmation in the presence of an election official. R.C. 3505.181(B)(2). The written affirmation is printed on the provisional ballot envelope into which the voter inserts the provisional ballot. The envelopes are then submitted to the county board of elections for a determination of the voter's eligibility; only if the voter is determined to be eligible will the envelope be opened and the provisional ballot counted.

Appellants concede that all provisional ballots of questionable eligibility have already been culled. Their Complaint alleges that 1,000 provisional ballots should be rejected because the affirmations are defective, either because (1) they contain the individual's printed name, but no signature; or (2) they contain the individual's signature, but no printed name.[3] During oral argument, Appellants and the Board identified a third category of alleged defect: the individual's name and signature both appear on the face of the form, but somewhere other than in the blanks designated for that information. (This "defect" is not discussed in Appellants' Appellate Brief, but will be addressed by the Secretary).

These "defects" in the affirmation forms are not valid reasons to reject the provisional ballots. Ohio law is clear that neither a printed name nor a signature is a necessary prerequisite for a ballot to be counted, and in fact expressly provides for ballots to be counted when they contain one piece of information but not the other. Moreover, Ohio law imposes an affirmative legal duty upon *poll workers*, not voters, to ensure that the provisional ballot affirmation forms are fully and properly filled out. If information is missing from the form, it necessarily is the result of poll worker error, and federal law (specifically the District Court's order of October 27, 2008 referenced in Directive 2008-103) forbids the rejection of an otherwise proper provisional ballot that is irregular due to error by the poll worker.

[3] The Complaint also challenged affirmation forms that lacked <u>both</u> signature and printed name, as well as affirmation forms upon which the poll worker failed to indicate what form of identification the individual presented in order to receive the provisional ballot. Those two issues have been resolved, and are not part of this appeal.

Unfortunately, this case is further complicated by the Franklin County Board of Elections' decision to use its own provisional ballot envelope. Under Ohio law, Secretary of State Jennifer Brunner is the State's chief elections officer. R.C. 3501.04. She has the authority to instruct the boards of elections on the proper conduct of the election, R.C. 3501.05(b), (c), and she further has the legal authority to prescribe the forms to be used in an election. R.C. 3501.05(g). The Secretary of State's form, Form 12-B, contemplates that the poll worker must witness the provisional voter sign the envelope. The form does not purport to impose a requirement that the provisional voter print his own name. Instead, the Secretary's form allows, consistent with the requirements of Ohio law, the poll worker to print the voter's name on the form. The Secretary's form is completely consistent with the requirements of R.C. 3505.182.

The Franklin County Board of Elections decided to reject the Secretary's form and developed its own affirmation form for inclusion on provisional ballot envelopes. Franklin County's form did not require that the poll worker actually print the voter's name on the form. Thus, the underlying problem in this case is actually caused by Franklin County's refusal to use the Secretary of State prescribed form and to require that all of its poll workers actually check provisional ballot envelopes before accepting them to make sure that the provisional voter filled the form out correctly.

## SUMMARY OF ARGUMENT

Appellants' Brief focuses almost entirely upon the question of federal jurisdiction: should the District Court have remanded the case back to state court? However, the district court correctly denied the Plaintiffs' motion to remand this case to the Ohio Supreme Court. Federal courts have jurisdiction in all cases arising under the constitution or laws of the United States. 28 U.S.C. § 1331. The Plaintiffs' complaint was brought under three separate federal questions:

1) An allegation of vote dilution brought under the Fourteenth Amendment;
2) An allegation that the Secretary of State violated an order of the United States District Court; and
3) An explicit challenge of a second order of the United States District Court.

This Court has previously ruled that removal is appropriate in situations where a Plaintiff challenges a federal court's orders directly through a separate action in State court. *EBI-Detroit, Inc. v. City of Detroit*, 279 Fed. Appx. 340 (6th Cir. 2008). Thus, the subject matter of this litigation is clearly within the rubrics of a federal court's jurisdiction.

Furthermore, the removal in this case was procedurally appropriate. While the general rule is that all defendants must join in a removal petition for it to be

successful, two exceptions to that rule apply in this case. First, removal was appropriate because the Franklin County Board of Elections had not been served with a summons in the original State court action. *Klein v. Manor Healthcare Corp.*, 1994 U.S. App. LEXIS 6086, * 12 (6th Cir. 1994). Second, removal was appropriate in this case because the Franklin County Board of Elections was a nominal party. *Id.* The Board of Elections had previously tied 2-2 on whether to count the disputed ballots. Thus, the decision on whether to count the ballots rested solely with the Secretary of State and her decision is binding upon the Franklin County Board of Elections. R.C. 3501.11(x).

Furthermore, the district court properly granted the Secretary's motion to realign parties and to align the Franklin County Board of Elections with the Plaintiffs. The Deputy Director of the board of elections had filed numerous affidavits in support of the Plaintiffs and their legal counsel had specifically advised the board to reject the ballots at issue in this case, thereby effectively advising the Board to ignore the Secretary's advice.

Not only did the district court appropriately determine that removal was appropriate for this case, it also correctly determined that the disputed provisional ballots must be counted. Ohio law mandates that an individual seeking to cast a provisional ballot must execute a written affirmation "before an election official at the polling location" which states that the individual voter is registered to vote and

eligible to vote in that election. R.C. 3505.181(B)(2). Thus, Ohio's poll workers have an affirmative duty to make sure that provisional ballot envelopes are properly completed. Since the poll workers at issue in this case failed to carry out their mandatory duty, these provisional ballots must be counted.

Although the Plaintiffs rely extensively on R.C. 3505.183, the Secretary of State, as Ohio's chief elections officer, has read Ohio's statutes as mandating that the provisional ballots at issue in this case should be counted. Under Ohio law, if Ohio statutes are capable of two or more reasonable interpretations, the Secretary's interpretation is entitled to deference. *Whitman v. Hamilton County Board of Elections*, 97 Ohio St.3d 216 (2002).

## STANDARD OF REVIEW

This court reviews denials of motions to remand to state court de novo, *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 338 (6th Cir. 1989), and examines "whether the case was properly removed to federal court in the first place," *Rogers v. Wal-Mart Stores, Inc*., 230 F.3d 868, 871-72 (6th Cir. 2000) (citing *Ahearn v. Charter Twp. of Bloomfield*, 100 F.3d 451, 453 (6th Cir. 1996)). In reviewing the district court's determination concerning its jurisdiction, the district court's findings of fact regarding jurisdictional issues are reviewed for clear error while its conclusions of law are reviewed *de novo*. *Certain Interested Underwriters at Lloyds, London, England v. Layne*, 26 F.3d 39, 41 (6th Cir. 1994); *Nichols v. Muskingum College*, 318 F.3d 674, 677 (6th Cir. 2003); *Gafford v. General Electric Co*. 997 F.2d 150, 155 (6th Cir. 1993).

Under this standard, the Court in *Certain Interested Underwriters at Lloyds, supra*, reviewed the underlying factual issues of whether the plaintiff was a real party in interest or a nominal party for the purposes of determining whether the district court properly exercised diversity jurisdiction. The defendants were all citizens of Tennessee, while the Plaintiff, an insurance underwriter, had its corporate citizenship in Great Britain. The defendants argued that the district court improperly exercised jurisdiction because the Plaintiff-underwriter was merely the agent or representative of the Plaintiff's undisclosed principal -- a syndicate whose

citizenship was also in Tennessee. 26 F.3d at 41. Thus, in order to determine whether there was complete diversity jurisdiction, the Court had to resolve the factual issue of whether the Plaintiff-underwriter was the real party in interest, or purely a nominal party. *Id*. at 42. The Court determined that the Plaintiff-underwriter was indeed the real party in interest because it wrote the policy, processed the claims related to that policy, and were thus liable on the contract. *Id*. at 43. Therefore, the Court affirmed the district court's denial of defendants' motion to dismiss for lack of subject matter jurisdiction. *Id*. at 44. Thus, while this Court must review the legal questions *de novo*, it can only overturn the district court's determination that the Franklin County Board of Elections is a nominal party to this litigation under a clear error standard. See also *Gafford*, 997 F.2d at 155 (applying clear error standard for reviewing the district court's determination of whether defendants met the amount-in-controversy requirement for diversity jurisdiction and thus properly removed to federal court).

## ARGUMENT

## I. THE DISTRICT COURT'S DECISION TO DENY THE MOTION TO REMAND WAS CORRECT AND SHOULD BE AFFIRMED

The majority of Appellants' appellate brief is devoted to the claim that the district court should have remanded the case to state court. The argument for remand has both a substantive and a procedural component. Substantively, Appellants deny their Complaint raises any questions of federal law, and therefore insist the federal District Court lacked subject matter jurisdiction. Alternatively, they argue that removal was procedurally improper because the Secretary was required to get the consent of the Board of Elections, and failed to do so. The District Court correctly rejected both arguments.

### A. The District Court had Federal Question Jurisdiction

Federal question jurisdiction exists in "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. A case "arises under" federal law where: (1) the plaintiff's cause of action is created by federal law; (2) a party's right to relief under state law requires a resolution of a substantial question of federal law in dispute; or (3) the claim is in substance one of federal law. *City of Warren v. City of Detroit*, 495 F.3d 282, 286 (6th Cir. 2007) (citing *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 13 (1983)). To determine whether a case raises a federal question, courts must apply the "well-pleaded complaint rule," which is to say they

must limit their review to the face of the plaintiff's complaint, to see if it raises a question of federal law. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987).

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

(3) 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].

### 1. Non-Race-Based Voter Dilution is a Federal Claim

Paragraph 4 of the Complaint states that Appellant Dana Skaggs "brings this action to assure that his vote is not diluted" by the counting of provisional ballots he deems unqualified. Appellant Kyle Fannin makes the same vote dilution claim in paragraph 5 of the Complaint. The Fourteenth Amendment prohibits vote

dilution, in recognition of the fact that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Bush v. Gore*, 531 U.S. 98, 105 (2000) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). And when it comes to allegations of dilution as a result of fraud or counting ineligible ballots, the Fourteenth Amendment is the source for a right or remedy.

The concept of "vote dilution" encompasses a number of illegal practices. Most commonly, vote dilution claims arise in the context of redistricting challenges, where the State has enacted a particular voting scheme allegedly as a purposeful device to minimize or cancel out the voting potential of racial or ethnic minorities. *Mobile v. Bolden*, 446 U.S. 55, 66 (1980). But vote dilution also occurs, for example, when districting is done arbitrarily, to consolidate political power, *Baker v. Carr*, 369 U.S. 186 (1962), or when reapportionment is not based on population, such that sparser populated areas have more seats, proportionally, than more densely populated areas. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). In addition, federal courts have recognized that voters must have their votes treated equally. *Bush v. Gore*, 531 U.S. 89 (2000).

Vote dilution as a result of unlawful districting is actionable under the Fourteenth Amendment (and sometimes the Voting Rights Act and even the Fifteenth Amendment). And in certain rare instances, states with extremely

expansive Equal Protection clauses in their State Constitutions (unlike Ohio) have found a state cause of action against redistributive vote dilution. *See, e.g., Hickel v. Southeast Conference*, 846 P.2d 38 (Ak. 1992); *Dortch v. Lugar*, 266 N.E.2d 25 (Ind. 1971).

But for some forms of vote dilution claims, there is a federal Fourteenth Amendment remedy. The U.S. Supreme Court has recognized that "voting fraud impairs the right of legitimate voters to vote by diluting their votes--dilution being recognized to be an impairment of the right to vote." *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007), *aff'd* 128 S.Ct. 1610 (2008) (citing *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006) (per curiam)). "The right of suffrage, whether in an election for state or federal office, is one that qualifies under the Equal Protection Clause of the Fourteenth Amendment for protection from impairment, when such impairment resulted from dilution by a false tally." *United States v. Wadena*, 152 F.3d 831, 845 (8th Cir. 1998). Indeed, the realization that counting false or invalid votes to arrive at a fraudulent tally qualifies as vote dilution goes all the way back to *Baker v. Carr*, 369 U.S. 186 (1962).

However, the Secretary is unaware of any case in Ohio in which a court has said that potential dilution of votes in a federal election based on counting possibly ineligible ballots is actionable under state law. Looking to other states, one finds "vote dilution" described as a concept "actionable under *federal* jurisprudence."

*Mixon v. Commonwealth*, 759 A.2d 442, 453 (Pa. 2000) (quoting *Reno v. Bossier Parish School Bd.*, 528 U.S. 320 (2000)) (emphasis added). For example, in a case challenging the eligibility of non-resident voters, the South Carolina Supreme Court looked solely to the Fourteenth Amendment, not state law, to find a constitutional protection against vote dilution. *Burriss v. Anderson County Bd. of Educ.*, 633 S.E.2d 482 (S.C. 2006). The same principle, that vote dilution protection is a creature of federal, not state law, has been endorsed in Alabama, *Birmingham v. Smith*, 507 So.2d 1312 (Ala. 1987) and Maryland, *McMillan v. Love*, 842 A.2d 790 (Ct.App.Md. 2004).

State law, at least in Ohio, creates no specific constitutional protection against vote dilution by the counting of ineligible ballots, and state law certainly creates no remedy or private right of action. Appellants Skaggs and Fannin explicitly invoked their *federal* constitutional rights under the Fourteenth Amendment in their own Complaint. Thus, they have raised an issue of federal law on the face of their own well-pleaded complaint, and the District Court correctly determined that it had jurisdiction to hear the case.

### 2. The Complaint Directly Implicates and Challenges Two Federal Court Orders

On October 24, 2008, the Secretary issued Directive 2008-101, which instructed county boards of elections on various issues relating to the processing and handling of provisional ballots. On that same day, the district court issued an

Order that expressly incorporated Directive 2008-101 as a correct statement of state of federal law. *Northeast Ohio Coalition for the Homeless v. Brunner*, Case No. 2:6-cv-896, R. 142.

The Complaint specifically refers to Directive 2008-101. [Complaint, ¶ 18]. Indeed, Appellants cite the Directive as legal authority for their position, and contend that the Secretary's decision to count these 1,000 provisional ballots conflicts with the Directive. The Secretary disagrees with Appellants' interpretation of the language in Directive 2008-101. *See, e.g.,* Compl. ¶ 18 (contemplating the meaning of the phrase "his or her name and signature" in the context of Directive 2008-101); *see also* Damschroder Affidavit, Exhibit 4 (documenting email discussions about the meaning of Directives 2008-101 between Secretary of State Elections Counsel Brian Shinn and Franklin County Assistant Prosecutor Patrick Piccininni).

But by making the meaning of Directive 2008-101 an issue in this case, Appellants have unavoidably challenged the federal court's order adopting the Directive as valid law.

Moreover, on October 27, the district court issued an Order expressly providing that a provisional ballot cannot be legally rejected solely on the basis of poll worker error. That court order prompted the Secretary to issue Directive 2008-103 on October 28. That Directive, among other things, asserts, consistent

with the order from the district court, the twin propositions that if information is missing from a provisional ballot affirmation, it reflects poll worker error, and no provisional ballot can legally be rejected solely on the basis of poll worker error.

The Complaint challenges both principles. Paragraph 34 asserts that the law imposes a duty on voters, not poll workers, to make sure affirmations are filled out correctly. If Appellants are correct, then any omissions would reflect voter error, not poll worker error. And so Appellants seek an order that provisional ballots should not be counted if any information is missing from the affirmation. As explained below, Appellants are legally incorrect on all these assertions. But the relevant point here is that by making these assertions, and seeking judicial relief to establish them as law, Appellants are attacking not only the Secretary's Directives, but the Orders issued by the district court adopting those Directives. Thus, the Complaint on its face presents questions of federal law.

In support of remand, Appellants cite two Sixth Circuit decisions, both of which are distinguishable. *State ex rel. Crotteau v. Chattanooga Women's Clinic*, 1992 U.S. App. LEXIS 12064 (6th Cir. May 18, 1992), stands for the unremarkable proposition that a federal *defense* will not create federal jurisdiction, only a federal issue in the complaint. The Secretary does not dispute this principle, but respectfully suggests that it is irrelevant because her claim of federal

jurisdiction is premised entirely upon the federal issues raised in the Complaint and not at all on any possible federal defenses she might assert.

The second case cited by Appellants involved a contract dispute over the supply of municipal water services. *City of Warren v. City of Detroit*, 495 F.3d 282. The City of Warren alleged that Detroit breached its contract and violated state law by overcharging for the water it supplied. Detroit removed the case to federal court. Detroit's theory was that federal jurisdiction existed as a result of prior litigation between Detroit and the Environmental Protection Agency over alleged Clean Water Act violations. The EPA litigation had resulted in the appointment of a Special Administrator whose authority encompassed not only monitoring Detroit's wastewater operations, but also other administrative activities, such as collection of receivables and customer rate setting.

The Sixth Circuit correctly held that the case should be remanded. Warren raised only state law claims: a common law contract claim and a claim under a Michigan statute. The Complaint raised no issues of federal law, and "a substantial, disputed question of federal law [was] not a necessary element of either of Warren's state-law claims." *City of Warren*, 495 F.3d at 287. The Appellate Court considered the Detroit/EPA consent Agreement irrelevant, in part because Warren was not a party to it, but primarily because the outcome of the Warren-Detroit suit would not lead to a conflict with the Special Administrator.

Warren was contending that the law would not permit Detroit to charge a certain rate, and if Warren was correct, then the law would also preclude the Special Administrator from setting that rate or Detroit from agreeing to pay the inflated rate. Appellants suggest that *City of Warren* decides this case, when in fact the two cases are greatly dissimilar. To appreciate why this is so, it is first necessary to consider a more recent decision from the Sixth Circuit on the same subject.

Ironically, the more analogous case arose out of the same Detroit/EPA consent agreement. *EBI-Detroit, Inc. v. City of Detroit*, 279 Fed. Appx. 340 (6th Cir. 2008) (unpublished). EBI-Detroit submitted a bid to build a pumping station and overflow facility, Detroit rejected the bid, and EBI filed suit in state court against the City and the Special Administrator. But this time, when Detroit removed the case to federal court, the removal was successful. The result was different this time because had EBI alleged that the Special Administrator, in electing to award the contract to another bidder, violated the terms of the federal court order appointing him Special Administrator. Thus, the Sixth Circuit could see allegations of federal law violations on the face of the complaint.

The Skaggs/Fannin Complaint is indistinguishable from EBI's, and bears no resemblance to City of Warren's. As the district court astutely observed, the Complaint alleges that the Secretary has violated Directive 2008-101, *which is a binding order from a federal court.* Thus, the Secretary stands in the same position

as the Special Administrator did in *EBI*: she is accused of violating a federal court order by a non-party to that order (EBI, like Skaggs/Fannin, can enforce the order without being bound by it).

On the other hand, any comparison between this case and *City of Warren* is deeply flawed. The Detroit/EPA consent agreement called for the appointment of a Special Administrator, who could take specific actions. The Sixth Circuit was unconcerned by the possibility that one of the Administrator's decisions might be undone by a state court ruling. But in this case, Appellants seek to undo and contradict not the fact-finding of a Magistrate, but an Order from a federal judge relating to the very same subject matter. The federal issue could not be more clear, and the District Court correctly determined that it had jurisdiction.

### B Removal was Procedurally Proper

Both the Appellants and the Board of Elections[4] challenge the propriety of removal without the consent of all defendants, specifically, the consent of the board of elections. It is true that courts generally require all defendants to join in or consent to a removal petition. *See, e.g., Klein v. Manor Healthcare Corp.*, 1994 U.S. App. LEXIS 6086, *12 (6th Cir. 1994). But there are three exceptions to that general rule, and two of them apply in this case: the consent of all defendants is not required when (1) the non-joining defendant has not been served with service of

[4] The Franklin County Board of Elections has inexplicably decided to challenge the order of the district court and as an appellee without actually filing a notice of appeal or cross-appeal.

process at the time the removal petition is filed; or (2) the non-joining defendant is merely a nominal or formal party. *Id.* Consent from the board was unnecessary for a third reason: the District Court correctly recognized that the board was not a true defendant, and re-aligned the parties to make the board a plaintiff.

### 1. Consent is Not Required of a Defendant Who has Not been Served with Summons at the Time of Removal

At the time the removal petition was filed, the Franklin County Board of Elections had not yet been served with a summons and complaint; thus, there was no need to receive the Board's consent in the filing of the removal petition. "The general rule that all defendants join or consent to the removal does not apply when the non-joining defendant has not been served at the time the notice of removal is filed." *Kralj v. Byers*, Case No. 4:06 CV 0368, 2006 U.S. Dist. LEXIS 16404, at *6 (N.D. Ohio April 5, 2006) (citing *Hicks v. Emery Worldwide, Inc*., 254 F.Supp.2d 968, 972 n. 4 (S.D. Ohio 2003)). According to the docket in the Supreme Court of Ohio, the Franklin County Board of Elections was not served with the summons and complaint until Monday November 17, 2008, well after the Secretary filed her Notice of Removal on Friday November 14, 2008. Furthermore, the Secretary of State filed her notice of removal at 9:06 a.m. on November 14, 2008. On the same day, the Franklin County Board of Elections filed its notice of appearance in the Supreme Court of Ohio. The Supreme Court does not show what time the notice of appearance was actually filed.

Although Appellants have cited *First Independence Bank v. Trendventures* in support of their position, it is distinguishable from the facts present in this case. The defendant in *Trendventures* had not only filed an appearance but had also been served with the summons and complaint and had even filed an answer to the complaint. *First Independence Bank v. Trendventures*, Case No. 07-CV-14462, 2008 U.S. Dist. LEXIS 6577 at *19 (E.D. Mich. Jan. 30, 2008). The fact that the board of elections may have filed a Notice of Appearance prior to the Secretary's filing of the Notice of Removal is irrelevant. The only pertinent question is whether or not it had been served with summons.

Furthermore, although Appellants speculate that the Secretary's office had not yet been served with the summons and complaint, this fact is irrelevant for the exception at issue. The exception to filing removal without the consent of the other named defendant(s) merely looks to whether the non-moving defendant had received summons and complaint, irrespective of whether the moving defendant had been served with the summons and complaint.

**2. Consent to Removal is Not Required from a Nominal Party**

The board of election's consent was not required to properly remove this case to the Southern District Court because, as the District Court found, the board is merely a nominal party. "In contrast to a real party in interest, a formal or nominal party 'is one who has no interest in the result of the suit and need not have

been made a party thereto.'" *Maiden v. N. Am. Stainless, L.P.*, 125 Fed. Appx. 1, 5-6 (6th Cir. 2004) (quoting *Grant County Deposit Bank v. McCampbell*, 194 F.2d 469, 472 (6th Cir. 1952) (citations omitted)). "Federal Rule of Civil Procedure 17(a) provides that 'every action shall be prosecuted in the name of the real party in interest.' Under the rule, the real party in interest is the person who is entitled to enforce the right asserted under the governing substantive law." *Certain Interested Underwriters at Lloyd's v. Layne*, 26 F.3d at 42-43 (quoting *Lubbock Feed Lots, Inc. v. Iowa Beef Processors Inc.*, 630 F.2d 250, 256-57 (5th Cir. 1980); *Simpson v. Providence Washington Ins. Group*, 608 F.2d 1171, 1173 n.2 (9th Cir. 1979); *Iowa Pub. Serv. Co. v. Medicine Bow Coal Co.*, 556 F.2d 400, 404 (8th Cir. 1977)).

Appellants do not state any cause of action or state any actual claim against the board and as such the board has no interest in the result of the case. The fact that the board is a nominal party is specifically reflected in the prayer for relief. The only relief Appellants request that is not specifically addressed to the Secretary of State is for a writ compelling the respondents, which would include both the Secretary and the board, to reject any provisional ballots that do not include both the name and signature of the voter on the provisional ballot affirmation. (Prayer C). However, the evidence put forth at the trial level indicates

that the board has been reduced to a purely ministerial role and is therefore a nominal party in this action.

Matthew Damschroder's affidavit, which was submitted in support of Appellants' Complaint, predicted that the board would deadlock 2-2 on whether they should count provisional ballots that do not have the voter's printed name on the envelope.[5] Damschroder Aff. ¶ 24. Mr. Dscmschroder's prediction was realized on Friday November 14, 2008, when the board did, in fact, tie on whether to count the provisional ballots. When a board of elections ties on such a decision, state law mandates that Secretary of State Brunner break the tie. RC 3501.11(X). In other words, Ohio law mandates that the board must automatically follow the tie-breaking decision of the Secretary. It is for this reason that the board has no specific interest in this litigation—it is merely a nominal party, as the board itself concedes in its Appellate Brief. Because the Franklin County Board of Elections' involvement is merely ministerial its consent is not required in order to properly remove this case to federal court.

Although Appellants cite *Local Union No. 172 v. P.J. Dick, Inc.*, the factual scenario is markedly different than the one at issue in this case. In *Local Union*, defendant P.J. Dick, Inc. was attempting to remove a case to federal court without the consent of the co-defendant Associated General Contractors of America, Inc.,

[5] The Deputy Director has signed an affidavit claiming that "internal discussions indicate the Board of Elections will tie in its vote on whether it would reject as ineligible Provisional Ballot Applications that do not bear both the voter's "Name AND signature… ." Damschroder Aff. ¶ 18.

Central Ohio Division ("AGC") on the basis that AGC was a nominal party. *Local Union No. 172 v. P.J. Dick, Inc.*, 253 F. Supp. 2d 1022, 1026 (S.D. Ohio 2003) ("the complaint properly states a claim (or at least an arguable claim) against AGC, and nothing more is required to find that AGC is not a nominal party to this action"). However, the plaintiff had specifically stated a cause of action against AGC. In particular, plaintiff was seeking to enforce a statutory provision which required mandatory arbitration of a labor dispute between the co-defendants. *Id.* at 1027. Therefore, the court held that "AGC was required to have joined in or unambiguously consented to the removal of the case, and its failure to do so cannot be excused on grounds that it is only a 'nominal' party." *Id.* Since the board has tied, there is no claim asserted against them and it is solely in the hands of the Secretary. Therefore the relief sought and the claims stated are solely against the Secretary, leaving the Franklin County Board of Elections as a merely nominal party.

### 3. The Board is No Longer a Defendant

Although the Franklin County Board of Elections was named as a Defendant in this case, it was evident from the materials attached to the Complaint that the Franklin County Board of Elections' interests were adverse to those of the Ohio Secretary of State. For that reason, the District Court properly realigned the parties (which effectively ended the need for the board to consent to removal).

It has long been held that "[i]t is our duty, as it is that of the lower federal courts, to 'look beyond the pleadings and arrange the parties according to their sides in the dispute.'" *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 690 (1941) (quoting *Dawson* v. *Columbia Trust Co*., 197 U.S. 178, 180 (1905)). If the parties are not properly aligned, as where one party is made a defendant when in truth and in fact he is not adverse to the plaintiff, or vice versa, the court will realign the parties according to their interests before determining diversity . . ." *Eikel v. States Marine Lines, Inc.*, 473 F.2d 959, fn 3 (5th Cir. 1973) (citing 3A Moore's Federal Practice, 2147-48). In other words, "[c]courts may realign parties, according to their ultimate interests." *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1133 (9th Cir. 2006), *cert. denied*, 126 S. Ct. 289 (2006). Moreover, the courts may realign the parties according to their ultimate or true interests, irrespective of whether the realignment has the effect of conferring or denying subject-matter jurisdiction on the court. *Id.* at 1133. In other words, the district court has jurisdiction immediately upon the filing of a notice of removal to look at the complaint and determine the true nature of the parties before deciding whether it holds jurisdiction or not.

"Although realignment questions typically arise in the diversity of citizenship context, the need to realign a party whose interests are not adverse to those of his opponent(s) exists regardless of the basis for federal jurisdiction."

*Larios v. Perdue*, 306 F. Supp. 2d 1190, 1195 (N.D. Ga. 2003). The federal courts have employed two different tests in determining the propriety of realignment; the Sixth Circuit has employed what has been labeled the "primary purpose test." *Id.* (citing *United States Fid. & Guar. Co. v. A & S Mfg. Co., Inc.*, 48 F.3d 131, 132-33 (4th Cir. 1995). Under the primary purpose test "'if the interests of a party named as a defendant coincide with those of the plaintiff in relation to the [primary] purpose of the lawsuit, the named defendant must be realigned as a plaintiff . . . .'" *United States Fid. and Guar. Co. v. Thomas Solvent Co.*, 955 F.2d 1085, 1089 (6th Cir. 1992) (citing *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1523 (9th Cir. 1987)).

Despite the structure of the Complaint, the district court properly looked past the fact that Appellants named the board as a Defendant and arranged the parties according to their sides in the dispute. In this case, the primary purpose of the litigation indicates that the board is an adversarial party to the Ohio Secretary of State and finds itself more aligned with the Appellants in this case. This is indicated by the affidavit of Matthew Damschroder, the Deputy Director of the Franklin County Board of Elections, which was submitted as the only support for the Complaint. In his affidavit, Mr. Damschroder made it clear that the Board of Elections' interests in this case were adverse to the Secretary of State. Not only did Mr. Damschroder, in his capacity as the Deputy Director, indicate an alignment

with the Appellants, but so did Patrick Piccininni, counsel for the Franklin County Board of Elections. As evidenced by the emails attached to Mr. Damschroder's affidavit, Mr. Piccininni engaged in a lengthy disagreement with Brian Shinn of the Secretary of State's Office over the interpretation of Directives 2008-101 and 2008-103 and how provisional ballots should be processed and counted. Furthermore, during discussion on these issues before the Franklin County Board of Elections, Prosecutor Ron O'Brien argued to the Franklin County Board of Elections that as the board's legal counsel, the board of elections should follow his legal interpretation, not the Secretary's.[6] In fact, Mr. Damschroder provided Appellants with a second affidavit in support of their motion to stay the district court's decision pending this appeal. This excessive entanglement between the parties indicates that the board was properly realigned as a plaintiff; justifying removal without the board's consent.

The appropriateness of the district court's factual finding concerning the appropriateness of Franklin County Board of Elections being aligned with the Plaintiffs has been further demonstrated in this Court. The Franklin County Board of Elections has filed a brief arguing the district court erred in denying the

[6] Although the Prosecutor's office has taken the position that poll worker error should not be used to reject a provisional ballot that does not have printed name on Franklin County's unique ballot application, the Prosecutor did convince the board of elections to count provisional ballots cast in the wrong precinct despite the apparent prohibition against doing so in Ohio law under certain circumstances in the future.

Plaintiffs' motion to remand. The Franklin County Board of Elections made this argument without actually filing a notice of appeal or cross appeal.

## II. THE SECRETARY IS CORRECT TO COUNT THESE BALLOTS

Leaving aside the procedural arguments, the Secretary can now address the substantive argument at the heart of this case. Both federal and Ohio law is very clear that the provisional ballots Appellants would see discarded contain valid votes and should be counted.

Revised Code Chapter 3505 creates a comprehensive scheme for processing provisional ballots. That scheme imposes multiple affirmative duties upon election officials at the polls, including but not limited to directing individuals to their proper polling places [R.C. 3505.181(C)(1)] and advising them that they have the right to cast provisional ballots. [R.C. 3505.181(B)(1)]. It also imposes a duty upon election officials, not voters, to ensure that the provisional ballot affirmation forms are filled out correctly and completely. R.C. 3505.181(B)(2).

In order to argue that these 1,000 provisional ballots should not be opened and counted, Appellants ask this Court to read one provision of the Revised Code in isolation, R.C. 3505.183(B)(1), and to unnecessarily disenfranchise 1,000 Ohioans for technical defects that in no way call into question whether these individuals were properly registered to vote or were appropriately casting ballots.

However, standing alone or read in tandem with other Code provisions, R.C. 3505.183(B)(1) demonstrates that these ballots must be counted.

### A. R.C. 3505.183(B)(1) and R.C. 3505.181(B)(6) Plainly Require the Counting of a Provisional Ballot that Contains a Printed Name but No Signature

Appellants have misread the plain language of R.C. 3505.183(B)(1). Section (B)(1) addresses two scenarios: one in which the individual executes an affirmation, and one in which the individual refuses to sign the affirmation. The two scenarios lead to different outcomes, yet Appellants conflate this distinction through selective quotation. R.C. 3505.183(B)(1) states in full:

> To determine whether a provisional ballot is valid and entitled to be counted, the board shall examine its records and determine whether the individual who cast the provisional ballot is registered and eligible to vote in the applicable election. The board shall examine the information contained in the written affirmation executed by the individual who cast the provisional ballot under division (B)(2) of section 3505.181 of the Revised Code. If the individual declines to execute such an affirmation, the individual's name, written by either the individual or the election official at the direction of the individual, shall be included in a written affirmation in order for the provisional ballot to be eligible to be counted; **otherwise**, the following information shall be included in the written affirmation in order for the provisional ballot to be eligible to be counted:
>
> (a) The individual's name and signature.

Appellants call Subpart (a) a mandatory obligation, yet it only applies when the voter agrees to sign the provisional ballot affirmation. When the voter does not

sign the affirmation, you end up with a provisional ballot affirmation that contains a printed name but no signature, and R.C. 3505.183(B)(1) clearly considers that a valid vote. (If refusal to sign invalidated the provisional ballot, there would be no point to requiring the poll worker to print the individual's name on the form).

In fact, the Revised Code goes a step further and imposes an affirmative duty upon election officials to print the voter's name on the affirmation form when the individual does not sign. R.C. 3505.181(B)(6). Clearly, the General Assembly anticipated that some affirmations would arrive at the boards of elections bearing printed names but no signatures, and yet be valid. As the district court observed,

> [W]here a voter refuses to sign the PBA, Ohio law requires that his vote be counted. Such a ballot is indistinguishable from a provisional ballot where the individual *forgot* to sign the affirmation.

[Nov. 20, 2008 Order, R. 41, p. 15]. The two provisional ballot affirmations *should* be distinguishable, because if an individual refuses to sign, the election official is required to note that fact on the affirmation form. R.C. 3505.181(B)(6). However, the responsibility to make such a notation belongs solely to the election official; his error cannot be held against the voter or used as a basis for disqualifying the ballot.

In short, R.C. 3505.183(B)(1) stands for the exact opposite of what Appellants claim: an otherwise eligible, qualified provisional ballot must be counted, when the affirmation has a printed name but no signature.

### B. R.C. 3505.181(B)(2) Requires the Counting of a Provisional Ballot that Contains a Signature but No Printed Name

The second scenario involves an affirmation that contains a signature but lacks a printed name. Here the case for disqualification is *weaker*, at least as regards Appellants' stated concerns of voter fraud. In this scenario, the provisional voter has signed the declaration acknowledging and subjecting himself to the penalties for election fraud. It is unclear what additional fraud protection the printed name provides, such that a signed affirmation lacking a printed name should be rejected since provisional ballot voters sign poll books.

Fortunately, here again, the Revised Code is consistent with sound policy and common sense: the provisional ballot should be counted notwithstanding any alleged technical violation. R.C. 3505.181(B)(2) states:

> The individual shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual *before an election official* at the polling place stating that the individual is both of the following:
>
> (a) A registered voter in the jurisdiction in which the individual desires to vote;
>
> (b) Eligible to vote in that election.

Thus, R.C. 3505.181(B)(2) makes the election official a mandatory witness to the execution, that is, the completion, of the provisional ballot affirmation form. "[T]he provision requires more than the mere passive presence of the poll worker, conferring on him a duty to verify the actual completion of the provisional ballot

application form, thereby requiring him to participate actively in the exercise of an eligible voter's franchise." [Order, R. 41, p. 12]. The active role of the election official is confirmed by R.C. 3505.182, which requires the poll worker to sign a Verification Statement attesting that the affirmation form was "subscribed and affirmed before me." As the District Court noted, to "subscribe" means "to sign one's name," and "to affirm" means "to swear under oath." "Thus, the verification statement requires the poll worker to confirm that the voter completed the affirmation by providing both a name and signature." [Order, R. 41, at p. 13]. The absence of one or the other, then, can only be the result of error or nonfeasance by the poll worker. Simply put, a poll worker who was doing her job would never have accepted a provisional ballot affirmation that was signed but unnamed.

### C. Appellants' Reliance on R.C. 3505.183(B)(1) is Misplaced

Appellants' challenge to these provisional ballots is based wholly on R.C. 3505.183(B)(1) and a belief that it creates a mandatory requirement that both printed name and signature appear on all provisional ballot affirmation forms. According to Appellants, 3505.183(B)(1) (1) "impose[s] a mandatory obligation on county boards of election to reject a provisional ballot application where the voter failed [to] include both his or her written name and signature on the required affirmation; and (2) clearly indicate[s] that it is the voter's obligation to provide this required information on the provisional ballot application." [Brief, p. 31].

However, Appellants' attempt at statutory construction suffers from numerous flaws.

R.C. 3505.183(B)(1) does state (in part) that "the following information shall be included in the written affirmation in order for the provisional ballot to be eligible to be counted: (1) The individual's name and signature." But as previously noted, that mandatory language only applies when the individual agrees to sign. When the individual refuses to sign, a printed name is sufficient. Therefore, it necessarily follows that printed, unsigned affirmations are valid, and the provisional ballots contained in envelopes bearing those unsigned affirmations must be counted upon verification by the Board of Elections that the voter was qualified and eligible to vote.

Appellants' second assertion, that R.C. 3505.183(B)(1) makes it the voter's responsibility to make sure the affirmation is complete, is also without textual support. R.C. 3505.183(B)(1) is written in passive tense; it does not say whose responsibility it is to check the form. But though that section is silent, R.C. 3505.182 is not: it demands a Verification from the election official that the form was completed. What more unambiguous demonstration could there be that it is up to the poll workers to see the work is done correctly?

### D. <u>The Placement of a Signature in the Wrong Place is Not Disqualifying</u>

Apparently, some voters signed their names in cursive in the blank for "name" and printed their names on the signature line. The argument for disallowing these ballots is tenuous at best, which is why Appellants have apparently and wisely dropped the argument from their Brief.

Two quick points should suffice to address the validity of these ballots. First, there is no statutory requirement that names – in cursive or block print – appear in any particular location on the affirmation. The best Appellants can do is point to R.C. 3505.182, which offers up a sample provisional ballot affirmation form. But R.C. 3505.182 merely suggests that the form should be "**substantially** as follows." By its plain terms, R.C. 3505.182 requires only "substantial" compliance, not strict compliance. Substantial compliance with an election law is acceptable when, as here, the statute expressly says so. *State ex rel. Stokes v. Brunner*, ____ Ohio St.3d ____, 2008 Ohio 5392, at ¶ 33; *State ex rel. Grounds v. Hocking Cty. Bd. of Elections*, 117 Ohio St.3d 116, 2008 Ohio 566, at ¶ 21. Therefore, R.C. 3505.182 offers no support for the notion that a ballot is invalid unless the affirmation is filled in one particular way.

Second, rejecting these ballots would contradict the principle, repeatedly affirmed by the Ohio Supreme Court, that courts "must avoid unduly technical interpretations [of election laws] that impede the public policy favoring free, competitive elections." *State ex rel. Myles v. Brunner*, 2008-Ohio-5097, ¶ 22

(quoting *State ex rel. Ruehlmann v. Luken* (1992), 65 Ohio St.3d 1, 3). Yet this is precisely what plaintiffs seek to achieve: a rigid, hyper-technical statutory construction that would achieve no valid end but would serve to disenfranchise hundreds of otherwise eligible voters.

### E. The Secretary of State's Legal Determinations are Entitled to Deference.

Ohio law has long recognized that the Secretary of State is the State's chief elections official. RC 3501.04. If an elections statute is subject to two or more reasonable interpretations, the Secretary of State's interpretation is entitled to deference. *Whitman v. Hamilton County Board of Elections*, 97 Ohio St.3d 216 (2002). Even if the Plaintiffs were correct in their reading of RC 3505.183, it would only result in an ambiguity over whether the ballots at issue in this case should be counted. Because of that ambiguity, Secretary Brunner is entitled to judicial deference in reaching a conclusion that the ballots must be counted. Such deference should be granted by a court not only because Secretary Brunner is the State's chief elections officer, but also because voters should not be disenfranchised based upon a hyper-technical reading of the requirements of Ohio's election law. *State ex rel. Myles v. Brunner*, ___ Ohio St.3d ___, 2008 Ohio 5097 (2008).

## CONCLUSION

For the foregoing reasons, this court should affirm the District Court's grant of summary judgment in favor of Secretary Brunner.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

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*/s Richard N. Coglianese*
Richard N. Coglianese

## CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of November, 2008, the foregoing *Brief* was electronically filed using this Court's CM/ECF system, and that all counsel of record received notification of that filing and copies via the CM/ECF system.

*/s Richard N. Coglianese*
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LEXSEE 279 FED APPX 340

**EBI-DETROIT, INC., Plaintiff-Appellant, v. CITY OF DETROIT, DETROIT WATER AND SEWER DEPARTMENT, GARY FUJITA, VICTOR MERCADO, KWAME KILPATRICK, individually and in his capacity as MAYOR OF DETROIT, Defendants-Appellees.**

**No. 07-1391**

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**08a0286n.06; *279 Fed. Appx. 340*; *2008 U.S. App. LEXIS 11043*; *2008 FED App. 0286N (6th Cir.)***

**May 22, 2008, Filed**

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**PRIOR HISTORY:** [**1]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

*Ebi-Detroit, Inc. v. City of Detroit, 476 F. Supp. 2d 651, 2007 U.S. Dist. LEXIS 12102 ( E.D. Mich., 2007)*

*EBI-Detroit, Inc. v. City of Detroit, 469 F. Supp. 2d 464, 2006 U.S. Dist. LEXIS 93964 ( E.D. Mich., 2006)*

**COUNSEL:** For EBI-DETROIT, INCORPORATED, a Michigan Corporation, Plaintiff - Appellant: Daniel J. McCarthy, Hyman & Lippitt, Birmingham, MI; D. Douglas McGaw, Poling McGaw, Troy, MI.

For CITY OF DETROIT, a Municipal Corporation, DETROIT WATER AND SEWERAGE DEPARTMENT, GARY FUJITA, an individual, VICTOR MERCADO, an individual, KWAME KILPATRICK, individually and in his fiduciary capacity as Mayor of Detroit, Defendants - Appellees: Marilyn A. Peters, Dykema Gossett, Bloomfield Hills, MI; Robert J. Franzinger, Dykema Gossett, Detroit, MI.

**JUDGES:** Before: BOGGS, Chief Judge; ROGERS, Circuit Judge; and SHADUR, * District Judge.

* The Honorable Milton I. Shadur, United States District Judge for the Northern District of Illinois, sitting by designation.

**OPINION BY:** BOGGS

**OPINION**

[*342] BOGGS, Chief Judge. Construction contractor EBI-Detroit appeals the district court's grant of summary judgment in favor of the City of Detroit, the Detroit Water and Sewer Department ("DWSD"), Gary Fujita and Victor Mercado, two directors of DWSD, and Detroit's mayor, Kwame Kilpatrick. EBI claims that the defendants breached a contract and committed various intentional torts [**2] when they rejected EBI's bid on a DWSD project. The threshold question in this case is whether federal jurisdiction exists. We conclude that it does. EBI's allegation that Kilpatrick acted outside the powers granted to him by a federal court requires us to interpret the federal court order and thus presents a federal question. The second, easier question is whether EBI's claims can survive summary judgment. We conclude that they cannot, and therefore affirm.

I

Our jurisdiction turns on Kilpatrick's appointment as "Special Administrator" of DWSD under a consent decree between DWSD and the EPA, so we summarize the extended litigation between those two parties. Thirty-one years ago, in 1977, the United States sued DWSD over DWSD's noncompliance with the Clean Water Act ("EPA Case"). In September 1977, the parties entered a consent decree establishing a compliance schedule for bringing DWSD's wastewater treatment and pollution discharges in line with the Clean Water Act. District Judge Feikens oversaw the initial consent decree, and he has continued to oversee the litigation surrounding DWSD and the EPA to this day. In 1979, Judge Feikens found that DWSD was not following the compliance [**3] schedule and appointed Coleman Young, the mayor of Detroit, as "Special Administrator" of the DWSD. *United States v. City of Detroit, 476 F. Supp. 512 (E.D. Mich. 1979)*. [*343] This appointment gave the mayor power to "exercise extraordinary remedies in control, management, and operation of the Wastewater Treatment Plant" to ensure DWSD's compliance, *id. at 515*, and allowed him "to enter into such contracts as he deems necessary and appropriate under the circumstances, with or without competitive bidding." *Id. at 516*.

Since the initial consent decree, DWSD has drifted in and out of compliance with the Clean Water Act. During periods of compliance, Judge Feikens "temporarily suspended the Special Administratorship," only to "revive" it when "compliance with the Clean Water Act or the Consent Judgments in this case was at risk." *United States v. Michigan, 409 F. Supp. 2d 883, 886 (E.D. Mich. 2006)* (Feikens, J.). In August 1997, DWSD acknowledged that it was once again operating in violation of EPA regulations. Judge Feikens appointed a committee to investigate DWSD's noncompliance. The committee issued its report in January 2000, and the court again responded by appointing Detroit's mayor, Dennis [**4] Archer, as Special Administrator of DWSD. The court gave Archer the same powers it gave to Mayor Young in 1979. *United States v. City of Detroit*, No. 77-71100, 2000 WL 371795 (E.D. Mich. Feb. 7, 2000). DWSD's contracts were "subject to the requirement of competitive bidding," but the mayor could waive the bidding rules when he deemed it "necessary." *Id.* at * 5. On December 3, 2001, the court transferred the authority of the Special Administrator to Detroit's new mayor, Kwame Kilpatrick.

This case arises from DWSD's rejection of EBI's bid on Contract PC-753, the Belle Isle Pump Station and Combined Sewer Overflow Control Improvements Project (the "Belle Isle Project"). The parties agree that the Belle Isle Project is required by DWSD's EPA permit. DWSD's Assistant Director Gary Fujita stated that the Belle Isle Project needed to be completed on a tight timetable to ensure compliance with the EPA's consent decree. DWSD solicited bids on the Belle Isle Project, and, after equalization, the two lowest bids came from EBI, at $ 13,265,009, and from Walsh Construction, at $ 13,588,680. [1]

1 "Bid equalization" is a process that allows a government body to give preference to bidders with certain [**5] characteristics by adjusting the bidder's bid according to an equalization table. DWSD gives bidders an "equalization allowance" of between 1% and 5%, depending on the contract size, to Detroit-based businesses or to small businesses. *See Walsh Constr. Co. of Ill. v. City of Detroit, 257 F. Supp. 2d 935, 938 (E.D. Mich. 2003)* (discussing Detroit's equalization process).

DWSD made it clear that the Belle Isle Project would be awarded to the lowest bidder who was both *responsive* and *responsible*, "responsive" meaning that the bidder submitted a timely bid that conformed to DWSD's request, and "responsible" meaning that the bidder's record suggested that it could be expected to complete the project on time and in compliance with all relevant laws. DWSD sent EBI a letter on January 28, 2005, telling EBI that it was the lowest responsive bidder, and that it needed to submit certain documents to prove that it was responsible. On February 4, 2005, EBI attended a bid evaluation meeting where EBI and DWSD discussed the items that EBI needed to submit. On March 21, 2005, DWSD's director, Victor Mercado, sent EBI a letter stating that due to EBI's deficient performance on an earlier project, the [**6] LH-391 Project, DWSD was deeming EBI a non-responsible bidder and awarding the contract to another bidder.

The LH-391 Project was also required by the consent decree, and EBI was the [*344] design/build contractor for that project. While the LH-391 Project is not at issue in this case, it is relevant because EBI's performance on it prompted DWSD to reject EBI's bid on the Belle Isle Project. Both parties agree that serious problems arose on the LH-391 Project. It was supposed to be substantially completed by June 21, 2004, but was not substantially

completed until July 2005. As expected, EBI and the defendants disagree over the source of the problems. EBI devotes three pages of its brief to explaining how the defendants falsely blamed EBI for problems that they created. The Defendants counter by pointing the finger at EBI. They also argue that because EBI has already sued DWSD in state court over the LH-391 Project, it should not be allowed to litigate the LH-391 Project in this case as well.

EBI responded to the rejection of its bid on the Belle Isle Project on March 29, 2005, by sending a letter claiming that the decision was unfair and requesting a protest hearing. Sections 13.2 and 13.3 [**7] of the bidding document state that if a bid is rejected, the bidder may file a protest, and DWSD will review the protest and "if necessary" hold a hearing on the matter within ten days. DWSD sent EBI a letter on April 19 pointing out the permissive nature of its hearing obligations and informing EBI that DWSD had determined that a hearing was not necessary. Instead, on June 9 Kilpatrick invoked his powers as Special Administrator of DWSD and awarded the contract to Walsh Construction.

EBI sued the defendants on September 25, 2006, in Wayne County Circuit Court, asserting claims for breach of contract, defamation, tortious interference, and "abuse of power by the Special Administrator" against Kilpatrick. On October 11, 2006, the defendants removed the case to federal court. The case was initially assigned to Judge Paul Gadola, but it was reassigned on November 11, 2006, to Judge Feikens in light of his role in overseeing DWSD. EBI filed a motion to remand the case to state court on October 30, but it was denied on December 6.

The defendants filed a motion for summary judgment on December 27, and on April 25, 2007, the district court granted the motion. Judge Feikens reasoned that EBI [**8] was merely a disappointed bidder and lacked standing to assert any of its claims. EBI appealed.

II

A

The first question in this case is whether we have subject matter jurisdiction, an issue we review de novo. *Taveras v. Taveraz, 477 F.3d 767, 771 (6th Cir. 2007)*.

B

The bedrock principle of the federal judicial system is that federal courts are courts of limited jurisdiction. For a federal court to have jurisdiction over a case, "[t]he Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it." *Finley v. United States, 490 U.S. 545, 548, 109 S. Ct. 2003, 104 L. Ed. 2d 593 (2003)* (quoting *Mayor v. Cooper, 73 U.S. 247, 6 Wall 247, 252, 18 L. Ed. 851 (1868))*. Generally speaking, the Constitution and Congress have given federal courts authority to hear a case only when the case raises a federal question or when diversity of citizenship exists between the parties. *Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987)*. The federal question must appear on the face of the plaintiff's well-pleaded complaint. *Ibid.; see also Louisville & N. R. Co. v. Mottley, 211 U.S. 149, 150, 29 S. Ct. 42, 53 L. Ed. 126 (1908)*. When a case [*345] raising a federal question is filed in state court, the defendant may remove it to federal court if the [**9] case could have been filed in federal court. *Caterpillar Inc., 482 U.S. at 392*. Thus, a plaintiff may avoid federal question jurisdiction by relying exclusively on state law. *Ibid.* EBI argues that it did so and that its complaint relies solely on state law.

The defendants counter by invoking *28 U.S.C. § 1442*, which allows federal officers who are civilly sued or criminally prosecuted for actions taken "under color" of their office to remove the case to federal court even if no federal question appears on the face of the plaintiff's complaint. *Mesa v. California, 489 U.S. 121, 125-26, 109 S. Ct. 959, 103 L. Ed. 2d 99 (1989)*. *Mesa* explained that removal under *§ 1442(a)* is proper when: 1) the defendant is a federal officer within the meaning of the statute; 2) there is a causal connection between what the officer has done under asserted federal authority and the state lawsuit; and 3) the officer presents a colorable defense arising from his duty to enforce federal law. *Mesa, 489 U.S. at 132-33*. The defendants say that federal jurisdiction exists under *§ 1442(a)* because: 1) Kilpatrick is "an officer of the courts of the United States" because of his federally-appointed position as Special Administrator; 2) a causal connection [**10] exists because he is being sued for an action that the Special Administrator may take; and 3) he has a federal defense because as Special Administrator, he may circumvent the bidding process to enforce the consent decree.

It seems likely that Kilpatrick is a "federal officer" because of his appointment as Special Administrator and

that he has "a colorable federal defense" because of his powers as Special Administrator. However, we question the defendants' ability to establish a "causal connection" between Kilpatrick's actions under federal authority and the lawsuit. Other courts have considered *§ 1442(a)* in the context of a state official's attempted compliance with a federal consent decree or court order, and they have held that the state official establishes the necessary "causal connection," and is transformed into a "federal officer," only when his actions are "explicitly mandated or necessarily required" by the court order or consent decree with which he seeks to comply. *See, e.g., In re County Collector (Appeal of O'Brien), 96 F.3d 890, 898 (7th Cir. 1996)*. It is not clear that Kilpatrick's actions were "explicitly mandated" or "necessarily required" by the consent [**11] decree. But we need not resolve this issue because even if the defendants cannot establish federal jurisdiction through the somewhat unusual means of Kilpatrick's status as a "federal officer," [2] EBI's own complaint establishes routine federal question jurisdiction under *28 U.S.C. § 1331*.

> 2 For additional illustrations of when a state official can invoke federal officer jurisdiction under *§ 1442(a)*, compare *Tucker v. Cleveland Bd. of Educ., 465 F. Supp. 687, 689 (N.D. Ohio 1979)* (no federal officer jurisdiction because defendants "undertook these actions of [their] own volition, albeit as a response to this Court's orders") with *Voinovich v. Cleveland Bd. of Educ., 539 F. Supp. 1100, 1102 (N.D. Ohio 1982)* (federal officer jurisdiction because the court had "directly ordered" the Board's actions as part of desegregation consent decree).

C

*Section 1331* creates federal jurisdiction for all lawsuits "arising under the Constitution, laws, or treaties of the United States." *28 U.S.C. § 1331*. In turn, *28 U.S.C. § 1441(b)* allows a defendant to remove such a case to federal court. The "laws" of the United States include the orders issued by the federal courts. In the vast majority of cases, a claim [**12] "arises [*346] under" federal law when federal law provides a right to relief. *Eastman v. Marine Mech. Corp., 438 F.3d 544, 550 (6th Cir. 2006)* (citing *Am. Well Works Co. v. Layne & Bowler Co. 241 U.S. 257, 260, 36 S. Ct. 585, 60 L. Ed. 987 (1916))*. Federal law provides EBI's right to relief here because EBI's complaint alleges that Kilpatrick violated the federal court order appointing him Special Administrator of the DWSD.

EBI's allegation that Kilpatrick violated federal law appears on the face of EBI's complaint. The complaint states that:

> 99. Mr. Kilpatrick's actions awarding the Project to another contractor without seeking approval of the City Council *constituted a violation of his powers as Special Master* [Administrator].
>
> 100. Such disregard by the Mayor of Detroit constitutes an improper use of enumerated powers and as such *Mr. Kilpatrick's actions are ultra vires.*
>
> . . .
>
> 107. Mayor Kilpatrick's actions awarding the Project contract to another contractor without consulting the City Council *violated his powers as Special Master* [Administrator].
>
> . . .
>
> 116. Mr. Kilpatrick's actions *abused the Special Master* [Administrator] *power granted by Judge Feikens because the awarding of this Project is outside the boundaries of Mr.* [**13] *Kilpatrick's power* and contrary to the provisions of the Contract Documents (emphases added).

EBI even labels count 14 of its complaint "Willful Violation and Abuse of Power as Special Master of DWSD." Therefore, EBI's "right to relief" against Kilpatrick turns on whether Kilpatrick exceeded the authority granted to him by the federal court order. The order was issued by a federal court, and therefore the interpretation of that order is a question of federal law. EBI cannot recover under count 14 of its complaint unless Kilpatrick violated federal law, so we have a classic federal question and therefore subject matter jurisdiction.

EBI attempts to avoid jurisdiction in two ways. First, at oral argument, its counsel asked us to look to the

"substance" of EBI's complaint and find no federal jurisdiction. This is an ambiguous request. If EBI means that we should look at the words of EBI's complaint and see what legal violations are alleged, that is what we are doing. EBI alleged in count 14 that Kilpatrick *broke federal law* by exceeding his powers as Special Administrator, and it is this substantive legal allegation that creates jurisdiction. But if EBI means that we should find no jurisdiction [**14] because most of its claims are state-law claims, we reject this suggestion because when a complaint raises a single federal question, federal courts have jurisdiction over "all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." *28 U.S.C. § 1367(a)*. EBI primarily raised state-law claims, but EBI's allegation that Kilpatrick broke federal law brings the entire case into federal court because all of EBI's claims are part of the same "case or controversy."

Second, EBI points to a forum-selection clause in the bidding documents. The clause states:

> 15.4.1 The Contractor [EBI] agrees to submit to the exclusive personal jurisdiction of, and not commence any action in other than, a competent State court in Michigan, regardless of residence or domicile, for any action or suit in law or equity arising out of or under the Contract Documents.

The clause is irrelevant because it says nothing about the defendants' right to remove. [*347] Indeed, it does not mention any of the defendants at all. Our circuit has held that any waiver of the right to remove must be "clear [**15] and unequivocal." *Regis Ass'n. v. Rank Hotels Ltd., 894 F.2d 193, 195 (6th Cir. 1990)*. A clause that does not even mention either removal or the party seeking to remove cannot be a clear waiver of removal. [3]

> 3 EBI relies on *Global Satellite Commc'n Co. v. Starmill U.K. Ltd,. 378 F.3d 1269 (11th Cir. 2004)* and *Fluidtech, Inc. v. Gemu Values, Inc., 457 F. Supp. 2d 762 (E.D. Mich. 2006)*, but neither case is persuasive. *Global Satellite* is not persuasive because that court held that waiver of the right to remove need not be unequivocal and clear, but nevertheless held that a clause stating that the parties agreed to "submit to the jurisdiction of Broward County, Florida," did not waive the defendant's right to remove the case. *Global Satellite, 378 F.3d at 1271-72*. *Fluidtech* is even less on point because it dealt with venue and never mentioned removal. A more relevant case is *City of New Orleans v. Mun. Admin. Servs., Inc., 376 F.3d 501 (5th Cir. 2004)*, which held that a clause similar to the one here was not a clear waiver of the right to remove. *Id. at 505*.

EBI wants to be in state court, but that desire is not enough to avoid federal jurisdiction. While as the plaintiff EBI enjoys the [**16] long-established right to "decide what law he will rely upon," *Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25, 33 S. Ct. 410, 57 L. Ed. 716, 1913 Dec. Comm'r Pat. 530 (1913)*, that right does not allow EBI to escape the consequences of claiming that the defendants violated a federal court order. In another context we observed that "[n]othing prevents a plaintiff from pleading itself out of court, which is all that happened here." *NicSand, Inc. v. 3M Co., 507 F.3d 442, 458 (6th Cir. 2007)* (en banc). The reverse is also true. Nothing prevents a plaintiff from inadvertently pleading so as to subject itself to removal *into* federal court, and that is what happened here.

III

A

Having found jurisdiction, we turn now to the merits of EBI's case. The district court granted summary judgment to the defendants. We review grants of summary judgment de novo under the familiar standard of *Federal Rule of Civil Procedure 56* and *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. *Mickey v. Zeidler Tool & Die Co., 516 F.3d 516, 521 (6th Cir. 2008)*.

B

Count 1 of EBI's complaint alleges that DWSD breached a contract with EBI. But despite its best efforts, EBI cannot hide the fact that *it never signed a contract with DWSD.* Indeed, this dispute is in court [**17] precisely because Walsh Construction, not EBI, received the contract. The letter informing EBI that it was the lowest bidder told EBI that no contract had yet been awarded and that EBI would receive the contract only if it were found to be "responsible."

EBI knows this. In a letter to Kilpatrick on April 7, 2005, EBI spoke of "delays in formally awarding the contract to EBI." EBI's president admitted in his affidavit that EBI never received the contract. EBI's brief on appeal argues that "while it had not yet been finalized, all other necessary requirements for the formation of a contract had taken place." But this is like saying that while a plaintiff has not yet filed his complaint, all other necessary requirements for the commencement of a lawsuit have taken place. Without a contract to breach, EBI's breach of contract claim cannot stand.

EBI seeks to avoid this inconvenient fact by re-framing its claim. At oral argument before the district court, EBI's counsel contended that the parties' agreement [*348] "was not a contract to give us the job . . .; it was a contract to abide by the terms of the proposal." EBI insists that the parties agreed to abide by the bidding document, and that the [**18] defendants violated the bidding document by not holding a hearing on EBI's protest, and by not allowing EBI the opportunity to be heard at a DWSD board meeting. A glance at the bidding document disposes of EBI's first contention because the bidding document says that DWSD alone decides whether to hold a hearing. The second contention requires more consideration because while the bidding document states that a disappointed bidder who files a protest "will be given an opportunity to be heard at the Board meeting," no Board meeting was held. But EBI still loses because disappointed bidders have no standing to bring claims based on a violation of bidding procedures.

We reviewed the law surrounding standing and disappointed bidders in *Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby, 470 F.3d 286 (6th Cir. 2006)*. *Club Italia* held that absent a statutory exception, "a disappointed bidder does not have standing before this court." *Id. at 293*. Cases prior to *Club Italia* consistently refused to allow disappointed bidders [4] to bring claims for violations of the bidding procedures. *See, e.g., Expert Masonry, Inc. v. Boone County, Kentucky, 440 F. 3d 336, 348 (6th Cir. 2006)* (disappointed [**19] bidder suffered no cognizable antitrust injury); *Leo J. Brielmaier Co. v. Newport Housing Auth., 173 F.3d 855* (table), [published in full text format at *1999 U.S. App. LEXIS 7496], 1999 WL 236193, at *5 (6th Cir. 1999)* (disappointed bidder lacked standing to assert constitutional due process claim); *United of Omaha Life Ins. Co. v. Solomon, 960 F.2d 31, 34 (6th Cir. 1992)* (per curiam) (disappointed bidder lacked standing). A bidder who, in addition to seeing his bid rejected, is disqualified from bidding on *future* projects may have standing, *Club Italia, 470 F.3d at 297*, *United of Omaha, 960 F.2d at 34*, but EBI cannot obtain standing this way because EBI was not disqualified from bidding on future projects.

> 4 Our cases generally call a bidder who sues after having his bid rejected by the government a "disappointed bidder" regardless of the basis on which the government rejected the bid. *See, e.g., Club Italia, 470 F.3d at 293*. Other courts occasionally call the bidder in these situations a "disqualified" or "unsuccessful" bidder. *See, e.g., Kabro Assocs., LLC v. Colony Hill Assocs. (In re Colony Hill Assocs.), 111 F.3d 269, 273 (2d Cir. 1997)*. We will refer to EBI as a "disappointed" bidder to help maintain the distinction between the usual case, where the bidder has no standing and merely [**20] sees his immediate bid rejected for whatever reason, and the unusual case where the bidder may have standing because it has been *disqualified* from bidding on *future* projects. *Cf. Club Italia, 470 F.3d at 293* (no standing for "disappointed" bidder whose bid was rejected) and *Colony Hill, 111 F.3d at 273* (stating that "unsuccessful" or "disqualified" bidders do not have standing, but holding that standing existed under the Bankruptcy Code) *with United of Omaha Life Ins. Co. v. Solomon, 960 F.2d 31, 34 (6th Cir. 1992)* (per curiam) (bidder disqualified from bidding on future contracts may have standing).

EBI's contract claim would fare no better in state court. Michigan courts hold that:

> [O]ne who is unsuccessful in bidding on a public contract does not have standing to challenge the result or the bidding process itself This rule is based on the belief that statutes or ordinances requiring such bidding procedures for public contracts were adopted to benefit taxpayers or the general public.

*WDG Inv. Co., LLC v. Mich. Dept. of Mgmnt. and Budget*, Case No. 229950, 2002 WL 31424731, at *3 (Mich. Ct. App. 2002) (citing *Talbot Paving Co v. Detroit, 109 Mich. 657, 67 N.W. 979, 980 (1896))*.

*United of Omaha* is particularly [**21] fatal to EBI's claims because it held that a disappointed [*349] bidder must show that "it was actually awarded the contract at any procedural stage or that local rules limited the discretion of state officials as to whom the contract should be awarded." *United of Omaha, 960 F.2d at 34*. EBI cannot meet this test because it was never awarded the contract and because Kilpatrick has unlimited discretion in awarding contracts in order to comply with the EPA consent decree. Like the bidder in *United of Omaha*, EBI was "obviously disadvantaged" by the government's actions, *id. at 35*, but it nevertheless "retained only a unilateral hope of being awarded the contract, not a right to it." *Ibid.* A "unilateral hope" does not create standing.

C

We turn now to EBI's state-law claims for defamation and tortious interference. EBI alleged other torts in its complaint, but raises only these two on appeal. Some confusion exists as to whether EBI alleged defamation against Mercado and Fujita as individuals, against DWSD as an entity, or against both. We will give EBI the benefit of the doubt and assume that it pleaded defamation claims against Mercado, Fujita, and DWSD.

The district court's grant of summary judgment [**22] never mentioned EBI's tort claims. The district court based its decision on a disappointed bidder's lack of standing, so we must assume that the district court concluded that EBI lacked standing to raise its intentional tort claims.

We have never determined whether disappointed bidders have standing to bring intentional tort claims, as opposed to breach of contract or constitutional due process and equal protection claims. The argument against granting standing is that doing so would allow disappointed bidders to circumvent the prohibitions on claims arising from the bidding document by pleading their contract claims as intentional tort claims. The argument for granting standing is that government agencies should not be given a free pass to commit intentional torts simply because the victim is a disappointed bidder. Some courts have addressed the issue and granted standing to disappointed bidders in intentional tort cases. *See, e.g., A-Valey Eng'rs. Inc. v. Bd. of Chosen Freeholders of County of Camden, 106 F. Supp. 2d 711, 719 (D.N.J. 2000)* (tortious interference); *United Prison Equip. Co. v. Bd. of County Comm'rs of Caroline County, 907 F. Supp. 908, 913 (D. Md. 1995)* (defamation); [**23] *Lacorte v. Hudacs, 884 F. Supp. 64, 70 (N.D.N.Y. 1995)* (defamation). Likewise, an unpublished case from our circuit assumed that a disappointed bidder had standing to raise a tortious interference claim. *Leo J. Brielmaier Co., 1999 U.S. App. LEXIS 7496, 1999 WL 236193 at *7*. But we need not definitively answer the standing question now, because even if EBI has standing, its claims fail.

1

First, all defendants may be entitled to governmental immunity. We say "may" because while it is clear that DWSD and the City of Detroit, as government agencies engaged in a government function, are entitled to absolute immunity, confusion exists among Michigan courts about whether Michigan's governmental immunity statute covers intentional torts by government employees. The Michigan Supreme Court squarely held that there is "no intentional tort exception to the governmental immunity statute." *Smith v. State, Dep't of Public Health, 428 Mich. 540, 410 N.W.2d 749, 772 (Mich. 1987)*. *Smith* has not been overruled and has been repeatedly cited by lower Michigan courts as holding that governmental immunity bars intentional tort claims against both government agencies and government employees. *See, e.g., Bell v. Fox, 206 Mich. App. 522, 522 N.W.2d 869, 871 (Mich. Ct. App. 1994)* [**24] (relying on *Smith* [*350] to grant immunity to police officers); *Flones v. Dalman, 199 Mich. App. 396, 502 N.W.2d 725, 731 (Mich. Ct. App. 1993)* (same).

Unfortunately, the picture gets more complicated, particularly with respect to lower-level government employees. Several panels of the Michigan Court of Appeals have interpreted *Smith* as holding that governmental immunity shields only state agencies, not state officers, from tort liability. *See, e.g., May v. Greiner, 2006 Mich. App. LEXIS 3089, 2006 WL 2987709, at *3 (Mich. Ct. App. 2006)* (per curiam) (stating that *Smith* shields only government agencies, not individual government officers, from intentional tort liability); *Sudul v. City of Hamtramck, 221 Mich. App. 455, 562 N.W.2d 478, 479 (Mich. Ct. App. 1997)* (holding that "an individual employee's intentional torts are not shielded by our governmental immunity statute"); *see also ibid. at 489-90* (Murphy, P.J., concurring in part and dissenting in part) (saying that *Smith* is responsible for the confusion and arguing that "an analysis of *Smith*

beyond the bare holding reveals" that governmental immunity does not apply to intentional torts committed by police officers).

As a federal court, we look to the Michigan Supreme Court for the authoritative interpretation [**25] of Michigan law. *United States v. Philp, 460 F.3d 729, 732 (6th Cir. 2006)*. *Smith* is a Michigan Supreme Court decision that has not been overruled and as such we are we are bound by it. Yet it is difficult to ignore the uncertainty created by *Smith* and the contradictory interpretations of *Smith* by the Michigan Court of Appeals as we attempt to interpret Michigan law correctly without intruding on the Michigan courts' prerogative to interpret Michigan law. Clarification from the Michigan Supreme Court would be helpful, and we are grateful that it appears to be forthcoming.

In January of this year, the Michigan Supreme Court initially declined to hear a case that could have cleared this confusion. *Odom v. Wayne County, 480 Mich. 1015, 743 N.W.2d 56, 57 (Mich. 2008), reconsideration granted, order vacated by 747 N.W.2d 249, 480 Mich. 1184, 2008 Mich. LEXIS 732, 2008 WL 1851282, at * 1, (Mich. April 25, 2008)*. Justice Markman dissented from the initial denial, pointing out the contradictory opinions within the Michigan Court of Appeals, and explaining that "[b]ecause the law in this area is in such disarray, I would grant leave to appeal." *Id. at 57*. Just before this opinion was issued, the Michigan Supreme Court vacated its denial of leave [**26] to appeal in *Odom*, granted leave to appeal, and asked for briefing on the scope of Michigan's governmental immunity statute. *Odom v. Wayne County, 747 N.W.2d 249, 480 Mich. 1184, 2008 Mich. LEXIS 732, 2008 WL 1851282, at *1, (Mich. April 25, 2008)*. Fortunately, we need not wait until *Odom* clears up this issue to decide this case because even if governmental immunity does not bar EBI's claims, the claims lack merit.

With that background, we turn to the immunity issue, where we consider first the question of absolute immunity with respect to DWSD and the City of Detroit. Although the defendants did not raise the issue of governmental immunity below, we may affirm if a district court's decision was correct for any reason, even if the reason was "not considered below." *United States Postal Serv. v. Nat'l Ass'n of Letter Carriers, AFL-CIO, 330 F.3d 747, 750 (6th Cir. 2003)*; *see also Mack v. City of Detroit, 467 Mich. 186, 649 N.W.2d 47, 53 (Mich. 2000)* (defendant's failure to raise governmental immunity defense at trial did not preclude court from considering the defense on appeal). Under Michigan law, governmental immunity is not an affirmative defense, but a characteristic of the government that bars tort liability unless an exception applies. [**27] *Mack, 649 N.W.2d at 53-54*. "A governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental [*351] function." *Ibid.* (citing *Mich. Comp. Laws 691.1407(1)*). A "'[g]overnmental function' is an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." *Ibid.* The Michigan Constitution expressly authorizes cities to maintain water systems like DWSD. *Mich. Const. art. 7, § 24*. Furthermore, the Michigan Court of Appeals has explicitly held that Detroit's operation of DWSD is a governmental function. *Davis v. Detroit, 269 Mich. App. 376, 711 N.W.2d 462, 465 (Mich. Ct. App. 2006)*. Thus, DWSD and the City of Detroit are immune from EBI's tort claims. This immunity is indisputable. All Michigan cases agree that government agencies are immune from liability for intentional torts; the conflict is over the immunity of government officers. *See Sudul, 562 N.W.2d at 490*.

Next, we ask if the individual defendants are entitled to absolute immunity. We answer that under our understanding of Michigan law, Mayor Kilpatrick and Director Mercado are absolutely immune from EBI's tort claims. [**28] Michigan's governmental immunity statute says that "the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority." *Mich. Comp. Laws 691.1407(5)*. Michigan courts have determined that Mayor Kilpatrick and Director Mercado are covered by this law. *Brown v. Mayor of Detroit, 271 Mich. App. 692, 723 N.W.2d 464, 481-82 (Mich. Ct. App. 2006)* (vacated in part on other grounds by *Brown v. Mayor of Detroit, 478 Mich. 589, 734 N.W.2d 514 (Mich. 2007))* (Kilpatrick); *Davis, 711 N.W.2d at 466 (Mercado)*.

When a government official covered by *MCL 691.1405(5)* is acting within the scope of his authority, that official enjoys absolute tort immunity. *American Transmissions v. AG, 454 Mich. 135, 560 N.W.2d 50, 52 (Mich. 1997)*. The official's motivation is irrelevant; the

only question is whether the act was within the scope of his authority. *Id. at 53* (no "malevolent-heart" exception to statute). Awarding contracts and determining whether or not a contractor is "responsible" lie within Kilpatrick's and Mercado's authority, so they are immune from [**29] suit. Indeed, both *Brown* and *Davis* granted Mercado and Kilpatrick immunity from intentional tort claims pursuant to *Mich. Comp. Laws 691.1407(5)* and did not mention *Smith.* This suggests to us that as the highest officials of their respective levels of government, their right to immunity is absolute and does not turn on the contradictory interpretations of *Smith.* [5]

> 5 We note, as additional reasons for our understanding of Michigan law, that the cases which disagree over *Smith* deal with the immunity of lower-level government employees and that the Michigan Supreme Court's grant of leave to appeal in *Odom* asked whether "intentional torts claims be brought under *MCL 691.1407(2)*," which grants qualified immunity, and not *Mich. Comp. Laws 691.1407(5)*, which applies to Mercado and Kilpatrick. *Odom, 2008 Mich. LEXIS 732, 2008 WL 1851282, at * 1*. If we are wrong, we welcome correction by the Michigan Supreme Court in *Odom* and add that the outcome of this case would not change because, as we explain later, EBI's claims lack merit.

Whether Deputy Director Fujita also enjoys immunity is closer question. As the *Deputy* Director, he is not the *highest* official at his level of government. While some Michigan courts have been [**30] willing to expand absolute immunity to Deputy Directors, others have not. *Compare, e.g., Chivas v. Koehler, 182 Mich. App. 467, 453 N.W.2d 264, 265 (Mich. Ct. App. 1990)* (granting immunity to both Director and Deputy Director of the Department of Corrections) *with Taylor v. Bomar-Parker, 2003 Mich. App. LEXIS 1940, 2003 WL 21978753, at *2 (Mich. Ct. App. 2003)* (stating that trial [*352] court granted summary judgment based on absolute immunity to Director, but not to Deputy Director, of Department of Transportation). Given this split in authority, we hesitate to speculate on how the Michigan Supreme Court would rule on Deputy Director Fujita's request for absolute immunity. And given that Michigan law concerning the liability of lower-level governmental employees for intentional torts will remain unclear until the Michigan Supreme Court rules in *Odom,* we hesitate to speculate on his request for qualified immunity under *Mich. Comp. Laws 691.1407(2).*

2

Fortunately, we need not decide these questions because we hold that even if governmental immunity does not protect one or all of the individual defendants, EBI's tort claims lack merit. EBI claims that Mercado and Fujita defamed EBI by declaring that EBI was "non-responsible" based on its performance [**31] on the LH-391 Project, and by communicating that declaration of non-responsibility to other area contractors. It alleges that this statement was "knowingly false" because Mercado and Fujita knew that DWSD, not EBI, was responsible for the problems with the LH-391 Project.

Under Michigan law, "[t]he elements of a defamation claim are: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication." *Mitan v. Campbell, 474 Mich. 21, 706 N.W.2d 420, 421 (Mich. 2005).* EBI cannot prove the second element. Defamation requires an unprivileged communication, but the only communication EBI points to is the letter notifying the other bidders that EBI was non-responsible. This communication was privileged because EBI consented to this communication by submitting a bid under bidding documents that plainly stated that if a bidder was disqualified, both the disqualification and the reasons for the disqualification would be sent to other bidders. [**32] *See Merritt v. Detroit Mem'l Hosp., 81 Mich. App. 279, 265 N.W.2d 124, 127 (Mich. Ct. App. 1978)* (statements consented to are privileged).

EBI also claims that Mercado and Fujita tortiously interfered with EBI's business relationship with DWSD. Under Michigan law, the elements of a tortious interference claim are: "(1) [t]he existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy by the interferer, (3) an intentional and wrongful interference inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage to the party whose relationship or expectancy was disrupted." *PT Today, Inc. v. Comm'r of the Office of Fin. & Ins. Servs., 270 Mich. App. 110, 715 N.W.2d 398, 422 (Mich. Ct. App. 2006).*

EBI claims that it had a "valid promissory relationship" with DWSD, and that defendants Mercado and Fujita interfered with this relationship. The court cannot find a single legal authority that even contains the phrase "valid promissory relationship," let. alone one that defines the phrase or says that a "valid promissory relationship" can form the basis of a tortious interference claim. But however one describes EBI's relationship with DWSD, it is [**33] not the kind of relationship that can support a tortious interference claim. Michigan courts have already rejected the idea that a disappointed bidder has a valid business expectancy in a potential government contract. *Timmons v. Bone*, 2002 WL 745089, at *2 (Mich. Ct. App. April 3, [*353] 2002). We agree, and note that holding otherwise would give any low responsive bidder an immediate business expectancy in the government contract at issue. EBI had a "unilateral hope" of winning the contract, nothing more, so its tortious interference claim cannot proceed. *United of Omaha, 960 F.2d at 35*; *see also NBT Bancorp, Inc. v. Fleet/Norstar Fin. Group, Inc., 87 N.Y.2d 614, 664 N.E.2d 492, 497, 641 N.Y.S.2d 581 (N.Y.1996)* (disappointed bidder in merger could not bring tortious interference suit because it had only an expectation of contractual relations).

D

Finally, we come to EBI's contention that Kilpatrick exceeded his powers as Special Administrator of the DWSD. As mentioned earlier, Judge Feikens's order appointing Kilpatrick Special Administrator of the DWSD gave Kilpatrick control over the "entering into and performance of all contractual obligations of the system related to the wastewater treatment plant." *United States v. City of Detroit*, 2000 WL 371795 at * 5. [**34] The same order gave Kilpatrick power to "waive" the competitive bidding requirements if he deemed it "necessary." *Ibid.*

When Kilpatrick authorized Mercado and DWSD to award the Belle Isle Project to Walsh Construction instead of EBI, Kilpatrick specifically invoked this power and explained that the order was necessary to "ensure that DWSD complies" with the consent decree. Nevertheless, count 14 of EBI's complaint protests that awarding the Belle Isle Project was "outside the boundaries of Mr. Kilpatrick's power." The protest is futile because the federal court order explicitly allows the Special Administrator to award the contract. EBI also complains that Kilpatrick never responded in writing to EBI's protest letter and that Kilpatrick never sought approval from the Detroit City Council when he short-circuited the bidding procedures. These complaints are irrelevant because nothing in the order appointing Kilpatrick Special Administrator requires him to seek the City Council's approval when awarding contracts, *cf. United States v. City of Detroit*, 2000 WL 371795 at *2 (stating that Special Administrator may exercise "all functions and powers of the Detroit City Council"), or to respond [**35] personally to every protest letter. Indeed, it is worth noting that if the Special Administrator is authorized to waive competitive bidding altogether, he is certainly authorized to waive EBI's right to appeal the denial of its bid to DWSD's Board.

IV

EBI raises, for the first time on appeal, an argument that Judge Feikens should have recused himself from hearing this case. We have little difficulty rejecting this contention. EBI bases its argument on *28 U.S.C. § 455*, which states that:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> >
> > . . .
> >
> > (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
> >
> > (i) Is a party to the proceeding, or an officer, director, or trustee of a

party.

*28 U.S.C. § 455*. EBI points to Judge Feikens's longstanding role in overseeing the consent decree between DWSD and the EPA. [**36] It claims that Judge Feikens is [*354] the "de facto chief executive officer" of DWSD, and therefore he should have disqualified himself under *§ 455(a)* because his objectivity could be reasonably questioned, and under *§ 455(b)(5)(i)* because he is an "officer" or "director" of DWSD. But EBI offers no specific facts that would evidence bias by Judge Feikens (other than his decision against EBI) and no case suggesting that Judge Feikens should have recused himself.

We have held that "[i]n order to justify recusal under *28 U.S.C. § 455*, the judge's prejudice or bias must be *personal* or *extrajudicial." United States v. Jamieson, 427 F.3d 394, 405 (6th Cir. 2005)* (emphasis added). Here, Judge Feikens's knowledge of, and relationship with, DWSD arose solely from his judicial role in overseeing the consent decree. A judge's role in overseeing a consent decree is part of his judicial responsibilities and is not evidence of "personal" or "extrajudicial" bias. *Reed v. Rhodes, 179 F.3d 453, 468 (6th Cir. 1999)*. We therefore reject EBI's argument.

V

By alleging that Kilpatrick exceeded the powers granted to him as Special Administrator, EBI pleaded itself into federal court. *Cf. NicSand, 507 F.3d at 458*. [**37] This gives our court jurisdiction, and while we cannot say whether the defendants' actions were fair or wise, we hold that they were not illegal and therefore AFFIRM the judgment of the district court.

**JACK B. KLEIN; Jack B. Klein, Executor of the Estate of Carol Ann Klein, Deceased, Plaintiffs-Appellants, v. MANOR HEALTHCARE CORPORATION, JERRY CANGELOSI, ROB VADIS, WANDA I. CORDERO, Defendants-Appellees.**

**Nos. 92-4328, 92-4347**

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

***1994 U.S. App. LEXIS 6086***

**March 22, 1994, Filed**

**NOTICE:** [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

**SUBSEQUENT HISTORY:** Reported in Table Case Format at: *19 F.3d 1433, 1994 U.S. App. LEXIS 12854.*

**PRIOR HISTORY:** United States District Court for the Northern District of Ohio. District No. 91-02018. Dowd, Jr., District Judge.

**DISPOSITION:** AFFIRMED

**JUDGES:** Before: KENNEDY and GUY, Circuit Judges; and CONTIE, Senior Circuit Judge.

**OPINION BY:** PER CURIAM

**OPINION**

**PER CURIAM.** In this handicap discrimination case, plaintiff appeals the decision of the district court granting defendants' motion for summary judgment. On appeal, plaintiff argues that genuine issues of material fact exist as to whether defendants' conduct constitutes handicap discrimination within the meaning of the operative federal and state statutes. Plaintiff further argues that the district court erred by allowing defendants to amend their removal petition and by granting defendants' motion to strike certain evidentiary material. For the following reasons, we affirm.

**I.**

In 1986, Carol Klein was diagnosed with colon cancer. She received surgical [*2] treatment for her cancer and appeared to be well on her way to recovery. In 1987, Mrs. Klein, a licensed physical therapist ("LPT"), began her employment with Manor Healthcare Corporation ("Manor Care") in Euclid, Ohio, as the Director of Rehabilitative Services/Physical Therapy at Manor Care's Lakeshore facility. In her application, she revealed that she had had cancer, but that she felt the surgery had cured her.

Unfortunately, her bout with cancer would resume in 1988, when it was discovered that the cancer had metastasized to her brain and lung. Again, she underwent surgery, which necessitated an extended leave of absence from her job with Manor Care. Although not fully recovered, she returned to work six months later. The illness had caused some weight and vision loss, and she was taking Dilantin, an anti-seizure medication. Despite her difficulties, it appears she competently discharged her duties with Manor Care through 1989.

In early 1990, Wanda Cordero became the administrator of the Lakeshore facility. This, at least according to Mrs. Klein's husband, Jack Klein ("plaintiff"), would mark the beginning of the end for Mrs. Klein's relationship with Manor Care. In the

aftermath [*3] of Cordero's arrival, Mrs. Klein felt that her views were being ignored by the staff. Furthermore, plaintiff claims Cordero was not particularly receptive to his wife's request for assistance. As Cordero would later testify:

> I spoke to Carol Klein in the physical therapy department. At this time she stated to me that, quote, she was overwhelmed with the paperwork, end quote. I asked her what we could do, what we could do, she stated she did not have an assistant. At this time I told her I could have Mimi Preisler or Terri [Steirer] here to help her.

(App. 724.)

Cordero claims to have followed through on her promise. Initially, she assigned Preisler, an LPT, to assist Mrs. Klein while she regained her strength. Two other Manor Care employees, Agnes Puro and Dawn Geiser, took over for Preisler once Mrs. Klein returned to her normal duties. While Puro and Geiser were assisting Mrs. Klein, Preisler and her administrative assistant, Steirer, were also made available to her on an as needed basis.

The adequacy of the assistance provided to Mrs. Klein by Cordero is a matter of some dispute. In support of his assertion that Mrs. Klein was in need of more assistance than was actually [*4] provided by Manor Care, plaintiff notes that Manor Care, following Mrs. Klein's first performance review, made it a "30-day objective" to recruit a licensed physical therapy assistant ("LPTA") to help her. In plaintiff's estimation, this indicates Manor Care's recognition of the fact that "even a healthy, normal, not handicapped person, such as Carol then was, could not treat patients, prepare charts and all paperwork for the State Examiner, Medicare and Medicaid, bill private insurance companies, as well as supervise her department *all on her own*."

Plaintiff also observes that of the people assigned to assist his wife, only one, Preisler, was an LPT. As he explains: "Unlicensed help was of very little practical benefit to Carol because unlicensed help lacked the educational and skill level as well as the statutory authorization to give Carol both quantitatively and qualitatively the level of assistance that she needed." Plaintiff further contends that even Preisler did little to ease Mrs. Klein's day-to-day burdens. In fact, plaintiff maintains that, far from providing assistance, " the main purpose of [Preisler's] presence in Carol's department would seem to be so that Mimi [*5] Preisler could observe and report on Carol for . . . Cordero since [Preisler] was instructed by . . . Cordero '**to evaluate the situation**' [in the department]." [1]

> 1 In short, plaintiff accuses Cordero and various other members of the Manor Care staff of "spying" on his wife. That these Manor Care officials would carefully monitor the quality of care being administered by Mrs. Klein's department, however, is not inconsistent with the nursing home's primary objective of ensuring the well-being of its residents.

Irrespective of Preisler's true motives, one thing was for certain: Mrs. Klein was not her old self. Asked to detail the problems Mrs. Klein was experiencing, Cordero responded:

> Well, there were several concerns, particularly in [regard] to memory, recalling a resident's name that she was taking care of. She was overwhelmed. What we would consider normal documentation having to rewrite things over and over again, not completing things, having seizures in the department, coughing up blood, *not knowing* [*6] *what treatments she was doing on residents*.

(App. 663; emphasis added.) In addition, Mrs. Klein began to behave erratically. On one occasion, believing that someone had stolen money from her locker, she erupted into a tirade, slamming doors and yelling in anger. Although no evidence was ever uncovered to substantiate her belief, her emotional outburst continued for two days. [2] Not surprisingly, her behavior was regarded as inappropriate for a nursing home.

> 2 In support of his contention that his wife was still capable of providing a level of care consistent with Manor Care's standards, plaintiff cites a report issued by Dr. Lisa Meek, Manor Care's Medical Director. The report, dated September 1, 1990, gave a glowing review of her physical therapy department. Notwithstanding the fact that the report did not evaluate particular individuals,

plaintiff argues that it represents an endorsement of his wife's performance because she was the only full-time LPT providing physical therapy services.

As further evidence of decedent's undiminished ability, plaintiff notes that she received special recognition from the Ohio Department of Health for developing a very successful high voltage wound and skin program.

[*7] In an attempt to address problems with Mrs. Klein's performance, a meeting was held in September of 1990. [3] Attending the meeting were: Mrs. Klein; Cordero; Rob Vadis, Cordero's supervisor; and Jerry Cangelosi, Manor Care's human resources manager. As a result of this meeting, Mrs. Klein resigned from her position with Manor Care, although exactly what prompted her decision is disputed. According to plaintiff, during the meeting "Carol was told she must resign or probably be terminated because her work performance was substandard[.]" The Manor Care representatives provide a somewhat different account of what took place during the meeting: "Although there was no request for her to resign, the subject was discussed and Mrs. Klein resigned."

3 For plaintiff, the timing of this meeting is significant:

> If Mimi Preisler . . . could have been of real benefit to Carol, was indeed "assigned to help" Carol . . . as opposed to being assigned to ***evaluate*** Carol and submit written ***evaluations*** on Carol's department's operation to . . . Cordero . . . that assignment was a *weekly* one and it only commenced on 8-30-90 four working days before the "Tribunal of 5" was convened and seven working days before Carol's forced resignation on 9-12-90.

(Appellant's brief at 24) (Citations omitted; emphasis in original.)

[*8] Mrs. Klein finally succumbed to cancer in May 1991. The instant action was initiated on September 9, 1991, when plaintiff, individually and as executor of his wife's estate, filed a ten-count complaint in Ohio state court. Named as defendants were Manor Care, Cangelosi, Vadis, and Cordero. In addition to alleging various state claims, [4] plaintiff sued defendants for wrongful termination pursuant to *sections 4112.02(A)* and *(J)* of the Ohio Revised Code, and for handicap discrimination pursuant to section 504 of the Rehabilitation Act, *29 U.S.C. § 794*.

4 These claims included: breach of implied contract (Count 3); promissory estoppel (Count 4); intentional and/or negligent misrepresentation/deceit (Count 5); unjust enrichment (Count 6); infliction of emotional distress (Count 7); bad faith (Count 8); loss of consortium/society (Count 9); and violation of public policy (Count 10).

On October 8, 1991, defendants Manor Care, Cangelosi, and Cordero filed a petition removing this matter [*9] to federal district court. [5] Defendant Vadis did not join in the petition due to the fact that he had not yet been served. On October 29, plaintiff, noting that defendants' petition had not explained Vadis's failure to join, moved for the case to be remanded to state court. [6] Plaintiff's motion was denied by the district court in an order dated November 21, 1992. The court reasoned:

> Removal in this case is predicated on the assertion of the federal handicap claim. Such a claim can only be asserted against the employer which in this case joined in the removal petition. Under such a scenario, only the defendants subject to the federal claim need sign the petition for removal.

(App. 30.)

5 Title *28 U.S.C. § 1441(a)* provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division

> embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

[*10]

6 Title *28 U.S.C. § 1447(c)* provides in relevant part:

> 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)*. If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses. . . .

Subsequently, plaintiff twice moved for reconsideration of the November 21 order. Although the court did grant the second such motion, it permitted defendants to amend their removal petition to explain Vadis's non-joinder. [7] In deciding against remand once again, the court merely stated that " after the thirty days [from the defendants' receipt of plaintiff's state court complaint] has passed, it is still permissible for a party, granted leave, to amend its petition to correct any defects." (*Id.* at 35; citations omitted.) The court did not reassert its earlier contention that only Manor Care's signature [*11] was needed to secure removal of the instant action.

7 Plaintiff had also moved to certify the issue of whether a section 504 claim could be asserted against an employee (*e.g.*, Vadis). The court denied this motion at the same time it granted plaintiff's motion for rehearing.

On September 11, 1992, defendants filed a joint motion for summary judgment with respect to each of the claims listed in plaintiff's complaint. Plaintiff countered by filing a motion for partial summary judgment (pertaining to the state and federal handicap claims) three days later. On September 21, 1992, defendants moved to strike certain materials accompanying plaintiff's summary judgment motion. Defendants asserted that these materials were contrary to *Rule 56 of the Federal Rules of Civil Procedure*.

On November 6, 1992, the district court granted both defendants' summary judgment motion and the motion to strike. Plaintiff's timely appeal followed.

**II.**

On appeal, plaintiff first argues that the district court erred in permitting defendants [*12] to amend their removal petition to explain defendant Vadis's initial failure to join the petition. [8] This court reviews denials of remand motions under a *de novo* standard. *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit, 874 F.2d 332, 338 (6th Cir. 1989)*. Plaintiff maintains that "remand to state court is required where (as here) a resident defendant has not been joined in the Notice of Removal and that Notice fails to allege the non-joining, resident defendant was not served in the state court proceeding." Moreover, plaintiff claims, defendants should not have been allowed to cure their defective petition beyond the thirty-day removal period provided by *28 U.S.C. § 1446(b)*.

8 Title *28 U.S.C. § 1446* provides in relevant part:

> (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* and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.
>
> (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.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by *section 1332* of this title more than 1 year after commencement of the action.

Historically, courts have strictly construed the procedural requirements of *§ 1446*. As the court in *Courtney v. Benedetto* explained:

> Courts have consistently construed *28 U.S.C. § 1446(a)* to require that all defendants either join the petition for removal or to consent to such removal. Furthermore, defendants mandated by 1446(a) to either join the petition for removal or to consent to such removal must do so within thirty (30) days of notice or service of process. The exceptions to the general rule that all defendants join or consent to the petition for removal exist when: (1) the non-joining defendant has not been served with service of process at the time the removal petition is filed; (2) the non-joining defendant is merely a nominal or formal party; and, (3) the removed claim is a separate and independent claim as defined by *28 U.S.C. § 1441(c)*. A necessary corollary to 1446(a) which requires the petition for removal contain "a short and plain statement of the facts which entitle him or them to removal" is that the removal petition must set forth the reason why a defendant named in such action has not joined the petition for removal. A petition for removal filed by less than all defendants is considered defective if it does not contain an explanation for the non-joinder of those defendants.
>
> *627 F. Supp. 523, 525-26 (M.D. La. 1986)* (citations and footnotes omitted).

[*13] Plaintiff cites numerous district court decisions to bolster his argument. *E.g., Howard v. George, 395 F. Supp. 1079 (S.D. Ohio 1975)*; *Walsh v. American Airlines, Inc., 264 F. Supp. 514 (E.D. Ky. 1967)*; *Gratz v. Murchison, 130 F. Supp. 709 (D. Del. 1955)*. For the most part, however, these decisions predate a developing line of cases within this circuit that severely undermines plaintiff's position. In recent years, this court has expressed a reluctance to interpret statutory removal provisions in a grudging and rigid manner, preferring instead to read them in a light of more consonant with a modern understanding of pleading practices. *See Tech Hills II Assocs. v. Phoenix Home Life Mut. Ins. Co., 5 F.3d 963 (6th Cir. 1993)* (holding that defendant was properly granted leave to amend its removal petition to cure defect in allegation of diversity of citizenship, even though thirty-day period under *28 U.S.C. § 1446(b)* had expired); *Gafford v. General Elec. Co., 997 F.2d 150 (6th Cir. 1993)* (same); [*14] *see also Stanley Elec. Contractors, Inc. v. Darin & Armstrong Co., 486 F. Supp. 769 (E.D. Ky. 1980)* (same); *Jackson v. Metropolitan Life Ins. Co., 433 F. Supp. 707 (E.D. Ky. 1977)* (same).

In *Gafford*, this court rejected the plaintiff's argument that the district court never should have allowed removal because the defendant's petition did not state its principal place of business. [9] The *Gafford* court

articulated the rationale underlying its liberalized approach to permitting amendments to removal petitions:

> Better, if the jurisdiction in fact exists, to permit the petition for removal to be amended to reflect it. It appears that the time has come to reexamine this entire matter and expressly adopt the approach . . . that amendments to the jurisdictional allegations of removal petitions should be permitted in the same manner as amendments to any other pleading.
>
> . . . .
>
> It must be made clear that this opinion is not to be construed as departing in any way from the precept that the *facts* giving rise to federal jurisdiction must be strictly construed and alleged with particularity. The decision holds only [*15] that the time has come to apply the principles of modern pleading relating to *amendments* to removal petitions, and that amendments should be permitted, to implement the spirit of the statute and rules cited herein, where the jurisdictional facts do indeed exist, and the parties are in law entitled to invoke the jurisdiction of the federal court.
>
> . . . .
>
> Virtually all of the commentators and the great weight of judicial authority favor the rule adopted by this decision. Indeed, the strict view reflected by the earlier cases hereinabove cited has been expressly criticized.
>
> For the above reasons, the court holds that a petition for removal may be amended under the same considerations governing the amendment of any other pleading containing jurisdictional allegations.

*997 F.2d at 164* (quoting *Stanley, 486 F. Supp. at 772-73*); *see also Tech Hills, 5 F.3d at 969*. Furthermore, as the *Stanley* court noted:

> Not only does the technical construction in effect in days past cause serious adverse effects to attorneys and parties rightfully entitled to invoke the jurisdiction of the federal [*16] courts, but in some cases great and needless waste of judicial time and effort, real prejudice to the parties, and severe injustice results. For example, in *Roseberry v. Fredell [174 F. Supp. 937 (E.D. Ky. 1959)]*, the trial was concluded when the losing party pointed out a technical defect in the removal petition, with the result that the cause had to be remanded to the state court for a retrial. In the instant case, substantial proceedings have occurred, including the payment into court of a large sum.

*486 F. Supp. at 773* (footnote omitted).

9 The defendant's petition stated in relevant part:

> This action is a civil action of which this Court also has original jurisdiction under *28 U.S.C. § 1332*, and is one which may be removed to this Court by the Petitioner pursuant to *28 U.S.C. § 1441(a)* in that it is a civil action in which the matter in controversy exceeds the sum or value of Fifty Thousand Dollars exclusive of interest and cost, and is between citizens of different states. The Petitioner is a corporation organized and incorporated under the laws of the State of New York, *having its principal place of business in a state other than Kentucky*, and is therefore a citizen of a state other than Kentucky. The Respondent is a citizen of the Commonwealth of Kentucky.

*997 F.2d at 163-64* (emphasis added). It was argued that the petition was invalid because, on its face, it failed to specify the state of the petitioner's principal place of business.

[*17] Although *Gafford* and *Stanley* both involved a jurisdictional deficiency (*i.e.*, failure to adequately state grounds for diversity jurisdiction) in a defendant's

removal petition, we think the reasoning of both courts is equally relevant in the context of an alleged procedural deficiency (*i.e.*, failure to include all defendants in a removal petition). Here, the parties did not dispute that the district court could, pursuant to a properly-drafted removal petition, exercise federal question jurisdiction over plaintiff's action; the only question was whether the failure to strictly comply initially with the niceties of the removal procedures could prevent the court from doing so. To preclude federal jurisdiction in this instance, we feel, would contravene the spirit of the more recent case law on the subject. We decline to so hold, and, accordingly, we reject plaintiff's argument founded on defendants' failure to initially explain Vadis's failure to join in his co-defendants' removal petition.

**III.**

Next, plaintiff challenges the district court's grant of defendants' motion to strike certain evidence submitted by plaintiff in support of his motion for partial summary [*18] judgment. The evidentiary material the court excluded includes tape recorded phone conversations between plaintiff and the decedent, and the decedent and her attorney. Through these recordings, plaintiff had hoped to demonstrate the decedent's poor physical condition, the enormity of her workload, her desire to have the assistance of an LPTA, and the fact that Manor Care and some of its administrators were "spying" on her. Also excluded was plaintiff's deposition testimony, in which he recounted conversations he allegedly had with the decedent regarding her job and working conditions. Finally, the court excluded certain documents, including letters from doctors and medical reports.

With regard to the recorded conversations, the district court deemed them to be inadmissible hearsay not falling under a recognized exception to the hearsay rule. Specifically, the court concluded that *Rule 803(1) of the Federal Rules of Evidence* (present sense impression) was inapplicable because, as it explained: "Clearly, the decedent did not describe any particular event which evidenced handicapped discrimination in the tapes, and certainly was not perceiving any such event as she spoke." (App. 44.) [*19] The court also found *Rule 803(3)* (then existing mental, emotional, or physical condition) inapposite because it found the decedent's then-existing mental or emotional condition irrelevant to the issue of defendants' liability. It stated: "The mere fact that someone is unhappy at work, that they do not feel that they get the recognition they deserve or that the fact that they do not like their superior does not give rise to any claim for relief." (*Id.*)

The court used similar reasoning in excluding plaintiff's deposition testimony. This evidence, too, the court concluded was inadmissible hearsay. In particular, the court noted that "while Rule 804(2) excepts statements under belief of impending death, decedent's statements do not qualify because the statements do not go to the cause of her death." (*Id.* at 45; citation omitted.) As to plaintiff's documentary evidence, the court observed that under *Rule 56(e) of the Federal Rules of Civil Procedure*, "all documents accompanying a motion for summary judgment must be sworn or certified." (*Id.* at 46; citations omitted.) The court proceeded to strike the documents from plaintiff's summary judgment motion due to the fact that they [*20] had not been properly authenticated.

Plaintiff now disputes the court's hearsay determinations and maintains that all of the evidence in question was, indeed, properly authenticated. [10] Plaintiff's task on appeal is not an easy one. "We review admission of testimony and other evidence by the trial court under the abuse of discretion standard." *Mitroff v. Xomox Corp., 797 F.2d 271, 275 (6th Cir. 1986)* (citations omitted). An abuse of discretion occurs when the appellate court is "firmly convinced that a mistake has been made." *United States v. Phillips, 888 F.2d 38, 40 (6th Cir. 1989)* (citation omitted).

> 10 Plaintiff also asserts that the district court should not have ruled on defendants' motion to strike before deciding their motion for summary judgment. This assertion, as defendants correctly point out, is "nonsensical since the Court cannot determine the Motion for Summary Judgment without determining first what materials may be considered."

Here, [*21] plaintiff has not overcome his heavy burden. Although we do not feel that the district court abused its discretion in making the challenged evidentiary rulings, we need not reach this conclusion to affirm the court's grant of summary judgment. In short, even had the district court considered the disputed evidence, such evidence would not have raised a genuine issue of material fact precluding the issuance of summary judgment in defendants' favor.

**IV.**

Finally, plaintiff contends that the district court erred in granting defendants' summary judgment motion as to his substantive federal and state claims. We review *de novo* a district court's grant of summary judgment. *EEOC v. University of Detroit, 904 F.2d 331, 334 (6th Cir. 1990)*. We examine the grant of summary judgment to determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1310 (6th Cir. 1989)* (citation omitted). Although we must draw all justifiable inferences in favor of the non-moving [*22] party, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)*, there must be a disagreement regarding an item of material fact. *Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986)*. The evidence presented must be sufficient to permit the plaintiff to recover if accepted by the jury.

**A.**

Plaintiff's federal claim is premised upon section 504 of the Rehabilitation Act, which provides in relevant part:

> No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

*29 U.S.C. § 794(a)*. As this court stated in *Pesterfield v. Tennessee Valley Authority*:

> In order to establish a *prima facie* case under the [Rehabilitation] Act, the plaintiff must allege and prove [*23] (1) that he is a "handicapped person" under the Act, (2) that he is "otherwise qualified" for the position sought, (3) that he was excluded from the position "solely by reason of his handicap," and (4) that the position was part of a program or activity [receiving federal financial assistance.]"

*941 F.2d 437, 441 (6th Cir. 1991)* (citing, *inter alia*, *Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979))*.

The dispute in the instant case centers around the third prong of the above analysis, namely, whether the decedent is entitled to relief as an "otherwise qualified" handicapped person under the Rehabilitation Act. To resolve this question, we must determine whether the decedent was, in fact, "otherwise qualified" within the meaning of the Act. In *School Board of Nassau County v. Arline*, the Supreme Court instructed:

> In the employment context, an otherwise qualified person is one who can perform "the essential functions" of the job in question. When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any "reasonable accommodation" [*24] by the employer would enable the handicapped person to perform those functions.

*480 U.S. 273, 287 n.17 (1987)* (citation omitted); *see also Jasany v. United States Postal Serv., 755 F.2d 1244, 1250 (6th Cir. 1985)* ("A 'qualified handicapped person' is one 'who, with or without reasonable accommodation, *can perform the essential functions of the position in question*.'") (Citation omitted). Exactly what constitutes an essential function is a fact-specific inquiry that "should be based upon more than statements in a job description and should reflect the actual functioning and circumstances of the particular enterprise involved." *Hall v. United States Postal Serv., 857 F.2d 1073, 1079 (6th Cir. 1988)*.

Here, the district court held that the decedent was not "otherwise qualified" for purposes of the Rehabilitation Act. [11] We agree and write further only to clarify that our decision rests primarily on an assessment of the decedent's compromised physical condition, not on an evaluation of defendants' conduct. [12] During the time leading up to her resignation from Manor Care, the

decedent's [*25] ability to perform the essential functions of her job had diminished to the point where no reasonable amount of accommodation, either from full-fledged LPTAs or otherwise, could have compensated for her handicap.

> 11 Plaintiff asserts that the district court erroneously relied on the term "otherwise handicapped individual" as defined in *Bailey v. Tisch, 683 F. Supp. 652 (S.D. Ohio 1988)*. The standard the court should have applied, according to plaintiff, was that of a "qualified handicapped individual." A person fitting this latter term is one "who can with reasonable accommodation perform the essential functions of the job in question." The key distinction between the above standards is that the former does not expressly take into account the measures taken by the employer. Notwithstanding any apparent discrepancy in the above standards, however, the district court's opinion here did, indeed, contain an analysis of defendants' attempt at accommodating the deceased. As the court concluded: "The evidence before the Court clearly indicates that Manor Healthcare made reasonable efforts to accommodate decedent's handicap, and that even with these reasonable accommodations decedent was not otherwise qualified for the position." (App. 52; footnote omitted.) Plaintiff's argument, therefore, is without merit.

[*26]

> 12 Plaintiff maintains that defendants never acknowledged the decedent's status as a handicapped person entitled to reasonable accommodation. Whether true or not, this assertion is irrelevant for purposes of determining liability under the Rehabilitation Act. So long as defendants provided adequate accommodation, their thoughts (or misconceptions) regarding the true nature of the decedent's ailment are irrelevant.

Plaintiff challenges the district court's assessment of the decedent's mental and physical competence. As evidence that the decedent was in possession of her faculties, plaintiff cites the favorable review Manor Care's Medical Director gave to the department under the decedent's supervision. Plaintiff also notes that the department's billing was at a two-year high and that the decedent was able to secure further employment as an LPT for the period following her resignation and until six weeks before her death. Counterbalanced against this evidence -- little of which speaks directly to the level of decedent's own performance -- is the substantial evidence indicating that the decedent [*27] could no longer do the things LPTs do. In fact, she not only was ineffective but also had become hazardous to those under her charge. For those in the business of caring for the health and well-being of others, requesting assistance for completing paperwork is one thing; confusing patients and their treatments (as the decedent did) is something else entirely.

**B.**

The district court's grant of defendants' summary judgment motion also disposed of plaintiff's state law claims. For instance, plaintiff sought relief for handicap discrimination under the applicable state statute. *Ohio Revised Code § 4112.02* provides in relevant part:

> It shall be an unlawful discriminatory practice:
>
> > (A) For any employer, because of the . . . handicap . . . of any person, to discharge without just cause, to refuse to hire, or otherwise discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

The Ohio Code further provides:

> (L) Nothing in divisions (A) to (E) of this section shall be construed to require a handicapped person to be employed or trained under circumstances that would [*28] significantly increase the occupational hazards affecting either the handicapped person, other employees, the general public, or the facilities in which the work is to be performed, or to require the employment or training of a handicapped person in a job that requires him routinely to undertake any task, the performance of which is substantially and inherently impaired by his handicap.

*Ohio Rev. Code § 4112.02(L)*.

This provision is fatal to plaintiff's claim on two

counts. Not only has he offered insufficient evidence to demonstrate that the decedent was capable of performing tasks that were inherent and routine in her position, but she was, as stated above, a hazard to her workplace environment. Accordingly, plaintiff's claim based on Ohio's anti-discrimination statute must fail.

Plaintiff's remaining state law claims also were properly dismissed. We reject plaintiff's related claims of breach of an implied contract, [13] promissory estoppel, [14] and intentional and/or negligent misrepresentation/deceit. [15] These claims are based on the assumption that the decedent had, in fact, been discriminated against. In light of our conclusion to the contrary, plaintiff's claims are [*29] without merit. We are also unpersuaded by plaintiff's claim of intentional infliction of emotional distress. [16] Although we voice no opinion as to whether plaintiff or the decedent actually suffered serious emotional distress, we do note that defendants' conduct was neither extreme nor outrageous, and, therefore, cannot serve as the basis for recovery under this tort.

13 The decedent's employment with Manor Care was terminated at the will of either party. Notwithstanding this fact, plaintiff argues that defendant failed to fulfill their promise to provide the decedent with the assistance of an LPTA. This promise, plaintiff asserts, effectively altered the terms of the at-will relationship to add rights and obligations that did not previously exist. (*See* App. at 54-55 ("At-will employment arrangements are most often transformed by company policy, statements in handbooks, and oral and written representations made by management personnel.") (citation omitted)).

14 Plaintiff argues that defendants were "estopped from discharging decedent based upon [their] promises to provide additional help, not to discriminate based on her handicap, and to follow the disciplinary procedures contained in the employee handbook." (App. 55.)

[*30]

15 As plaintiff alleged in his complaint:

> At the time Defendants made their oral and/or written representations to decedent, Carol Ann Klein; would not discriminate against [her] because of her handicap; and, would reasonably accommodate the same as aforesaid; in actuality said Defendants did not intend to do the same but rather secretly intended the opposite, and deliberately and maliciously concealed their true intentions from decedent, Carol Ann Klein. In so doing, Defendants acted fraudulently and with malice, in reckless disregard for the rights of the decedent, Carol Ann Klein, all to Plaintiff's damage as aforesaid.

(App. 24-25.)

16 To prevail on such a claim, a plaintiff must establish:

> 1) that the actor either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff; 2) that the actor's conduct was so extreme and outrageous as to go "beyond all possible bounds of decency" and was such that it can be considered as "utterly intolerable in a civilized community"; 3) that the actor's actions were the proximate cause of plaintiff's psychic injury; and 4) that the mental anguish suffered by plaintiff is serious and of a nature that "no reasonable man could be expected to endure it[.]"

*Pyle v. Pyle, 463 N.E.2d 98, 103 (Ohio Ct. App. 1983)* (citations omitted).

[*31] Finally, plaintiff charges defendants with unjust enrichment. Plaintiff maintains that defendants reaped the profits from a new therapy technique for burn patients developed by the decedent. Manor Care's profit sharing plan, plaintiff notes, allows employees to receive a percentage of profits earned from products or techniques they invent. As the district court pointed out, however, rather than developing the technique herself, the decedent had actually learned of it while attending a conference as a Manor Care representative. Upon

returning from the conference, the decedent simply incorporated the technique into a therapeutic program. In other words, "there is no evidence to suggest that decedent made any contribution to the development of the technique, itself." (App. 60.)

For the foregoing reasons, the decisions of the district court granting defendants' motion to strike and defendants' motion for summary judgment are **AFFIRMED.**

LEXSEE 1992 US APP LEXIS 12064

**STATE OF TENNESSEE, ex rel. Richard D. Crotteau, et al., Plaintiffs-Appellants, v. CHATTANOOGA WOMEN'S CLINIC, Defendant-Appellee.**

**No. 91-5662**

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

***1992 U.S. App. LEXIS 12064***

**May 18, 1992, Filed**



**SUBSEQUENT HISTORY:** Reported as Table Case at *963 F.2d 373, 1992 U.S. App. LEXIS 20394*.

**PRIOR HISTORY:** United States District Court for the Eastern District of Tennessee. District No. 90-00423. Leon Jordan, District Judge.

**JUDGES:** BEFORE: NELSON and BOGGS, Circuit Judges; and KRUPANSKY, Senior Circuit Judge.

**OPINION BY:** BOGGS

**OPINION**

BOGGS, Circuit Judge. Seventeen Tennessee citizens brought a state court quo warranto action as relators for the State of Tennessee against an ambulatory surgical treatment center for failure to comply with state statutes regulating abortion. After the case was removed to federal court, the district court dismissed the action for lack of standing. We hold that subject matter jurisdiction was lacking and therefore the matter should have been remanded to state court pursuant to *28 U.S.C. § 1447(c)*.

**I**

This action was filed on October 5, 1990 by 17 Tennessee citizens, 16 of whom are practicing lawyers, [1] as relators in the name of the State of [*2] Tennessee, against the Chattanooga Women's Clinic, an ambulatory surgical treatment center. Plaintiffs allege that the Clinic is performing abortions in Hamilton County, Tennessee in violation of three Tennessee statutes regulating abortion. *T.C.A. § 68-11-223(b)(1)(A)* requires $ 2,000,000 of medical malpractice insurance; *T.C.A. § 39-15-202* requires written consent from women before abortions are performed; and *T.C.A. § 39-15-201(c)(2)* prohibits performing abortions after the first three months of pregnancy except in hospitals.

1 The 17th relator, Rhonda Bradford, is an individual who underwent an abortion at the defendant's facility on March 2, 1990. She claims that she sustained serious and permanent injuries during the course of the abortion procedure and that the doctor performing the procedure did not have privileges at any licensed hospital in Chattanooga. The district court held she did not have standing as there is no causal relationship between her alleged injuries and the clinic's noncompliance with the statutes at issue. At oral argument, appellants conceded this point.

[*3] Plaintiffs allege that the Tennessee Department of Health has declined to enforce these statutes because the Tennessee Attorney General rendered an opinion that the provisions are unconstitutional. The problem, as the plaintiffs see it, is that the laws of the state of Tennessee are not being enforced solely because of the opinion of the Tennessee Attorney General.

The plaintiffs brought this action seeking a

declaratory judgment that the Tennessee statutes regulating abortion are constitutional and asked for an injunction restraining the Clinic from operating in violation of the statutes. Originally filed in Hamilton County Chancery Court, the action was removed to federal district court by the defendant. That removal was not challenged or scrutinized, so far as appears from the record, once the removal occurred. However, upon our examination, it appears that the removal was improper and there is no federal jurisdiction in this case.

**II**

Plaintiff's complaint alleges a purely state cause of action. State law is invoked to complain about the failure of state authorities to enforce a state statute. The plaintiffs are a group of Tennessee citizens, purporting to act in [*4] the name of the State of Tennessee. The named defendant is a Tennessee corporation, and those whose actions are complained of are Tennessee state officials. Therefore, there is no possibility of diversity jurisdiction. The only possible grounds for jurisdiction would be federal question jurisdiction, which establishes that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, of treaties of the United States." *28 U.S.C. § 1331*. However, the plaintiff's complaint makes no reference to any federal statute or cause of action.

In making its defense, the defendant has relied solely upon Tennessee procedural law. While it might also have attempted to defend on the grounds of federal constitutional law, see *Roe v. Wade, 410 U.S. 113 (1973)*, that defense would not give a federal court jurisdiction. In the case of *Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983)*, the Supreme Court dealt with a very analogous situation: a nonfederal claim, followed by a federal defense. Plaintiffs brought action under California law to enforce a tax levy, while the defendant raised [*5] a federal defense under ERISA.

> California law establishes a set of conditions, without reference to federal law, under which a tax levy may be enforced; federal law becomes relevant only by way of a defense to an obligation created entirely by state law, and then only if appellant has made out a valid claim for relief under state law.

*Id. at 13*. The Franchise Board court dismissed this claim under the "well-pleaded complaint" rule, holding that "under the present statutory scheme as it has existed since 1887, a defendant may not remove a case to federal court unless the *plaintiff's* complaint establishes that the case 'arises under' federal law." *Id. at 10* (emphasis in the original). Under the well-pleaded complaint rule

> Whether a case is one arising under the Constitution . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.

Ibid. (citations omitted). The court also emphasized that:

> By unimpeachable authority, [*6] a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby.

*Id. at 12* (citations omitted).

Here the obligation to enforce the Tennessee statutes arises entirely out of Tennessee law creating that obligation. While plaintiffs want the statutes declared constitutional, the fact that a possible defense for nonenforcement of the statutes could be made on federal constitutional grounds fails to meet the requirements of the well-pleaded complaint rule.

For all the same reasons, the federal jurisdictional statutes do not give federal courts jurisdiction over this case. We therefore dismiss the appeal, and remand the case to the district court with instructions to remand the case to state court pursuant to *28 U.S.C. § 1447(c)*.

LEXSEE 2006 US DIST LEXIS 16404

**KEVIN M. KRALJ, Plaintiff, v. BRENDAN P. BYERS, et al., Defendants.**

**CASE NO. 4:06 CV 0368**

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION**

***2006 U.S. Dist. LEXIS 16404***

**April 5, 2006, Decided**

**COUNSEL:** [*1] For Kevin M. Kralj, Plaintiff: Alfred J. Fleming, Youngstown, OH.

Brendan P. Byers, Defendant, Pro se, Youngstown, OH.

For Bank of America, N.A., Defendant: David A. Wallace, Carpenter & Lipps, Columbus, OH.

For Nationwide Credit, Inc., agent of Fleet Bank (RI) National Association agent of Fleet Credit Card Services, L.P., Phillips & Cohen Associated, LTD, agent of Fleet Bank (RI) National Association agent of Fleet Credit Card Services, L.P., Defendants: Jeffrey C. Turner, Boyd W. Gentry, Surdyk, Dowd & Turner, Dayton, OH.

For NCO Financial Systems, Inc., agent of Fleet Credit Card Services, L.P. agent of Fleet Bank (RI) National Association, Defendant: Thomas A. Prislipsky, Reminger & Reminger, Youngstown, OH.

Brendan P. Byers, Cross Defendant, Pro se, Youngstown, OH.

For Kevin M. Kralj, Counter-Defendant: Alfred J. Fleming, Youngstown, OH.

Brendan P. Byers, Cross Defendant, Pro se, Youngstown, OH.

For Bank of America, N.A., Counter-Claimant: David A. Wallace, Carpenter & Lipps, Columbus, OH.

**JUDGES:** PETER C. ECONOMUS, UNITED STATES DISTRICT JUDGE.

**OPINION BY:** PETER C. ECONOMUS

**OPINION**

**MEMORANDUM OPINION AND ORDER**

This matter is before the Court upon [*2] Plaintiff Kevin M. Kralj's Motion to Remand and Motion for Costs, Attorney Fees, and Expenses Pursuant to *28 U.S.C. § 1447(c)* (Dkt. # 10).

**I. FACTUAL HISTORY**

On September 8, 2004 Plaintiff, Kevin M. Kralj ("Kralj"), filed a complaint ("Complaint" or "original Complaint") in the Mahoning County Court of Common Pleas, naming Brendan P. Byers ("Byers"), Fleet National Bank, N.A, dba Fleet Credit Card Services nka Bank of America ("Fleet Bank"), and Fleet Credit Card Services ("Fleet Credit") as defendants. The Complaint asserted state law claims against the named defendants.

Byers was served a copy of the summons and Complaint on September 22, 2004. (Dkt. # 10, Exs. A, B). Fleet Bank and Fleet Credit each received a copy of the summons and Complaint on or about September 23, 2004. (Dkt. # 10, Exs. A, B). Fleet Bank and Fleet Credit moved to amend the Complaint to substitute Bank of America, N.A. (U.S.A.) ("Bank of America") as the defendant in the case, as a result of a merger in which Fleet Bank and Fleet Credit along with various other entities were merged into Bank of America. (Dkt. # 10, Ex. B; Dkt. # 14 at 3). The state court, accordingly, ordered [*3] that Bank of America be substituted as a defendant for both Fleet Bank and Fleet Credit. (Dkt. # 10, Ex. C).

On January 19, 2006, Kralj filed a First Amended Complaint ("Amended Complaint") in the Mahoning County Court of Common Pleas, naming Byers, Bank of America, N.A. (U.S.A.) ("Bank of America"), Nationwide Credit, Inc. ("Nationwide"), Phillips & Cohen Associates, Ltd. ("Phillips & Cohen"), and NCO Financial Systems, Inc. ("NCO Financial") as defendants. (Dkt. # 1 Ex. 5). The Amended Complaint asserted state law claims as well as violations of the following federal statutes: Truth in Lending Act, *15 U.S.C. § 1601, et seq.*, the Fair Credit Reporting Act, *15 U.S.C. § 1681*, et sea., and the Fair Debt Collection Practices Act, *15 U.S.C. § 1692, et seq.* (Id.). Bank of America was served with a copy of the Amended Complaint on or about January 23, 2006. (Dkt. # 12 P1). New Party defendants Nationwide, Philips & Cohen, and NCO Financial were all served by summons on January 23, 2006. (Id.). Service of the Amended Complaint upon Byers was unsuccessful. (Dkt. # 14, Ex. D).

On February 16, 2006, Defendants [*4] Bank of America, Nationwide, Phillips & Cohen and NCO Financial (collectively "Defendants") removed the action to this Court. (Dkt. # 1).

**II. LAW AND ANALYSIS**

The Court has original jurisdiction over Kralj's Amended Complaint because his claims under the Truth in Lending Act, Fair Credit Reporting Act and Fair Debt Collection Practices Act clearly arise under federal law. See *28 U.S.C. § 1441(b)*. Kralj, however, challenges the removal as noncompliant with the "rule of unanimity" because Byers, Fleet Credit and Fleet Bank did not properly and timely consent to the removal. "'The rule of unanimity requires that in order for a notice of removal to be properly before the court, all defendants who have been served or otherwise properly joined in the action must either join in the removal, or file a written consent to the removal.'" *Harper v. AutoAlliance Intern. Inc., 392 F.3d 195, 201 (6th Cir. 2004)* (quoting *Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 533 n. 3 (6th Cir. 1999))*; see *Loftis v. United Parcel Service, Inc., 342 F.3d 509, 516 (6th Cir. 2003)* ("We hold that all defendants [*5] in the action must join in the removal petition or file their consent to removal in writing within thirty days of receipt of (1) a summons when the initial pleading demonstrates that the case is one that may be removed, or (2) other paper in the case from which it can be ascertained that a previously unremovable case has become removable....Failure to obtain unanimous consent forecloses the opportunity for removal under *Section 1446*.") (internal citations omitted). Application of the rule of unanimity within the Sixth Circuit, however, allows that "a first-served defendant can consent to a later-served defendant's removal petition, despite having already failed in its own efforts to remove." *Brierly, 184 F.3d at 533 n. 3*.

"There are three exceptions to the general rule that all defendants join or consent to the removal. The exceptions apply when: (1) the non-joining defendant has not been served with service of process at the time the removal petition is filed; (2) the non-joining defendant is merely a nominal or formal party; and (3) the removed claim is a separate and independent claim as defined by *28 U.S.C. § 1441(c)*." *Hicks v. Emery Worldwide, Inc., 254 F.Supp.2d 968, 972 n. 4 (S.D. Ohio 2003)* [*6] (citing *Klein v. Manor Healthcare Corp., 19 F.3d 1433, 1994 WL 91786, *3 n. 8 (6th Cir. Mar. 22, 1994))*. A Notice of Removal filed by less than all defendants "'is considered defective if it does not contain an explanation for the non-joinder of those defendants.'" Id.

First, Kralj argues that removal is defective, because Byers did not join in or consent to the removal. Byers was served with a copy of the original Complaint on September 22, 2004. On January 20, 2006, Kralj attempted to serve Byers with a copy of the Amended Complaint. (Dkt. # 14, Ex. D). This attempt, however, failed, and Byers, therefore, has not been served with the Amended Complaint. The general rule that all defendants join or consent to the removal does not apply when the non-joining defendant has not been served at the time the notice of removal is filed. See *Hicks, 254 F.Supp.2d at 975* (finding consent to removal by co-defendant was not required where co-defendant at time of removal had been improperly served and was, currently, a nonexistent entity); *Dunson-Taylor v. Metropolitan Life Ins. Co., 164 F.Supp.2d 988, 991-92 (S.D. Ohio 2001)* (finding removal [*7] proper where non-consenting defendant had not been served at time of removal); Sulfridge v. Kindle, No. C-1-00-824, 2001 WL 1842453, *2 (S.D. Ohio Jun. 21, 2001) (finding that proper service of process upon co-defendant was needed before the consent requirement of the removal statutes and the rule of unanimity was triggered as to said co-defendant).

In the instant case, at the time of removal, co-defendant, Byers, had not been served with the

Amended Complaint. Although Byers was served with the original Complaint, that Complaint did not allege a federal cause of action. Instead, Defendants' removal is based upon the Amended Complaint which alleges a federal cause of action for the first time. Thus, because removal is based upon the Amended Complaint, Byers's consent should not be required due to the failure of service upon Byers of the Amended Complaint. See *Hicks, 254 F.Supp.2d at 975*; *Dunson-Taylor, 164 F.Supp.2d at 991-92*. As a result, Byers's consent to removal may be excused, and Defendants need not obtain consent from Byers to perfect removal.

Kralj contends the "rule of unanimity does not distinguish between service of original [*8] complaints and service of amended complaints;" it matters only, that the defendant was *"served in the action."* (Dkt. # 15 at 8). Kralj is incorrect. The rule of unanimity necessarily must distinguish between service of complaints and service of amended complaints because *28 U.S.C. § 1446*--the statute delineating procedure for removal--distinguishes between an initial pleading which is not removable and amended pleadings which change the nature of the action and make a case removable.

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable....

*28 U.S.C. § 1446(b)*. The "rule of unanimity" must be applied within the statutory context for which it was created. Accordingly, the text of *Section 1446* requires that the rule of unanimity apply once a pleading makes a case removable. The instant case became removable upon filing of the Amended Complaint which [*9] asserted a federal action. Defendants, in removing the action, therefore, needed the unanimous consent of all defendants properly served with the Amended Complaint. Byers was not served with a copy of the Amended Complaint at the time of removal, and, therefore, his consent to removal is excused.

Moreover, even if Byers had been served with the Amended Complaint prior to Defendants' removal, Byers's consent to removal would nonetheless be excused because Defendants have exhausted all reasonable efforts to obtain his consent. See *White v. Bombardier Corporation, 313 F.Supp.2d 1295, 1303-04 (N.D. Fla. 2004)* (holding that consent of a defaulted defendant who has not appeared may be excused when the removing defendant has demonstrated that it unsuccessfully exhausted all reasonable efforts to obtain the defendant's consent). [1] Indeed, Byers has failed to appear in this matter despite being served with the original Complaint on September 22, 2004. Defendants attempted to contact Byers at the address at which the original Complaint was received, but Byers no longer resides there. (Dkt. # 14, Ex. A, Affidavit of Julie A. Whitney ("Whitney Aff.") PP4-5). Defendants also [*10] contacted, without success, Byers's parents [2] and other persons with whom he has resided. (Id. PP6, 8). Defendants contacted several of Byers's previous employers, without success. (Id. P7). Defendants attempted to locate a current address or telephone number for Byers by using a private, fee-based database maintained by LEXIS/NEXIS, as well as various internet databases. (Gentry Aff. P4; Whitney Aff. P8). These searches did not reveal a valid current address or telephone number for Byers. (Gentry Aff.; Whitney Aff.).

1 Kralj argues that White v. Bombardier Corporation supports his motion to remand because Byers, unlike the co-defendant in White, is not subject to an entry of default. (Dkt. # 15 at 9-10). The pertinent fact emphasized in *White*, however, is not the fact that a defendant is found to be in default, but, rather, that a defendant has not appeared in the mater. In White, the district court discussed that an entry of default does not terminate a defendant's participation in a case--that even after the entry of default, the defaulting party may continue to file pleadings and papers with the court. See *White, 313 F.Supp.2d at 1303*. Nevertheless, the court concluded

> that, consistent with a strict interpretation of the removal statutes in favor of remand, it is possible under some circumstances for the unanimity requirement to be excused with respect to a defaulted defendant *who has not appeared.* However, in order to

> excuse such consent, the removing defendant must allege with specificity in its petition for removal, and prove upon challenge by a timely motion to remand, that the removing defendant has unsuccessfully exhausted all reasonable efforts to locate the defaulted defendant to obtain its consent.

*Id. at 1303-04* (emphasis added).

[*11]

2 Byers's father indicated that he had not spoken with Byers in over a year and was unaware of Byers's whereabouts. (Dkt. # 14, Ex. B, Affidavit of Boyd W. Gentry ("Gentry Aff.") P3).

Despite this evidence of Defendants' fruitless efforts to locate Byers, Kralj argues that Defendants have not exhausted all reasonable efforts to obtain Byers's consent because Defendants did not actually mail a request for consent to Byers's last known address. Kralj asserts that it is not enough that Defendants attempt to locate Byers, but Defendants must, "at a minimum," actually ask for Byers's consent by mailing a request for consent to Byers's last know address even if it is undoubtedly determined that Byers no longer resides there. This argument ignores plain logic and common sense. Defendants made extensive and very reasonable efforts to determine Byers's current address. It would be unreasonable to require Defendants to mail a request for consent to an address which Defendants know is no longer valid merely because it is an individual's last known address.

Accordingly, even assuming the Amended Complaint [*12] was properly served on Byers prior to removal, Byers's consent would nonetheless be excused because Defendants exhausted all reasonable efforts to locate Byers and obtain his consent.

Next, Kralj argues that removal is defective, because Fleet Bank and Fleet Credit (collectively "the Fleet entities") did not join in or consent to the removal. The Fleet entities are not parties to this action. They were named in the original Complaint. The Fleet entities later moved to amend the Complaint to substitute Bank of America, because the Fleet entities had been merged into Bank of America. Plaintiff disputed the fact that Fleet Bank and Fleet Credit had ceased to exist. (Dkt. # 10, Ex. C). Nevertheless, the state court ordered that Bank of America be substituted for both Fleet Bank and Fleet Credit:

> The undersigned Magistrate finds, based upon representations of Counsel for Defendants Fleet Credit Card Services, L.P. and Fleet National Bank, N.A., Bank, N.A., Bank of America has assumed of the contractual rights and liabilities of Defendants Fleet Credit Card Services, L.P. and Fleet National Bank, N.A. and, in the event that Plaintiff prevails in his Complaint, Bank of America is [*13] able to provide the relief sought. Accordingly, as a result of the merger, Bank of America is the real party in interest and is hereby substituted as a party Defendant for Defendants Fleet Credit Card Services, L.P. and Fleet National Bank, N.A.

(Dkt. # 10, Ex. C).

Therefore, the Fleet entities are no longer parties to the original Complaint, and, moreover, they are not named as parties in the Amended Complaint. Accordingly, consent to removal by Fleet Bank and Fleet Credit is not necessary and their lack of consent does not require remand.

Kralj argues that because he disputes whether the Fleet entities have merged with Bank of America, all original served defendants in the state court action must join in or consent to removal. This argument does not alter the fact that the Fleet entities are not parties to this action. The rule of unanimity applies to "defendants who have been served or otherwise properly joined in the action." *Brierly, 184 F.3d at 533 n. 3*. Fleet Bank and Fleet Credit are neither defendants in this action nor have they been served with the Amended Complaint. Consequently, their consent to removal is not required.

**III. CONCLUSION**

[*14] For the foregoing reasons, the Court finds that Defendants' Notice of Removal is not defective. All defendants who have been served in this action have joined in or consented to removal. The consent of defendant Byers is excused because he was not a properly served defendant at the time of removal. Moreover, the

removing Defendants have exhausted all reasonable efforts to obtain Byers's consent. The consent of Fleet Bank and Fleet Credit is not necessary because they are not defendants in this action. Consequently, Defendants' Notice of Removal complies with *28 U.S.C. § 1446*, and Plaintiff Kevin M. Kralj's Motion to Remand and Motion for Costs, Attorney Fees, and Expenses Pursuant to *28 U.S.C. § 1447(c)*, (Dkt. # 10), is **DENIED.**

**IT IS SO ORDERED.**

**04/05/06**

**PETER C. ECONOMUS**

**UNITED STATES DISTRICT JUDGE**

LEXSEE 2008 US DIST LEXIS 6577

**FIRST INDEPENDENCE BANK, Plaintiff, vs. TRENDVENTURES, L.L.C., et al., Defendants.**

**Civil Action No. 07-CV-14462**

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION**

***2008 U.S. Dist. LEXIS 6577***

**January 30, 2008, Decided**
**January 30, 2008, Filed**

**COUNSEL:** [*1] For First Independence Bank, Plaintiff: Douglas Young, LEAD ATTORNEY, Wilson Young, Detroit, MI, James D. Wilson, LEAD ATTORNEY, Wilson Young, Detroit, MI.

For Eurofly, SpA, Intervenor Plaintiff: Eric D. Scheible, LEAD ATTORNEY, Frasco Caponigro, Bloomfield Hills, MI.

For First Independence Bank, Intervenor Defendant: Douglas Young, LEAD ATTORNEY, Wilson Young, Detroit, MI, James D. Wilson, LEAD ATTORNEY, Wilson Young, Detroit, MI.

For Bank of America, Intervenor Defendant: Scott R. Murphy, LEAD ATTORNEY, Barnes & Thornburg, Grand Rapids, MI.

For Thomas Frazee, Receiver: Gordon J. Toering, Warner, Norcross, Grand Rapids, MI.

For Bank of America, Cross Claimant: Scott R. Murphy, LEAD ATTORNEY, Barnes & Thornburg, Grand Rapids, MI.

For Eurofly, SpA, Cross Defendant: Eric D. Scheible, LEAD ATTORNEY, Frasco Caponigro, Bloomfield Hills, MI.

**JUDGES:** BERNARD A. FRIEDMAN, CHIEF UNITED STATES DISTRICT JUDGE.

**OPINION BY:** BERNARD A. FRIEDMAN

**OPINION**

**OPINION AND ORDER GRANTING FIRST INDEPENDENCE BANK'S MOTION TO REMAND, DENYING FIRST INDEPENDENCE BANK'S MOTION FOR COSTS, EXPENSES, AND ATTORNEY FEES, AND DENYING BANK OF AMERICA'S MOTION TO STRIKE FIRST INDEPENDENCE BANK'S REPLY**

This matter is presently before the Court on First Independence [*2] Bank's Motion to Remand and for Costs, Expenses, and Attorney Fees [docket entry 7] and Bank of America's Motion to Strike [docket entry 14]. On October 19, 2007, Bank of America filed its Notice of Removal. First Independent Bank filed a Motion to Remand on November 7, 2007. Bank of America filed a response to First Independence Bank's Motion to Remand on November 21, 2007, and on December 3, 2007, First Independence Bank filed a reply.

The Court has had an opportunity to thoroughly examine the pleadings, documents, and evidence submitted by the parties in this matter. Pursuant to E.D. Mich. LR 7.1(e)(2), the Court will decide this matter without oral argument. For the reasons stated below, the Court finds that Bank of America's removal was procedurally improper, and will therefore remand this matter to Wayne County Circuit Court pursuant to *28 U.S.C. § 1447(c)*.

I. **THE ORIGINAL COMPLAINT, THE COMPLAINT IN INTERVENTION, AND THE**

**PARTIES**

A. *The Original Complaint and the Parties Thereto*

First Independence Bank initiated this action on November 30, 2006, when it filed its Complaint in Wayne County Circuit Court. [1] In its Complaint, First Independence Bank named three parties as defendants: [*3] (1) Trendventures, LLC d/b/a US Bankcard, a California limited liability company ("Trendventures, LLC of California"); (2) Process America, Inc.; and (3) Carl Smith ("Smith"). [2] According to First Independence Bank's Complaint, Smith is the president of Trendventures, LLC of California and owns all or part of Process America, Inc. (*See* Original Compl. at P 4.) The state court dismissed Process America, Inc. from this action on December 15, 2006. (*See* Notice of Removal at P 4.) In its Notice of Removal, Bank of America states that Process America, Inc. was "improperly named in the lawsuit." (*See id.* at P 12 n.2.)

1 The Original Complaint is attached as Exhibit A to Bank of America's Notice of Removal.

2 These three defendants shall collectively be referred to as "the original defendants."

The allegations contained in the Original Complaint arise out of what appears to be an extremely complicated and convoluted scheme allegedly perpetrated by Smith and his affiliates to misappropriate a large sum of money from First Independence Bank and, ultimately, Eurofly, S.P.A. ("Eurofly"), the Intervening Plaintiff. [3] First Independence Bank is a principal member of VISA, U.S.A., Inc. and MasterCard [*4] International, Inc. (*See* Original Compl. at P 9.) As such, First Independence Bank is authorized to sign agreements with merchants, enabling the merchants to accept VISA and MasterCard credit cards from their customers in accordance with the terms and conditions of certain agreements between First Independence Bank and the credit card companies. (*See id.* According to First Independence Bank, Trendventures, LLC of California is in the business of developing and marketing merchant credit card programs, originating merchant relationships, and providing various services to those merchants. (*See id.* at P 10.) On or about February 7, 2007, First Independence Bank entered into a merchant processing agreement with Trendventures, LLC of California, in which the two agreed to establish a merchant processing program. (*See id.* at P 11.) Under the agreement, Trendventures, LLC of California agreed to become a registered independent sales organization of First Independence Bank. (*See id.* at P 12.) The agreement required Trendventures, LLC of California to refer all merchants to First Independence Bank, and no other VISA/MasterCard member bank, for credit card processing services. (*See id.* at P 13.) [*5] The agreement further specified that Trendventures, LLC of California would deposit all funds generated from any merchant processing agreement into an account at First Independence Bank. (*See id.*)

3 Eurofly's role in this litigation is explained in more detail below.

In November 2006, First Independence Bank learned that Smith had breached this agreement by entering into a merchant credit card processing agreement with Eurofly without notifying First Independence Bank. First Independence Bank also learned that Smith had deposited funds generated from that agreement into a Bank of America [4] account rather than into an account at First Independence Bank. (*See id.* at P 14.) First Independence Bank states that, at that time, the allegedly unauthorized Bank of America account contained $ 3.7 million. (*See id.*)

4 As explained more fully below, Bank of America is one of five defendants named by Eurofly in its Complaint in Intervention.

First Independence Bank contacted Smith on several occasions, both orally and in writing, demanding that the $ 3.7 million be transferred from the Bank of America account and put into an account at First Independence Bank. (*See id.* at PP 15, 18, 20.) Soon thereafter, [*6] First Independence Bank learned that Smith transferred almost all of the money out of the Bank of America account; however, First Independence Bank did not receive a penny. (*See id.* at P 26.) The Original Complaint contains two counts. In Count One, First Independence Bank requested a temporary restraining order and a preliminary and permanent injunction against the original defendants, thereby preventing them from transferring any additional funds out of the Bank of America account. In Count Two, First Independence Bank requested the same relief with respect to Bank of America, prohibiting Bank of America from transferring any funds out of any account established by Smith or his affiliates. [5] The state court granted First Independence Bank's request for a temporary restraining order and subsequently issued a preliminary injunction, enjoining the transfer of the funds at issue. (*See* Mot. to Remand at

4.)

5 Neither First Independence Bank nor Bank of America has explained the anomaly that is presented by virtue of the fact that First Independence Bank, in its Original Complaint, sought relief against a non-party who it failed to name as a defendant. (*See* Original Compl. at P 46.)

B. *The* [*7] *Complaint in Intervention and the Parties Thereto*

On December 19, 2006, the state court allowed Eurofly to intervene in this action as a plaintiff, and on September 14, 2007, Eurofly filed a separate Complaint in Intervention. (*See* Notice of Removal at PP 3, 9.) Eurofly named five defendants in its Complaint. Two of the five, First Independence Bank and Smith, are also parties with respect to the Original Complaint. The three new parties are (1) Trendventures, Inc. d/b/a US Bankcard ("Trendventures, Inc."); (2) Trendventures, LLC, d/b/a US Bankcard, a Virginia limited liability company ("Trendventures, LLC of Virginia"); (3) and Bank of America. [6]

6 The Court notes that there are three parties in this matter purportedly doing business under the name "US Bankcard." Trendventures, LLC of California is one of the original defendants, and Trendventures, LLC of Virginia and Trendventures, Inc. are defendants on Eurofly's Complaint in Intervention. In its Notice of Removal, Bank of America states that both Trendventures, LLC of California and Trendventures, LLC of Virginia are nominal parties because the former does not exist and the latter is in the business of publishing magazines and has [*8] "absolutely no affiliation with Carl Smith." (*See* Notice of Removal at PP 12 n.3, 14, 26.) According to Bank of America, Trendventures, Inc. is the proper party to this suit because Smith is the president, secretary, and treasurer of this entity. (*See id.* at P 29.) Because the parties appear to be referring to the same Trendventures in their respective pleadings and briefs, i.e., the one affiliated with Smith--whichever one that might be--the Court will hereinafter refer to this defendant simply as "US Bankcard" or "USBC," as the parties do.

Eurofly is the merchant whose funds were allegedly misappropriated by Smith and USBC. Eurofly states that it entered into an agreement with First Independence Bank and USBC on or about May 18, 2006, whereby First Independence Bank and USBC would process VISA and MasterCard charges made by Eurofly's customers. (*See* Eurofly Compl. at P 17.) Eurofly alleges that Smith and USBC deposited the proceeds from the credit card payments into Bank of America accounts, instead of into accounts at First Independence Bank, in violation of the merchant processing agreement. (*See id.* at P 20.) Eurofly accuses Bank of America of allowing USBC and Smith to establish [*9] and maintain these accounts without first verifying whether Smith was authorized to do so. (*See id.* at P21.) Eurofly further contends that Bank of America allowed Smith and USBC to transfer money out of the accounts in violation of the temporary restraining order and permanent injunction issued by the state court. (*See id.* at PP 39-40.)

Additionally, Eurofly has brought claims against First Independence Bank. Eurofly states that First Independence Bank had knowledge of Smith's allegedly wrongful conduct, and that First Independence Bank assisted Smith by allowing him to maintain control over the misappropriated funds, which were being held in a non-First Independence Bank account. (*See id.* at PP 135, 142, 150, 162, 166, 170.)

Eurofly's Complaint in Intervention contains 22 counts. Nine counts are directed at all of the defendants in intervention. [7] Six counts are directed at USBC, Smith, and First Independence Bank, only. [8] The remaining seven counts are directed at Bank of America and First Independence Bank, only. [9]

7 Those nine counts are as follows: Count VI: Conversion; Count VII: Statutory Conversion; Count VIII: Breach of Fiduciary Duty; Count IX: Civil Conspiracy; Count X: Concert [*10] of Action; Count XII: Quantum Meruit/Unjust Enrichment/Constructive Trust; Count XIII: Negligence; Count XXI: Declaratory Judgment; and Count XXII: Injunctive Relief.

8 Those six counts are as follows: Count I: Fraudulent Misrepresentation/Fraudulent Inducement; Count II: Innocent Misrepresentation; Count III: Silent Misrepresentation; Count IV: Fraud; Count V: Negligent Misrepresentation; and Count XI:

Promissory Estoppel.

9 Those seven counts are as follows: Counts XIV through XVII: Various UCC violations; Count XVIII: Tortious Interference with an Economic Expectancy; Count XIX: Tortious Interference with Contractual Relations; and Count XX: Bad Faith.

II. **WAS BANK OF AMERICA'S REMOVAL PROPER?**

As mentioned above, Bank of America filed a Notice of Removal on October 19, 2007, and First Independence Bank filed its Motion to Remand on November 7, 2007. First Independence Bank contends that this matter should be remanded to Wayne County Circuit Court on the grounds that Bank of America failed to obtain the consent of all the defendants in this case prior to removing the matter to this Court. [10]

10 First Independence Bank mainly argues that Bank of America should have obtained its consent prior [*11] to removing. However, the Court does not reach the merits of this argument because it finds that Bank of America was obligated to obtain the consent of one of First Independence Bank's co-defendants on Eurofly's Complaint in Intervention, Smith.

In its Notice of Removal, Bank of America explained why it failed to obtain Smith's consent:

> Defendant Carl Smith has not appeared in this case since an Order for a Bench Warrant was issued for his arrest on March 16, 2007. An Entry of Default has been ordered by the state court against Smith. [Bank of America] has exercised reasonable efforts to locate Smith and obtain his consent to removal but has been unable to do so. See Exhibit D. In addition to sending Smith correspondence at the email address specified on the Eurofly Complaint, [Bank of America] also attempted to ascertain Smith's whereabouts by contacting business associates, neighbors, and family members. Id. Smith's whereabouts have been unknown since March, 2007. Upon information and belief, he has not been served with the Eurofly Complaint.

(Notice of Removal at P 28.) Exhibit D, referenced above, contains the Affidavit of Laura Kane, a paralegal at Barnes & Thornburg, LLP, Bank of [*12] America's counsel. The Affidavit explains, in detail, what steps were taken to locate Smith in order to obtain his consent. The effort, though ultimately unsuccessful, was clearly exhaustive and diligent. Because Bank of America could not locate Smith, it failed to obtain his consent prior to filing the Notice of Removal.

*Title 28, section 1441(a) of the United States Code* reads, in relevant part,

> any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

According to Moore's Federal Practice, "because the effect of removal is to deprive the state court of jurisdiction over a case properly before [it], removal raises federalism concerns that mandate strict construction." 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE P 107.05 (3d ed. 2007) (footnote omitted). "The removal petition is to be strictly construed, with all doubts resolved against removal." *Her Majesty The Queen In Right of the Province of Ontario v. City of Detroit, 874 F.2d 332, 339 (6th Cir. 1989)* [*13] (citing *Wilson v. United States Dep't of Agric., Food, & Nutrition Servs., 584 F.2d 137, 142 (6th Cir.1978)). See also* MOORE'S FEDERAL PRACTICE at P 107.06 ("all doubts are resolved in favor of remand") (footnote omitted). Erring on the side of remand is a sound policy:

> [i]f the court of appeals determines that the case should have been remanded on the ground that there was no federal jurisdiction, the judgment on the merits must also be vacated because of the lack of jurisdiction. If the case was improperly remanded, at least the state court judgment will not be invalidated because of a lack of subject matter jurisdiction.

MOORE'S FEDERAL PRACTICE at P 107.05. Clearly,

then, "the district court must evaluate the removal question carefully." *Id*. "If the requirements of the removal statute are met, the right to remove is absolute." *Id*.

The first issue before the Court is whether Bank of America had the right to remove this case to federal court. "The right to remove a case from state to federal court is vested exclusively in 'the defendant or the defendants . . .'" *Yakama Indian Nation v. State of Wash. Dep't of Revenue, 176 F.3d 1241, 1248 (9th Cir. 1999)* (quoting *28 U.S.C. § 1441(a)*). [*14] "For the purpose of removal, the federal law determines who is plaintiff and who is defendant." *Chicago, Rock Island & Pac. R.R. Co. v. Stude, 346 U.S. 574, 580, 74 S. Ct. 290, 98 L. Ed. 317 (1954)*. "Determining who is authorized to remove the case can become quite complicated . . . if additional parties or claims are added after the complaint is filed." MOORE'S FEDERAL PRACTICE at P 107.11[1][a]. "It must be determined whether the party seeking to remove on the basis of any [later asserted claims] is a *defendant* for removal purposes." *Id*. (emphasis in original).

The present case was removed by Bank of America, a defendant on Eurofly's Complaint in Intervention and a non-party with respect to the Original Complaint. Thus, the first question is whether a defendant in intervention qualifies as a defendant for removal purposes when that party was not a party to the Original Complaint. According to Moore's Federal Practice,

> [a]s used in *Section 1441(a)*, the general removal statute, the word *defendant* means the original plaintiff's defendant. Thus, generally, a party who was not a defendant on the plaintiff's original suit will not be recharacterized as a "defendant" by reason of the filing of later claims filed against [*15] that party in . . . claims in intervention.

*Id*. at P 107.11[1][b][I] (emphasis in original). Bank of America is not the "original plaintiff's defendant" because First Independence Bank did not name Bank of America as a defendant in its Original Complaint. Rather, Bank of America is a defendant on Eurofly's Complaint in Intervention only. Consequently, based on the general rule, it would appear that Bank of America, as a non-party on First Independence Bank's Original Complaint, had no right to remove this action under *28 U.S.C. § 1441(a)*.

However, a subsequent passage in Moore's Federal Practice provides more detailed insight into the operation of the general rule:

> [v] **Whether Defendant Intervenors May Remove**
>
> Assuming that the original action would have been removable, and if the time for removing an action has not passed, and the original defendants join in the notice of removal or may be disregarded for removal purposes, the action may be removable by an intervening defendant. On the other hand . . . if the sole basis for removing the action is the claim raised through the intervention of the intervening defendant, the intervenor may not remove the action.

*Id*. at 107.11[1][b][v] (footnote [*16] and citations omitted). *See also York Hannover Holding A.G. v. Am. Arbitration Ass'n, 794 F. Supp. 118, 121 (S.D.N.Y. 1992)* (finding that a party's status as an intervenor does not necessarily preclude it from initiating removal). Therefore, it appears that there are three requirements that must be met before an intervening defendant, like Bank of America, can remove: (1) the original action must be removable; (2) the removal must be timely; and (3) the original defendants must join in the removal or be disregarded for removal purposes. The Court examines these elements in reverse order. Because Smith, an original defendant, did not join in the removal and cannot be disregarded for removal purposes, the Court need not reach the remaining two requirements.

"In general, all defendants must join in the notice of removal. Because the right of removal is jointly held by all the defendants, the failure of one defendant to join in the notice precludes removal." MOORE'S FEDERAL PRACTICE at P 107.11[1][c] (footnote omitted). "The rule of unanimity requires that in order for a notice of removal to be properly before the court, all defendants who have been served or otherwise properly joined in [*17] the action must either join in the removal, or file a written consent to the removal." *Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 533 n.3 (6th Cir. 1999)*. *See also* 14C CHARLES ALAN WRIGHT,

ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3731, pp. 258-265 (3d ed. 1998) (stating that "[t]he rule [of unanimity] applies to all forms of defendants--whether they are characterized as indispensable, necessary, or proper parties--over whom the state court has acquired jurisdiction as of the time of removal"). Although, in the Sixth Circuit, "a breach of the rule of unanimity . . . may not be raised *sua sponte* . . . . frank opposition to removal by a codefendant who affirmatively seeks a remand . . . empowers the district court to enforce the unanimity requirement." *Loftis v. United Parcel Serv., Inc., 342 F.3d 509, 516-517 (6th Cir. 2003)*.

The Sixth Circuit has excused noncompliance with the rule of unanimity in three situations:

> (1) the non-joining defendant has not been served with service of process at the time the removal petition is filed; (2) the non-joining defendant is merely a nominal or formal party; and, (3) the removed claim is a separate and [*18] independent claim as defined by *28 U.S.C. § 1441(c)*.

*Klein v. Manor Healthcare Corp., 1994 U.S. App. LEXIS 6086, 1994 WL 91786, at *3 n.8 (6th Cir. Mar. 22, 1994)* (unpublished). The first exception shall hereinafter be referred to by the Court as the "non-service exception" to the rule of unanimity.

In order for Bank of America's removal to be proper, original defendants Trendventures, LLC of California, Process America, Inc., and Smith, needed to join in the removal, or else be disregarded for removal purposes. None of these parties have joined in the removal. Thus, whether Bank of America can remove hinges on whether all three parties can be disregarded for removal purposes. Even assuming that Trendventures, LLC of California and Process America, Inc. may be disregarded because they are nominal parties, as Bank of America argues, Smith may not be disregarded.

Smith is not a nominal party. Moreover, the "separate and independent claim" exception does not apply in diversity cases. *See 28 U.S.C. § 1441(c)*. Thus, he may be disregarded for removal purposes only if he was a "non-joining defendant" that "ha[d] not been served with service of process at the time the removal petition [was] filed." *See Klein, 1994 U.S. App. LEXIS 6086, 1994 WL 91786, at *3 n.8*. [*19] As noted above, Smith is a defendant with respect to both First Independence Bank's Original Complaint and Eurofly's Complaint in Intervention. Because he has appeared in this action with respect to First Independence Bank's Original Complaint, the non-service exception does not apply. Smith is not a "non-joining" defendant with respect to this matter as a whole (i.e., *both* complaints), and the Court cannot conclude that he "ha[d] not been served with service of process at the time the removal petition [was] filed." *See id.* While the evidence submitted by Bank of America seems to suggest that Smith was not served and not properly joined with respect to Eurofly's Complaint in Intervention, he was clearly served and properly joined with respect to First Independence Bank's Original Complaint. In fact, the Court notes that, according to the state court docket sheet, Smith's attorney at the time, P. Rivka Schochet, filed an appearance on his behalf on December 8, 2006, and filed an answer on January 2, 2007. Because Smith has appeared in this action, albeit only in connection with the Original Complaint, the non-service exception does not apply to excuse Bank of America's noncompliance [*20] with the rule of unanimity. [11]

11 Bank of America urges the Court to recognize and apply a fourth exception to the rule of unanimity that has been created and utilized by one United States district court in Florida. In *White v. Bombardier Corp., 313 F. Supp. 2d 1295, 1298 (N.D. Fla. 2004)*, a class of defendants, referred to by the court as the "Bombardier defendants," failed to obtain the consent of their co-defendants, the "Destiny defendants," prior to filing the notice of removal. The Destiny defendants never appeared in the action, and the state court clerk entered a default against them. *See id. at 1298*. After concluding that the non-consenting Destiny defendants were properly served with service of process, the court declined to excuse the Bombardier defendants' noncompliance with the rule of unanimity based on any of the recognized exceptions to the rule, most notably the non-service exception. *See id. at 1301*. However, after noting that the court's "research has revealed no reported federal appellate court decision where a removing defendant has been excused from obtaining the consent of a codefendant who as [sic] been personally served, but against whom a default has

been entered [*21] for failure to appear and answer the complaint," the court proceeded to create a new exception, applicable in cases where default has been entered against a party who has entirely failed to appear in the state court action:

> I conclude that, consistent with a strict interpretation of the removal statutes in favor of remand, it is possible under some circumstances for the unanimity requirement to be excused with respect to a defaulted defendant who has not appeared. However, in order to excuse such consent, the removing defendant must allege with specificity in its petition for
>
> removal, and prove upon challenge by a timely motion to remand, that the removing defendant has unsuccessfully exhausted all reasonable efforts to locate the defaulted defendant to obtain its consent. Conclusory allegations in an affidavit are insufficient. Instead, to sustain its burden on removal, the removing defendant must describe what efforts it took and those efforts must be consistent with the exercise of reasonable diligence, similar to that necessary for a plaintiff to establish a basis for substitute service.

*Id. at 1303-1304* (footnote omitted).

While the Court acknowledges Bank of America's efforts to [*22] locate Smith, the Court declines to recognize the *White* court's "non-appearing, defaulted defendant" exception to the unanimity rule. The *White* court fails to cite any federal law in support of the creation of this exception and the exception has not been recognized by the Sixth Circuit. Nor has it been recognized by any federal appellate court, to this Court's knowledge. The Court also notes that the two most prominent and respected treatises on federal practice and procedure likewise do not mention such an exception to the rule of unanimity in their respective discussions on the topic.

*See* MOORE'S FEDERAL PRACTICE at P 107.11[1][d] (under the heading "Special Cases in Which

Not All Defendants Need to Join") and 14C WRIGHT, MILLER & COOPER, at § 3731, pp. 267-277 (discussing the exceptions to the rule of unanimity). For these reasons, the Court declines to recognize the exception created by the *White* court. However, even if the Court did recognize the *White* court's "non-appearing, defaulted defendant" exception, it would not apply in this case. As mentioned above, the *White* exception applies "with respect to a defaulted defendant who has not appeared." *White*, at *313 F. Supp. 2d at 1303-1304* [*23] (footnote omitted). In the present case, though default has been entered against Smith, he did appear in the state court action. Even in the event that the Court recognized the exception, it would be unwilling to extend its scope to cover situations where an absconding defendant has appeared in an action, as Smith has with respect to the Original Complaint, and subsequently disappeared. In any case, because "all doubts are resolved in favor of remand," remand is appropriate in this case. *See* MOORE'S FEDERAL PRACTICE at P 107.06 (footnote omitted).

The Court notes that Bank of America appears to have made strenuous and diligent efforts to locate Smith in order to obtain his consent to removal. However, the Court is without authority under clearly established law to excuse noncompliance with the rule of unanimity in this case. "The unanimous consent requirement is a bright line limitation on federal jurisdiction, which some might consider unfair or arbitrary, that is an inevitable feature of a dual court system involving one court of limited jurisdiction and a strictly construed right of removal." MOORE'S FEDERAL PRACTICE at P 107.11[1][c] (citing *Russell Corp. v. Am. Home Assurance Co., 264 F.3d 1040, 1050 (11th Cir. 2001)* [*24] (declining to recognize a fairness exception to the unanimity rule)). The Court will therefore remand this case to Wayne County Circuit Court pursuant to *28 U.S.C. § 1447(c)*.

III. **FIRST INDEPENDENCE BANK'S MOTION**

**FOR COSTS, EXPENSES, AND ATTORNEY FEES**

First Independence Bank seeks costs, expenses, and attorney fees. *Title 28, section 1447(c) of the United States Code* broadly authorizes the Court to award such fees in the event that a case is remanded: "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." The United States Supreme Court has shed light on when costs and expenses may properly be awarded. In *Martin v. Franklin Capital Corp., 546 U.S. 132, 139-141, 126 S. Ct. 704, 163 L. Ed. 2d 547 (2005)*, the Supreme Court recognized that this determination would have important implications on a party's decision to seek removal. On one hand, "[i]f fee shifting were automatic, defendants might choose to exercise this right only in cases where the right to remove [is] obvious." *Id. at 140*. On the other hand,

> [t]he process of removing a case to federal court and then having it remanded back to state court delays resolution of the [*25] case, imposes additional costs on both parties, and wastes judicial resources. Assessing costs and fees on remand reduces the attractiveness of removal as a method for delaying litigation and imposing costs on the plaintiff.

*Id.* Indeed, the Court noted that the test must strike a delicate balance:

> [t]he appropriate test for awarding fees under *§ 1447(c)* should recognize the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied.

*Id.* Therefore, the Court held that a district court may, in its discretion, award costs and expenses "where the removing party lacked an objectively reasonable basis for seeking removal." *Id. at 139-141*.

Given the extremely complicated jurisdictional posture of this case and the complexity of the issues presented, the Court finds that Bank of America had an objectionably reasonable basis for seeking removal. Furthermore, the Court has no reason to believe that Bank of America's removal was motivated by a desire to prolong this litigation or impose added costs [*26] on the other parties. Therefore, the Court will deny First Independence Bank's Motion for Costs, Expenses, and Attorney Fees.

Accordingly,

IT IS ORDERED that First Independence Bank's Motion to Remand is granted. This matter is remanded to Wayne County Circuit Court pursuant to *28 U.S.C. § 1447(c)*.

IT IS FURTHER ORDERED that Bank of America's Motion to Strike First Independence Bank's Reply Brief, or in the Alternative, Motion for Leave to File Sur-Reply [docket entry 14] is denied as moot. The Court's decision to remand this matter did not rely on the arguments discussed by First Independence Bank in its Reply.

IT IS FURTHER ORDERED that First Independence Bank's Motion for Costs, Expenses, and Attorney Fees is denied.

s/Bernard A. Friedman

BERNARD A. FRIEDMAN

CHIEF UNITED STATES DISTRICT JUDGE

Dated: January 30, 2008

Detroit, Michigan

LEXSEE 125 FED APPX 1

**DANNY MAIDEN, Plaintiff-Appellant, v. NORTH AMERICAN STAINLESS, L.P. and COMMONWEALTH OF KENTUCKY, LABOR CABINET OCCUPATIONAL HEALTH AND SAFETY, Defendants-Appellees.**

**No. 03-5740**

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

***125 Fed. Appx. 1*; *2004 U.S. App. LEXIS 25998***

**December 15, 2004, Filed**

**NOTICE:** [**1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

**SUBSEQUENT HISTORY:** Subsequent appeal at *Maiden v. N. Am. Stainless, 2005 U.S. App. LEXIS 29031 (6th Cir. Ky., Dec. 29, 2005)*

**PRIOR HISTORY:** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

**DISPOSITION:** Affirmed.

**COUNSEL:** For DANNY L. MAIDEN, Plaintiff -- Appellant: Philip C. Kimball, Louisville, KY; Harry L. Gregory, III, Law Office of Jacqueline K. Schroering, Louisville, KY.

For NORTH AMERICAN STAINLESS, L.P., Defendant -- Appellee: Carl D. Edwards, Jr., Leigh G. Latherow, Van Antwerp, Monge, Jones & Edwards, Ashland, KY.

For COMMONWEALTH OF KENTUCKY, LABOR CABINET, OCCUPATIONAL SAFETY AND HEALTH PROGRAM, Defendant -- Appellee: James R. Grider, Jr., Kentucky Labor Cabinet, Frankfort, KY.

**JUDGES:** Before: BOGGS, Chief Judge; CLAY, Circuit Judge; and HAYNES, District Judge *

* The Honorable William J. Haynes, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

**OPINION BY:** HAYNES

**OPINION**

[*2] **OPINION**

**HAYNES, District Judge.** [**2] Plaintiff Danny Maiden appeals the district court's final order denying Plaintiff's motion to remand and dismissing his claims for wrongful discharge against Defendant North American Stainless, L.P. ("NAS"), and for declaratory relief against Defendant Commonwealth of Kentucky, Labor Cabinet, Occupational Health and Safety ("Labor Cabinet"). Maiden's claims arise from his discharge by NAS in alleged retaliation for Maiden's charges against NAS to the Kentucky Department for Environmental Protection. Maiden asserts that his complaint resulted in an administrative complaint filed by the Labor Cabinet against NAS on Maiden's behalf. Maiden seeks a declaratory judgment of his "jural rights" or his remedies for such retaliatory conduct. Maiden filed this civil action in a Kentucky state court, but NAS removed the action under *28 U.S.C. §§ 1332*, *1441*, and *1446*.

Maiden moved to remand his action to the state court contending that the presence of the Labor Cabinet as a defendant destroyed diversity of citizenship jurisdiction.

Defendants moved to dismiss the action, contending that the enforcement scheme of the Kentucky Occupational Safety and Health Act ("KOSHA"), [**3] *Ky. Rev. Stat. §§ 338.010 et seq.*, preempted Maiden's claims. The district court denied Maiden's motion to remand, holding that the Labor Cabinet was a nominal party that did not divest the district court of diversity jurisdiction. The district court then granted NAS's motion to dismiss, concluding that KOSHA provides Maiden's exclusive remedy. Maiden filed a timely appeal.

Maiden argues that the district court erred in denying its remand motion because his declaratory judgment action is equitable in nature and that the Labor Cabinet is not a nominal party. Maiden further argues that the district court erred in concluding that KOSHA provided his exclusive remedy. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

## I. FACTUAL BACKGROUND

NAS, a limited partnership whose partners are Delaware citizens, owns and operates a stainless steel manufacturing plaint in Carroll County, Kentucky. Maiden, a Kentucky citizen, was an at-will employee of NAS at the Carroll County plant and was discharged on or about August 29, 2002. Maiden alleges that his discharge was in retaliation for charges he made to the Kentucky Department of Environmental Protection [**4] about the workplace health at and safety practices of NAS.

In response to Maiden's allegations of retaliatory discharge, the Labor Cabinet filed an administrative action against NAS on Maiden's behalf on February 10, 2003. The Labor Cabinet issued a citation to NAS and demanded Maiden's reinstatement with seniority and benefits, restoration of his back pay and expungement of his discharge from his work record. The Labor Cabinet also assessed compensatory and punitive penalties against NAS. NAS contested the citation and award, and on [*3] March 6, 2003, the Labor Cabinet filed its administrative complaint with the Kentucky Occupational Safety and Health Review Commission, and that proceeding remains pending.

Shortly after NAS filed its contest, on February 26, 2003, Maiden filed his action in a Kentucky state court against NAS, under the authority of common law, state constitutional law, and state statute, for damages for the alleged retaliatory discharge. As to the Labor Cabinet, Maiden sought a declaration of his "jural rights" to proceed against NAS in the civil action "concurrent with the damages on his behalf from North American in the KOSHA proceeding." (J.A. 12-15, Complaint at [**5] PP 12, 15, 20, 24). In his prayer for relief, Maiden sought "any and all other proper relief to which he should now or hereafter appear to be entitled, whether in law or equity."

## II. LEGAL ANALYSIS

### A. Federal Subject Matter Jurisdiction

Diversity jurisdiction in the district court requires complete diversity, i.e., none of the defendants can be citizens of the same state as any of the plaintiffs. *Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267-68, 2 L. Ed. 435 (1806), 28 U.S.C. § 1332(a)*. In determining whether complete diversity exists, "a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of the real parties to the controversy." *Navarro Sav. Ass'n v. Lee. 446 U.S. 458, 461, 64 L. Ed. 2d 425, 100 S. Ct. 1779 (1980)* (citations omitted). "The real party in interest is the person who is entitled to enforce the right asserted under the governing substantive law." *Certain Interested Underwriters at Lloyd's of London v. Layne, 26 F.3d 39, 42-43 (6th Cir. 1994)*. In contrast to a real party in interest,' a formal or nominal party "is one who has no interest in the result of the suit and need not [**6] have been made a party thereto." *Grant County Deposit Bank v. McCampbell, 194 F.2d 469, 472 (6th Cir. 1952)* (citation omitted).

Here, Maiden's only claim against the Labor Cabinet for which he seeks relief from the court is as follows:

> [A] declaration of his jural rights to proceed against NAS for all of his claims made herein; and, also, a declaration that those rights are cumulative and not exclusive in any way of his rights sought to be protected by the KOSHA, subject however, to the limits that: a) Plaintiff should enjoy only one recovery for each of his elements of damage[;] and, that [b)] he should be fully accountable for any damages awarded to him or recovered by him pursuant to his complaint made herein which touch upon lost wages sought to be recovered by KOSHA from NAS for the benefit of the Plaintiff.

(J.A. 14, Complaint at P 24). In essence, Maiden seeks a declaration that he can proceed with his action to recover concurrently any award granted by the Labor Cabinet. Maiden is not seeking to enforce any duty or enjoin any action of the Labor Cabinet. Any ruling for Maiden in this action would not impact the state administrative proceedings. [**7] In a word, the Labor Cabinet does not have any interest in the outcome of this action.

Thus, we agree with the district court that the Labor Cabinet is merely a "nominal party" and should not be considered for the purposes of determining diversity jurisdiction. The remaining parties are a Kentucky citizen plaintiff and a limited partnership whose partners are Delaware citizens. For jurisdictional purposes, the citizenship of a limited partnership is determined by the citizenship as all [*4] of its partners. *Carden v. Arkoma Assoc., 494 U.S. 185, 197, 108 L. Ed. 2d 157, 110 S. Ct. 1015 (1990)*. Because NAS's partners are Delaware citizens, NAS is deemed a Delaware citizen. Complete diversity of citizenship exists. There is not any dispute that a sufficient amount in controversy is alleged. Accordingly, federal diversity jurisdiction over this action is proper and the district court properly denied Maiden's motion to remand.

**B. KOSHA Preemption**

The next issue is whether KOSHA preempts Maiden's action in the district court. On appeal, Maiden argues that his damages claims are not preempted by KOSHA because *Kentucky Revised Statute § 446.070* allows a person injured by a statutory violation to recover [**8] damages. Thus, Maiden contends that he should be allowed to recover damages from NAS. Maiden also argues that KOSHA does not affirmatively require the Labor Cabinet to provide relief to an aggrieved employee, and that, as a result, the Labor Cabinet systematically denies such relief.

In a diversity action, state law governs the parties' claims and defenses. *Erie R.R. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938)*. Under Kentucky law, "where the statute both declares the unlawful act and specifies the civil remedy available to the aggrieved party, the aggrieved party is limited to the remedy provided by the statute." *Grzyb v. Evans, 700 S.W.2d 399, 401 (Ky. 1985)*.

The Kentucky OSHA statute provides that "no person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [Kentucky OSHA]." *Ky. Rev. Stat. § 338.121(3)(a)*. To enforce the KOSHA requirements, "any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may . . . file a complaint with the commissioner [**9] alleging such discrimination." *§ 338.121(3)(b)*. If the commissioner issues a citation and that citation is appealed, "the review commission may order *all appropriate relief* including rehiring and reinstatement of the employee to his former position with back pay." *Id.* (emphasis added).

Thus, KOSHA provides a statutory structure for employees to seek a remedy, thereby preempting any common-law wrongful discharge claims based on those statutes. *Hines v. Elf Atochem N. Am., Inc., 813 F. Supp. 550, 552 (W.D. Ky. 1993)*. Indeed, "employees seeking to enforce their rights under these laws must file their complaints with the Kentucky Labor Cabinet . . . not in court." George J. Miller, *Federal District Court Dismisses Worker's OSHA Retaliation Claim*, Ky. OSHA J., July 2001, at 1, 2 (citing *Hines*).

In support of his contention, Maiden first cites the text of KOSHA that does not impose a duty to the Review Commission to provide relief, and *State Farm Mutual Auto Insurance Company v. Reeder, 763 S.W.2d 116 (Ky. 1988)*, that permitted a direct action under *Ky. Rev. Stat. § 446.070* for violations of the state unfair settlement law. In *Grzyb* [**10] , the Kentucky Supreme Court held that *§ 446.070* "is limited to where the statute is penal in nature, "or where by its terms the statute does not prescribe the remedy for its violation." *700 S.W.2d at 401*. Moreover, in *Reeder*, the Kentucky Supreme Court affirmed its prior holding in *Gryzb* that if a statute specifies a civil remedy, an aggrieved party is limited to the remedies provided for in the statute, and further affirmed that it had based its prior decision in *Reeder* on the fact that the statute at issue did not [*5] specify such a civil remedy. *763 S.W. 2d at 118* (analyzing *Ky. Rev. Stat. § 304.12-230*); *cf. Phoenix Healthcare of Ky., LLC v. Ky. Farm Bureau Mut. Ins. Co., 120 S.W.3d 726, 727-28 (Ky. Ct. App. 2003)* (following *Gryzb* and distinguishing *Reeder* where applicable statute, *Ky. Rev. Stat. § 304.39-220*, provided a civil remedy). Maiden's argument is incompatible with Kentucky precedent because KOSHA provides a civil remedy.

As to his contention that KOSHA does not affirmatively require the Labor Cabinet to provide any relief to an aggrieved employee, Maiden argues that he "would have been able to establish, though [**11] the simple expedient of Interrogatories to KOSHA, that the Labor Commissioner never has, nor ever intends to, provide any relief to aggrieved employees (including the Plaintiff in this case) beyond, . . . rehiring and reinstatement of the employee to his former position with back pay.'" (Appellant Brief at 10-11). Maiden seeks an injunction from the district court ordering the Review Commission to consider awarding him compensatory and punitive damages.

As noted above, KOSHA explicitly provides that the Review Commission may provide "all appropriate relief," which includes compensatory and punitive damages. Maiden's argument that he will be denied such damages simply because the Review Commission allegedly has a *de facto* policy of denying such relief is not properly before the court for several reasons. First and foremost is that the Review Commission proceeding is pending and the Commission may award Maiden the damages he prospectively seeks. We consider this claim as more appropriate for any appeal of the Review Commission's decision, if necessary.

**III. CONCLUSION**

For the foregoing reasons, we **AFFIRM** the judgment of the district court.